
(2016) 02 BOM CK 0151
In the Bombay High Court
Case No : Writ Petition No. 315 of 2013

Mahendra Builders

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Regional and Town Planning Act, 1966 — Section 47, Section 53, Section 53 (1)

Citation : (2016) 2 AIRBomR 377 : (2017) 1 ALLMR 293 : (2016) 2 BCR 818

Hon'ble Judges : Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Aspi Chinoy, Sr. Advocate and P.S. Dani, Sr. Advocate i/b Janhvi Bejoy, for the Appellant; Geeta Shastri, Additional Government Pleader and Anjali Helekar, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

G.S. Kulkarni, J.—1. Rule Returnable forthwith. By consent and at the request of the parties heard finally.

2. By this Petition under Article 226 of the Constitution of India, the petitioners seek quashing and setting aside of the order dated 24 January 2013 passed by the respondent No. 3- the Municipal Commissioner of the Mumbai Municipal Corporation, whereby it is held that the proposal for regularization submitted by the respondent Nos. 5 to 7 of additions and alterations namely additional rooms and toilets at the premises namely "Empire Royale Hotel" 3rd Floor, Empire Building, 147, Dr. D.N. Road, Fort, Mumbai, be processed by the Executive Engineer (Building and Proposals). The petitioners are also seeking quashing of the communication of the Assistant Engineer (Building and Proposal) dated 22 March 2012 by which certain compliances are sought from Respondent Nos. 5 to 7. A further prayer is made that the notice dated 10 October 2003 issued under section 53 (1) of the Maharashtra Regional Town Planning Act 1966 (for short the

M.R.T.P. Act) and order dated 18th March 2004 passed by the Executive Engineer (Building and Proposal) declaring the said additional construction on the 3rd floor with intended toilets as unauthorized be implemented.

3. The litigation between the parties has a chequered history which needs to be noted in a little detail. The Petitioners claim to be the owners of a property being a heritage building known as "Mahendra Chambers" situated at C.S. No. 1390, Dr. D.N. Road, Fort Mumbai acquired by virtue of a Deed of Assignment and Agreement dated 23rd August 1974 entered with the predecessor-in-title of the Petitioners namely the Parsi Panchayat Trust. These premises stand on the land leased by the Municipal Corporation for Greater Mumbai. There is a litigation pending in regard to the issue of subsistence of the lease. However, that may not be relevant in the context of the present dispute as the subject matter pertains to the additions and alterations namely the construction of the additional rooms and intending toilets on the 3rd floor of the said premises by Respondent No. 5 to 7, who are admittedly in occupation of the same. The 3rd floor premises were used by Respondents for a lodging house business under the name and style of "Empire Hindu Hotel."

4. It is the Petitioner's case that the respondent No. 5 under the guise of carrying structural repairs had made unauthorized construction on the 3rd floor of the said premises without the consent of the petitioners or of the Municipal authorities by constructing several additional rooms with attached toilets as also a mezzanine floor so as to multiply number of rooms and profit therefrom. This unauthorized construction casted a huge load on the 100 year old heritage building.

5. The Municipal Corporation had issued a notice dated 10th October 2003 under section 53 (1) of the M.R.T.P. Act calling upon respondent No. 5 to demolish the mezzanine floor as also the additional rooms with intended toilets. Petitioners aver that even as per the plans dated 28 June 2001, approved by the Corporation it was evident that there were only 16 number of rooms on the 3rd floor with only two toilet blocks on other side of the 3rd floor, which revealed non-existence of the mezzanine floor and the additional rooms with attached toilets. Respondent No. 5 attempted to seek regularization of this unauthorized construction after receipt of the demolition notices dated 10 October 2003 and 5 January 2004 issued by the Corporation under section 53 (1) of the M.R. & T.P. Act. The Executive Engineer (Building and Proposal) by his communication dated 18 March 2004 rejected the regularization proposal. In this communication it was recorded that as per the municipal records of the Assessment Department there was no proof/documents to prove existence of mezzanine floor above 3rd floor of the building and that as regards the additional rooms constructed on the 3rd floor with intended toilets the same amounted to additions and alterations which are not permissible as per Municipal policy regarding repair permission. For these reasons, the amended plans for regularization of the mezzanine floor and the additional rooms with intended toilets on the 3rd floor of the said premises were

rejected.

6. Against this rejection of the regularization plans by the Executive Engineer of the Corporation, respondent No. 5 approached the City Civil Court at Bombay, by filing L.C. Suit No. 1517 of 2004, inter alia challenging the rejection of the regularization proposal and action initiated by the Municipal Corporation to demolish the mezzanine floor and the additional rooms. A notice of motion seeking injunction in which initially an injunction was granted which came to be ultimately rejected by the Civil Court by an order dated 10 July 2009. It is stated that subsequently the suit came to be unconditionally withdrawn by the respondent No. 5 on 21 July 2010.

