

(2015) 05 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 2359 of 2011, Writ Petition No. 693 of 2011, Writ Petition No. 388 of 2015, Writ Petition No. 2646 of 2014 [WP (L) No. 2045 of 2014], Writ Petition No. 2657 of 2014, Writ Petition No. 2658 of 2014 [WP (L) No. 2045 of 2014], Writ Petition

J. Gala Builders and Others

APPELLANT

Vs

Mumbai Building Repairs and Reconstruction Board and Others

RESPONDENT

Date of Decision : 07-05-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 300A, 300-A
Maharashtra Housing and Area Development Act, 1976 — Section 103B (3), 103-I, 103I(3), 103-I(3), 82
Maharashtra Regional and Town Planning Act, 1966 — Section 154, 22(m), 37(1AA), 37(2)
Securities and Exchange Board of India Act, 1992 — Section 11AA

Citation : (2015) 4 ABR 44

Hon'ble Judges : M.S. Shah, C.J.;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Veerendra Tulzapurkar, Virag Tulzapurkar, Senior Advocates, Sanjay V. Kadam, Apeksha Sharma and Sanjeel Kadam i/by Kadam and Co., for the Appellant; P.D. Anklesaria, Senior Advocate-Special Counsel, P.G. Lad, V.M. Parsurami and Aparna Murlidharan, Advocat

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J—In this group of writ petitions, the petitioners have challenged clause-4 of Appendix-III of Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991 ("DCR") particularly the words in bold:-

"4. the prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area Development Act, 1976 shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants in transit camps or cessed building

which cannot be reconstructed, on payment of an amount as may be prescribed under MHADA Act, 1976."

2. The petitioners have broadly challenged the above Regulation on the ground that the same provides for compulsory acquisition of part of property constructed by the petitioners on their own lands without authority of law and without providing for any adequate or reasonable compensation and that the compensation proposed to be paid is illusory.

3. The petitioners have also challenged the consequential orders and notices as the petitioners were not being granted building permissions (IODs), commencement certificates or occupation certificates in respect of constructed properties without the petitioners complying with the aforesaid impugned Regulation.

4. Since all the petitions raise common questions of law, we are referring to the facts in the lead petition being Writ Petition No. 2359 of 2011.

(a) Petitioner no. 1 is a registered partnership firm engaged in the business, inter alia, of development of immovable properties and construction of buildings. Petitioner no. 2 is the partner of the 1st petitioner firm. Petitioner no. 1 (hereinafter referred to as "the petitioner") is the owner of the property bearing CS No. 770 of Mazgaon Division in Mumbai admeasuring about 6,492 sq. meters.

(b) In its capacity as owner of the land, the petitioner applied to Mumbai Building Repairs and Reconstruction Board ("the Board") which is a unit of Maharashtra Housing and Area Development Authority (MHADA) for No Objection Certificate ("NOC") for reconstruction of a building on the above land under DCR 33(7). On 23 August 2002, the Board granted NOC for the said reconstruction scheme under DCR 33(7), subject to various conditions including the impugned condition that the petitioner is required to surrender to the Board a portion of the surplus area generated in the reconstruction scheme under the impugned Regulation. In the year 2002, the petitioner undertook to surrender surplus area.

(c) The Municipal Corporation sanctioned the building plans for construction of total built-up area of 14,354.40 sq. meters. After completion of rehab buildings with built-up area of 6,018 sq. meters, when the petitioner applied for occupation certificate, the Municipal Corporation granted the occupation certificate in June 2006, but the Board also issued a letter calling upon the petitioner to surrender 833.64 sq. meters out of the total surplus built-up area of 8,336.40 sq. meters (i.e. 10% of the surplus built-up area which is calculated after excluding rehab area of 6,018 sq. meters from permissible total built-up area of 14,354.40 sq. meters).

(d) By letter dated 31 December 2010, the Board also added condition no. 17 in the NOC dated 23 August 2002. As per the said condition, the Board made it mandatory for the petitioner to execute an agreement with MHADA/Board in respect of surplus built-up area within 30 days after approval of IOD/plans by the

Municipal Corporation and prior to the issuance of commencement certificate. The Board also directed that the Municipal Corporation shall not grant the commencement certificate or any further permission unless the agreement as aforesaid is duly executed between the petitioner and MAHADA/Board.

(e) After the petitioner completed construction of the buildings, the petitioner applied for occupation certificates, but the occupation certificates were not granted in the absence of NOC to be issued by the Board. The Board withheld the issuance of NOC on the ground that the petitioners had not entered into the agreement with the Board to surrender the surplus built-up area as required by the impugned regulation.

(f) The petitioner, therefore, filed the present petition in November 2011 challenging the relevant portion of clause-4 of Appendix-III of Regulation 33(7) of DCR and also prayed for directions to the Board for issuance of NOC and to the Municipal Corporation for Greater Mumbai for issuance of further permissions and occupation certificates without insisting for NOC of the Board.

(g) When the petitions reached preliminary hearing on 31 January 2012, while issuing notice, this Court granted ad-interim reliefs directing the Board to grant NOC to the petitioners to obtain occupation certificates in respect of the concerned buildings from the Municipal Corporation and also directing the Municipal Corporation to issue the occupation certificates of completed buildings without insisting for submission of NOC from the Board, subject to the petitioners keeping the flats referred to in the statement vacant. The petitioners were directed not to create any rights whatsoever in respect of the said flats until further orders. The statement referred to in the above order gave particulars of 33 flats admeasuring 833.64 sq. meters in the aggregate required to be kept vacant in certain buildings constructed by the petitioners.

(h) Affidavits-in-reply have been filed on behalf of the Board. The same have been adopted by the State Government.

5. Before enumerating the rival submissions, we may briefly refer to the scheme of the relevant statutory provisions.

(a) Development Control Regulations for Greater Mumbai, 1991 have been made by the State Government in exercise of the powers conferred by section 154 of the Maharashtra Regional and Town Planning Act, 1966 (MRTPA Act). These DCRs regulate the construction of buildings within the local limits of the planning authority, viz. the Municipal Corporation for Greater Mumbai. Regulation 32 thereof lays down restrictions regarding Floor Space Index ("FSI"), that is the ratio between the permissible built-up area on the land with reference to the area of the land on which construction is proposed. There is no dispute about the fact that the FSI in South Mumbai is 1.0 and the FSI in suburbs in the north is 1.33. However, various clauses of Regulation 33, such as clauses (7) and (10), provide for additional FSI.

