

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.35671 OF 2022

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|----|--|-----------------|
| 1. | NAREDCO WEST FOUNDATION | |
| 2 | VIRESH PANDEY | |
| | Director and Secretariat of Petitioner No.1 |Petitioners |
| | V/S | |
| 1 | UNION OF INDIA | |
| | Ministry of Environment,
Forest and Climate Change, | |
| 2 | STATE ENVIRONMENT IMPACT
ASSESSMENT AUTHORITY | |
| 3 | SLUM REHABILITATION AUTHORITY | |
| 4 | MUNICIPAL CORPORATION OF GREATER MUMBAI | |
| 5 | STATE OF MAHARASHTRA | |
| 6 | NATIONAL GREEN TRIBUNAL,
WESTERN BENCH AT PUNE |Respondents |

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Mr. Pravin Samdani, Senior Advocate, Mr. Karl Tamboly, Mr. Samit Shukla, Mr. Viraj Parikh, Ms. Saloni Shah, Ms. Shivani Khanwilkar, Mr. Abhishek Kothari i/b M/s. DSK Legal for the Petitioners.

Mr. Amogh Singh a/w Mr. Pranav Thackur for Respondent No.1-UOI.

Mr. Milind V. More, Additioal GP for Respondent Nos.2 and 5-State.

Mr. Vijay Patil for Respondent No.3-SRA.

Mrs. Rupali Adhate for Respondent No.4-MCGM.

Ms. Seema Sarnaik i/b Ms. Sangeeta Salvi a/w Ms. Kavita Yadav for the Applicant/Intervenor in IAL 730 of 2023.

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**CORAM: S.V. GANGAPURWALA, ACJ &
SANDEEP V. MARNE, J.**

JUDGMENT RESERVED ON : 17 JANUARY 2023.

JUDGMENT PRONOUNCED ON: 27 JANUARY 2023.

JUDGMENT (per Sandeep V. Marne, J.):

- 1 Rule. Rule made returnable forthwith. By consent of parties, Petition is heard finally.

2 The Petitioner No.1 is the Maharashtra chapter of the National Real Estate Development Council (NAREDCO) and claims to have more than 400 real estate developers as its members. Petitioner No.1-NAREDCO is aggrieved by the inaction of Respondent No.2-State Environment Impact Assessment Authority (SEIAA) in repeatedly deferring the proposals of members of Petitioner No.1-Association for environmental clearance on the ground of receipt of email dated 23 September 2022 from Registrar of National Green Tribunal (for short 'the NGT') inviting attention of SEIAA to the judgment and order dated 13 September 2022 passed by the NGT in Appeal Nos.22 of 2016. By that judgment, NGT has held that recreational ground has to be provided at the ground level which should not only be open to sky, but must also enable plantation of trees. The NGT has further directed that if any project proponent fails to provide recreational ground as per norms, the project may not be allowed to proceed.

3 Thus, on account of the judgment and order dated 13 September 2022 passed by the NGT, SEIAA has deferred various proposals for environmental clearance. By way of illustration it would be profitable to refer to the minutes of SEIAA held on 28 September 2022 in respect of proposal for environmental clearance for proposed redevelopment of residential cum commercial project 'Sagar Co-operative Housing Society Limited' at Condominium No.8, Sector 10, Koparkhairane, Navi Mumbai by M/s.

Maithili Builders Pvt. Ltd. in which SEIAA has deliberated and decided as under:

“Deliberation in SEIAA-

Proposal is a new construction project. Proposal is recommended by SEAC-2 in its 184th meeting for grant of Environmental Clearance for total plot area of 8797.830 Sq.Mtrs., Total construction area of 67313.572 Sq. Mtrs. and FSI area of 42399.518 Sq. Mtrs.

SEIAA is in receipt of Hon'ble NGT Judgment in NGT appeal no.22/2016 communicated vide NGT registrar email dated 23.09.2022. SEIAA has perused the said judgment and more specifically para 8 of the said judgment and is of the opinion that, SEIAA needs to seek clarification whether the said judgment is applicable only to the specific case of NGT appeal no.22/2016 or to MCGM or to all other local bodies wherein UDCPR is applicable. SEIAA after deliberation decided to defer the proposal for clarification required in the aforesaid NGT matter.