7. Respondent No. 5 had also simultaneously filed a statutory appeal under section 47 of the MRTP Act before the State Government challenging the rejection of regularization of the mezzanine floor and the additional rooms with toilet by the said communication of the Executive Engineer dated 18 March 2004 which was Appeal No. 4303/600/2004. The Petitioners were not served with a copy of the Appeal and that they were kept in dark of the proceedings about the said Appeal. However, after much correspondence with the Urban Development Department and the Municipal Corporation it was revealed that the Hon"ble Chief Minister had passed an order dated 6th October 2004 remanding the matter to the Municipal Corporation for re-consideration. As the petitioners were not served with any of the proceedings of the statutory appeal as preferred by the respondent No. 5 and that copies of the documents and the entire correspondence was not being furnished to the petitioners, the petitioners approached this Court in Writ Petition No. 1838 of 2008. By an order dated 25th September 2008 passed by the Division Bench the Municipal Commissioner was directed to hear the petitioners as well as respondent Nos. 5 and 6, in taking a decision on the application of the respondent No. 5 being decided by the Municipal Commissioner in pursuance of the orders passed by the Hon"ble Chief Minister.

8. Parties accordingly appeared before the Municipal Commissioner by filing their respective written submissions as also various documents were placed for consideration of the Municipal Commissioner. The Municipal Commissioner passed an order dated 24 November 2008 whereby it was held additional rooms with attached toilets and construction of mezzanine floor on the 3rd floor was unauthorized and the same are required to be demolished.

9. Respondent No. 5 being aggrieved by this order of the Municipal Commissioner preferred an Appeal before the Hon"ble Chief Minister under section 47 of the M.R.& T.P. Act. It is the case of the petitioners that the Appeal was filed only in respect of the mezzanine floor which the Petitioners say was clear from the reading of the memo of appeal and the grounds as raised in the appeal which contained no grounds in respect of additional rooms and toilets. The petitioners aver that the Appeal preferred by respondent No. 5 was only on the limited aspect of re-consideration of the three documents so as to ascertain

the existence of the mezzanine floors and that the only issue as agitated was the mezzanine floor.

10. On this Appeal the Hon"ble Chief Minister passed an order dated 29th June 2009. The Hon"ble Chief Minister noting the three documents and the case of respondent no 5 in respect of the mezzanine floor held that the appeal was accepted and the impugned order of the Municipal Commissioner dated 24th November 2008 was set aside and directed that the Municipal Commissioner shall re-consider the documents submitted by the respondent No. 5 regarding existence of mezzanine floor, before 15th August 1997 and process the regularization of mezzanine floor as per revised Development Control Regulations No. 38 (6) and take a decision within two months thereof. The entire controversy in the petition revolves around the fact whether the Hon"ble Chief Minister by this order has at all set aside Municipal Commissioner's order dated 24 November 2008 upholding demolition qua the additional rooms with attached toilets being unauthorized.

11. In pursuance of the said orders passed by the Hon"ble Chief Minister dated 29 June 2009 the Municipal Commissioner heard the parties and passed a reasoned order dated 22 October 2009 holding that the documents submitted by the respondent No. 5 before the Hon"ble Chief Minister were not adequate to prove the authenticity of the existence of the mezzanine floor on the third floor prior to 15 August 1997 and the same cannot be regularized as per revised Development Control Regulations.

12. Against the said order dated 22nd October 2009 of the Commissioner the respondent No. 5 again approached the Hon"ble Chief Minister in an Appeal under section 47 of the M.R. & T.P. Act. The petitioners have contended that despite the grievance of the petitioners that they were not served with copy of the Appeal, the Hon"ble Chief Minister proceeded with the hearing and passed an order dated 15 July 2010 allowing the appeal and once again remanding the matter back to the Municipal Commissioner for re-consideration of the documents.

13. The Petitioners therefore being aggrieved by the orders dated 15 July 2010 passed by the Hon"ble Chief Minister of repetitive interference and the third successive remand to the Municipal Commissioner approached this Court in writ petition No. 1511 of 2010, inter alia seeking quashing of the said order of the Hon"ble Chief Minister as also sought an effective implementation of the demolition notice issued under section 53 (1) of the M.R.& T.P. Act dated 18th March 2004. By an order dated 20 April 2011 the Division Bench allowed said Writ Petition setting aside the order dated 15 July 2010 of the Hon"ble Chief Minister and upholding the order dated 22 October 2009 of the Municipal Commissioner holding that the mezzanine floor cannot be regularized as per revised Development Control Regulations 38 (6). The Division Bench made the following observations in allowing the Writ Petition:

"In our opinion, therefore this overwhelming evidence on record negates existence of mezzanine floor before 1997 and therefore, really speaking, there was in room for the State Government to interfere with the order of the Municipal Commissioner. In our opinion, if the respondent No. 5 was relying on the documents, it was for him to prove the authenticity of the documents especially in view of the report that those documents are not traceable on the record of the Corporation. In our opinion the State Government was not at all justified in interfering with the order of the Municipal Commissioner. The reason given by the State Government for interfering with the order is unacceptable. In our opinion, the State Government should have considered that admittedly on the third floor, mezzanine floor was put up without getting prior permission of the Corporation though in law obtaining prior permission for putting up the construction was necessary. The State Government should also have taken into consideration the nature of construction. From record, it is clear that the mezzanine floor has been put up on the entire third floor with the result the usable area of the third floor has become double and the entire area is being used for commercial purpose. One can understand that in a small residential flat, a mezzanine floor is created in one of the rooms to increase the usable area without seeking permission but putting up a mezzanine floor to cover the entire third floor and using it for commercial purpose in our opinion has rightly not been regularized by the Corporation. The State Government should have seen that increasing usable area to such a extent and when the entire area is being used for commercial purpose like hotel puts additional burden on already overburdened civil amenities. In the result therefore, the petition will have to be allowed. Petition therefore succeed and is allowed, the order passed by the State Government dated 15th July 2010 is set aside and the order passed by the Municipal Commissioner dated 22nd October 2009 is maintained. Rule is made absolute with no order as to costs."