(b) The relevant portion of DCR 33(7) and Appendix-III to DCR 33(7), prevailing between 1999 and 2011, when NOC was first granted by the Board to most of the petitioners, read as under:

"DCR 33(7): Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation or of old buildings belonging to the Police Department -

For reconstruction/redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-op. Housing Societies of landlords and/or occupiers of a cessed buildings of "A" category in Island City, which attracts the provisions of MHADA Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation and Department of Police, Police Housing Corporation, Jail and Home Guard of government of Maharashtra, constructed prior to 1940, the Floor Space Index shall be 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more.

Note: "

"APPENDIX-III [Regulation 33(7)]

Regulation for reconstruction or redevelopment of cessed buildings in the Island City by the landlord and/or co-operative housing societies

1. (a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 percent of the occupiers of the old building.

(b) All the occupants of the old building shall be reaccomodated in the redeveloper building.

2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.90 sqmt. (225 sft) and/or maximum carpet area upto 70 sqmt. (753 sft.) as provided in the MHADA Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

3. The list of occupants and area occupied by each of them in the old cessed building shall be certificated by the Mumbai repairs and reconstruction board and the irrevocable written consent as specified in 1(a) above shall be certified by the Board.

4. The tenements in the reconstructed building shall be allotted by the landlord/ occupants co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board. The prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area development Act, 1976 shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants

in transit camps or cessed building which cannot be re-constructed, on payment of an amount as may be prescribed under MHADA Act, 1976.

5. The FSI for rehabilitation of existing tenants/occupiers in a reconstructed building and incentive FSI that will be available shall be as under:

(a) In case of redevelopment of "A" category cessed building undertaken by landlord and/or cooperative housing societies of landlord and/or occupiers, the total FSI shall be 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI, whichever is more.

(b) In case of redevelopment scheme of "B" category cessed building undertaken by landlord and/or cooperative housing societies of landlord and/or occupiers, the total FSI shall be same as above or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI."

(emphasis supplied)

6. On 21 May 2011, the State Government in Urban Development Department issued Notification dated 21 May 2011, amending Appendix-III to DCR 33(7), under Section 37(2) of the MRTP Act, 1966.

The provision regarding permissible FSI under Regulation 33(7) and the minimum and maximum carpet area in clause-2 of Appendix-III has undergone changes from time to time as under:

7. The above amendment dated 21 May 2011 also provided as under:-

8. The table in the Third Schedule to the Maharashtra Housing and Area Development Act, 1976 (MHADA Act) reads as under:-

THIRD SCHEDULE [SEE SECTION 103-I(3)] SCALE SHOWING THE PERCENTAGE OF BUILT-UP AREA TO BE RESERVED BY THE CO-OPERATIVE SOCIETY FOR ALLOTMENT BY THE BOARD

PETITIONERS' CONTENTIONS

9. Learned counsel for the petitioners have contended that:-

(a) Impugned clause (4) of Appendix-III of Regulation 33(7) of the DCR provides for compulsory acquisition of the property constructed by the petitioners on their own land without any authority of any legislation. Such compulsory acquisition cannot be made by delegated legislation such as Development Control Regulations. Such compulsory acquisition can be made by the Land Acquisition Act or by the Maharashtra Regional and Town Planning Act (MRTP Act).

(b) Even if the Regulation is considered as a part of the MRTP Act, it is beyond competence of the State Legislature to enact such a legislation in conflict with the Land Acquisition Act, 1894 or the Right to Fair Compensation and Transparency in Land Acquisition Act, 2013 (Land Acquisition Act, 2013).

(c) Even assuming that the impugned Regulation is considered as within legislative competency of the State Legislature, the amount offered by the Board for such acquisition is not determined by any law made by the Legislature or by any subordinate Legislation, but the amount is offered under an administrative circular dated 6 July 1991.

(d) On 21 July 2014, the then Advocate General had made a statement on behalf of the State Government in D.B. Realty Limited Vs. State of Maharashtra and others (Writ Petition No. 366 of 2014 and group) that the provisions of inclusive housing shall not apply to the projects, inter alia, under DCR 33(7), and therefore also, the respondent authorities are estopped from applying the impugned clause (4) of Appendix-III of DCR 33(7) to the redevelopment projects.

(e) In the inclusive housing scheme under Government Notification dated 8 November 2013, the area to be handed over for Low Income Group/Economically Weaker Section (affordable housing area) is made free of FSI, whereas the surrender demanded by the Board under DCR 33(7) is from the FSI of the plot. In case of inclusive housing scheme, the construction cost compensated is as per Annual Standing Rates (ASR) which is Rs. 25,000/- per sq. meter, but in case of surrender under the impugned scheme under DCR 33(7), the Board pays only Rs. 235/- per sq. ft., i.e. Rs. 2,529/- per sq. meter as cost of construction.

(f) As per circular dated 5 May 2012, where Mumbai Municipal Corporation is the owner of the land and building with tenants, if a developer appointed by such tenants undertakes redevelopment of the property under DCR 33(7), then that developer is not required to surrender any surplus area. Such developer is entitled to sell entire surplus built up area in the open market by paying a premium as per SDRR rates to the Municipal Corporation, that is to the owner of the property. On the other hand, where a private land owner undertakes redevelopment under DCR 33(7) by appointing a developer, such private owner/developer is compulsorily required to hand over a part of the surplus area. Thus, there is patent discrimination and arbitrariness without any rationale and, therefore, the impugned regulation is violative of Article 14 of the Constitution.

(g) When occupants of a land and building owned by MHADA through their cooperative housing society acquire the property from MHADA under Chapter VIII-A of the MHADA Act, then such society is rightly not entitled to make profit out of the redevelopment process and, therefore, surrender of surplus built up area by the Society to MHADA would be justified. But when the owners of the land and building themselves undertake the redevelopment by investing their own funds and by divesting their rights over the property and land underneath, then the demand of the Board to surrender any part of the surplus area would be arbitrary and, therefore, unconstitutional.

(h) Without prejudice to any of the above submissions, the petitioners have submitted that the Third Schedule prescribing the percentage of built up area to be surrendered in case of residential buildings clearly provides that where the

surplus area is upto 50%, no built up area is to be surrendered to the Board. Thereafter the Schedule provides that if the surplus area is upto 55%, the built up area to be surrendered would be 5%.

