
(2014) 04 SC CK 0031

In the Supreme Court Of India

Case No : Civil Appeal No. ... of 2014 (Arising out of SLP (C) No. 20279 of 2013)

Janhit Manch

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Constitution of India, 1950 — Article 226

Development Control Regulations for Greater Bombay, 1991 — Regulation 33, 33(24), 34, 35(2), 64

Evidence Act, 1872 — Section 114

Maharashtra Regional and Town Planning Act, 1966 — Section 44, 44(1), 45, 45(1), 45(2)

Mumbai Municipal Corporation Act, 1888 — Section 354(A), 51

Citation : 2015 (13) SCC 310 = 2014 (7) SCALE 698

Hon'ble Judges : V. Gopala Gowda, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

V. Gopala Gowda, J.—Leave granted.

2. My sister Justice Gyan Sudha Misra has delivered the judgment today in this matter by dismissing the SLP holding that it has become infructuous. I am in respectful disagreement with the view expressed by Her Ladyship in this matter. As I received draft judgment in the evening of 24th April, 2014, I could not deliver judgment. I am of the view that the leave has to be granted and civil appeal has to be allowed. In the proceedings, it is stated that reasons would follow, that is why I am releasing this reasoned judgment.

Pursuant to the order of the High Court of Judicature at Bombay dated 13.05.2013 passed in Public Interest Litigation Petition No. 43 of 2012 filed by the Appellants, 13 issues of violations and breach of Development Control Regulations for Greater Mumbai, 1991 (for short "the DCR") and the Maharashtra Regional and Town Planning Act, 1966 (for short "the MRTP Act") were raised.

3. Out of the 13 issues raised in the said writ petition, which were in two parts, six issues (in Part-A) were, remanded to the Municipal Commissioner for reconsideration and re-examination and (Part-B) Eight issues were finally decided by the High Court in the aforesaid writ petition (one issue being remanded in part). Pursuant to the said order of MCGM, six issues were decided vide order dated 12.09.2013.

4. Being aggrieved by the order dated 12.09.2013 Respondent No. 5 challenged the correctness of the same by filing W.P. No. 2223 of 2013 before the High Court of Judicature at Bombay.

For the sake of ready reference, the issues pending for adjudication before High Court and this Court is highlighted in the following table:

Therefore, the learned sister Her Ladyship held that the challenge made in relation to the other issues in this appeal has become infructuous and has been dismissed by Her Ladyship in the SLP by recording Her reasons to which I am in respectful disagreement and of the view that certain factual and legal contentions rise before the High Court in Part-A, and 7 issues were not decided. The correctness of the same are challenged in this appeal raising certain questions of law and grounds in support of the same.

5. After hearing the legal contentions advanced by both the parties, Mr. Shekhar Naphde the learned senior counsel who appeared on behalf of the Appellants and Mr. Goolam E. Vahanvati, Attorney General along with Mr. R.P. Bhatt, learned senior counsel who appeared on behalf of Respondent Nos. 2 to 4, Dr. A.M. Singhvi and Mr. Paramjit Singh Patwalia, learned senior counsel on behalf of Respondent No. 5, I am of the view that this SLP has not become infructuous. I intend to consider the legal questions raised and answer the same by adverting to certain necessary relevant facts.

Brief facts are stated hereunder for examining the factual and rival legal contentions urged on behalf of the parties and I answer the same by recording reasons in this judgment:

6. The Appellant No. 1 herein, a non-governmental organization, filed Public Interest Litigation No. 43 of 2012 before the High Court of Judicature at Bombay questioning the legality of the permission granted in favour of Respondent No. 5 regarding construction of 56 storied residential building known as 'Palais Royale' and a public parking lot (for short "PPL") adjacent to it situated at Worli, Mumbai. The challenge in the writ petition by the Appellants herein is regarding the approval and commencement certificate issued in respect of the residential building and PPL upto 43rd floors of the building in question. The order by the MCGM, Mumbai dated 12.9.2013, would clearly indicate the challenge of the sanctioned permission and commencement certificate issued upto 43rd floor for construction of residential building by the Respondent No. 5 who is the owner of the property bearing Cadastral Survey Nos. 288, 289, 309, 310, 1/1540, 2/1540, 3/1540, 1547, 1548, 1549, 1/1539 and 1550 of Lower Parel Division at

Ganpatrao Kadam Marg, Worli. The larger property is sub-divided in 9 sub-plots in the following manner:

The Corporation No. 5B-6 admeasuring 28,409.57 sq. mtrs. is the subject-matter of the petition, as it is on this plot that the residential building and PPL are being constructed as per sanctioned permission accorded by Respondent No. 2. The plans were amended from time to time and a residential building was subsequently proposed. On 20.8.2010 and 8.2.2011, the plans were approved for construction of a PPL with its potential available under Regulation 33(24) of the DCR as applicable in the city of Mumbai.