(emphasis supplied)

Against this judgment of the Division Bench respondent No. 5 preferred Special Leave Petition (Civil) No. 13430 of 2011 before the Supreme Court which came to be rejected by an order dated 13th May 2011.

14. The Petitioners also moved a Writ Petition bearing No. 1594 of 2008 seeking a direction that in view of the unauthorized and illegal construction on the 3rd floor by respondent Nos. 5 and 6 the licensing authority should take appropriate steps for cancellation and/or revocation of the licence to conduct a hotel on the said premises. By an order dated 2 March 2009 the Division Bench directed the Municipal Corporation and/or licensing authority not to permit respondent Nos. 5 to 7 to conduct business of hotel unless the respondent No. 7 meets all requirements of the Development Control Regulations and building bye laws. A Review Petition preferred by the respondent No. 5 against the said order was also permitted to be withdrawn by an order dated 10th June 2009.

15. After rejection of the Special Leave Petition by the Supreme Court the

Petitioners made a representation to the Corporation to execute the notice dated 18 March 2004 issued under section 53 (1) of the M.R. & T.P. Act and to demolish the unauthorized additional rooms and toilets and the mezzanine floor. Accordingly, demolition work was initiated on 24th May 2011. When the demolition work was in progress Writ Petition (Lodging) No. 1045 of 2011 was preferred by the respondent Nos. 6 and 7 seeking a stay of the demolition work on the ground that another proposal for regularization has been submitted by respondent Nos. 6 and 7. This writ Petition came to be dismissed by an order dated 7th June 2011 passed by the Division Bench. The petitioners thereafter made various representations to the Municipal Commissioner to initiate action for demolition and to complete the demolition of the mezzanine floor and additional rooms. However, as no action was being initiated by the Municipal Corporation and according to the petitioners on account of the Municipal Commissioner's high-handed approach of entertaining subsequent regularization proposals, the petitioners again approached this Court in Writ Petition No. 168 of 2012. The Division Bench at the interim stage passed an order dated 6 March 2012 recording a statement of the counsel appearing for the respondent-Corporation that the notice issued under section 53 of the M.R. & T.P. Act is executed in part meaning thereby that the entire construction of the mezzanine floor is removed. It was recorded that so far as additional rooms and toilets are concerned regularization application was made by the occupants (respondent Nos. 5 to 7) to the Municipal Commissioner and an appropriate decision would be taken by the Municipal Commissioner on the said application expeditiously and in any case within two months, and the same would be produced before the Court on the adjourned date of hearing.

16. Immediately thereafter the Assistant Engineer (Buildings & Proposals) issued a communication dated 22 March 2012 to the Architect of the respondent Nos. 5 and 7 informing that the Municipal Commissioner had principally approved the proposal for regularization of the additions and alterations and regular approval would be issued only after submission of NOC's as listed in the said letter.

17. Thereafter the Division Bench of this Court decided Writ Petition No. 168 of 2012 by its judgment and order dated 17th December 2012. The Division Bench set aside the order passed by the Hon'ble Chief Minister dated 15 July 2010 and all communications and/or decisions of the Corporation on the application for regularization made by respondent Nos. 5 and 6 after the decision dated 18 March 2004 and more particularly after the decision of this Court and the Supreme Court. A serious doubt was raised as to whether the appropriate authority of the Corporation could have entertained the second application for regularization and that too after the decision dated 18th March 2004 of the Corporation, which was upheld by the Division Bench in Writ Petition No. 1511 of 2010 as also S.L.P. against the same being dismissed by the Supreme Court. As regards the earlier interim order dated 6th March 2012 the Division Bench clarified by observing as under:

"We are of the opinion that the said order cannot be interpreted to mean that it was open for the Corporation to entertain the second regularization application of respondent Nos. 6 and 7 even if the law does not permit the Corporation to do so. In fact, our understanding of the said order to which one of us (R.D. Dhanuka, J) was a party is that it has only recorded the statement made by the counsel for the Corporation and not the opinion of the Court as such. In fact it is noticed from the said order that the Court's attention was not invited to the communication dated 18th March 2004 Exhibit D at page 61 at the relevant time which clearly deals with the issue regarding regularization of additional rooms with intended toilets constructed on third floor of the building. As aforesaid, Commissioner may have to consider the controversy on its own merits uninfluenced even by the order dated 6th March 2012 and in accordance with the law keeping in mind the observations made by this Court hitherto."

The issue was accordingly left to be decided by the Municipal Commissioner as noted in the above observations.