In view of the above, if the surplus area is 51%, 1% of the surplus area should be required to be surrendered. However, the Board requires the petitioner to surrender 5% of the surplus built up area, with the result that the exempted surplus area comes down to 46%. For instance, if the permissible total built up area is 10,000 sq. meters and the rehab area is 4,999 sq. meters, the surplus built up area would be 5,001 sq. meters and, therefore, the percentage of surplus area would be 50.01%. According to the petitioners, the petitioners would be liable to surrender only 1 sq. meter, but the Board requires the petitioners to surrender 250 sq. meters by calculating the surrender area as 5% of 5,001 sq. meters.

(i) Clause 4 in Appendix III of DCR 33(7) provides that the prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the MHADA Act shall be made available to respondent no. 4. The table in the Third Schedule refers to section 103-I(3) of the said Act. (The relevant portion of section 103-I(3) is quoted at the appropriate place.) It is, therefore, submitted that the respondent-Board has to determine the surplus area on the basis of the above formula embodied in section 103-I(3), but the Board takes into consideration less than the built-up area of the old existing building.

Impact of Regulation and area to be surrendered to the Board

10. While we will refer to the submissions made by the learned counsel for the respondents at the appropriate place, it is necessary to refer at the outset to the impact of the impugned Regulation as explained by the respondent Board in various charts. The total number of redevelopment projects approved by the Board under DCR 33(7) is 1,816 i.e. in all such projects, the Board has granted permission for construction of built-up area for rehab tenements plus 50% additional built-up area or FSI as applicable from time to time as indicated in the above table, which ever is more. Out of these 1,816 projects, in 1,331 projects, the Board has not asked the society/developer to surrender any built-up area under the impugned Regulation. It is only in 485 projects that the Board has called upon the society/developer to surrender only a small part of the surplus built-up area. Surplus built-up area means the total permissible built-up area less the built-up area for rehab tenements. In other words, in 73 percent redevelopment projects under DCR 33(7), the Board has not asked for any part of the surplus built-up area to be surrendered and only in remaining 27 percent redevelopment projects under DCR 33(7), the Board has called upon the society/developer to surrender a portion of surplus built-up area.

11. Further, what exactly is the portion of surplus built-up area which the Board has called upon the various petitioners to surrender to the Board is clear from the following chart submitted by the Board at the hearing.

Petitionwise details of NOC granted along with Built up Area for Residential Properties

Petitionwise details of NOC granted along with Built up Area for Residential cum-Commercial Properties

12. Learned A.G.P. Mr. Mattos also submitted that there are 292 plots with old dilapidated buildings which cannot be redeveloped because of road widening or the requirement to keep minimum building margins. About 6000 tenants, who were occupiers of such buildings, have been shifted to transit camps and they are required to be rehabilitated in flats with carpet area of 225 sq.ft. or 300 sq.ft. which will be available as surplus flats under the impugned clause.

Contentions (a) and (b)

13. The first contention of the petitioner is that the impugned clause (4) of Appendix III of DCR 33(7) provides for compulsory acquisition of the property without any authority of any legislation and that it is being done by Development Control Regulations which is a delegated legislation.

14. The Supreme Court has held in *Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others*, AIR 2006 SC 1489 : (2006) 4 CompLJ 4 : (2006) 3 JT 235 : (2006) 3 SCALE 1 : (2006) 3 SCC 434 : (2006) 67 SCL 107 : (2006) AIRSCW 1392 : (2006) 3 Supreme 49 that the Development Control Regulations were framed under section 22(m) of the MRTP Act for controlling and regulating the use and development of land. They are not and cannot be treated to be provisions for compulsory acquisition of land.

15. Thereafter in *Jayant Achyut Sathe Vs. Joseph Bain D" Souza and Others*, (2008) 9 JT 605 : (2008) 12 SCALE 194 : (2008) 13 SCC 547 , the Supreme Court examined the scheme of DCR 33(7) and in terms held that there is no acquisition of property under DCR 33(7). (Paras 36 and 47 of the judgment).

16. The contention raised herein was also raised by the petitioners in another group of writ petitions challenging Regulation 2(e) inserted by the Government of Maharashtra Notification dated 8 November 2013, which requires owners of plot admeasuring 4,000 sq. meters or larger area, to surrender 20% of the land or 20% of the built-up property to MHADA. The notification issued in exercise of powers under section 37(1AA) of the Maharashtra Regional and Town Planning Act, 1966 ("MRTP Act") came to be challenged in a group of writ petitions being W.P. No. 366 of 2014 and connected matters (*D.B. Realty Ltd. vs. State of Maharashtra and others*). In the judgment dated 5 February 2015, a Division Bench of this Court to which one of us (Chief Justice) was a party, upheld the constitutional validity of the said Notification after taking the view that the said Notification for inclusive affordable housing does not provide for compulsory acquisition of property, but merely imposes certain conditions for development of the property.

17. In the aforesaid decision, following the Supreme Court decision in *Girnar*

Traders Vs. State of Maharashtra and Others, (2011) 1 JT 469 : (2011) 1 SCALE 223 : (2011) 3 SCC 1 : (2011) 3 SCR 1 : (2011) 1 UJ 125 this Court has clearly held that while the object of the Land Acquisition Act is to acquire land for a public purpose, the object of the MRTP Act is to deal with the development of a particular area or land. The paramount purpose of the MRTP Act is for planning and acquisition of land, if any, is merely incidental. Such schemes for inclusive housing do not tantamount to compulsory acquisition of the property, but merely involve laying down conditions on the basis of which the Planning Authority grants permission for construction of buildings on a piece of land. Hence it is not acquisition of land but merely regulation for the purposes of granting permission under the MRTP Act.

18. In view of the above decision, we do not propose to dwell further on the subject and we reject the petitioners' contention that the impugned Regulation being clause (4) of Appendix-III of Regulation 33(7) of the DCR amounts to compulsory acquisition of the immovable property or that it is beyond the legislative competence of the State Legislature.

Contention (d)

19. Now we take up the petitioner's contention that the respondent authorities are estopped from applying the impugned clause (4) of Appendix-III of DCR 33(7) to redevelopment scheme under DCR 33(7) in view of order dated 21 July 2014.

20. The contention is thoroughly misconceived. The order dated 21 July 2014 passed by a Division Bench of this Court, to which one of us (the Chief Justice) was a party, in D.B. Realty Limited case (supra), reads as under:

" Mr. Khambatta, learned Advocate General for the State Government states under instructions that the State Government will be making amendments in the Development Control Regulation for inclusive housing to allow the developer to provide affordable plots or affordable housing tenements on different plots in the same administrative ward of the Municipal Corporation.

2. The learned Advocate General further states under instructions that there shall be no obligation on the developer to construct affordable housing tenements in re-development projects in accordance with Regulation 2(e) of the Notification for inclusive housing. Out of abundant caution, the State Government will make amendment to the Regulation that the provisions of inclusive housing shall not apply to projects under Regulations 33(5), 33(7), 33(9), 33(10) and 33(14)."