7. On 7.5.2011, the Respondent No. 2 received a letter from Respondent No. 5 informing that all conditions of intimation of disapproval (IOD) as well as amended plans have been complied with and the Respondent No. 5 completed work upto plinth level as per the approved plan. Respondent No. 5 called upon the MCGM to check the plinth and grant further commencement certificate.

8. On 16.7.2011, MCGM, Mumbai issued a notice u/s 354(A) of the Mumbai Municipal Corporation Act (for short "MMC Act") to Respondent No. 5. stating misrepresentation was made to it while submitting plans by way of showing amalgamation of leasehold and free hold plots.

Thereafter, MCGM carried out an inventory on 22.7.2011 in which it was noted that the work of residential tower was carried out up to 180 meters (36 floors) within the commencement certificate granted on 6.7.2010 and the work of PPL was in progress up to plinth level. On 11.11.2011, another inventory was carried out wherein it was recorded that the work of residential building was up to 180 meters and the work of PPL was up to plinth level.

9. On 29.11.2011, MCGM issued another notice to Respondent No. 5 u/s 51 of the "MRTP Act", wherein it is stated that a circular modifying the policy regarding PPL in the city is issued on 22.6.2011 prescribing certain conditions. It was stated that as per the Circular, the height of PPL would be limited to ground + 4 floors and 2 basements. A notice was called upon Respondent No. 5 not to carry further constructions and Respondent No. 5 was directed to show cause as to why the commencement certificate issued on 10.10.2010 should not be revoked or modified as the Respondent No. 5 had not carried out the construction beyond plinth.

To the notice dated 29.11.2011, Respondent No. 5 replied on 14.12.2011 stating that Section 51 of the MRTP Act was not applicable to the facts of the case placing on record the various steps taken for construction of the PPL.

10. Again on 19.12.2011, MCGM issued notice u/s 53(1) of the MRTP Act to Respondent No. 5 stating that the work of construction of PPL from 1st to 6th floor (entire) and 7th to 9th floor (part) which was beyond the permission granted in commencement certificate dated 10.10.2010 was illegal being without permission.

11. Being aggrieved by the notices, Respondent No. 5 filed Civil Suit No. 2492 of 2011 before the City Civil Court, Mumbai challenging the notices issued by MCGM and contended that it had carried out construction as per sanctioned plan and construction has reached up to 9th floor. It was contended by Respondent No. 5 that it had applied for commencement certificate on 7.5.2011 which was neither granted nor refused and therefore it is deemed to have been granted. The City Civil Court Judge by order dated 24.12.2011, granted ad interim order and observed that Respondent No. 5-the Plaintiff had undertaken that he would not carry out construction in contravention of sanctioned plan. The City Civil Court Judge granted relief as under:

- (1) ad interim relief;
- (2) Deft/MMC is restrained from taking action in view of impugned notice;
- (3) MMC was directed to file reply by 10.1.2012.

12. Preliminary objection was raised by Respondent No. 5 regarding locus of the Appellants to move this petition in public interest before the High Court. It is the case of Respondent No. 5 that it was involved in a litigation with M/s. Kalpataru Properties Pvt. Ltd. that M/s. Kalptaru Properties has set up the present Appellants. It is further contended by the learned Counsel for the Respondent No. 5 that the Chairman of Appellant No. 1-Mr. Rayani is himself a developer and the petition is not in public interest but is meant for settling a private dispute. The Division Bench of the High Court adverted to certain relevant provisions of the MRTTP Act in this case namely, Sections 44, 45, 46 and 51 which are extracted below:

44. Application for permission for development 1(1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make in application writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed:

45. Grant or refusal of permission:

(1) On receipt of an application u/s 44 the Planning Authority may, subject to the provisions of this Act, by order in writing-

- (i) grant the permission, unconditionally;
- (ii) grant the permission, subject to such general or special conditions as it may impose with the previous approval of the State Government; or
- (iii) refuse the permission

(2) Any permission granted under Sub-section (1) with or without conditions shall be contained in a commencement certificate in the prescribed form.

46. Provisions of Development plan to be considered before granting permission:

The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under this Act.

