

(2008) 07 BOM CK 0067

In the Bombay High Court

Case No : Writ Petition No. 2168 of 2007

Lokhandwala Infrastructure Pvt. Ltd. (previous known as
Lokhandwala Builders)

APPELLANT

Vs

Municipal Corporation of Greater Mumbai and Others

RESPONDENT

Date of Decision : 31-07-2008

Acts Referred:

Development Control Regulations for Greater Bombay, 1991 — Regulation 33(7), 33(9)
Maharashtra Housing and Area Development Act, 1976 — Section 103B, 95A

Citation : (2008) 5 ALLMR 743

Hon'ble Judges : Swatanter Kumar, C.J.;J.P. Devadhar, J

Bench : Division Bench

Advocate : D.D. Madon and A.N. Jakhadi, for the Appellant; A.Y. Sakhare and A.K. Savla for B.M.C., C.U. Singh and Soma Singh, instructed by S. Udeshi and Co. for respondent No. 6, Aspi Chinoy and R.M. Pethe for Respondent No. 10, S.K. Talsania and J.S. Saluja, instructed by V.K. Tiwari, for the Respondent

Judgement

J.P. Devadhar, J.—Where some of the buildings constructed prior to 1940 on a large municipal plot are occupied by the tenants, whether the Municipal Corporation would be justified in permitting the developer appointed by the tenants to redevelop the entire plot under Regulation 33(7) of the Development Regulations for Greater Mumbai, 1991 instead of permitting redevelopment either by subdividing the plot or developing the plot under Regulation 33(9) is the question raised in this petition.

2. The dispute in the present case relates to the redevelopment of a large plot belonging to the Mumbai Municipal Corporation ("Corporation" for short) admeasuring 12130.07 sq. mtrs. bearing C.S. No. 17/47 (part) of Lower Parel Division situated at Dr. E.Moses Road, Worli Naka, G/South Ward, Mumbai - 400 018 (hereinafter referred to as the "plot in question").

3. On the plot in question, the Corporation had constructed several buildings prior to 1940, some of which are occupied by the municipal tenants and the

remaining buildings are used for housing the Municipal Conservancy staff. Subsequently in the year 1959, a building for municipal school has also been constructed by the Corporation on the plot in question. Some other commercial structures have also been constructed on the said plot during the period from 1960 to 1/1/1995.

4. As the buildings constructed prior to 1940, have become dilapidated and the Corporation has not taken any steps for reconstruction of the said buildings, the municipal tenants as well as the municipal conservancy staff have formed independent co-operative societies with a view to redevelop their dilapidated buildings. Respondent No. 10 society is formed by the municipal tenants and Respondent No. 8 and 9 societies are formed by the municipal conservancy staff.

5. Since the plot in question is a large plot, the developer appointed by the municipal tenants had sought subdivision of the said plot and N.O.C. for redevelopment of the subdivided plot on which buildings occupied by the municipal tenants are existing. The petitioners representing the municipal employees had also applied for redevelopment of the adjoining subdivided plot on which the buildings occupied by the municipal employees are existing. The municipal authorities had approved the subdivision of the plot in question and granted N.O.C. to the developer appointed by the municipal tenants to redevelop the subdivided plot. However, by the impugned decision dated 24/8/2007, the Improvement Committee of the Corporation decided to allow the Respondent No. 6, developer appointed by the municipal tenants to redevelop the entire plot in question. Challenging the above order, the present petition is filed. During the pendency of the petition, the Corporation by the impugned order dated 22/1/2008 rejected the proposal submitted by the Architect of the Petitioner-developer. The writ petition has been amended to challenge the said order dated 22-1-2008.

6. Regulation 33(7) and 33(9) of the Development Control Regulations for Greater Bombay, 1991 ("DCR 1991" for short) published by the State Government to the extent relevant herein read thus:

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.
-- For reconstruction / redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-operative 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 constructed prior to 1940, the FSI 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. Provided....

33(9) Repairs and reconstruction of cessed buildings and Urban Renewal Scheme. - For repairs and reconstruction of cessed buildings and Urban Renewal

Scheme undertaken by the Maharashtra Housing and Area Development Authority or the Mumbai Housing and Area Development Board or Corporation in the Island City, the FSI shall be 4.00 or the FSI required for rehabilitation of existing tenants / occupiers, whichever is more.

7. The relevant facts are that by a letter dated 26/10/2002, the Chief Promoter of the respondent No. 8 - Society formed by the Municipal employees had requested the improvement committee of the Corporation not to evict the Municipal employees from the Municipal staff quarters situated on the plot in question which are dilapidated and instead the municipal employees should be conferred with the status of tenancy, so that they can redevelop their buildings at their own costs by availing the incentive F.S.I. available under Regulation 33(7) or 33(9) of D.C.R., 1991.