(emphasis supplied)

The statement was made by the then learned Advocate General in D.B. Realty Limited case (supra) in the context of challenge to Regulation 2(e) introduced by the Notification dated 8 November 2013, which provided for an altogether different scheme for affordable housing by surrendering 20% of the land or 20% of the built-up property to MHADA where the land admeasures 4,000 sq. meters

or larger area. It was in the context of the said scheme of affordable housing that the learned Advocate General made a statement that the State Government will make amendment to the relevant scheme so that the provisions of inclusive housing shall not apply to redevelopment schemes under DCRs 33(5), 33(7), 33(9), 33(10) and 33(14), because the redevelopment schemes under the above numbered DCRs themselves contain provisions regarding affordable housing.

21. The facts in the present petitions indicate that the percentage of the total built-up area which the petitioners are required to surrender, is in a range between 2% to 7% of the total permissible built-up area, which is far less than 20% of the total permissible built-up area required to be surrendered in the inclusive housing scheme under Regulation 2(e) inserted by Notification dated 13 November 2013. This will be clear from the chart already set out in para 11 hereinabove.

Contention (c)

22. Learned counsel for the petitioners submitted that in any view of the matter, the Legislature cannot require the petitioners to surrender a portion of the permissible built-up area constructed on the petitioners' own lands without payment of any compensation in accordance with the principles to be laid down in the Legislation itself or to be prescribed in the Rules to be made by rule making authority in exercise of the powers conferred by the Act. It is submitted that the impugned Regulation provides for "payment of amount as may be prescribed by MHADA Act, 1976", but the MHADA Act itself does not lay down the principles for determination of the compensation nor does the Act confer power on any authority to prescribe the rules for determining the amount to be paid; but the respondent Board purports to offer the amount for taking over a part of the built-up area constructed by the petitioners on their own lands on the basis of an administrative circular dated 6 July 1991, which provides for payment for taking over a part of the surplus built-up area merely at the rate of Rs. 235/- per sq. ft. with effect from 25 October 1990 as against the actual cost of construction, which is about Rs. 2,500/- per sq. ft..

23. Learned counsel for the petitioners submitted that the impugned Regulation is violative of the petitioners' constitutional rights under Article 300-A of the Constitution. Strong reliance is placed on the following observations in para 41 of the decision of the Supreme Court in *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, AIR 1982 SC 33 : (1981) 3 SCALE 1685 : (1982) 1 SCC 39 : (1982) 1 SCR 1137 : (1982) 14 UJ 802 :-

"41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as

is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order; having the force of law, that is positive or State made law."

The petitioners have also placed reliance on the following observations in para 168 of the decision in K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka, AIR 2011 SC 3430 : (2011) 8 JT 65 : (2011) 8 SCALE 583 : (2011) 9 SCC 1 : (2011) 5 UJ 3051 : (2011) AIRSCW 5356 :-

"168. Article 300-A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression "property" in Article 300-A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law."

The Supreme Court then observed in para 221 as under:-

"(e) Public purpose is a precondition for deprivation of a person from his property under Article 300A and the right to claim compensation is also inbuilt in that Article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors.

(f) Statute, depriving a person of his property is, therefore, amenable to judicial review on grounds hereinbefore discussed."

24. The learned counsel for the petitioners have vehemently submitted that the legislation or subordinate legislation itself must lay down the principles for determining compensation and that determination of compensation cannot be left at the whims and caprice of the executive, but in the instant case the Regulation making authority has merely provided that the surplus area is to be surrendered by the landlord/occupants" cooperative housing society to the Board "on payment of an amount as may be prescribed under MHADA Act, 1976". It is submitted that the respondent authorities have not indicated any provision of MHADA Act or any Rules thereunder prescribing how the amount is to be determined, but the respondents have only relied upon the circular dated 6 July 1991. The said circular issued by the Housing and Special Assistance Department of Government of Maharashtra was not placed in public domain, but was merely issued to the Board by way of administrative instructions.

25. In support of the above contention, strong reliance is placed on the decision of the Supreme Court in Gulf Goans Hotels Company Ltd. Vs. Union of India (UOI) , wherein the Supreme Court observed as under:-

"22. It is also essential that what is claimed to be a law must be notified or made

public in order to bind the citizen. In *Harla Vs. The State of Rajasthan*, AIR 1951 SC 467 : (1952) 1 SCR 110 while dealing with the vires of the Jaipur Opium Act, which was enacted by a resolution passed by the Council of Ministers, though never published in the Gazette, this Court had observed:-

"8. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special role or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man."

The Supreme Court further observed:

"24. It will not be necessary to notice the long line of decisions reiterating the aforesaid view. So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognized official channel, namely, the official gazette *B.K. Srinivasan and Others Vs. State of Karnataka and Others*, AIR 1987 SC 1059 : (1987) 1 JT 180 : (1987) 1 SCALE 142 : (1987) 1 SCC 658 : (1987) 1 SCR 1054 : (1987) 1 UJ 657 . Admittedly, the "guidelines" were not gazetted."

Relying on the above decision, it is also contended that it is also essential that what is claimed to be a law must be notified or made public in order to bind the citizen.

26. It is, therefore, submitted that since the said circular has not been issued in exercise of any statutory provisions and has not been authenticated as having been issued by the Governor of Maharashtra, the circular is not binding on the petitioners nor does it afford any power on the respondents to require the petitioners to surrender the surplus built-up area on the basis of the said circular.

27. Without prejudice to the above submissions, it is also contended that in any view of the matter, the circular dated 6 July 1991 stipulates that an amount of Rs. 235/- per sq.ft. be paid for the area to be surrendered to the Board. It is vehemently contended that the offer being made by the Board to pay the petitioners cost of construction of the surrender area at the rate of Rs. 235/- per sq. ft., that is at the rate of approximately Rs. 2,500/- per sq. meter, is ridiculously low and illusory when the State Government itself in the ready reckoner for 2014-15 has notified Rs. 25,000/- per sq. meter as the market price of the property for the purposes of determining the stamp duty payable.

28. It is further contended that the decision relied upon by the respondents in D.B. Realty Ltd. (supra) does not help the respondent authorities on the question of determining the compensation or amount payable for surrendering the surplus built-up area. In the said decision, this Court has referred to the provisions of the Notification dated 8 November 2013 specifically providing that where tenements built by the land owner are required to be surrendered to the extent of 20% for economically weaker sections, the cost of construction is to be paid to land owners at the ready reckoner rates (para 18 of the judgment dated 5 February 2015).