51. Power of revocation and modification of permission to development....

13. The Division Bench also referred to DCR 2(11) regarding building, DCR 5(5) regarding Procedure for obtaining Development Permission and Commencement Certificate, DCR 6(4) regarding procedure during construction, DCR 30(e) regarding features permitted in open spaces, DCR 33(24) regarding Additional Floor Space Index which may be allowed in certain categories and referred to the incentive FSI given in favour of the Respondent No. 5 and additional FSI on built up parking area with certain conditions, DCR Regulation 35(2)(iv) regarding Floor Space Index Computation and Clause (iv) which is about the area not to be counted in FSI and DCR 38 (4) deals with requirements of parts of buildings and other requirements. The Division Bench also noted the submissions with regard to the challenge made by the Appellants and arguments advanced on behalf of the Respondents in respect of PPL and the contention advanced on behalf of Respondent No. 5 that letter dated 7.5.2011 under DCR 6(4) for issuance of further commencement certificate and the application having not been refused, deemed to have been granted. At paragraph 29 of the impugned order it is referred that construction of additional floors from 44 to 56 was solely dependent on the incentives FSI and till date mandatory precondition of handing over the PPL has not been fulfilled by the Respondent No. 5.

14. At para 29 (b) it is subsequently stated regarding submission on behalf of the Appellants, that no commencement certificate has been issued to construct the residential building beyond 43rd floor. However, it has constructed the residential building up to 56th floors without having obtained commencement certificate. Therefore, the construction is in breach of law and it should not be permitted to be regularized. It is further stated that the work in the main building has reached completion and in spite of the pendency of suit, the Respondent No. 5 has undertaken the construction in a hurried manner.

15. The learned Counsel for Respondent No. 5, on the other hand stated that the grant of commencement certificate is only a ministerial action and substantive rights of the parties are governed by the sanction of plans. It is further submitted by the learned Counsel that the work has been carried out as per the sanctioned plan and non-endorsement of commencement certificate is not a breach of the DCR. It is also submitted that the position has been recognized u/s 53 of the MRTTP Act and in such situation, there is an option for regularization u/s 44 of the MRTTP Act. The learned Counsel has placed on record circulars dated 17.6.2006 and 6.7.2005 and 4.2.2011 in respect of regularization.

16. At para 29(e) of the impugned judgment, the High Court noticed the factual aspect regarding building plans of Respondent No. 5 for the residential building which are sanctioned up to 56 floors. It further noticed the fact that the

commencement certificate has been issued only till 43rd floors and examined the question as to whether the action of the Respondent No. 5 to continue construction up to 56 floors is so patently illegal so as to warrant an order of demolition.

17. The Division Bench of the High Court observed that the plans are sanctioned up to 56th floors and the construction per-se is not in violation of the sanctioned plans. The Division Bench further referred to the submission made on behalf of the MCGM that before occupation certificate is granted, the aforesaid aspects of construction without commencement certificate will be considered and referred to Section 52 of the MRTP Act which envisages different categories of constructions. Once a construction is found to be as falling in the category enumerated in Section 52, then a notice u/s 53 of the MRTP Act is issued. And at this stage, it is open to the developer to make an application for regularization as per the Act and the circulars. Since the MCGM has not yet granted occupation certificate to the Respondent No. 5, the same has not taken a final decision in the matter. The High Court considering the fact that there is a sanctioned plan permitting the Respondent No. 5 to construct up to 56th floors, it did not think it necessary to interfere and issue a drastic order of demolition on the ground that the work is carried out beyond commencement certificate. Particularly, the statutory planning body has not yet taken final decision in the matter, it will not be appropriate to prejudice the issue and direct demolition.

18. Aggrieved by the non-consideration of this important aspect along with other 6 issues which are referred to in the table mentioned above in the additional affidavit filed by the Appellants, this civil appeal is filed by the Appellant also on the ground of various other deviations regarding not following the guidelines issued regarding refuge area contained in DCR 44 (7) and also deviation from the National Building Code regarding fire protection and FSI of structural column.

At paragraph 36 of the impugned judgment, directions were given to Respondent Nos. 1 and 2 to reconsider and re-examine 6 issues out of 13 and the petition was disposed of in the above terms.

19. On the ground of non consideration of remaining 8 issues in the writ petition, this civil appeal has been filed raising certain questions of law regarding concessions granted under DCR 64(b) in the light of the express bar against the grant of concessions in respect of FSI contained in DCR 64 (b) and non compliance with the mandatory and obligatory precondition of the builder-Respondent No. 5 to make out a case of 'demonstrable hardship' and a reasoned and coherent finding thereon being arrived at by Respondent No. 3, as required by DCR 64(b).

This civil appeal was heard at length on different dates.

20. The learned senior counsel on behalf of the Appellants Mr. Shekhar Naphde submits that the Division Bench of the High Court has failed to exercise its power Under Article 226 of the Constitution of India despite the fact that Respondent

No. 5 had illegally availed and amassed additional FSI amounting to about 66,449.85 sq. mtrs. out of a total FSI of 1,21,165.76 sq. mtrs. of which the legitimate FSI consumed was only 54,715.19 sq. mtrs. which was amassed through blatant and brazen breach of the fundamental provisions of the MRTTP Act and DCR.