8. By a letter dated 6/4/2003, the Corporation informed the Chief Promoter of the respondent No. 8 Society that the redevelopment of the plot in question would be undertaken under Regulation 33(9) of D.C.R., 1991 by inviting tenders. The Deputy Mayor of the Corporation vide his letter dated 28/5/2004 informed the Assistant Municipal Commissioner that the fresh guide-lines prepared by the Corporation for redevelopment of the Municipal staff quarters are pending approval before the State Government and as and when the said guide-lines are approved, the proposal submitted for redevelopment of the Municipal staff quarters by the municipal staff would be considered.

9. It appears that on 14/10/2004, the Architect appointed by the respondent No. 10 - Society of the Municipal tenants had submitted a Plan for subdivision of the plot in question so as to redevelop the subdivided plot on which the dilapidated buildings occupied by Municipal tenants are existing by availing the incentive FSI under D.C.R. 33(7).

10. On consideration of the proposal, the Deputy Chief Engineer (P.I.Cell) submitted a report to the Assistant Municipal Commissioner on 18-1-2005 stating therein that redevelopment of the respective portion of the plot occupied by the tenants as well as the municipal employees can be considered separately in case the layout / subdivision of the plot is approvable. Accordingly, the Assistant Commissioner (Estates) by his letter dated 27/6/2005 forwarded N.O.C. for redevelopment of the subdivided plot in the form of Annexure-II to the Architect appointed by the Municipal tenants Society and requested him to submit a scheme for redevelopment of the subdivided plot admeasuring 4905.17 sq. mt. (out of total area of 12,130.17 sq. mtrs), subject to final demarcation by the D.I.L.R. By the said letter, the Architect of the Municipal tenants was further called upon to submit the scheme of redevelopment in the form of Annexure I and III along with plans, scrutiny fee of Rs. 1,000/- and also information about the developer appointed by the municipal tenants. On receipt of the Annexure I & III from the Architect of the Municipal tenants, the Assistant Municipal Commissioner (Estates) forwarded the same to the technical committee for scrutiny on 26/8/2005.

11. In the meantime, the Architect of the petitioners representing the Municipal employees (respondent Nos. 8 and 9) submitted a proposal on 26/9/2005 seeking permission to redevelop a portion of the plot in question admeasuring 5761.23 sq. mtrs. area (out of the total area of 12,130.07 sq. mtrs.) so as to reconstruct the buildings occupied by municipal employees on the terms more particularly set out therein. Thereupon, the Deputy Chief Engineer (B.P.) City I/c in his report dated 21/10/2005 remarked that the sub-division of the plot in question into three plots is acceptable and though from the planning point of view it was always better to develop the entire plot at a time, in view of the delay in finalisation of the policy guide-lines in respect of municipal staff quarters, the proposal submitted by the Municipal employees would have to be delayed till the policy guide-lines are finalised by the State Government. The Dy. Chief Engineer further remarked that since the plot falls in the height restriction zone covered under D.C.R. 31(4)(a), relaxation provided under D.C.R. 33(10) would have to be sought for.

12. While the proposal for redevelopment of the subdivided plot submitted by the Architect of the municipal tenants under D.C.R. 33(7) was pending final approval by the technical committee of the Corporation, suddenly on 16/11/2006 the Architect of the Municipal tenants gave up the proposal for redevelopment of the subdivided plot admeasuring 4905.17 sq. mtrs. and submitted modified Annexure I and III for redevelopment of the entire plot in question admeasuring 12,130.07 sq. mtrs. by availing 2.5 F.S.I. under D.C.R. 33(7). The Architect of the municipal tenants further offered to pay to the Corporation premium on the surplus area of 17,193.49 sq. mtrs. remaining after rehabilitating the municipal tenants, municipal employees, municipal school and other structures set out therein, at a capitalised value of Rs. 31,22,33,780/- calculated on the basis of the market value set out in the Stamp Duty Ready Reckoner ("SDRR" for short).

13. In the meantime, the Chief Promoter of the Municipal employees Society as well as their Architect wrote letters on 17/1/2007 and 22/1/2007 objecting to the Architect of the municipal tenants submitting modified Annexure I and III for redevelopment of the entire plot in question. In the meantime the Architect of the municipal employees submitted modified Annexure I and III on 16/7/2007 seeking approval for redevelopment of the subdivided plot admeasuring 5761.23 sq. mtrs. with 2.5 F.S.I. and offered to pay to the Corporation a premium of Rs. 14,33,59,040/- on the surplus area of 6445.31 sq. mtrs. calculated at the rate prescribed under S.D.R.R, 2007.

14. The technical Committee which met on 15-5-2007 approved redevelopment of the entire plot under D.C.R. 33(7) by the respondent No. 6 - developer appointed by the Municipal tenants.

15. The Improvements Committee by the impugned order dated 24/8/2007, approved the recommendations of the technical committee dated 15/5/2007 and permitted the respondent No. 6 representing the municipal tenants to redevelop the entire plot in question subject to the conditions set out therein and subject to

payment of premium on the surplus area calculated on the basis of the price set out in S.D.R.R. at Rs. 99,76,85,205/- less Rs. 3,16,50,660/- towards the cost of reconstruction of the municipal school building and reconstruction of the structures built after 1960 but prior to 1/1/1995. Challenging the aforesaid decision, the present Writ Petition was filed on 10/9/2007.