29. At the outset, we may refer to the submissions made by Ms. Anklesaria, learned Senior Advocate for the respondent Board, based on the following observations made by the Supreme Court in P.G.F. Limited and Others Vs. Union of India (UOI) and Another, AIR 2013 SC 3702 : (2013) 113 CLA 526 : (2013) 179 CompCas 352 : (2013) 2 CompLJ 1 : (2013) 4 JT 146 : (2013) 3 RCR(Civil) 2 : (2013) 3 SCALE 413 : (2014) 125 SCL 243 : (2013) AIRSCW 2420 :

"31. Before advertng to the various contentions raised in challenging the vires of Section 11AA of the SEBI Act, we feel that it is worthwhile to state and note certain precautions to be observed whenever a vires of any provision of law is raised before the Court by way of a writ petition. It will be worthwhile to lay down certain guidelines in that respect, since we have noticed that on very many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of those provisions of law and thereby create an impediment for the concerned authorities and the institutions who are to monitor those persons who seek such challenges by abusing the process of the Court. Such frivolous challenges always result in prolongation of the litigation, which enables such unscrupulous elements who always thrive on other peoples money to take advantage of the pendency of such litigation preferred by them and thereby gain, on the one side, unlawful advantage on the monitory aspect and to the disadvantage of innocent victims, and ultimately, gain unlawful enrichment of such ill-gotten money by defrauding others. In effect, such attempts made by invoking the extraordinary jurisdiction of the writ Courts of many such challenges, mostly result in rejection of such challenges. However, at the same time, while taking advantage of the long time gap involved in the pending proceedings, such unscrupulous litigants even while suffering the rejection of their stand at the end as to the vires of the provisions, always try to wriggle out of their liabilities by stating that the time lag had created a situation wherein those persons who were lured to part with huge sums of money are either not available to get back their money or such unscrupulous Petitioners themselves are not in a position to refund whatever money collected from those customers or investors. It is, therefore, imperative and worthwhile to examine at the threshold as to whether such challenges made are bonafide and do require a consideration at all by the writ courts by applying the principle of lifting the veil" and as to whether there is any hidden agenda in perpetrating such litigation.

With that view, we lay down some of the criteria to be kept in mind whenever a challenge to a provision of law is made before the Court.

32. The Court can, in the first instance, examine whether there is a prima facie strong ground made out in order to examine the vires of the provisions raised in the writ petition. The Court can also note whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made. It should also be noted as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made. With reference to those relevant provisions, the Court should be conscious of the position as to the extent of public interest involved when the provision operates the field as against the prevention of such operation. The Court should also examine the extent of financial implications by virtue of the operation of the provision vis-a-vis the State and alleged extent of sufferance by the person who seeks to challenge based on the alleged invalidity of the provision with particular reference to the vires made. Even if the writ Court is of the view that the challenge raised requires to be considered, then again it will have to be examined, while entertaining the challenge raised for consideration, whether it calls for prevention of the operation of the provision in the larger interest of the public. We have only attempted to set out some of the basic considerations to be borne in mind by the writ Court and the same is not exhaustive. In other words, the Writ Court should examine such other grounds on the above lines for consideration while considering a challenge on the ground of vires to a Statute or provision of law made before it for the purpose of entertaining the same as well as for granting any interim relief during the pendency of such writ petitions. For the above stated reasons it is also imperative that when such writ petitions are entertained, the same should be disposed of as expeditiously as possible and on a time bound basis, so that the legal position is settled one way or the other."

30. The learned counsel for the respondent authorities have submitted that the compensation is not always required to be paid in terms of money. Relying upon the decision of the Supreme Court in *Godrej and Boyce Manufacturing Co. Ltd. Vs. State of Maharashtra and Others*, (2009) 2 JT 283 : (2009) 2 SCALE 286 : (2009) 5 SCC 24 : (2009) 1 SCR 1016 : (2009) 2 UJ 499 , it is submitted that grant of FSI is a valid form of compensation for surrendering the land or built-up area. It is submitted that if the petitioners had not taken advantage of DCR 33(7), the petitioners would have got an FSI of only 1.33, but it is only by taking advantage of the said Regulation that the petitioners are going for redevelopment of their property by availing higher FSI of 2.0 between 1991 to 1999 or FSI of 2.5 between 1999 and 2011 or FSI of 3.0 from 2011 onwards. It is submitted that having taken the advantage of such high FSI of 2.5 or 3.0 and having voluntarily agreed to undertake redevelopment subject to the condition for surrendering a part of the surplus built-up area as per formula prescribed in

the Third Schedule to MHADA Act, now it is not open to the petitioners to challenge such condition and the Regulation and that too after such a gross delay of a number of years. The petitions are filed in the year 2011 or thereafter for challenging the conditions stipulated in NOC issued by the respondent Board as far back as between 1993 and 2008. It is further submitted by the learned counsel for the respondent authorities that the petitioners cannot be permitted to wriggle out of the obligations voluntarily undertaken by them to surrender a part of the surplus built-up area which is negligible. Where the surplus built-up area is upto 50%, the land owner is not required to surrender any surplus built-up area. Where the surplus built-up area is between 50% and 55%, only 5% of the surplus built-up area is required to be surrendered to the Board for the purpose of allotting the same as transit accommodation or rehab component for occupants of those dilapidated buildings which cannot be reconstructed. It is submitted that the Board is a public welfare authority and does not charge any amount from such allottees and, therefore, the petitioners are not entitled to contend that they are being paid any illusory amount when they are getting almost double or more than double of the permissible FSI of 1.33.

31. When we called upon learned counsel for the respondent Board to explain the benefits being obtained by the society/developer by availing higher FSI, with reference to the broad facts of Writ Petition No. 2359 of 2011 of M/s. Gala Builders, learned counsel for the Board submitted the following chart (built up area would give more accurate picture):

It is, therefore, submitted that by availing the higher FSI, the benefit obtained by the society/developer far outweighs the amount which the developer would get as the cost of construction on the basis of ready reckoner rate, because the cost of construction may be Rs. 2,500/- per sq. ft., but the price which the developer would fetch on sale of flat in the market would be Rs. 25,000/- per sq. ft.

It is vehemently submitted that the provisions of clause 4 of Appendix III of Regulation 33(7) of the DCR are not unconstitutional nor do they become unconstitutional merely on the ground of absence of revision of the amount specified in the circular dated 6 July 1991.