Learned senior counsel on behalf of Appellants further submitted that DCR 64(b) requires the party seeking concessions to make out a case of demonstrable hardship for seeking such a concession. There was no such case of attempt made out by Respondent No. 5, let alone there being a reasoned finding of demonstrable hardship arrived at by Respondent No. 3. Yet, despite the aforesaid arguments being advanced before the High Court, the same were not considered.

It is the further contention of the Appellants that the High Court has, contrary to the statutory provisions of law held at paragraph Nos. 36(vii) and 36(viii) that the decision of the Commissioner in respect of the aforementioned concessions cannot be termed as illegal or arbitrary and is not to be interfered with. This finding of the High Court is contrary to the plain and express provisions of the DCR.

Regarding refuge area, it is contended that the same is required to be segregated and kept open as a safety measure in case of any emergency. Also, by definition, a refuge area cannot have any direct access from the habitable premises and cannot be sold or attributed to any flat or its occupants.

21. It is further contended by the learned senior counsel for the Appellants that Respondent No. 5-builder has fraudulently and illegally constructed a total refuge area of 52452.99 sq. mtrs (39446.91 on habitable floors + 13006.08 as individual floors) while the total permissible refuge area when calculated at 4% is only 2188.60 sq. mts. for the entire building. The MCGM fraudulently and illegally allowed refuge areas/fire escape passages free of FSI to the tune of 95.87%, which is astronomical and exorbitant in nature. In sum and substance, these extensive refuge areas are illegal and are not refuge areas but have been constructed and sold by the builder-Respondent No. 5 to flat owners as decks/terraces.

It is further contended that Respondent Nos. 2 to 4 filed an Affidavit dated 18.9.2012 in the writ petition before the High Court and admitted that the refuge area is far in excess of the permissible limits. Despite the said fact being noticed by the High Court in paragraph 36 (ii) of the impugned order, it has failed to direct the Corporation to demolish excessive Refuge Areas and instead it has directed the MCGM to re-examine the issue and rework on the FSI.

It is the further case of the Appellants herein that the High Court committed manifest error in abdicating its duty to adjudicate the disputes brought before it. However, apart from the issue of Refuge Areas, it has directed Respondent No. 3 to examine the issues of construction beyond 43rd floor of the Main Building which has been done without obtaining commencement certificate as required u/

s 45(2), FSI in lieu of Set Back Areas, passages at Manor Level and entrances, private swimming pools and deck areas, FSI in respect of structural columns, lack of NOC from the High Rise Committee, and Height of Habitable Areas above 4.2 meters. The High Court proceeded on the erroneous factual position that the Corporation-Respondent No. 2 stated that it would 'reconsider' these issues. No such submissions have been made by Respondent Nos. 2 to 4 earlier. In fact, the Affidavit filed on behalf of the said Respondents dated 18.9.2012 admits that these areas could not have been granted free of FSI and are to be calculated in the FSI consumed. Thereby, the High Court is patently mistaken in proceeding on such a footing and ought to have rendered a decision on these issues.

22. The builder-Respondent No. 5 opted for a PPL scheme to be constructed and handed over to the Corporation in lieu of which incentives FSI was to be received. The PPL was however constructed upto 15 floors vide sanction of Building Plans after obtaining of Commencement Certificate only upto plinth level. While the sanction was for 15 floors and the first Commencement Certificate was granted up to plinth level, the second commencement upto 15 floors is stated to be on "deemed basis" and the 'deemed' status. This is entirely illegal and fraudulent since on 7.5.2011, when the second commencement certificate was applied for, it was premised on the fact that the first commencement certificate had been exhausted by completion of construction upto plinth level. In fact, in the month of July, 2011, it was recorded by the Respondent No. 2 in an inventory report dated 22.7.2011 that construction upto plinth level was not completed. In the circumstances, the PPL has been constructed, inter alia, without following the due process of law.

It is further contended that upon the valid construction of a PPL building and its being handed over to the Corporation along with the title, the builder could use incentive FSI to construct the Main Building over 43 floors going up to 56 floors. As a matter of fact, the construction of the main building has not been handed over to the Corporation. Yet, the construction of the Main Building has progressed upto and beyond the 56th floor during the pendency of the present matter before the High Court and this Court.