18. Accordingly, the Municipal Commissioner heard the parties on the regularization application and passed the impugned order inter alia observing that, what was concluded up to the Supreme Court was in respect of the mezzanine floor which came to be demolished by the Corporation in the month of November 2011. It was observed that the Hon'ble Chief Minister by his order dated 29th June 2009 set aside the order of then Municipal Commissioner dated 24th November 2008 in toto and remanded the matter for consideration of regularization of mezzanine floor. The issue of regularization of the additional rooms was thereafter agitated and hence the application for regularization namely additional rooms and toilets can be considered and will not amount to review of the earlier order passed by his predecessor. It is recorded that the Municipal Commissioner by his order dated 16th March 2011 granted in-principle approval for regularization for additions and alterations. The operative order of the impugned order of the Municipal Commissioner reads thus:

ORDER

"The proposal for regularization submitted vide application dated 18/07/2011 by the Respondent Nos. 6 and 7 for additions and alterations at the premises of the Empire Royal Hotel third floor, empire Building, 146, Dr. D.N. Road Fort, Mumbai -400 001 will be processed further by E.E.B.P. After the compliance of the condition is recorded in the letter under No. EB/4855/AA dated 22/03/2012. However, Respondent Nos. 6 and 7 are hereby directed to demolish the covered portion of the chowk at the third floor on sought side as mentioned in the aforesaid letter dated 22/03/2012 before the regularization proposal is processed."

19. In assailing the impugned order, learned Senior counsel appearing for the petitioners has made the following submissions:--

"(i) The issue as regards additional rooms with attached toilets being

unauthorised and consequently requiring demolition, had attained finality in view of order dated 24 November 2008 passed by the Municipal Commissioner upholding the action under Section 53 (1) of the MRTTP Act.

(ii) The challenge to the order dated 24 November 2008 of the Municipal Commissioner in the statutory appeal of Respondent Nos. 5 to 7 before the Hon"ble Chief Minister was limited only in respect of mezzanine floor. This was clear from the reading of the Memo of Statutory Appeal No. 4309/45/CR-75/09/UD-11 and the grounds contained therein which pertain only to the mezzanine floor. The consequent order of the Chief Minister dated 29 June 2009 also clearly records that the appeal was filed in respect of the mezzanine floor only and that the documents which were placed for consideration pertaining to only mezzanine floor, and, thus the directions as contained in the order dated 29 June 2009 are required to be understood in the context the appeal was filed and considered by the Chief Minister.

(iii) Even if the order of the Hon"ble Chief Minister dated 29 June 2009 records that the appeal is accepted and the impugned order of the Municipal Commissioner dated 24 November 2008 is set aside, the same cannot be understood to mean that the same is set aside in the context of additional rooms with attached toilets inasmuch as the same was neither the subject matter of the appeal nor the subject matter of consideration by the Hon"ble Chief Minister. The operative portion of the order dated 29 June 2009 passed by the Hon"ble Chief Minister cannot be considered de hors the discussions and the reasons preceding the same.

(iv) It is submitted that Respondent Nos. 5 to 7 accepted order dated 24 November 2008 passed by the Municipal Commissioner in totality by not raising a challenge in respect of the additional rooms and the toilets in the successive appeals before the Hon"ble Chief Minister. It is urged that this position also becomes clear from the order dated 20 April 2011 passed in Writ Petition No. 1511 of 2010 which also pertains only to the mezzanine floor and which order was upheld by the Supreme Court in Special Leave Petition No. 13430 of 2011 filed by Respondent Nos. 5 to 7 which came to be rejected by order dated 13 May 2011.

(v) It is urged that the observations in the judgment and order dated 17 December 2012 in Writ Petition No. 168 of 2012 are significant in as much as the Division Bench has raised a serious doubt as to whether the Corporation could entertain a second application for regularization after the decision dated 18 March 2004 of the Corporation, which was upheld by this Court in the Writ Petition filed by the Petitioners.

(vi) It is contended that the Municipal Commissioner did not have any powers under the MRTTP Act to review its order dated 18 March 2004 and entertain the successive regularization application.

(vii) The impugned order in no manner can reopen the issue of regularization of

unauthorised additional rooms with intended toilets.

(viii) The counter affidavit as filed on behalf of the Corporation also admits of the said position that Appeal under Section 47 of the MRTTP Act filed on behalf of Respondent Nos. 5 to 7 against the order dated 29 June 2009 was in respect of mezzanine floor. The averments in paragraph 4(j) in the counter filed by the Respondent-Corporation are clear to that effect and no other interpretation, therefore, can now be made that Respondent Nos. 5 to 7 had not accepted order dated 24 November 2008."

20. On the other hand on behalf of the Corporation, learned Senior counsel made the following submissions:--

"(i) The statutory Appeal under Section 47 of the MRTTP Act filed by Respondent Nos. 5 to 7 before the Hon"ble Chief Minister in fact pertained to the challenge to the entire order dated 24 November 2008 passed by the Municipal Commissioner.

(ii) The operative portion of the order passed by the Hon"ble Chief Minister when it categorically records that the "appeal is accepted and the impugned order of the Municipal Commissioner dated 24 November 2008 is set aside." Thus, there is no impediment for the Corporation to consider the second regularization application as made on behalf of Respondent Nos. 5 to 7.

(iii) The order dated 20 April 2011 passed by the Division Bench in Writ Petition No. 1511 of 2010 filed by the Petitioners pertained only to the mezzanine floor.