SEIAA Decision-

SEIAA after deliberation decided to defer the proposal.”

4 From the above deliberation and decision of SEIAA, it appears that no final decision rejecting proposal for environmental clearance is taken by SEIAA, but the proposal is merely deferred. According to the Petitioners the order of the NGT is not only *inter partes* but applicable only to projects which are governed by Development Control Regulations, 1991 (for short 'DCR 1991') and is not applicable to the projects which are governed by the Development Control and Promotion Regulations 2034 (for short 'DCPR 2034') and Unified Development Control & Promotion Regulation (for short 'UDCPR'). However, since there is no clarity on the issue, It appears that SEIAA has been deferring the proposals rather than taking any final

decision on the same. The Petitioners are aggrieved by such an inaction on the part of the SEIAA.

5 Mr. Samdani, the learned Senior Advocate appearing for the Petitioner would invite our attention to the judgment and order dated 13 September 2022 passed by NGT in support of his contention that the said order merely follows the judgment of the Apex Court in ***Municipal Corporation of Greater Mumbai and others vs. Kohinoor CTNL Infrastructure Co. (Pvt) Ltd. (2014) 4 SCC 538***. Mr. Samdani would further submit that the judgment in ***Kohinoor*** (supra) is rendered by the Apex Court by interpreting the provisions of DCR 1991 and has no application to the projects which are governed by DCPR 2034 and UDCPR. He would further submit that DCR 1991 made it mandatory to provide recreational/amenity space at the ground level whereas DCPR 2034 and UDCPR specifically permit provision of some portion of recreational open spaces on podium area as well. Mr. Samdani would take us through a comparative chart between the provisions of DCR 1991, DCPR 2034 and UDCPR. He would submit that the judgment of the Apex Court in ***Kohinoor*** (supra) would have no application to the projects governed by DCPR 2034 and UDCPR as the Apex Court did not have an occasion to interpret the provisions of DCPR 2034 or UDCPR. He would further submit that even before NGT, the project in question was governed by DCR 1991 and not by

DCPR 2034/UDCPR and therefore the order of NGT would not have any application to the projects governed by DCPR 2034/UDCPR.

6 Mr. Samdani would further submit that the judgment of NGT is otherwise in *personam* and not in *rem*. He would submit that the said judgment would only govern the parties before the NGT and the same cannot be construed as a general direction to SEIAA not to sanction any proposal for environmental clearance unless recreational ground is provided at the ground level.

7 Mr. Samdani would further submit that it is settled law that if the basis on which the judgment of a Court is altered by subsequent provisions of law, the judgment would not have application to the changed circumstances. In support of his contention Mr. Samdani would rely upon the judgments of the Apex Court in ***Shri Prithvi Cotton Mills Ltd. vs. Broach Borough Municipality***, 1969 (2) SCC 283 and ***Welfare Association ARP Maharashtra & Anr. vs. Ranjit P. Gohil & Ors.*** (2003) 9 SCC 358.

8 Mr. Samdani would further contend that the Development Control Regulations are legislative in nature and is a piece of delegated legislation which is statutory in nature and binding on authorities dealing with. In support of his contention, he would rely upon judgment of this Court in ***Janhit Manch & Anr. vs. State of Maharashtra & Ors.***, 2006 SCC OnLine

Bom 1145 and Janhita Manch & Anr. vs. State of Maharashtra & Ors, (2019) 2 SCC 505.

9 Lastly, Mr. Samdani would contend that on account of the inaction of SEIAA in taking a final decision on proposals submitted by various projects for environmental clearance, several projects in the City of Mumbai and its vicinity have been held up, thereby resulting in enormous increase in the costs of construction.

