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2014

Justice (Retd.) B. N. SRIKRISHNA  
Former Judge, Supreme Court of India

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OPINION

Tree House Education  
& Accessories Limited .....

..... Querist  
Ex parte

1. Facts:

- a) Eastern Ceramics Limited (“Owner”) is the owner of all those piece and parcel of land bearing Survey No. 161(pt), old CTS No. 236, 236/1 to 3, 237/1, 238, 238/1 and 239 and new CTS No. 236/A/1 to 236/A/5 at village Mouje Pahadi, Goregaon Taluka, Borivali, admeasuring 58,441.4 square meters (“Larger Property”). The Larger Property was situated in Special Industrial Zone (I-3) zone;

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- b) The Querist is a company by the name of Sheth Developers Private Limited ("**Developer**"), a company incorporated under the provisions of Companies Act 1956 having its registered office at Sheth House, behind Dindoshi Fire Station, Opposite Oberoi Mall, off Western Express Highway, Gen AK Vaidya Marg, Malad (East), Mumbai- 400097, engaged in the business of real estate construction;
- c) The Owner has granted redevelopment rights with respect to the said Larger Property to the Developer;
- d) A portion of the Larger Land bearing CTS No. 236/A/3 of Village Mouje Pahadi, Goregaon District admeasuring 4394.8 square meters ("**said Land**") falls within the Coastal Regulation Zone ("**CRZ**") and falls within the CRZ – II category;
- e) In 2013, the Owner and the Developer have conveyed the said Land to the Querist;
- f) Since the Larger Property was situated in Special Industrial Zone (I-3) zone, the Owner applied to MCGM for permission for residential development on the Larger Property and conversion of I-3 zone to R zone under Regulation 57 of the Development Control Regulations, 1991;

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- g) MCGM vide its letter dated 4<sup>th</sup> October, 1993 granted no-objection for residential development on the said Larger Property situated on I-3 zone ("**said Permission for conversion**"). Hence, MCGM granted permission for conversion of I-3 zone to R-zone for the Larger Property in accordance with Development Control Regulations, 1991 more particularly Regulation 57. A copy of the letter dated 4<sup>th</sup> October, 1993 granting no-objection for residential development on the said Larger Property is furnished.
- h) The said Permission for conversion was further modified on 24<sup>th</sup> September, 1995, 17<sup>th</sup> May, 2000, 19<sup>th</sup> June, 2002 and 21<sup>st</sup> April, 2005. A copy of the modified permissions dated 24<sup>th</sup> September, 1995, 17<sup>th</sup> May, 2000 and 19<sup>th</sup> June, 2002 are furnished.
- i) Pursuant thereto, the Developer has constructed residential buildings on the Larger Property and even procured occupation certification for the same from MCGM;
- j) The Querist now proposes to construct a school on portion of the said Land, which is affected by CRZ II;
- k) The Developer applied to MCGM for development of the said Land by construction of Primary and Secondary School, in accordance with FSI norms of

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Development Control Regulations, 1967 and planning norms of Development Control Regulations, 1991.

- l) By under letter dated 16<sup>th</sup> July, 2002, the Government of Maharashtra issued a No Objection for development of the Larger Property from the point of view of CRZ, subject to the condition that it should be developed as per Development Control Regulations applicable as on 19<sup>th</sup> February, 1991 i.e. Development Control Regulations, 1967. It is pertinent to note that the Government of Maharashtra also recorded that MCGM has granted permission for residential development on the said Larger Property by conversion of I-3 zone to residential zone and that the same is permissible. A Copy of the letter dated 16<sup>th</sup> July, 2002, by which the Government of Maharashtra issued No Objection for development of Larger Land from the point of view of CRZ is furnished.
- m) Pursuant to this the MCGM granted development permission dated February, 2006 to the Developer to develop a school on the said Land of ground plus two floors. MCGM issued IOD dated 5<sup>th</sup> August, 2006 in respect thereof. A copy of the IOD dated 5<sup>th</sup> August, 2006 by which the MCGM granted development permission to develop a school is furnished.
- n) By a letter dated 7<sup>th</sup> February, 2013 the MCGM issued a fresh IOD to the Developer for construction of the

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school building on the said Land, subject to terms and conditions as stated therein. A Copy of the IOD dated 7<sup>th</sup> February, 2013 for the construction of school building on the said land is furnished.