(iv) On the basis of the letter dated 23 August 2011 of the Petitioners addressed to the Municipal Commissioner and more particularly from the dates and events as set out at item No. 11 and 15 it is clear that even the Petitioners had sought action only in respect of demolition of mezzanine floor and not the additional rooms.

(v) It was open to the Corporation to consider the second regularization proposal as submitted by Respondent Nos. 5 to 7.

(vi) The impugned order, therefore, does not require any interference by this Court, as the same is legal and valid."

21. Learned Counsel for Respondent Nos. 5 to 7 submits that the order dated 29 June 2009 passed by the Hon"ble Chief Minister is clear and unambiguous inasmuch as it has set aside the order dated 24 November 2008 passed by the Municipal Commissioner. It is submitted that the Petitioners had neither asked for clarification of paragraph (1) of the operative portion of the said order nor had the petitioners at any point of time challenged the same. It is submitted that the order dated 20 April 2011) in Writ Petition No. 1511 of 2011 is required to be read to pertain only to the mezzanine floor. It is contended that in fact there was change in circumstances after the mezzanine floor was demolished inasmuch as height becomes available for the rooms and, therefore, regularization surely could be considered in this changed circumstances.

22. Learned Senior Counsel appearing for the Petitioners in rejoinder has taken us through the Appeal Memo as filed by respondent No. 5 before the Hon"ble Chief Minister and more particularly paragraphs 2, 3 and all the grounds in Statutory Appeal No. 4309/45/CR-75/09/UD-11, to contend that Respondent Nos. 5 to 7 have clearly accepted the order dated 24 November 2008 ordering demolition of the additional rooms and intended toilets. It was urged that in fact the entire proceedings arising out of the order dated 24 November 2008 and the remand order dated 29 June 2009 were in the context of the mezzanine floor. The orders passed by the Statutory Authorities as also the orders passed by the Division Bench of this Court in the earlier round of litigation clearly shows that the same pertain only to mezzanine floor and that Respondent Nos. 5 to 7 had given up their challenge to the unauthorised construction of additional rooms with attached toilets and the consequent order of the Municipal Commissioner demolishing the same. Respondent Nos. 5 to 7 cannot sub silentio by reference to clause (1) of the operative portion of the order dated 29 June 2009 of the Hon"ble Chief Minister contend that they have succeeded in the appeal and that the order directing demolition in respect of additional rooms with attached toilets has been set aside. (It is submitted that the observations of the Municipal Commissioner in the impugned order that the earlier order of the Municipal Commissioner dated 24 November 2008 was set "aside in toto" by the Hon"ble Chief Minister in the order dated 29 June 2009 is not correct inasmuch as the order of the Hon"ble Chief Minister does not record that the order dated 24 November 2008 is set aside in toto. It is submitted that the order is required to be read in the context of what is urged in the appeal before the Hon"ble Chief Minister and the appeal cannot be read de hors the subject matter as urged and considered by the Hon"ble Chief Minister.

23. We have heard the learned Counsel for the parties and perused the relevant documents as placed on record with their assistance.

24. The issue which falls for our consideration in the facts of the case would be:

"(i) Whether a second regularization application could have been made by Respondent Nos. 5 to 7 in regard to the additional rooms and the toilets in question;

(ii) Whether the order dated 24 November 2008 passed by the Municipal Commissioner inter alia ordering demolition of the additional rooms alongwith toilets was accepted by Respondent Nos. 5 to 7 so as to preclude Respondent Nos. 5 to 7 from agitating the same in a subsequent regularization application.

(iii) Whether by the impugned order dated 24 January 2013 the Municipal Commissioner could have directed that the proposal of Respondent Nos. 5 to 7 for regularization of additional rooms and attached toilets on the third floor of the said premises be processed further by Executive Engineer (Building & Proposal);"

25. It is an admitted position that a notice under Section 53 (1) of the MRTP Act dated 10 October 2003 came to be issued to Respondent Nos. 5 to 7 informing

Respondent Nos. 5 to 7 that they had carried out work of a mezzanine floor and additional rooms with attached toilets on the third floor, contrary to the approved plans. Respondent Nos. 5 to 7 were called upon to restore the work as per the approved plans failing which Respondent Nos. 5 to 7 were to be liable for prosecution and also for demolition. After receipt of this notice dated 10 October 2003, respondent Nos. 5 to 7 resubmitted plans for approval to the Executive Engineer (Building and Proposal) in regard to the mezzanine floor and additional rooms. The Executive Engineer (Building & Proposal) by communication dated 18 March 2004 rejected the proposal to approve the amended plans for mezzanine floor and the additional rooms with intended toilets. It appears that in the meantime Respondent Nos. 5 to 7 moved a regularization application before the Municipal Commissioner seeking to regularise the mezzanine and additional rooms. As the said application was kept pending and was not being decided, the Petitioners had approached this Court in Writ Petition No. 1838 of 2008 in which by order dated 25 September 2008 this Court directed the Municipal Corporation to decide the regularization application. The Municipal Commissioner after hearing all the parties and considering the documents as placed on record in the regularization application as filed on behalf of Respondent Nos. 5 to 7, passed an order dated 24th November 2008. The operative order reads thus:--