10 Mr. More, the learned AGP appearing for the State Government would submit that SEIAA is felt bound by the directions of NGT which appears to be in *rem*. He would submit that there is no clarity on the issue as to whether the order of NGT is applicable only to the projects governed by DCR 1991 or whether the same would also apply to the projects governed by DCPR 2034/UDCPR and therefore, SEIAA has rightly deferred various proposals till a clarity is achieved. Mr. More, however, fairly leaves it to this Court to clarify the issue so that SEIAA can proceed accordingly.

11 Mr. Amogh Singh, the learned Counsel appearing for the Union of India would oppose the Petition submitting that though Union of India does not have any particular stand with regard to the merits of the issue involved in the Petition, the Petitioners would have an alternate remedy before the NGT in respect of their grievance and that therefore, this Court would be loath in entertaining the present Petition.

12 Ms. Sarnaik, learned Advocate appearing for the Intervenor has opposed the Petition. She would submit that the Writ Petition is filed by the Petitioner No.1-Association of Developers and M/s. Kalpataru Properties Pvt. Ltd., in whose case the NGT has passed the judgment and order dated 13 September 2022, is a member of the Petitioner No.1-Association. She would submit that M/s. Kalpataru Properties has already challenged the judgment and order dated 13 September 2022 of NGT in separate proceedings which are being defended by the Intervenor. She would express an apprehension that the present Petition is filed to indirectly seeks stay of the judgment and order dated 13 September 2022 passed by NGT in *M/s. Kalpataru Properties* case. Inviting our attention to the prayers made in the present Petition, Ms. Sarnaik, would contend that this Court ought not issue directives to SIEAA to process proposals of members of Petitioner No.1-Association by ignoring/not applying NGT's judgment and order as well as the judgment of the Apex Court in ***Kohinoor*** (supra)

13 The objection of Mr. Amogh Singh about alternate remedy is countered by Mr. Samdani submitting that an alternate remedy under National Green Tribunal Act, 2016 cannot be a bar to exercise writ jurisdiction of this Court. He would rely on judgments of the Apex Court in ***Madhya Pradesh High Court Advocates Bar Association & Anr. vs. Union of India & Anr., 2022 SC OnLine SC 639, Whirlpool Corporation***

vs. Registrar of Trade Marks & Anr, (1998) 8 SCC 1 and Magadh Sugar & Energy Ltd. vs. State of Bihar & Ors. 2021 SCC OnLine SC 801. So far as submissions made by Ms. Sarnaik are concerned, Mr. Samdani would clarify that M/s. Kalpataru Properties is not a member of Petitioner No.1-Association. He would further submit that the Petitioners are not seeking stay of the judgment and order dated 13 September 2022 of NGT in any manner. He would submit that the correctness of NGT's judgment and order would be determined in independent proceedings filed by M/s. Kalpataru Properties and that this Petition does not involve that issue. He would submit that the present Petition is confined to inaction on the part of SIEAA in taking decision on the proposals submitted before it by project proponents by applying provisions of the DCPR 2034 or UDCPR.

14 Rival contentions of the parties now fall for our consideration.

15 Since the issue involved in the present Petition relates to the deferment by SIEAA of the proposals submitted by the members of Petitioner No.1-Association relying upon the judgment and order dated 13 September 2022 passed by the NGT, it would be apposite to refer to the relevant portions of said judgment. In paragraphs 3 to 5 of its judgment, NGT has captured the submissions of the parties as under:

"3. Main grounds for challenging the impugned EC are that Recreation Ground (RG) has not been provided at ground level but on slab above the basement where plantation is not possible, in

violation of judgement of the Hon'ble Supreme Court in **Municipal Corporation of Greater Mumbai and Ors. vs. Kohinoor CTNL Infrastructure Company Private Limited and another**, (2014) 4 SCC 538 (Kohinoor case). Fire safety norms have been ignored. Setback for light and open spaces has not been provided as per Development Control Regulations (DCR). In the meeting of SEAC dated 25th to 27th June, 2014, recommendation was made to leave margin of 6 m from boundary of the plot but the said condition has not been incorporated in the EC. The area exceeds 1.5 lakh sq. m. and thus, the project is 'B-1' category project but has been wrongly appraised as 'B-2' category project. Project wrongly provides for two rehabilitation tenements to each person instead of one.