32. Having heard learned counsel for the parties on the question of the amount to be paid to the petitioners for surrendering part of the surplus area which, as indicated above, works out to surplus area of only 5% or 7% of the total built up area, we find considerable substance in the submission of Ms. Anklesaria, learned counsel for the respondent Board that the petitioners having voluntarily agreed to the condition of surrendering part of the surplus built up area by obtaining NOC from the respondent Board under DCR 33(7) before a number of years, it is not open to the petitioners to challenge such condition after such a long period. Besides, on merits also, we find considerable substance made on behalf of the respondent Board that as against the normal FSI of 1.33 in suburbs, the petitioners wanted higher FSI of 2.0 between 1991-1999, FSI of 2.5 between 1999 and 2011 and FSI of 3.0 from 2011 onwards and, therefore, they had

voluntarily accepted the condition stipulated in the impugned clause (4) of Appendix-III of DCR 33(7) for surrendering a portion of the surplus built up area. Having thus taken advantage of higher FSI, the petitioners cannot be permitted to approbate and reprobate by trying to wriggle out of their obligations voluntarily undertaken to surrender part of the surplus area. As indicated in the charts produced by the respondent Board, the built up area which the petitioners are called upon to surrender in most of the cases works out to hardly 2% to 7% of the total permissible built up area. The charts also indicate that in all cases of residential buildings, the petitioners are able to sell more than 50% of the total built up area in the open market, even after providing for rehab built up area to existing tenants to the extent of 30% to 48% in most of the cases. In our opinion, therefore, the compensation which the petitioners have received in the form of higher FSI of 2.5 or 3.0 against the normal FSI of 1.33 in the suburb is substantial compensation for a small portion of the surplus area required to be surrendered by the petitioners to the respondent Board and, therefore, the same cannot be considered as illusory merely by looking at the amount being paid to the petitioners in cash at the rate of Rs. 235/- per sq. ft. of built up area to be surrendered by the petitioners to the respondent Board. Even if we were to ignore the Circular dated 9 July 1991 and also ignore the said amount to be paid at the rate of Rs. 235/- per sq.ft., the incentive being taken by the developers/ owners for taking higher FSI of 2.5 or 3.0 as against normal FSI of 1.33 would be more than sufficient compensation for the surplus area which is required to be surrendered by the petitioners to respondent no. 1.

33. We would have appreciated if the Petitioner-developers had expressed their "Joy of Giving" a part of the surplus built-up area in direct proportion to the FSI that they get under DCR 33(7) Unfortunately, the developers do not derive any Joy of Giving even after FSI of 3.0 from 2011 onwards as is apparent from filing of the Petitions even by those developers who obtained NOC after 2011 with FSI of 3.0.

Contention (f)

34. We may now take up the petitioners' contention that impugned clause (4) of Appendix-III of DCR 33(7) makes discrimination between private owners of land on the one hand and the Municipal Corporation on the other hand. It is submitted that the Municipal Corporation is not required to surrender any part of its surplus built up area, but the private owners are required to make such surrender.

35. Mr. Sakhare, learned Senior Advocate for the Municipal Corporation, submitted that the Municipal Corporation is a Public Body performing public duties of providing civic amenities to the residents within the territorial limits of the Municipal Corporation, such as water supply, roads, drainage, sewerage, conservancy, etc. and, therefore, the Municipal Corporation requires large funds for providing such civic amenities. The primary responsibility of the Municipal Corporation is to provide such basic civic amenities to millions of people in city of Mumbai and its primary responsibility is not to provide housing to the people.

Hence when the Municipal Corporation undertakes redevelopment scheme under DCR 33(7) in respect of its own buildings which are occupied by tenants, it is duty bound to provide rehabilitation buildings to its existing tenants, but there is no obligation on it to provide any housing accommodation to others and, therefore, the Municipal Corporation is entitled to sell off the entire surplus built up area in the open market for the purposes of generating funds for its multifarious activities for the benefit of residents in the city.

36. We find considerable substance in the above submission made on behalf of the Municipal Corporation which is also adopted by the learned A.G.P. for the State and the learned counsel for the respondent Board. The Municipal Corporation as a public body providing civic amenities to millions of people in the city stands on a different footing and forms a class by itself. Hence there is no violation of the equality clause in Article 14 of the Constitution.

Contention (g)

37. We may also deal with the petitioners' contention that when the land and the buildings belong to MHADA, Chapter VIII-A of MHADA Act provides that such land and building may be provided to the cooperative societies of tenants and, therefore, as a consideration for transfer of property the cooperative society of tenants may be called upon to surrender a part of the reconstructed property to MHADA. It is submitted that the question of such consideration would not arise when private owners of land demolish old buildings occupied by tenants and reconstruct new buildings for rehabilitation of the existing tenants and for selling off the remaining built up area in open market to recover the cost of construction and to generate reasonable profit.

38. The petitioners' contention is misconceived. The private owner of land with building occupied by existing tenants is not called upon to surrender any part of the land or any part of the existing building. However, it is only when such private owner of the land was to demolish the old building and reconstruct a new building with much larger built up area by availing a higher FSI under DCR 33(7) that he is called upon to surrender a part of the surplus built up area, after rehabilitation of the existing tenants. Secondly, the private owner has voluntarily decided to take advantage of FSI of 2.5 or 3.0 as against the normal FSI of 1.33 in suburbs and, therefore, the Government has stipulated it as a condition as part of DCR 33(7) that such higher FSI is to be given to private owner of the land if he agrees to surrender a part of the surplus built up area.

Contention (h)

39. It was vehemently submitted by learned counsel for the petitioners that if the surplus area is 51%, the petitioner can be called upon to surrender only 1% of the surplus area which is in excess of 50% and not 5% as demanded by the respondent Board. On the other hand, Ms. Anklesaria, learned counsel for the respondent Board as well as Mr. Mattos, learned AGP for the State, have submitted that a bare perusal of the Third Schedule to MHADA Act clearly

indicates that when the surplus area is upto 55%, the developer/owner is required to surrender 5%. It is submitted that Appendix-III contains a mathematical formula which is not capable of two interpretations and which was accepted by the petitioners at the time of issuance of NOC by the Board a number of years ago.

40. We find considerable substance in the submissions urged on behalf of the respondent that the formula laid down by the Third Schedule to MHADA Act is required to be implemented as per the mandate contained therein. When the legislature/Regulation making authority has directed that in case of surplus area being upto 55%, 5% built up area is required to be reserved for/surrendered to the respondent Board, it is obvious that 5% built up area will have to be reserved/surrendered to the respondent Board whether the surplus area is 51% or 52% or 53% or 54% or 55%. The legislature has laid down the brackets for the built up areas to be surrendered and, therefore, there cannot be any debate at the time of application of formula contained in the Third Schedule, particularly when the petitioners accepted the condition with open eyes long back.