16. On 17/9/2007, this Court while issuing Court notice to all the respondents directed that any steps taken for redevelopment of the plot in question thereafter shall be subject to further orders of the Court. On 19th October, 2007, this Court recorded the statement of the Counsel for respondent No. 5 and 6 that they would not take any action in furtherance to the impugned decision of the Corporation till the next date of hearing. By order dated 19th December, 2007, the statement made by the counsel for the respondent Nos. 5 and 6 on 19th October, 2007 was continued till the next date of hearing.

17. To complete the narration of facts, it may be noted that pursuant to the direction given by this Court, the Corporation considered the proposal for redevelopment of the subdivided plot submitted by the Architect of the petitioners and by the impugned order dated 22/1/2008 rejected the proposal submitted by the petitioners for redevelopment of the subdivided plot and also rejected the petitioners' objection to the Corporation granting permission to the developer appointed by the municipal tenants to redevelop the entire plot in question. The Writ Petition has been amended to challenge that order as well.

18. At the outset, Mr. Singh, learned senior Advocate appearing on behalf of respondent Nos. 5 and 6, raised preliminary objection regarding the maintainability of the present Writ Petition mainly on two grounds. Firstly, he submitted that the petitioners claim right to redevelop the property in question on the basis of the consent given by the municipal employees who have formed respondent Nos. 8 and 9 society. Since the members of respondent Nos. 8 and 9 society have resolved on 6/11/2007 and 3/11/2007 respectively to withdraw the consent, the petitioners have no locus standi to pursue the present Writ Petition. Secondly, he submitted that the right to redevelop the plot under D.C.R. 33(7) is available only to the Municipal tenants and not to the municipal employees. Since the municipal employees do not have the status of tenants, they have no right to redevelop the plot in question under D.C.R. 33(7) and consequently the petitioners who claim to represent the municipal employees do not have any right to redevelop the plot in question.

19. Dealing with the first preliminary objection, Mr. Madon, learned senior Advocate appearing on behalf of the petitioners submitted that the Affidavits filed by the Chief Promoters of respondent Nos. 8 and 9 society to the effect that the members of the society have resolved to withdraw their consent is totally false. Mr. Madon referred to various Affidavits filed by the individual members of the respondent Nos. 8 and 9 society wherein they have denied the allegation that the individual members of the society have resolved to cancel and/or withdraw the consent and/or development rights given to the petitioners. He submitted that

the Chief Promoters of respondent Nos. 8 and 9 society have filed the false Affidavits at the instance of respondent Nos. 5 and 6 because, this Court on 19-10-2007 had ordered that the respondent Nos. 5 and 6 shall not implement the decision of the Corporation. Accordingly, Mr. Madon submitted that in view of the irrevocable consent given by more than 70% of the members of the respondent Nos. 8 & 9 society to the petitioners for redevelopment of the plot in question is still valid and subsisting, the petitioners would have locus standi to pursue the present Writ Petition.

20. With reference to the second preliminary objection relating to the maintainability of the Writ Petition, Mr. Madon submitted that admittedly the guide-lines framed by the Corporation regarding the redevelopment rights of the municipal employees occupying municipal staff quarters are pending for approval before the State Government and during the pendency of the said approval, if the respondent No. 6 developer appointed by the municipal tenants is permitted to redevelop the entire plot in question, then grave prejudice will be caused to the petitioners as well as the members of the respondent Nos. 8 and 9 society. Mr. Madon further submitted that in any event, where the action of the Corporation is vitiated by malafides and the same is not in public interest, the petitioners can invoke writ jurisdiction to enforce the fundamental rights guaranteed under the Constitution.

21. As to the merits of the case, Mr. Madon submitted that once the Corporation took decision to subdivide the plot and permit redevelopment of the subdivided plot the Corporation could not have arbitrarily decided to permit the developer appointed by the municipal tenants to redevelop the entire plot in question under D.C.R. 33(7). By permitting the developer appointed by the municipal tenants to redevelop the entire plot under D.C.R. 33(7), instead of a portion of the plot, the Corporation purported to distribute the State largesse upon the respondent No. 6 -developer which is totally unfair, unreasonable and unsustainable. In this connection he relied upon the decisions of the Apex Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, .

22. Mr. Madon further submitted that when admittedly the guide-lines framed by the Corporation in respect of the municipal staff quarters was pending for approval before the State Government, the Corporation ought not to have hastily taken a decision so as to deprive the municipal employees of their right to redevelop the subdivided plot in question by availing the benefits under D.C.R. 33(7).

23. Mr. Madon submitted that D.C.R. 33(7) applies to reconstruction or redevelopment of the cessed buildings or old buildings belonging to the Corporation which were constructed prior to 1940. The municipal school on the plot in question was constructed in the year 1959 for which D.C.R. 33(7) was not applicable and, therefore, permitting the developer appointed by the municipal tenants to redevelop the entire plot under D.C.R. 33(7) is totally illegal and

contrary to law.