"ORDER

I have heard the above parties and also gone through the file papers available with the Building Proposal Department and discussed the matter with my Officers. I have come to the conclusion that there was no existing mezzanine on 3rd floor of the building. From the papers, it is seen that during the course of repairs, occupiers of the 3rd floor has constructed mezzanine floor and additional rooms with attached toilets on 3rd floor. All the additional rooms with attached toilets and mezzanine floor constructed on 3rd floor are unauthorized and same has to be demolished as per provision of M.M.C. Act and M.R. & T.P. Act. The action has already been taken by M.C.G.M. u/Sec. 53 (1) of M.R. & T.P. Act 1966 and the same will be pursued further. However, as stated in the order of Hon''ble High Court, demolition action will not be executed so long as injunction order/ stay order issued by Bombay City Civil Court in the Suit No. 1517 of 2004 is in force.

Sd/- Municipal Commissioner"

26. Respondent Nos. 5 to 7 being aggrieved by the above order dated 24 November 2008 of the Municipal Commissioner moved a statutory Appeal under Section 47 of the MRTP Act before the Hon''ble Chief Minister, State of Maharashtra. We have perused the appeal memo and the grounds as set out therein which clearly reveal that the subject matter and the scope of the appeal was only in regard to the mezzanine floor. There are no grounds whatsoever raised in regard to the additional floors and attached toilets. Further, we find that there was no material placed on record justifying the legality of the additional rooms and attached toilets in question even if it is assumed that the appeal was

filed in respect of additional rooms and the toilets. If Respondent Nos. 5 to 7 were to be aggrieved by the findings as recorded in respect of the additional rooms and the attached toilets in the order dated 24 November 2008, surely the appeal would have contained specific grounds to assail such findings as made by the Municipal Commissioner. However, neither any material is placed to show that the additional rooms and the attached toilets, would be required to be considered legal nor any specific ground are urged in the Appeal Memo as regards the additional rooms and attached toilets in question.

27. It is quite clear that the Hon"ble Chief Minister also considered the appeal as stood before him and only in the context of the mezzanine floor. This is clear from the very first paragraph of the order dated 29 June 2009 passed by the Chief Minister which categorically records that "the appeal under Section 47 of the MRTP Act is in respect of mezzanine floor in Empire Royal Hotel, Empire Building, D.N. Road, Fort, Mumbai." Further the discussion and observations in the order also go to show that there is no issue specifically urged in respect of the additional rooms and toilets. What was urged in the appeal was in respect of three documents which were in the context of the mezzanine floor and to show that the mezzanine floor was in existence. There was no other material concerning the additional rooms and thus, the Hon"ble Chief Minister considering the case of Respondent Nos. 5 to 7 only in respect of these three documents pertaining to the mezzanine floor made the following observations which are necessary to be noted:--

"Accordingly, I am of the opinion that the Municipal Commissioner while passing impugned order has not considered BMC's own records about the mezzanine floor and therefore, the said order need to be set aside. Accordingly, I pass following order:--

"ORDER

1) Appeal is accepted and impugned order of Municipal Commissioner dated 24/11/08 is set aside.

2) The respondent shall consider the documents submitted by the appellant regarding existence of mezzanine floor before 15/8/97 and process regularization of mezzanine floor on 3rd floor of M/s. Empire Royale Hotel, Empire Building, Fort, Mumbai, as per revised Development Control Regulation 38(6) and take a decision within 2 months of this order.

Place: Mumbai

Date: 29th June, 2009

sd/-

(Ashok Chavan)

Chief Minister of Maharashtra"

(emphasis supplied)

A conjoint and plain reading of the above paragraphs of the order passed by the Hon''ble Chief Minister (which we have underlined) makes it very clear that the order dated 24 November 2008 was set aside only in respect of the mezzanine floor. Clause (1) of the operative portion of the order is required to be read with the preceding paragraph wherein the Hon''ble Chief Minister has categorically recorded that the Municipal Commissioner while passing the order dated 24 November 2008 has not considered the Corporation's own record about the mezzanine floor and, therefore, he is setting aside the order in that regard. Clause (2) of the operative portion also makes it abundantly clear that the Municipal Commissioner is directed to reconsider the documents submitted by Respondent Nos. 5 to 7 regarding existence of mezzanine floor before 15 August 1997 and accordingly process regularization of mezzanine floor by taking a decision thereon. It is, therefore, clear that when Clause (1) of the order of the Hon''ble Chief Minister (supra) records that the appeal is accepted and the order dated 24 November 2008 passed by the Municipal Commissioner is set aside, it would mean that the same is set aside only in respect of the mezzanine floor and not in respect of the additional rooms and attached toilets which was not the subject matter of the appeal nor the subject matter of any consideration or material as placed for consideration in the statutory appeal before the Hon''ble Chief Minister. We are, therefore, of the clear opinion that the issue as regard the additional rooms and attached toilets as declared to be unauthorised and illegal in the order dated 24 November 2008 stood accepted by Respondent Nos. 5 to 7.