Contention (i)

41. The learned counsel for the petitioners urged that impugned clause 4 in Appendix-III to DCR 33(7) provides that the prescribed percentage of the surplus built up area, as provided in the table in the Third Schedule to the MHADA Act, shall be made available to the respondent Board. It is, therefore, submitted that for calculating the surplus built up area, one must refer to the Third Schedule to the MHADA Act, which specifically refers to section 103I(3). Section 103I(3) reads as under:-

"103I. Reconstruction of new building by cooperative society.-

(1)

(2)

(3) The co-operative society shall, notwithstanding anything contained in any other law, reserve and allot, in the new building such percentage as is specified in the Third Schedule to this Act of the surplus area in the new building determined on the basis of the difference between the floor space index availed of by it while reconstructing the building and the floor space index that had been utilised in the construction of the old building, for housing such dishoused occupiers from other cessed demolished buildings as may be nominated by the Board and upon such nominations, the nominated occupiers shall be accepted by the cooperative society as its members in accordance with its bye-laws, and shall not dispose of tenements covered by such reserved surplus area to others..... "

(emphasis supplied by the petitioners)

It is submitted on behalf of the petitioners that the surplus area as per the above statutory provision has to be determined on the basis of the difference between

the FSI availed of by the co-operative society while reconstructing the new building and the FSI that had been utilised in the construction of the old building. Hence the entire FSI utilised in the construction of old building has to be deducted from the FSI availed while reconstructing the new building. However, the respondent Board does not take into account the full FSI of the old building, but confines the maximum area of the tenements in the old building to 753 sq.ft. per tenement and, therefore, the respondent Board is acting illegally in determining the surplus area.

42. The above contention of the petitioners cannot be accepted because clause 2 of Appendix-III prior to its amendment in 2011 specifically provided as under:-

"Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.99 sq.mt. (225 sq.ft.) and maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHADA Act, 1976."

(emphasis supplied)

43. In view of the above specific language of clause 2, the respondent Board is justified in determining FSI of the old buildings by restricting the maximum carpet area of each tenement to 70 sq.mts. (753 sq.ft.). The NOCs which were obtained by the petitioners between 1999 and 2011 are, therefore, governed by the above clause 2 in Appendix III to DCR 33(7). It was thereafter that clause 2 was amended. The amended clause (2) reads as under:-

""Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum fixed carpet area of 27.88 sq.mt. (300 sq.ft.) and maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHADA Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

Provided that if carpet area for residential purposes exceeds 70.00 sq.mt. (753 sq.ft.) the cost of construction shall be paid by tenant/occupant to the developer. The cost of construction shall be as per Ready Reckoner rate of that year. However, the carpet area exceeding 70.00 sq.ft. (753 sq.ft.) shall be considered for rehab FSI but shall not be considered for incentive FSI."

The amended clause 2 has increased the minimum carpet area to be provided to the existing tenants from 225 sq.ft. to 300 sq.ft. The petitioners, therefore, cannot be permitted to rely on a part of the amended clause 2 for the purpose of getting rid of the maximum carpet area limit of 753 sq.ft. applicable to NOCs issued prior to the amendment of 2011. In fact, having obtained NOC from the respondent Board prior to 2011, the petitioners had already obtained building permissions and constructed buildings on that basis. The petitioners are, therefore, bound by the provisions of clause 2 in Appendix III to DCR 33(7) as applicable at the time of issuance of NOC by the respondent Board.

44. Ms. Anklesaria, learned Senior Advocate for the respondent Board and Mr. Mattos, learned A.G.P. for the State Government, have submitted that the challenge to the constitutional validity of DCR 33(7) and Appendix-III thereto has already been examined by the Supreme Court in *Jayant Achyut Sathe Vs. Joseph Bain D" Souza and Others*, (2008) 9 JT 605 : (2008) 12 SCALE 194 : (2008) 13 SCC 547 and the Supreme Court has upheld the constitutional validity thereof.

45. In that case, the Supreme Court traced the historical background leading to making of DCR 33(7) read with Appendix-III to DCR, 1991. The Supreme Court noticed that 16,502 buildings constructed prior to 1940 are in the need of urgent repairs and in some cases reconstruction. The State Government had taken it upon itself to see to it that these buildings were repaired and wherever necessary reconstructed and for that purpose it created the Bombay Building Repairs and Reconstruction Board (respondent no. 2 Board) by passing the Bombay Building Repairs and Reconstruction Board Act, 1969. A cess was to be contributed by the tenants of private buildings to the said Board from 1969. However, the amount of cess was insignificant in view of the fact that the cess was calculated as a percentage of the rent payable by the tenant. In view of freezing of rent under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the rents received by the landlords were found very much insufficient for them to carry out repairs and consequently the cess collected by the Mumbai Building Repairs and Construction Board was also not found to be sufficient. The above Act of 1969 was later repealed and the activities of the said Board under that Act were taken over by the Maharashtra Housing and Area Development Authority (MHADA) upon enactment of the Maharashtra Housing and Area Development Act, 1976 (MHADA Act). A cess was to be contributed by the tenants of private buildings under section 82 of the MHADA Act. The cessed buildings were divided into following categories under section 84 of the MHADA Act.

46. Chapter VIII of the MHADA Act provides for repairs and reconstruction of dilapidated buildings. MHADA is supposed to undertake structural repairs of the buildings which are in ruinous condition and likely to deteriorate and fall. However, where the cost of the structural repairs exceeds Rs. 1200/- per sq.mtr., MHADA may not consider such buildings for repairs and issue a certificate to that effect to the owner of the buildings. Where the occupiers are ready to contribute to the cost in excess of Rs. 1200/- per sq.mtr., MHADA may carry out the structural repairs.

47. There was hardly any progress in the matter of repairs and/or reconstruction by the above procedure and, therefore, Chapter VIII-A was introduced in the said Act. Chapter VIII-A provides that notwithstanding anything contained in Chapter VIII, the provisions of this chapter are to operate when 70% of the occupiers come together and approach the Government to acquire the property. They are required to assure to contribute towards the acquisition and take steps since the landlords are not cooperating. Under the scheme of this Chapter VIII-A, the

developed buildings are to be given FSI 2.0. It appears that the provisions of Chapter VIII-A of MHADA Act came to be challenged and though the writ petition was dismissed, the appeal is pending before the Supreme Court. We are informed that no proposal was made and cleared under Chapter VIII-A of the MHADA Act.