23. It was the further contention of the Appellants that the PPL could not have been built upto the 15th floor since the scheme was brought down to 4 floors by virtue of a circular issued by the Corporation dated 22.6.2011. The roll-back of the scheme was premised on the fact that PPL over 4 floors were found to be unfeasible and self-defeating and contrary to Public Interest as it would cause further traffic congestion, as also it was found to be impractical to transport vehicles to floors higher than the 4th floor. DCR 33(24)(iv) provides that the proposed development shall be further subject to such conditions as mentioned/prescribed by the Municipal Commissioner and the builder could not have built upto 15th floor in the presence of the above conditions and show cause notice dated 29.11.2011. This notice was not challenged by the builder-Respondent No. 5. Therefore, the PPL building could not have been constructed and thus the

question of construction beyond 43 floors of the main building using the incentive FSI does not arise. The builder-Respondent No. 5 submitted a lengthy reply to notice dated 29.11.2011 but raised no defense of any 'deemed' commencement certificate. The High Court, however, relied upon Section 51 and 52 of the MRTP Act and the case of Kohinoor CTNL Infrastructure v. MCGM (W.P. No. 143 of 2012 decided on 9.7.2012) stating that by the time the circular was issued, "substantial progress" had been made in the PPL building and therefore, the circular was of no avail. It is also urged that the High Court failed to consider that in such large projects, Section 51 was not meant to be an escape. This is not a case of hardship of an individual but is a huge commercial project. In this view, the High Court could not have come to the aid of such a builder/project Under Article 226 of the Constitution of India.

24. It is further submitted that even otherwise, plea of "substantial progress" u/s 51 could not have been pressed into service, since the "substantial progress" contemplated by Section 51 and 52 has to be in accordance with law as held in the case of Kohinoor CTNL Infrastructure (supra) and not illegal substantial progress. Further, since there was a "stop work notice" in force from 22.7.2011 till 11.11.2011, and then again from 14.12.2011 to 24.12.2011, any progress on the PPL after the inventory of 22.7.2011 was ex facie, illegal and in violation of the said Stop Work Notice.

25. It is further contended that the High Court committed a grave error in law by refusing to place any reliance on the inventory reports of the Corporation which disclosed the falsity of the substantial progress as well as the deemed permission, that too on the sole ground that the same was not signed by the representative of Respondent No. 5. The finding of the High Court at paragraph 28(n) of the impugned order is contrary to and in derogation of DCR 8, which contains no such requirement of an inventory report apart from Section 114 of the Evidence Act, which raises a legal presumption in favour of its authenticity.

26. In the context of the PPL and the construction of the Main Building beyond the 43rd floor without a commencement certificate and without the incentive FSI having accrued, the High Court has committed a manifest error by relying merely on the sanctioned plans and ignoring the lack of commencement certificate in order to determine whether the construction is illegal/unauthorized and has set a dangerous precedent in the city of Mumbai at a time when there is already rampant unauthorized construction. Further the commencement certificate is a tool that the legislature in its wisdom chose to incorporate in the MRTP Act as a check and control mechanism to ensure that construction activities are in accordance with law and regulatory provisions which could not have been ignored by the builder-Respondent No. 5. It was brought to the notice of the High Court but the same was overlooked by giving irrelevant reasons which were neither valid nor proper. Therefore, the High Court has rendered Sections 45 and 69 of the MRTP Act otiose and redundant by effectively ruling that construction can be carried out de-hors of a commencement certificate and can be later

regularized by applying to the Corporation u/s 51 of the MRTTP Act. This ruling of the High Court is totally contrary to the judgment of this Court in the case of Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and Others, . Further, it is contended by the learned Counsel that it is now settled position of law that no equity can be claimed by any party on account of money having been expended and/or in illegal or unauthorized construction having either been completed or having reached an advanced stage though the Appellants cited more than eight decision before this Court as well as in support of the propositions of the law. Despite this, the High Court without making a reference to the above decisions, let alone dealing with or distinguishing them, has erroneously stated at para 29(e) that it is open to the developer to make an application for regularization and has declined from passing a purportedly drastic order of demolition by inter alia taking cognizance of the workforce employed, third party agencies appointed, investments made and expenses incurred by Respondent No. 5. and has erroneously legitimized the PPL (and consequently the illegal construction of "Palais Royale" beyond 43 floors). It ought not have directed the Corporation to take possession of the PPL from the builder Respondent No. 5 and also could state that FSI claimed by Respondent No. 5 in lieu of Set Back Areas also could never have been claimed by it for the reason that two separate communications by two independent Government Departments being the Respondent No. 2 itself in 1992 and the Urban Land Ceiling Authority in 2004, Respondent No. 5 have already received compensation for Set Back Areas, and therefore, could not also have received FSI in lieu thereof. Secondly, the claim is contrary to Circular dated 8.7.1987 which requires a party claiming FSI in lieu of Set Back Areas to do so within 12 years from the date of handing over of Set Back Areas. In the present case, the same was handed over in 1976 and is therefore time-barred. Yet the High Court has directed the Respondent No. 3 to re-examine/reconsider this issue purporting that Respondent No. 2 is verifying the exact position from the Urban Land Ceiling Department without appreciating that it has failed to do so in the 15 months when the matter was pending before the High Court despite Respondent Nos. 2 to 4 having undertaken to do so in its pleadings as well as during arguments.