24. Assuming that the redevelopment of the entire plot as a whole was essential from the planning point of view, then, it is submitted by Mr. Madon that the proper course was to invite tenders and award the work to the highest tenderer, instead of arbitrarily and illegally awarding the redevelopment work to the respondent No. 6 developer without inviting tenders. He submitted that by determining the capitalized value of the surplus FSI based on SDRR the Corporation is made to suffer huge losses. He submitted that as against the capitalized value of Rs. 99,76,85,205/- determined by the Corporation, the petitioners were willing to redevelop the said plot on the same terms and conditions by offering capitalised value on the surplus area at Rs. 130 crores and to prove the bonafides, Mr. Madon produced before us a bank draft in the sum of Rs. 15 crores drawn in favour of the Corporation. Accordingly, it is contended that the impugned decision of the Corporation is neither bonafide nor in public interest. He placed reliance on the Division Bench decision of this Court in the case of *Municipal Corporation of Greater Mumbai v. State of Maharashtra* (Original Side Writ Petition No. 2687 of 1999) decided on 19/9/2005.

25. Mr. Madon further submitted that the decision of the Corporation in computing the cost of construction of the municipal school and other structures at Rs. 3,16,50,660/- is not only unreasonable but excessively high. He submitted that if the redevelopment of the plot in question is entrusted to the petitioners, they are willing to construct the municipal school and other structures free of cost and offer higher premium on the surplus area as stated hereinabove. Accordingly, Mr. Madon submitted that by the impugned decision the Corporation has purported to favour the developer appointed by the municipal tenants at the cost of the Corporation which is wholly unsustainable in law.

26. With reference to the order passed by the Corporation on 22/1/2008 whereby the proposal for redevelopment given by the petitioners is rejected, Mr. Madon submitted that the said order has been passed without application of mind. The proposal given by the petitioners has been rejected firstly on the ground that the petitioners have not submitted a comprehensive plan for the entire plot. When the Corporation had already granted N.O.C. to the developer appointed by the municipal tenants to redevelop the plot by notionally subdividing the plot, there is no question of the petitioners submitting a composite plan for the entire plot. In any event, if the Corporation had called upon the petitioners or its Architect to submit a comprehensive plan, the petitioners would have gladly submitted comprehensive plan and in such a case the Corporation would have been immensely benefited. Secondly, the proposal submitted by the petitioners has been rejected on the ground that the petitioners have not obtained the consent of the tenants / occupants of the entire plot. When the petitioners were seeking to redevelop the subdivided plot there was no question of obtaining consent of the tenants / occupants of the entire plot. Thirdly, during the pendency of the approval of the guide-lines framed by the

Corporation in respect of the municipal employees, the Corporation ought not to have favoured the respondent No. 6 by conferring the benefits of D.C.R. 33(7) available on the entire plot to defeat the rights of the petitioners. Accordingly Mr. Madon submitted that the approval granted by the Corporation to the respondent No. 6 for redevelopment of the plot in question which is vitiated by malafides, favouritism and entails huge loss to the public exchequer be quashed and set aside and the Corporation be directed to approve the plans submitted by the petitioners on such terms and conditions as this Court deems fit and proper.

27. Mr. A.Y.Sakhare, Mr. Aspi Chinoy and Mr. C.U. Singh, learned senior Advocates appearing on behalf of the respective contesting respondents have vehemently opposed the claim of the petitioners. Their main contention is that redevelopment of the plot in question under D.C.R. 33(7) could be undertaken only by the municipal tenants and not by municipal employees. Admittedly the members of the respondent Nos. 8 and 9 - Society are not municipal tenants, and therefore they do not have legal right to seek redevelopment of the plot in question. Consequently, the petitioners who claim to represent the interest of the municipal employees have neither the right to develop the property under D.C.R. 33(7) nor they have any right to challenge the permission granted to the respondent No. 6 to redevelop the plot in question under D.C.R. 33(7). It is contended that the petitioners having failed in their mission to obtain permission to redevelop the plot on behalf of the municipal employees have filed the present Writ Petition with ulterior motives and with a view to delay the redevelopment of the plot in question by the respondent No. 6.

28. Learned Counsel appearing for the contesting respondents further submitted that in the present case, initially the Officers of the Corporation were considering redevelopment by subdividing the plot in question. However, as the subdivision of the plot in question was not feasible and under D.C.R. 33(7) the municipal tenants were entitled to the incentive FSI of 2.5 on the "gross plot area" and further from the planning point of view, development of the plot as a whole was advisable it was decided to permit the developer appointed by the municipal tenants to redevelop the entire plot under D.C.R. 33(7). Therefore, the fact that initially the developer appointed by the municipal tenants had erroneously applied for redevelopment of the notionally subdivided plot it cannot be said that the said developer is estopped from submitting revised proposal for development of the entire plot. It is submitted that the plot in question being an undivided plot, under D.C.R. 33(7) the developer appointed by the municipal tenants was entitled to redevelop the entire plot. Moreover, in the present case, the Corporation has imposed stringent conditions by directing the developer of the municipal tenants to redevelop the municipal staff quarters, municipal school etc. at a nominal cost of Rs. 3,16,50,660/- and further the Corporation has charged premium on the surplus FSI at Rs. 96,60,34,545/- which is the best deal ever secured by the Corporation.