4. The appeal came up for hearing on 05.05.2016 and notice was issued to the Project Proponent (PP), SEIAA Maharashtra, MHADA and the Group Housing Society. The contesting respondents have filed their respective replies.

Stand of the PP

5. Stand of the PP is that the judgment of the Hon'ble Supreme Court in Kohinoor case, supra, only deprecates practice of providing RG on podium as per DCR 38 (34) and thus is not applicable as in the present case, podium has not been provided. Requirement of 6 meter open space is not binding as the Municipal Corporation has modified DCR 43 to the effect that open space of 6 meter will not be insisted if the building abuts road with width of 6 meters or more. In the present case, the plot under redevelopment abuts 3 roads having width more than 6 meters. Thus, as per relaxation in DCR 33(10), read with the Notification dated 6th December, 2008, provisions for additional 6 meters open space is not binding. Out of 128 members, 104 members have already vacated their respective flats to enable the redevelopment. The appellant is a minority member who is creating hurdles in the redevelopment process."

16 The NGT thereafter proceeded to decide the issue by rendering following findings:-

"7. We find that only issue for consideration is the compliance of the condition of RG in terms of law laid down by the Hon'ble Supreme Court in Kohinoor case, supra. In the said case, the Hon'ble Supreme Court dealt with the issue of mandatory minimum RG to be provided

in Mumbai in a housing project to give effect to the sustainable development principle of environmental law. Questions framed and answers given are as follows:

Questions

“17.1.(i) What should be the correlation between DCR 23 and DCR 38(34) regarding the recreational area? Is it permissible to reduce the minimum recreational area provided under DCR 23 on any ground?

17.2.(ii) Whether the exemption from DCR 31(1) under DCRs 33(7), 33(8), and 33(9) is justified, valid and legal particularly in the island city of Greater Mumbai? If so, to what extent and in which context?

17.3.(iii) What is the impact of the addition of FSI in the island city on the traffic situation? How can it be controlled?

17.4. (iv) Whether the present mechanism for protection against the fire hazards is adequate and is being implemented effectively? If not, what should be the mechanism for enforcement with respect to the provisions concerning the fire safety?

Answers

71.2.1. Issue (i) – The minimum recreational space as laid down under Development Control Regulation (DCR) 23, cannot be reduced on the basis of DCR 38(34). The recreational space, if any, provided on the podium as per DCR 38(34)(iv), shall be in addition to that provided as per DCR 23.

71.2.2. Issues (ii) and (iii) – The Government of Maharashtra, the Development Plan Drafting Committee, and the appellant Municipal Corporation shall consider the suggestions as contained in paras 60 and 61 above, while framing the Development Plan for Greater Mumbai.

71.2.3. Issue (iv) – The second proviso to DCR 43(1)(A), concerning fire protection requirements, is held to be bad in law. We hold that even for the reconstruction proposals of plots up to the size of 600 sq m under DCR 33(7), open space of the width of 6 m at least on one side at ground level within the plot, accessible from the roadside will have to be maintained for the manoeuvrability of a fire engine, unless the building abuts two roads of 6 m or more on two sides, or another access of 6 m to the building is available, apart from the road abutting the building.

71.3. The decision as contained in paras 71.2.1 and 71.2.3 above, will apply to those constructions where plans are still not approved, or where the commencement certificate (CC) has not

yet been issued. All authorities concerned are directed to ensure strict compliance accordingly.

71.4. The Government of Maharashtra shall issue the necessary notification within four weeks of this order, reconstituting the “Technical Committee for the High-Rise Buildings”, as directed in paras 64 go 66, including the additional terms of reference, as mentioned in para 67 above. The appellant is directed to render assistance and provide the required honorarium, as mentioned in para 68 above.

8. In the light of above, we hold that RG has to be provided on ground to enable plantation. SEIAA, Maharashtra has thus to ensure availability of space as per above norms. The area has not only to be open to sky but must also enable plantation of trees. If the PP fails to provide RG as per norms, the project may not be allowed to proceed and till compliance, no third-party rights may be created. SEIAA, Maharashtra may verify facts on the ground and take its decision within one month from today.