27. It is, therefore, contended by the Appellants that almost the entire layout and construction of Palais Royale and the PPL is illegal and fraudulent. The Appellants in this appeal raise substantial issue of law that has direct bearing on public interest since the same has a fundamental effect on the interpretation and validity of the DCR as also the provisions of the MRTTP Act particularly Section 45(2) and Section 69 and the directions issued in the impugned judgment in relation to the seven (7) issues are only decided on the merits of the case with reference to the legal question raised in the PIL petition. Therefore, the Appellants are before this Court and the SLP has not become infructuous merely because the Commissioner has complied with the directions issued in the impugned order dated 13.5.2013 by passing his order dated 12.9.2013. Moreover, this order is under challenge before the High Court in W.P. No. 2223 of

2013 at the instance of the builder-Respondent No. 5. The issues in the said case are very narrow and limited when compared to the issues raised in the PIL petition which are not adverted to and considered by the High Court. Therefore, the Appellants requested this Court to grant relief as prayed in this civil appeal.

28. The learned Attorney General on behalf of the Corporation contented that since the builder-Respondent No. 5 has not fulfilled the mandatory precondition of handing over of PPL, the construction of the aforesaid floors of the building is in breach of law and should not be regularized contrary to the observation made by the High Court. Further, the High Court made an observation on the basis of the written statement filed by the Corporation wherein it has placed on record that work in the main building has reached completion. In spite of the pendency of the suit, the Respondent No. 5 has undertaken construction in a hurried manner. The learned Attorney General also submits that the impugned order in the original suit is wholly untenable in law for the reason that the order of the Civil Court in Civil Suit No. 2492 of 2011 dated 24.12.2011 observed that the builder-plaintiff has undertaken that they would not carry construction in contravention of sanctioned plan. This means that the construction could be made only after getting endorsement made by the MCGM extending the commencement certificate. This is a mandatory requirement u/s 45(2) of the MRTP Act from 44th floor to 56th floor. However, the commencement certificate was issued and endorsed on 18.11.2011 by the Superintending Engineer, Assistant Engineer of the Corporation up to the 43rd floor of the building. In fact, the learned Attorney General placed reliance upon the letter written by the authorized signatories for Talati & Panthaky-Associated Pvt. Ltd. to Corporation-MCGM which was received on 14.11.2011 with reference to the residential building in sub-plot in question belongs to the private builder with reference to File No. EB/987/GS/A which is extracted hereunder:

With reference to the above subject, we hereby submit you compliances of I.O.D. conditions. Some of the conditions we will comply before issue of further C.C.

You are therefore requested to kindly scrutinize the same and grant us further C.C. at the earliest and oblige.

In view of the said letter, the plea taken before the High Court in the PIL which is reiterated in this appeal by the learned senior counsel is only an after thought and the said contention is wholly untenable in law. In fact, in the month of July, 2011, it was recorded by the Respondent No. 2-Corporation, in an inventory report dated 22.7.2011 that construction upto plinth level was not completed. Therefore, the PPL has been constructed upto 15th floor without following the due process of law. Therefore, the handing over of the PPL to the Corporation is totally impermissible in law and further the direction issued in this regard in the impugned order by the High Court is wholly untenable in law.

29. The claim on behalf of Respondent No. 5 regarding the regularization as provided Under Sections 51 and 52 of the MRTP Act placing reliance upon the

case of Kohinoor CTNL Infrastructure (supra) by the builder is not permissible as the entire construction is illegal, unauthorized without obtaining the commencement certificate.

30. Learned senior counsel Dr. A.M. Singhvi appearing on behalf of Respondent No. 5 rebutted the aforesaid contentions contending that the PIL is not maintainable, the Appellants have no locus standi and there is no public interest involved in this case. Therefore, the High Court should have rejected the writ petition particularly on the issue of delay and latches. The first Appellant is in association with the builders and therefore, the High Court could have rejected the writ petition as it is not a public interest litigation.

Secondly, it is contended by him that the directions issued to the Commissioner in the writ petition was complied with by the Commissioner vide his order dated 12.9.2013 and the writ petition is filed by the builder-Respondent No. 5 questioning the correctness of the same. Therefore, this appeal has become infructuous and the learned senior counsel prayed for dismissal of the appeal as no question of law would arise for consideration of this Court. It is also contended that the contentions urged on behalf of the Appellants was an after thought contrary to the earlier stand taken by them before the High Court in the PIL petition. The stand of the Respondent Nos. 2 to 4 that construction of the PPL beyond plinth level upto 15th floor and 44th to 56th floor is illegal and unlawful since the same was made without obtaining commencement certificate, is wholly untenable in law for the reason that by issuance of commencement certificate when the Corporation has issued sanctioned plan as provided u/s 45(1) of the MRTP Act, it granted permission with certain conditions on the application filed u/s 44 of the Planning Authority and made endorsement for issuance of commencement certificate in the prescribed form that has been issued upto plinth level and upto 43rd floor. Application was filed for grant of commencement certificate from 44th to 56th floor and non communication regarding non grant of the same by the Respondent Corporation within 16 days amounts to deemed grant of issuance of commencement certificate in favour of the Respondent No. 5 to proceed with the construction of the building as per sanctioned plan is the legal contention urged by the learned senior counsel on behalf of the Respondent No. 5.