29. It is further contended that the redevelopment of the plot in question could

not be carried on by the Corporation itself under D.C.R. 33(9) because of the height restriction contained in D.C.R. 31(4)(a) as plot in question is in the vicinity of the Nehru Centre. In these circumstances, on examination of all the issues, it was decided that firstly, redevelopment of the plot in question under D.C.R. 33(9) was not possible due to height restriction, secondly, redevelopment of the plot in question under D.C.R. 33(7) could be done only by the developers appointed by the municipal tenants and not by the municipal employees. Thirdly, the plot in question being a single undivided plot and the subdivision of the plot was feasible, in the best interest of the Corporation, bonafide decision has been taken to permit the respondent No. 6 to redevelop the entire plot in question by imposing stringent conditions and further premium of Rs. 96.60 crores on the surplus F.S.I. has been secured which is the best development proposal ever secured by the Corporation.

30. It is further contended by counsel for the contesting respondents that the petitioners cannot find fault with the determination of the premium amount on the surplus F.S.I. based on SDRR because, even the petitioners themselves had calculated premium based on SDRR while seeking to redevelop a portion of the plot in question. SDRR represents the current market price and, therefore, no fault can be found in determining the premium amount based on SDRR. Referring to the administrative guidelines framed by the Corporation for the implementation of D.C.R. 33(7) for reconstruction / redevelopment of old municipal properties by municipal tenant's Co-operative Housing Societies, counsel for the respondents submitted that it is only the municipal tenants who are entitled to redevelop the plot in question and quantification of the total built up area required for rehabilitation and the surplus FSI as well as the premium thereon has been done in strict compliance of law, while granting permission to the developer appointed by the municipal tenants to redevelop the entire plot. Accordingly, it is submitted that there is no merit in the petition and the same is liable to be dismissed.

31. Relying upon an unreported decision of this Court dated 5/7/1990 in Writ Petition No. 118 of 1983 (Ramchandra K. Paralikar and Anr. v. The Municipal Corporation of Greater Bombay), Counsel for the respondents have contended that the municipal staff occupying the municipal staff quarters have no legal right whatsoever to remain in the quarters nor they can compel the Corporation to grant permission to redevelop the plot in question.

32. Reliance is also placed on the decision of this Court in the case of Mangesh Janardhan Mohite (President) and Others Vs. State of Maharashtra and Others, , wherein, while dealing with the similar provisions contained in the Maharashtra Housing & Area Development Act, 1976 it is observed thus:

...Now as far as the reconstruction in respect of cessed properties located in the island city, which attract the provisions of MHADA Act to be taken up by co-operative housing societies is concerned, the F.S.I. made available is 2.5 as per the provision quoted earlier. This F.S.I. is subject to provision of Appendix III to

these Regulations. This Appendix III lays down how much should be the minimum area for a tenement and how much should be the maximum. Clause 11 of this Appendix III lays down that the decision with respect to F.S.I. to be allowed under D.C.R. 33(7) is to be taken by the Municipal Commissioner only after he is satisfied that the said society fulfills all conditions to be eligible for the benefits under this Regulations. Clause 4 of this Appendix III provides that the tenements in the reconstructed building shall be allotted by the occupant society as per the list certified by the Bombay Housing and Area Development Board and from amongst them. It also provides that the prescribed percentage of the surplus built up area as per the Third Schedule of the MHADA Act is to be made available to the Bombay Board for accommodating the other tenants in the transit camp of the cessed building which cannot be reconstructed. Thus as far as the co-operative societies of the occupants of the cessed buildings either u/s 103B or 95A are concerned, there is no requirement under the MHADA Act or the Regulations that they should invite tenders for selecting the developer. This is because under both the provisions 70% of the occupiers have moved the proposal. In the case of a proposal u/s 103B, they form or propose a co-operative society and then approach the board without the landlord, but with 30% of the acquisition amount. u/s 95A, they approach the board for the N.O.C. along with the landlord. Under both these situations, therefore, it is quite understandable that they are permitted to select their own developer, and it is not necessary for them to invite any tender. In fact, the so-called developer is nothing but a contractor for reconstruction when the work is executed under these two sections. " In the light of the above decision of this Court, Counsel for the respondents submitted that in the facts of the present case, the decision of the Corporation to grant redevelopment of the plot in question to the developer appointed by the Municipal tenants without inviting tenders is in accordance with law.