- o) Pursuant thereto, Maharashtra Coastal Zone Management Authority has been constituted and the Querist has applied to Maharashtra Coastal Zone Management Authority for environmental clearance for development of the said Land by construction of school;
  - p) Since the said Land falls within CRZ-II, the development of the said Land shall be governed by the Coastal Regulation Zone Notification dated 6<sup>th</sup> January, 2011 issued by the Ministry of Environment and Forest ("**CRZ Notification 2011**"). A copy of the CRZ Notification 2011 is furnished.
2. In light of the aforesaid facts and keeping in view the provisions of the Development Control Regulations, 1967, Development Control Regulations, 1991, Notification dated 6th January, 2011 issued by the Ministry of Environment and Forests for coastal areas, the Querist seeks your written opinion on the following issues to enable the Querist to discuss the matter with Maharashtra Coastal Zone Management Authority and place your view before the Maharashtra Coastal Zone Management Authority:

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- i. *Whether the FSI for the development of the said Land has to be frozen in accordance with the Development Control Regulations, 1967, which were prevalent on the date of the issuance of the CRZ Notification dated 19<sup>th</sup> February, 1991?*
- ii. *Whether the said Permission for conversion from Special Industrial Zone to Residential Zone under Regulation 57 of the Development Control Regulations of 1991 could be granted by MCGM though portion of the Larger Property is affected by CRZ II and Development Control Regulations of 1967 may apply?*
- iii. *Generally*

#### **MY OPINION**

I have perused the case for opinion and the documents sent along with it. I have also had the benefit of conference with the representatives of the Querist and its Advocates. Based on the facts thus ascertained, I shall now express my opinion on the queries addressed to me as under:

*BSM*

Query (i)

The issue as to whether the Development Control Regulations or the provisions of CRZ Notifications have precedence has been the subject matter of several judgments. This issue was debated at length in the judgment of the Bombay High Court in *Overseas Chinese Cuisine (India) (P) Ltd vs Municipal Corporation of Greater Mumbai*, (2000) 1 Bom CR 341, wherein it was pointed out that the CRZ Notification was law made pursuant to the Environmental Protection Act, 1986, which provides (vide section 24) that all orders made under it would have effect notwithstanding anything inconsistent therewith in any other law and, therefore, the CRZ Notification would have over-riding effect. The Bombay High Court laid down the doctrine of tolerance and the doctrine of containment as the two doctrines emerging from a conflated view of the Environmental Protection Act, 1986, the CRZ notifications and the Development Control Regulations.

In my opinion, therefore, the FSI for the development of the land in question would be frozen in accordance with DC

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Regulations 1967, which were the only Regulations prevalent on the date of issue of CRZ notification dated 19<sup>th</sup> February 1991.

**Query (ii)**

In a recent case, which arose before the Bombay High Court, a question was raised as to whether the effect of the CRZ notification dated 19<sup>th</sup> February 1991 was that in respect of a land falling in CRZ-II, all development would have to be necessarily only under the DCR 1967 and all subsequent DC Regulations must be ignored and held not applicable to the said land. This question, after great debate, has also been resolved by the Bombay High Court in the judgment dated 21<sup>st</sup> October 2013 passed in Writ Petition No.1244 of 2012 (*M/s TCI Industries Ltd and another vs The State of Maharashtra and others*). The High Court by placing reliance on the observations made in the judgment of the Supreme Court in *Suresh Estates Private Limited and others vs Municipal Corporation of Greater Mumbai and others*, (2007) 14 SCC 439, resolved this question. The High Court interpreted the law in *Suresh Estates* (supra) as restricting the freezing effect only to the FSI/FSA and not to other developmental regulations which are prescribed from time to time. The High Court arrived at this

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reasoning by placing reliance on the observations of the Supreme Court in paragraph 19 of the judgment in *Suresh Estates* (supra) which interpreted the word "existing" in the Regulations to mean that what was being frozen was the FSI/FAR.

The judgment of the Bombay High Court in *TCI Industries Ltd* (supra) was followed in another recent unreported judgment in *Official Trustee, State of Maharashtra vs Maharashtra Housing & Area Development Authority*, (**Writ Petition No.1469 of 2009 dated 6<sup>th</sup> March 2014**), where also the Division Bench of the High Court has, following the law laid down in *TCI Industries Ltd.*, clearly held that the freezing effect of the CRZ notifications would operate only in so far as the FSI is concerned and would not affect other provisions of the later Development Control Regulations.

In the result, I am of the opinion that the permission for conversion from Special Industrial Zone to Residential Zone under Regulation 57 of the Development Control Regulations of 1991 can very much be granted by MCGM even though a portion of the larger property is affected by CRZ-II in respect of which Development Control Regulations of 1967 would apply for computing the FSI.


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Query (iii)

I have nothing further to add.

Mumbai

June 24, 2014

  
(B.N. Srikrishna)