28. Further it can be very well seen that after the remand by the Hon''ble Chief Minister, the Municipal Commissioner reconsidered the matter only in respect of mezzanine floor and by his order dated 22 October 2009 held that the documents submitted by Respondent Nos. 5 to 7 were not adequate to prove the authenticity of existence of mezzanine floor and hence, same cannot be regularised as per the Development Control Regulations. Here also it is clearly seen that the issue was pertaining to mezzanine floor and not the additional rooms with attached toilets as also the same was not agitated. The same is the position again when Respondent Nos. 5 to 7 approached in a statutory appeal before the Hon''ble Chief Minister, the issue which was raised was of the mezzanine floor and it can be seen from the order dated 15 July 2010 that the Hon''ble Chief Minister again remanded the matter to the Municipal Commissioner only qua the mezzanine floor and to take a decision on regularization of the mezzanine floor. Nevertheless this order which was a third indulgence granted to Respondent Nos. 5 to 7 by the Hon''ble Chief Minister, was assailed in Writ Petition No. 1511 of 2010 and in the Judgment dated 20 April 2011 of the Division Bench of this Court, the order dated 15 July 2010 of the Hon''ble Chief Minister was set aside and the order dated 22 October 2009 holding the mezzanine floor to be illegal was maintained. A perusal of this order makes it clear that the orders dated 24 November 2008 of the Municipal Commissioner declaring additional rooms and attached toilets to be unauthorized

and illegal requiring them to be demolished remained undisturbed even in the second round before the Municipal Commissioner in the order dated 22nd October 2009. The Special Leave Petition preferred before the Supreme Court by Respondent Nos. 5 to 7 against the order dated 20 April 2011 passed by the Division Bench also came to be rejected by the Supreme Court by order dated 13 May 2011. Further also by an order dated 2 March 2009 passed in Writ Petition No. 1594 of 2008 the Division Bench directed the Municipal Corporation and the Licensing Authority not to permit Respondent Nos. 5 to 7 to conduct business of hotel unless Respondent No. 5 would meet the requirement as per the Development Control Regulations and bye laws.

29. It would be pertinent to note the observations of the Division Bench of this Court in its order dated 17 December 2012 in Writ Petition No. 168 of 2012 regarding the stand of the Corporation that as the earlier proceedings pertained only to the mezzanine floor and that the Corporation was competent to entertain the second application for regularization. A serious doubt was expressed by the Division Bench as regards the said contention of the Corporation. In fact, the Division Bench observed that if at all such second application was pending for regularization qua additional rooms and attached toilets then the Municipal Corporation will have to consider at the outset whether it was open to the authorities to entertain the second application and that to the decision dated 18 March 2004 of the Corporation which was upheld by the Division Bench of this Court by an order dated 24 April 2011 in Writ Petition No. 1511 of 2010 and which was confirmed by the Supreme Court by dismissal of Special Leave Petition of Respondent Nos. 5 to 7. It was further observed that even if it was assumed that the additional rooms and attached toilets were not the subject matter of the proceedings before the High Court and the Apex Court, whether the respondent - Corporation could review the decision dated 18 March 2004 in the absence of any express power of review by entertaining successive application filed on behalf of Respondent Nos. 5 to 7. Another facet which is required to be noted from this order is the contention of the Corporation on the basis of the interim order dated 6 March 2012 passed in the very same petition asserting that it was open to the Corporation to consider the successive second regularization application. The Division Bench in paragraph 5 categorically recorded that in the order dated 6 March 2012 the Division Bench has recorded only a statement on behalf of the Counsel for the Corporation to contend that the issue regarding additional rooms and intended toilets was kept open and would be decided by the Authority on its own merit and it was in no manner the order of the Court accepting the position that whether any such application could be held to be maintainable. The Division Bench rejected such interpretation to the order dated 6th March 2012 as considered by the Corporation. This is clear from the observations of the Division Bench as noted in paragraph 5 which we have already noted (*supra*).

30. Considering the facts of the case, we feel certain that Respondent Nos. 5 to 7 had given up their rights in totality to assail order dated 24 November 2008. The several proceedings which are taken out on behalf of Respondent Nos. 5 to 7

after the order dated 24 November 2008 came to be passed by the Corporation, clearly go to show that unauthorized construction of additional rooms and the toilets was never assailed. The issue had attained finality in view of the order dated 18 March 2004 confirmed by the order dated 24 November 2008 passed by the Municipal Corporation which accepted that the additional rooms and intended toilets on the mezzanine floor on the third floor of the premises in question were unauthorized and illegal and were required to be demolished. This position was not assailed by Respondent Nos. 5 to 7 in the subsequent proceedings and thus as observed above the entire scope of the subsequent proceedings was the mezzanine floor. Respondent Nos. 5 to 7, therefore, could not have taken a reverse position to reopen the issue under the garb of successive regularization application. The contention on behalf of Respondent Nos. 5 to 7 that the order dated 24 November 2008 was set aside by the Hon''ble Chief Minister by the order dated 29 June 2009 is also unfounded, inasmuch as the construction of additional rooms and toilets was not the subject matter of the appeal. Therefore, what was not the subject matter of the appeal cannot be attributed to be a subject matter of the operative portion of the order dated 29 June 2009. In view of this clear position on facts, the Respondent Nos. 5 to 7, in our opinion, could not have reopened the issue by filing a regularization application once it had become final in view of order dated 24 November 2008 passed by the Corporation. If the contention raised on behalf of Respondent Nos. 5 to 7 is to be accepted, then finality of the proceedings under the MRTTP Act could never be achieved as also no sanctity would be left to such orders as passed under the Act. This definitely is not the intention of the Legislature. The rights which accrue to the parties can very well be given up by the parties by their own volition, conduct and actions. This is a case where Respondent Nos. 5 to 7 acquiesced in the order dated 24 November 2008 qua the additional rooms and toilets. No other inference can be drawn looking at the legal proceedings adopted by Respondent Nos. 5 to 7 before the second regularization application in question came to be filed. Respondent Nos. 5 to 7 cannot at their whims and fancies and at their convenience take recourse to statutory remedies, overlooking their earlier actions and the consequences of the orders passed against them. Thus, taking into consideration these facts making a second regularization application after having not agitated the issue in that regard in the earlier proceedings, in our opinion, was impermissible in law. The Municipal Commissioner could not have entertained the said application overlooking these glaring facts as we have noted above. The observations as contained in paragraph 13 of the order passed by the Municipal Commissioner, therefore, in our opinion, are inappropriate nay perverse and completely overlook the factual position that Respondent Nos. 5 to 7 had accepted the earlier order dated 24 November 2008 passed by the Municipal Commissioner. The Municipal Commissioner has also misread the order passed by the Hon''ble Chief Minister dated 29 June 2009.