33. Relying upon a decision of the Apex Court in the case of Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Others, , it is contended that since there is no violation of any mandatory provisions, it will not be proper for this Court to interfere with the impugned decisions which are taken in accordance with the guidelines framed in that behalf. Accordingly, Counsel for the respondents submit that the petitioners have neither the locus standi nor any right to redevelop the property in question, nor there is any infirmity in the impugned order and, therefore, the present petition is liable to be dismissed with exemplary costs.

34. We have carefully considered the rival submissions.

35. We may first deal with the preliminary objections raised by the respondents. According to the respondents, the petitioners do not have locus standi in pursuing the writ petition because the authority given to them have been withdrawn by the members of the respondent Nos. 8 & 9 society during the pendency of the petition as is evident from the affidavits filed by the Chief Promoters of the respondent Nos. 8 & 9 society. The petitioners have disputed

the correctness of these affidavits and have tendered affidavits of some of the members of the respondent Nos. 8 & 9 society to show that the consent given to the petitioners by the individual members has not been withdrawn. In these circumstances, in view of the serious dispute regarding the withdrawal of the consent, we do not consider it proper to reject the petition at the threshold since the petitioners admittedly had locus standi on the date of the filing of the petition. The second preliminary objection raised by the respondents is that the right to redevelop the plot under D.C.R. 33(7) is available only to the municipal tenants and, therefore, a writ petition at the instance of the municipal employees or their developers would not be maintainable. It is pertinent to note that the guide-lines framed by the Corporation for rehabilitation of the municipal employees is pending before the State Government and during the pendency of the said approval, whether, the Corporation is justified in entrusting redevelopment of the entire plot under D.C.R. 33(7) to the developer appointed by the municipal tenants is a question which needs to be considered on merits. Therefore, in the facts of the present case, we do not consider it proper to reject the petition on the basis of the preliminary objections raised by the respondents.

36. Turning to the merits of the case, the basic object of D.C.R. 33(7) is to get the dilapidated buildings constructed prior to 1940 demolished and reconstructed through a developer by granting incentive FSI, so that the tenants / occupants living in the dilapidated buildings get accommodation of a habitable size, free of cost, in the newly constructed building. Thus, D.C.R. 33(7) seeks to achieve twin objects, namely (one) safety of the tenants / occupants living in the buildings constructed prior to 1940 which are in dilapidated condition by demolishing and reconstructing new buildings with incentive FSI and providing free of cost accommodation of a habitable size to the said tenants / occupants and (two) the additional construction put up by the developer by consuming the incentive FSI not only helps him to recover the cost free accommodation given to the tenants / occupants but also helps in solving the acute housing problem prevailing in the city of Mumbai.

37. The question is, where there is a large municipal plot and the buildings occupied by the tenants are situate on a portion of the said plot, whether under D.C.R. 33(7), the Corporation is obliged to permit the developer appointed by the municipal tenants to redevelop the entire plot ?

38. This Court in Original Side Writ Petition No. 580 of 2007 (Subhash R. Acharya v. State of Maharashtra and Ors.) decided on 16th August, 2007 considering various Judgments of the Apex Court has observed thus:

17. While dealing with the aspect of distribution of State largesse or contractual obligations of the State, the principles of public trust and public accountability have to be applied in judicial determination. The State authorities should exercise discretion in awarding contracts but such discretion should be fair and in public interest. They should be free of arbitrariness and nowhere should amount to misfeasance in public office. In the case of Shivsagar Tiwari Vs. Union of India

(UOI) and Others, , the Supreme Court while setting aside the discretionary allotments made by the Minister of Urban Development to his employees, relatives, etc. even directed that this amounted to misuse of duty and awarded exemplary damages as actionable in tort.

18. Judicial review of administrative action was further expanded by the Supreme Court in the case of State of N.C.T. of Delhi and Another Vs. Sanjeev @ Bittoo, . The Supreme Court emphasised that the present trend of judicial opinion is to further restrict arbitrariness in the administrative action of the Government referable to the executive, legislative or quasi-judicial nature. Though the scope of judicial review was stated to be limited but where the decision-making process was per se faulty and not in conformity with rules, judicial intervention was permissible.

19. Reference in this regard can also be made to the case of Tata Cellular Vs. Union of India, , wherein the Supreme Court has held that unreasonable decision or a decision without proper application of mind or decision with procedural impropriety were the kind of cases which would squarely fall within the limited scope of judicial intervention.

39. Again, in Original Side Writ Petition No. 1889 of 2007 (Vijay Kumar Gupta v. State of Maharashtra and Ors.) decided on 13th March, 2008 Division Bench of this Court (Swatanter Kumar, C.J.) observed thus:

6.3...Besides statutory restrictions, in the case of a Government, the limitation of fairness, equal opportunity to persons even in a stated class are also indicated in law relating to contracts. A State is free to choose its course of action in relation to contracts and matters of State largess. It must adhere to the principle of equality and fairness in the distribution of State largess either directly or by inviting tenders for utilisation of the assets, commodities and resources of the State. Except in exceptional circumstances, where the State may, out of public necessity in the larger interest of administration, choose to enter into private contracts by negotiations or otherwise. This mode may be for the contracts relating to specialised technical-know how and in such fields where recourse to normal methodology of inviting tenders may be prejudicial to the interest of the State or such other circumstances in the opinion of the authorities which are bona fide and ex facie unquestionable. (Refer Mulla Indian Contract and Specific Relief Acts, twelfth Edition & Anson's Law of Contract, 28th Edition by J. Beatson).