The appeals are disposed of.

All pending MAs will stand disposed of.

A copy of this order be forwarded to SEIAA, Maharashtra by mail for compliance.”

17 Perusal of the order of NGT would indicate that the same has squarely followed the judgment of the Apex Court in **Kohinoor** (supra), in which the Apex Court has held in paragraph 32 of the judgment as under:

“32. Therefore, after reflecting upon the legal position, we are clearly of the opinion that having 15%, 20% or 25% of the area (depending upon the size of the layout) as the recreational/amenity area at the ground level is a minimum requirement, and it will have to be read as such. We therefore, answer Issue (i) by holding that it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreational area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area.”

18 We have gone through the judgment of the Apex Court in ***Kohinoor*** (supra), in which the Apex Court was essentially concerned with interpretation of provisions of DCR 1991. After interpreting the provisions of DCR 23 dealing with recreational/amenity open spaces, the Apex Court held that the recreational/amenity area is required to be provided at the ground level. It appears that DCR 23 did not contain any specific provision for providing recreational/amenity open spaces at podium level and on the contrary it provided that the recreational space shall be kept permanently open to sky and trees shall be grown as per the requirements specified therein. It is on account of such provisions of the DCR 1991, that the Apex Court held that the recreational/amenity area is required to be provided at ground level.

19 The provisions of DCR 1991 came to be superseded/replaced by the provisions of the DCPR 2034 for areas within Greater Mumbai and the some of the principles enunciated in Regulation 23 of DCR 1991 *prima facie* appear to have been deviated in some of the provisions in Regulation 27 of DCPR 2034. While we do not propose to interpret the provisions of Regulation 27 of DCPR 2034, it would be apposite to reproduce Note 2 appended to Regulation 27 which reads thus:

“2. The minimum 60% of the required LOS shall be provided exclusively on the ground and at least 50% of this shall be provided on mother earth to facilitate the percolation of water and balance 40%

of required LOS may be provided on podium area extending beyond the building line. The LOS on mother earth shall not be paved and all LOS shall be accessible to all the occupants of the plot/layout. Rest of the compound pavement other than stated above shall be paved with perforated paving having adequate strength, in order to facilitate percolation of rain water into the ground.”

20 Coming to the areas falling outside the limits of Municipal Corporation for Greater Mumbai, the provisions of Unified Development Control and Promotion Regulations also contain a provision in the form of Regulation 3.4.1 which apparently permits recreational open space being provided on terrace of podium in certain cases. Sub clause 3 of Regulation 3.4.1 of UDCPR provides as under:

“3. Not more than 50% of such recreational open space may be provided on the terrace of a podium in congested/non congested area subject to Regulation No.9.13.”

21 Thus, both under the DCPR 2034 as well as in UDCPR there appears to be change in the provision relating to provision of recreational open spaces.

22 Thus there appears to be a deviation in the provisions of the Development Control Regulations applicable at the time of delivery of the judgment by the Apex Court in **Kohinoor** and the one which are prevalent now. This aspect is required to be considered by the concerned authorities.

23 Mr. Samdani has submitted that the proposals for development permission have already been sanctioned by respective planning authorities

and that the proposal for environmental clearance are required to be submitted only after grant of development permissions. He would submit that the proposals for development permission submitted by members of Petitioner No.1-Association fully conform to the provisions of DCPR 2034 and UDCPR. This aspect would be considered by SIEAA while taking final decision on the proposals. Suffice it to say at this juncture that there appears to be some change in the provisions relating to the manner in which recreational open spaces are to be provided in the earlier Development Control Regulations as considered by Apex Court in case of **Kohinoor** (supra) and the one which are prevalent now. Mr. Samdani has relied upon the judgment of the Apex Court in **Shri Prithvi Cotton Mills Ltd.** (supra), in which the Apex Court has held in para 4 of the said judgment as under:

“4. A court’s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction.”