48. Since the provisions of Chapter VIII-A also did not receive adequate response, on 25 March 1991, the Development Control Regulations for Greater Mumbai, 1991 were notified and Regulation 33(7) thereof provides for reconstruction or redevelopment of cessed buildings in the island city by cooperative housing societies or old buildings belonging to Municipal Corporation. As indicated earlier, the DCR of 1991 provided for old consumed FSI or FSI 2.0, whichever is higher. The DCR of 1991 was amended on 25 January 1999 to provide FSI of 2.5.

49. A PIL was filed by Joseph Bain D'Souza and others in the Bombay High Court making a grievance that there was gross misuse of amended DCR 33(7) when applied to private buildings. It was submitted that by taking shelter under the amended Regulation 33(7), there has been misuse by pulling down buildings which were otherwise in good condition merely because they were constructed prior to 1940; that the numbers of tenants/occupiers were being inflated by creating bogus tenancies to claim extra FSI and that as a consequence there was going to be tremendous increase in the population in the island city causing further strain on its infrastructure. It was also submitted that the extra FSI under the amended Regulation 33(7) was meant for the reconstruction of unsafe and dilapidated buildings only and not for all the 16,502 "A" Category cessed buildings and that the dilapidated buildings were supposed to be just 10% of them. A declaration was, therefore, prayed that Regulation 33(7) would be applicable to only those cessed buildings which are in dilapidated and in unsound and unsafe condition.

50. The Supreme Court examined the entire historical background, including freezing of rents under the Bombay Rent Restriction Act, 1939 and subsequently Bombay Rent Act, 1947, levy of cess by the Bombay Buildings Repairs and Reconstruction Board and its replacement by the MHADA Act. The Supreme Court noted the findings in the Sukhtankar Committee Report submitted in July 1997 that the life of most of the buildings in Category "A" (i.e. constructed prior to 1/1/1940) had nearly come to an end and that instead of repairing such buildings periodically, their reconstruction would be the only far sighted solution. It was felt that without giving incentive FSI, nothing could be achieved in respect of reconstruction and redevelopment of old buildings and, therefore, amendment under the MRTTP Act was made on 25 January 1999 to Regulation 33(7), whereby for reconstructing "A" category cessed buildings, FSI of 2.5 was granted on the gross plot area or the FSI required for rehabilitating the tenants plus 50% to 70% incentive FSI (as specified in Appendix III) whichever is more.

51. After noting the above, the Supreme Court then held as under:-

"26. The history of the Regulation 33(7) framed under the Town Planning Act, 1966 for reconstruction and redevelopment and the scheme for reconstruction/redevelopment under Development Act shows that there are separate schemes under two separate Acts, that are self contained and one cannot borrow the provisions from one Act and incorporate them into the other, without upsetting the scheme of Regulation 33(7) read with Appendix III thereof.

27. The scheme under Regulation 33(7) involves landlords with the consent of 70% of the occupiers. There is no acquisition for redevelopment under this Scheme. Therefore to bring in "old and dilapidated buildings" which is a prerequisite for acquisition and reconstruction under the other Scheme, namely under Chapter VIII of MHADA cannot be included in the provisions of Regulation 33 (7) read with Appendix III.

36. It is of significance to note that in the writ petitions filed there was no challenge to Regulation 33(7). Only incentive FSI was challenged. So far as Regulation 33(7) is concerned, there will be no acquisition in Chapter VIII. Stress is on spending money out of the funds and of acquisitions. Chapter VIII-A essentially deals with occupiers, acquisition and the Board's role is that of certification. Under Regulation 33(7) the occupier and the landlord are involved. There is no acquisition and there is no government fund utilized. There is a Transferable Development Right (in short "TDR") and the concept of incentive FSI.

41. In 1991 nearly 73% of the households occupied one room tenements-vertical slums; 18% occupied two rooms i.e. most of the persons-more than 90% lived in small areas. Those occupying large areas constitute 2.7% only. Between 1961 and 1991, the number of households increased to 20,88,000. Most of the tenements are of 100 to 120 square feet area only.

42. It is thus clear that the policy was to enhance the quality of the lives of those living in such poor conditions by increasing the living space to nearly double. This is to be contrasted with the need to give a better lifestyle to those who can afford it namely those who can afford the time to live a leisurely life. If such people have to undergo some hardships, the policy cannot be faulted especially when they constitute a minority.

45. Most of the buildings constructed prior to 1940 (17,490 buildings) were constructed prior to 1905. Most of the buildings have outlived the period of their survival by 1979. 80% were occupying one-room tenements. [See: Vivian Joseph Ferreira and Another Vs. The Municipal Corporation of Greater Bombay and Others, AIR 1972 SC 845 : (1972) 1 SCC 70 : (1972) 2 SCR 257 .

47. It would be seen that with respect to reconstruction of buildings both Chapters VIII and VIIIA require the building to be acquired by the Board for the reconstruction in terms of Sections 92 and 103B (3). This is not the case with Regulation 33(7)."

52. It is thus clear that the Supreme Court examined the scheme of DCR 33(7) vis-a-vis the provisions of Chapter VIII and VIII-A of MHADA Act and in terms held that the scheme of DCR 33(7) is quite different from the scheme of the above two Chapters of MHADA Act. We, therefore, do not find any merit in the petitioners' contention that while calculating the surplus area under DCR 33(7), resort must be had to the provisions of section 103-I in Chapter VIII-A of the MHADA Act.

53. We are also of the view that once the Supreme Court rendered the final judgment dated 4 September 2008 in Jayant Achyut Sathe vs. Joseph Bain D'Souza (supra) upholding the constitutional validity of DCR 33(7) with Appendix III, it is not open to this Court to entertain any contention challenging the constitutional validity of DCR 33(7) and Appendix III on any other ground.

54. In view of the above discussion, we find no merit in any of the contentions urged on behalf of the petitioners. The Petitions, therefore, fail and are dismissed. Interim relief, wherever granted earlier, stands vacated.

After the judgment is pronounced, learned counsel for the petitioners prays for continuation of interim relief which was granted earlier.

The learned counsel for the respondents oppose the prayer and submit that in case the stay is continued, it must be on condition that the respondents do not create any third party rights in the flats which have already been earmarked for surrender to the respondent Board.

We continue the interim relief granted earlier till 10 July 2015 subject to the condition that the petitioners shall not create any third party rights in the flats earmarked for surrender to the respondent Board.