6.4. The scope of judicial review in public contracts or such actions of the State is limited and it is settled rule that the judicial review will be concerned in reviewing not the merits of the decision made but the decision making process itself. If the contract by State or its instrumentalities has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate

authority by substituting its opinion in respect of selection made for entering into the contract. If the Court is of the opinion that public interest has been made to suffer then it would interfere in the larger interest of the public. Another facet of this is the legitimate expectation of the persons who claim to be interested or similarly situated is that where persons are legitimately entitled to expect that certain entitlements would continue with them, but they are not continued. The Courts insist that the decision affecting such expectation should be taken after giving to such persons an opportunity of being heard. There must exist good and even compelling circumstances to justify exclusion of all other eligible persons. The legitimacy of expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. In other words, the orders and decisions in such commercial field would be tested by the touchstone of fairness in executive action and exceptions may be there where larger public interest may outweigh the legitimate expectation of the public at large.

40. In the light of the aforesaid decisions, the question to be considered is, whether the decision of the Corporation in permitting the developer appointed by the municipal tenants to redevelop the entire plot in question is reasonable and is in public interest? In the present case, the plot in question admeasures 12130.07 sq. mtrs. The developer appointed by the municipal tenants had put up proposal for subdivision of the plot in question and had sought permission to redevelop the subdivided plot admeasuring 4905.17 sq.mtrs. under D.C.R. 33(7). The Dy. Chief Engineer (BP) on scrutiny of the proposal had recommended redevelopment by subdividing the plot in question. Accordingly, N.O.C. was granted to the developer appointed by the municipal tenants to redevelop the notionally subdivided plot. There is no material on record to suggest that the technical committee had found any fault with the recommendation of the Dy. Chief Engineer (BP). Even before us it is not argued that subdivision of the plot in question is not legally permissible and the recommendation of the Dy. Chief Engineer (BP) for subdivision of the plot in question was erroneous. Therefore, in the absence of any legal impediment for subdivision of the plot in question, the decision of the Corporation to allow the developer appointed by the municipal tenants to redevelop the entire plot admeasuring 12130.07 sq.mtrs. with 2.5 FSI instead of the subdivided plot admeasuring 4905.17 sq.mtrs. with 2.5 FSI amounts to conferring relief to the municipal tenants / occupants in excess of what is contemplated under D.C.R. 33(7).

41. It was however contended that the plot in question being a single undivided plot covered under D.C.R. 33(7), it was obligatory on the part of the Corporation to permit the developer appointed by the municipal tenants to redevelop the entire plot. Reliance is also placed on the word "gross plot area" used in D.C.R. 33(7). There is no merit in this contention because, D.C.R. 33(7) merely provides for the quantum of FSI available to the developer and it does not provide that the developer is entitled to redevelop the entire plot irrespective of the size of the plot. The word "gross plot area" is used in relation to the quantum FSI

available to the developer under D.C.R. 33(7). Moreover, the very fact that the Corporation has charged premium on the surplus FSI, that is, the FSI in excess of what is contemplated under D.C.R. 33(7), clearly negates the argument of the respondents that under D.C.R. 33(7) the developer is entitled to redevelop the entire plot. In other words, where the plot could be easily subdivided and the developer appointed by the tenants / occupants could be permitted to redevelop the subdivided plot under D.C.R. 33(7), the decision of the Corporation in permitting the redevelopment of the entire plot under D.C.R. 33(7) by the developer appointed by the tenants / occupants would amount to distributing Government largesse without any justification.

42. If the plot in question was subdivided, then in respect of one of the subdivided plot, the Corporation could have permitted the developer appointed by the tenants to redevelop under D.C.R. 33(7) and could have independently considered the proposal submitted by the petitioners in respect of the other subdivided plot or in the alternative the Corporation itself could have redeveloped the entire plot under D.C.R. 33(9) by inviting tenders. Redevelopment of the entire plot by subdividing it or under D.C.R. 33(9) with 4 FSI would certainly be beneficial to the Corporation instead of redevelopment under D.C.R. 33(7) with 2.5 FSI. In fact, initially the Corporation had decided to redevelop the entire plot with 4 FSI under D.C.R. 33(9) by inviting tenders. However, the same has not been pursued without any justification and by the impugned order the Corporation has arbitrarily decided to allow redevelopment of the entire plot under D.C.R. 33(7) by the developer appointed by the municipal tenants.