31. We may also note the observations of the Municipal Commissioner in

paragraph 14 of the impugned order which record that the then Municipal Commissioner vide his order dated 16 March 2012 had granted in-principle approval for regularization of additions and alterations in respect of the said premises and that the said order was already communicated by a letter dated 22nd March 2012. In making these observations the Municipal Commissioner has completely overlooked the binding observations of the Division Bench of this Court in its Judgment dated 17 December 2012 whereby the Division Bench observed and directed in paragraph 4 as under:

"For the time being, we are inclined to quash and set aside all the communications and/or decisions of the Officers of the Corporation on the application for regularization made by respondent Nos. 6 and 7 after the decision dated 18th March 2004 Exhibit D at page 61 and more particularly after the decisions of the High Court and of the Apex Court upholding the said order of the Corporation."

(emphasis supplied)

The Municipal Commissioner therefore, in any event could not have taken into consideration the order of the Municipal Commissioner dated 16 March 2012 in view of the above categorical directions of the Division Bench that the said decision/order of the Municipal Commissioner would stand set aside. Admittedly, the in-principle approval dated 16 March 2012 as referred by the Municipal Commissioner is not on the second regularization application. Thus looked from any angle the impugned order cannot be sustained.

32. Apart from what we have observed above, there is no dispute that order dated 24 November 2008 of the Municipal Commissioner was a quasi judicial order. We have come to a conclusion that this order qua additional rooms and toilets was not assailed and was not the subject matter of the various proceedings before the authorities, this Court and the Supreme Court and thus qua the additional rooms and the toilets being illegal was not disturbed and continued to remain in operation. If this is the situation, then a question would arise as to how the same can be reviewed by the Municipal Commissioner. The Division Bench in its order dated 20 April 2011 in Writ Petition No. 1511 of 2010 had made specific observations raising serious doubt as to whether the action of the Corporation in entertaining a second regularization application would not amount to review of the order dated 28 November 2008 and whether such a review as permissible. The learned Counsel for the Respondents have not drawn our attention to any provision which would confer power with the Municipal Commissioner under the MRTP Act to review an earlier decision taken under Section 53 of the MRTP Act. It is now well established that quasi judicial authority cannot review its own order, unless the power of the review is expressly conferred on it by the statute. The power of review is not an inherent power, it must be conferred by law either by specifically or by necessary implication. (Refer: , AIR 1987 SC 2186, (Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) & Ors.)." In our

opinion, though the Municipal Commissioner has observed that the impugned order would not amount to a review, the Municipal Commissioner has in fact reviewed the earlier order dated 28 November 2008 without any power to review the same under the MRTP Act. On this count also the impugned order is rendered illegal.

33. We may also observe that the unauthorized construction in question is in a heritage building. Any addition or alterations in a heritage building would necessarily have far reaching implications to its structural stability and the safety of the occupants therein. Therefore, as a matter of legal requirement and necessarily any additions or alterations are required to be undertaken only after obtaining prior permission from the authorities concerned and only after such permission is granted, additions or alterations can be carried out. In the present case, as noted above, large additions and alterations are done and that too without a prior permission, of which regularization was sought. We cannot overlook this aspect of the matter. On a perusal of the impugned order, we are of the clear opinion that the nature of the premises being a heritage building and such peculiarity of the premises has completely missed the attention of the Municipal Commissioner and/or there is no application of mind in this regard in passing the impugned order.

34. In the light of the above discussion, we have no hesitation to allow the writ petition. Writ petition is accordingly allowed in terms of prayer clauses (a) and (b) of the Petition. No order as to costs.

35. At this stage, learned Counsel appearing for Respondent Nos. 5 to 7 seeks stay of the effect and operation of the judgment. Though the facts do not justify delaying the removal of unauthorised constructions which is in heritage building, we are of the opinion that the request as made on behalf of Respondent Nos. 5 to 7 be granted. Accordingly, the effect and operation of the Judgment is stayed for a period of six weeks from today.