31. Therefore, it is urged that the contention urged on behalf of learned senior counsel for the Appellants and Attorney General on behalf of the Respondent Nos. 2 to 4 is wholly untenable in law, and is liable to be rejected and the appeal should be dismissed as it has become infructuous.

32. The learned senior counsel for the Respondent Mr. P.S. Patwalia placed strong reliance upon the provisions of Section 51 of the Municipal Corporation Act read with DCR and circulars issued by the state government which provides for regularization of unauthorized construction to be considered by the Corporation. Therefore, by placing reliance on government order dated 18.6.2010, the learned Counsel contented that there is no merit in this appeal as contended by the

Appellants in public interest litigation.

33. In the background of the said rival legal contentions urged on behalf of the parties, I have examined the impugned judgment with reference to the pleadings and the additional affidavits placed on record by the parties pursuant to the directions issued by this Court after hearing the learned senior counsel on behalf of the parties vide order dated 11.3.2014. I have carefully perused the detailed written statement filed by the Appellants and I proceed to pass the judgment by assigning following reasons:

34. The preliminary objection raised by the learned senior counsel for the Respondent No. 5 - Dr. A.M. Singhvi that it is not public interest litigation is not maintainable in law is wholly untenable for the reasons that the High Court in Para 22 of the impugned judgment states that it has examined this aspect of the matter regarding locus of the Appellants who moved this petition in public interest. With reference to the said contention the High Court has categorically recorded a finding to the following effect:

22...We do not think that the present public interest litigation can be dismissed at the threshold only the ground that the Petitioners do not have locus to question decisions and actions of the Corporation. It is not the cases for the Respondent No. 5 that Petitioners are directly involved in litigation against the Respondent No. 5. Several issues are raised in this petition, especially regarding the exercise of discretionary power by the Commissioner. Such legal issues concern several cases of multi storied building in City of Mumbai. It cannot be said that there is no public interest involved in adjudication of these issues. We therefore overrule the preliminary objection raised by the Respondent No. 5 and proceed to examine the challenge on merits.

Further, it has stated that it is not the case of Respondent No. 5 that the Appellants are directly involved in litigation against the builders. Specially, regarding the exercise of discretionary power by the Commissioner such legal issue is not uncommon in the city of Mumbai. Therefore, it cannot be said that there is no public interest involved in the writ petition No. 43 of 2012 filed by the Appellants.

35. In view of above, the said finding recorded by the High Court is against Respondent No. 5, which is not challenged by filing a separate SLP questioning the correctness of the same. Without challenging the same, Respondent No. 5 is entitled to question the finding in this appeal by invoking its right Under Order 41 Rule 33 CPC but I intend to address the issue. Question has been raised in this appeal regarding the function of the Commissioner with respect to Regulation 64 DCR for granting more than 1.5 meters FSI under the pretext of 8.40 meters for PPL. For exercise of such power the reasons contemplated that demonstrable hardship has to be disclosed, has not been done. Further, sanctioned plan u/s 45 read with Regulation 35(2). is a colourable exercise of power and the same is accepted by the High Court in relation to certain aspects and the Commissioner

was directed to reconsider and reexamine the same. The directions issued to the Commissioner in the impugned order has been accepted by him and he re-examined and passed order dated 12.9.2013. The same is challenged in the writ petition referred to supra. Further, as could be seen from the various legal questions raised in this case pointing out that the issuance of the extra FSI, more than the permissible limit has been given in exercise of power under Regulation 64(b) making use of the said area for the benefit of the builder-Respondent No. 5 and the other areas for construction of the building from 44th floor to 56th floor has been made beyond plinth level to 15th floor and 44th floor to 56th floor without obtaining the necessary commencement certificate by applying as provided u/s 45(2) and (3) read with relevant Regulations in the prescribed form. The non consideration of the same by the High Court on seven issues in Part 'A' and other issues in Part 'B' would certainly affect the public interest as held by this Court in the case of S.P. Gupta Vs. President of India and Others, , Janata Dal Vs. H.S. Chowdhary and Others, and comprehensive decisions referred to in State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 902. By exercise of power in a colourable manner, the builder was permitted to have more FSI under the pretext of PPL and construction of the building from 15th floor to 43rd and upto 56th floor without obtaining commencement certificate which is mandatory in law. This practice is illegal and therefore, it would certainly affect the public interest and violate provisions of Section 45 and Section 69 of the MRTP Act and Regulations 35(2) and 64 of DCR. This amounts to violation of Rule of Law. Therefore, in my view writ petition filed by the Appellants is maintainable and Appellants have locus to question the action of the Respondent Nos. 2 to 4 and illegal action on the part of the builder-Respondent No. 5 in constructing unauthorized construction and the delay and laches raised cannot be pressed into service. According to the submissions made on behalf Respondent Nos. 2 to 4 the illegality is in perpetuation which cannot be allowed; Therefore, the cause of action delay and laches cannot be attributed to the Appellants to reject this appeal or public interest litigation. Hence, the said contention is held against Respondent No. 5.