43. The only explanation given by the Corporation for not developing the plot under D.C.R. 33(9) is that the plot in question falls within the height restrictions set out in D.C.R. 31 (4)(a). This explanation is a false excuse given by the Corporation which is wholly unsustainable, because, firstly, the Corporation could have applied for relaxation of the height restriction which is permissible under D.C.R. 1991 and secondly, there is evidence on record to show that in the same locality and in fact on the adjoining plot several towers have been constructed by the developers by obtaining relaxation of the height restriction from the Urban Development which is not disputed. To a query raised by the Court, counsel for the Corporation fairly stated that if there were no tenants then the Corporation would have redeveloped the plot in question under D.C.R. 33(9). In these circumstances, the decision of the Corporation in not permitting redevelopment by subdividing the plot in question as also the decision not to redevelop the plot under D.C.R. 33(9) by inviting tenders but to permit the developer appointed by the tenants / occupants under D.C.R. 33(7) cannot be said to be bonafide decision taken in public interest or in the interest of the Corporation.

44. The impugned decision is sought to be justified by arguing that the Corporation has imposed stringent conditions upon the developer appointed by the municipal tenants by directing him to rehabilitate the municipal tenants, municipal employees, municipal school, other structures, etc. and further the

Corporation has charged premium on the surplus FSI at the prevailing market rate. There is no merit in this contention because, admittedly, the premium on the surplus FSI is fixed on the basis of the price set out in the Stamp Duty Ready Reckoner (SDRR) and not on the basis of the current market rate of the saleable FSI. SDRR merely prescribes a yardstick for the purpose of stamp duty. It provides for the minimum price that could be considered for the purpose of stamp duty. It provides that for payment of stamp duty, the market value is the value worked out as per SDRR or the consideration stated in the document, whichever is higher. Thus SDRR does not reflect the market price. Therefore, the decision taken by the Corporation in computing the premium on the surplus FSI based on SDRR cannot be said to represent the current market rate of the saleable FSI. Consequently the quantum of premium determined without taking into consideration the current market rate would be wholly arbitrary, unreasonable and prejudicial to the public interest and the interest of the Corporation.

45. Strong reliance was placed by the counsel for the respondents on the decision of this Court in the case of Ramchandra K.Paralikar (supra) and Mangesh J. Mohite (supra) in support of their contention that the municipal employees do not have any right to seek redevelopment of the municipal plot and that the society formed by the tenants is not required to issue tenders in selecting its developer. The decision of this Court in the case of Ramchandra K. Paralikar (supra) is distinguishable on facts, because, at that time there were no guidelines framed by the Corporation, whereas, in the present case, admittedly guidelines have been framed by the Corporation for rehabilitation of the municipal employees and the same is pending for approval before the State Government. Therefore, the decision of this Court in the case of Ramchandra K.Paralikar is distinguishable on facts.

46. Similarly, the decision of this Court in the case of Mangesh Mohite (supra) is also not applicable to the facts of the present case. There can be no dispute with the proposition laid down therein that the society formed by the tenants need not invite tenders while selecting its developer. The question in the present case is altogether different. The question is, whether the Corporation ought to have redeveloped the plot by subdividing it or under D.C.R. 33(9) by inviting tenders instead of permitting redevelopment of the entire plot under D.C.R. 33(7) by the developer appointed by the municipal tenants. The question is, whether the Corporation is justified in arbitrarily determining the premium on the surplus FSI without inviting tenders to ascertain the market value of the saleable FSI. Therefore, the aforesaid decision of this Court has no relevance in the facts of the present case. Similarly, other decisions relied upon by the counsel for the respondents are distinguishable on facts.

47. As noted earlier, in the present case, the decision of the Corporation in not permitting redevelopment by subdividing the plot or not redeveloping the plot under D.C.R. 33(9) is without any justiciable basis. It is apparent that the

impugned decision has been taken solely with a view to favour the developer appointed by the tenants / occupants in redeveloping the entire plot under D.C.R. 33(7). Even the quantum of premium on the surplus FSI has been fixed arbitrarily without ascertaining the market value of the saleable FSI. This is established by the petitioners by offering to redevelop the plot in question on the same terms and paying to the Corporation premium on the surplus FSI at Rs. 130 crores instead of Rs. 96.60 crores fixed by the Corporation. Thus, the decision of the Corporation being wholly arbitrary, unreasonable and contrary to public interest, the same is liable to be quashed and set aside.

48. Accordingly, we hold that the decision of the Corporation in permitting redevelopment of the entire plot under D.C.R. 33(7) by the developer appointed by the municipal tenants is not a bonafide decision taken in public interest and consequently the impugned order dated 24/8/2007 is quashed and set aside. Since the decision of the Corporation in rejecting the proposal of the petitioners is primarily based on its decision dated 24/8/2007, the said decision dated 22/1/2008 is also set aside and the Corporation is directed to reconsider both the proposals for redevelopment by subdividing the plot submitted by the developer appointed by the municipal tenants as well as the petitioners afresh and in accordance with law. If for any reason subdivision of the plot in question is not feasible, then the Corporation shall redevelop the plot under D.C.R. 33(9) either by itself or by inviting tenders.

49. The petition is disposed off in the above terms with no order as to costs.