24 Again in **Welfare Association ARP Maharashtra** (supra) the Apex Court, referring to the judgment in **Shri Prithvi Cotton Mills Ltd.** (supra), has held in paragraph 46 as under:

“46. Thus, it is permissible for the legislature, subject to its legislative competence otherwise, to enact a law which will withdraw or fundamentally alter the very basis on which a judicial pronouncement has proceeded and create a situation which if it had existed earlier, the Court would not have made the pronouncement.”

25 From perusal of comparative chart of the provisions of DCR 1991 and DCPR 2034 as well as UDCPR, *prima facie* there appears to be deviation in the exact location at which open recreational spaces is to be provided. Therefore, SEIAA is required to take into consideration the provisions of DCPR 2034 or UDCPR as applicable, in order to determine permissibility of provision of open recreational spaces on podium level in a particular project. The judgment and order dated 13 September 2022 of NGT in case of *Anil Tharthare vs. The Secretary, Environment Dept. State of Maharashtra & Ors.* cannot be construed to mean a blanket prohibition to consider the proposals of the projects governed by DCPR 2034 or UDCPR.

26 The objections raised by the Intervenor about the Petitioners indirectly seeking stay of NGT's judgment and order is totally misplaced. Firstly, the Petitioners have not questioned correctness of NGT's judgment and order in the present Petition in any manner, nor we had gone into the same. Secondly, the Petition is confined only to the issue of failure on the part of SEIAA to decide the proposals for environmental clearances. We have repeatedly clarified in the present judgment that we are not expressing any final opinion as to whether recreational spaces in a particular project can be provided at podium level or not. This is something which SEIAA will determine applying provisions of DCPR 2034 or UDCPR. All that we are directing the SEIAA is to decide the proposals for environmental clearances

in accordance with the provisions of DCPR 2034 or UDCPR. Therefore, the objections raised and apprehension expressed by the Intervenor are totally misconceived.

27 We have, therefore, no hesitation in holding that SIEAA could not have deferred decision of proposals for grant of environmental clearances merely on the basis of the judgment and order dated 13 September 2022 of NGT. The said decision is rendered by NGT relating to inter-party *lis* involved in Appeal No.20 of 2016. The same would not govern each and every proposal submitted before the SIEAA based upon DCPR 2034 or UDCPR.

28 So far as the objection about entertainability of the present Writ Petition in the light of availability of alternate remedy under the National Green Tribunal Act, 2016 is concerned, we have not gone into the merits of the issue as to whether environmental clearance *qua* particular project is grantable or not. All that we have dealt with in the present judgment is about the legality of action of SIEAA in deferring the proposals rather than taking final decisions thereon. Since entitlement of a particular project proponent for grant of environmental clearance is not an issue either raised in the Petition nor have we decided the same, the issue of availability of alternate remedy under the Act of 2016 becomes redundant. We are only issuing

direction to SIEAA to take decisions on proposals submitted before it by applying and interpreting the provisions of the relevant DCPR 2034/UDCPR. Therefore, the objection of availability of alternate remedy is repelled.

29 We, therefore, proceed to pass following order:

ORDER

- i) We direct that the judgment and order dated 13 September 2022 passed by the National Green Tribunal in Appeal No.22 of 2016 shall not be an impediment for SIEAA to decide various proposals submitted by members of Petitioner No.1-Association for grant of environmental clearances on its own merits.
- ii) SIEAA, shall consider and decide each of the proposals for grant of an environmental clearance by applying provisions of DCPR 2034 or UDCPR, as the case may be.
- iii) All questions on merits relating to permissibility of providing recreational open spaces at podium level in a particular project are left open to be decided by SIEAA on its own merits.
- iv) Considering the fact that the proposals submitted by Petitioner No.1 Association are pending since long, SIEAA shall proceed to take a final decision thereon as expeditiously as possible preferably within a period of eight weeks from today.

v) With the above directions, the Writ Petition is partly allowed. Rule made partly absolute in the above terms. No costs.

(SANDEEP V. MARNE, J.)

(ACTING CHIEF JUSTICE)