36. As can be seen from the impugned order with reference to the legal grounds in the PIL though the same has been adverted to by the High Court at paragraph 29(b) (c) (d) and (e), the same are wholly untenable in law. The said finding and reasons recorded by the High Court is contrary to the provisions of Section 45(2) read with Regulations 33 and 34 and are not examined by the High Court in proper perspective. The construction of building without obtaining commencement certificate, which is the condition incorporated in the sanctioned plan permission granted u/s 45(1) in favour of the builder-Respondent No. 5 after adverting to Section 53 of the MRTP Act, is wholly untenable in law.

37. Once a construction is found to be as falling in the category of constructions enumerated in Section 52 then a notice u/s 53 of the MRTP Act is issued. The High Court in the impugned judgment has erroneously observed that it is open to the developer to make an application for regularization of the building as per the

Act and the circulars and it is open to the Corporation to consider the requests as per law. Further, it has observed that yet the Corporation has to grant commencement certificate in favour of the builder and it has not taken final decision in the matters. The sanctioned plan permits the builder-Respondent No. 5 to construct upto 56 floors. Therefore, the High Court has erroneously held that it has not felt it necessary to intervene and issue a drastic order of demolition on the ground that the work is carried out beyond commencement certificate. Particularly when the statutory planning body has not yet taken final decision in the matter and therefore it has gravely held that it will not be appropriate to prejudge the issue and direct demolition of the building in question. The High Court failed to take into consideration these aspects though the legal principle laid down by this Court in catena of cases was brought to its notice, it has either adverted or distinguished the same. Therefore, I am of the view that the High Court has not examined the legal issues raised by the public spirited Appellants in the PIL petition which has rendered the decision of the High Court contrary to the legal principle laid down by this Court in the case of Dipak Mukherjee (supra) wherein it has relied upon following catena of cases in support of the proposition of law.

3. In *K. Ramadas Shenoy v. Town Municipal Council, Udipi* the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:

28. An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

29. The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is

injured by the illegal construction.

4. In *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* this Court approved the order passed by Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed:

7.... Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, Regulations and bye-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits.

(Emphasis supplied)

6. In *Shanti Sports Club v. Union of India* this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the Appellant on the land acquired for planned development of Delhi to be illegal and observed:

74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution

and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc....

38. In view of the aforesaid decisions and various other decisions, the finding and reasons recorded by the High Court are contrary to judgments of this Court. Therefore, in my considered view the legal issues raised in this regard requires reconsideration by the High Court. Hence, I am of the view that submission made on behalf of the Appellants both on facts and legal grounds are well founded and the same must be accepted by me. The said view is supported by learned Attorney General Mr. G.E. Vahanvati on behalf of the Respondents 2 to 4 by placing reliance upon Dipak Mukherjee case (supra) wherein this Court placed reliance on catena of decisions of earlier decisions of this Court with regard to the similar situation of illegal and unauthorized construction. The said principles have to be applied to the fact situation which has been done by the High Court. Therefore, in my considered view, apart from not obtaining commencement certificate, construction even in respect of PPL and from 44th floor to 56 floors and further the grant of higher FSI area are in deviation of the Rules and Regulations. This matter requires re-examination by the High Court. Therefore, I am of the view that this civil appeal is allowed. The matter is remanded to the High Court with a direction to club the PIL along with writ petition filed by builder-Respondent No. 5, wherein orders were passed by the Commissioner pursuant to the direction contained in the impugned judgment in which proceedings the Respondent No. 5 is directed to implead the Appellants. The High Court is directed to hear both the cases and dispose the same expeditiously on merits by giving opportunity to all the parties involved. However, I must mention that the observation made by me on violation of law by Respondent No. 5 in building the PPL and the extra floor in the building shall not prejudice the case of the parties before the High Court.

39. The High Court is directed to consider the same and dispose the matter independently by considering the rival legal contentions that would be urged on behalf of the parties, with reference to the provisions of the MRTTP Act, DCR and law laid down by this Court in catena of cases referred to supra and dispose of the petitions expeditiously.