

(2004) 05 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No's. 379 and 2822 of 2003

Mr. Rajendra Thacker

APPELLANT

Vs

Municipal Corporation of Gr. Mumbai and Another

RESPONDENT

Date of Decision : 05-05-2004

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2004) 4 BomCR 1 : (2004) 106 BOMLR 598

Hon'ble Judges : R.S. Mohite, J;H.L. Gokhale, J

Bench : Division Bench

Judgement

R.S. Mohite. J.

1. These two writ petitions seek to prevent the proposed regularisations of several unauthorised constructions in Mumbai city. Since both the petitions are filed in public interest, arise out of a common background of facts and involve the same questions of law, they are being heard and disposed of together.

2. A brief chronology of the relevant facts is as under :

(a) According to the petitioners they learnt from Newspaper reports that 154 buildings had been erected in an irregular manner by committing violations of the provisions of the Development Control Rules. These violations were mostly in the R-ward and K-ward of the Bombay Municipal Corporation, comprising of areas in Dahisar, Borivali, Kandivali, Andheri and Bandra. From the facts available, the petitioners noted that a few architects were responsible for these violations and that there was a nexus between the officers of the Bombay Municipal Corporation and these few architects, in as much as, on noticing the irregularities, the Bombay Municipal Corporation would only issue stop work notices but would take no follow up action of demolition in pursuance thereof. Further the Bombay Municipal Corporation would take no action when the builders/developers put out advertisements for sale of the said unauthorised structures which resulted in unsuspecting buyers purchasing flats without knowledge that the construction

thereof was unauthorised and illegal. That some of such flat purchasers were persons who would be taking huge loans on interest and in due course they would find that they had been victimised and would also become liable to pay higher taxes in the absence of an Occupation Certificate, It was contended that such builders/developers, after effecting illegal construction were purchasing "Transferable Development Rights" (hereinafter referred to as T.D.R.) and using the same for seeking the regularisation of their illegal structures. That this method being followed by the builders/ developers and being permitted by the Bombay Municipal Corporation was setting up a bad precedent for builders/ developers to first effect an illegal construction and then to get it regularised by paying a penalty. That such construction was overburdening the infrastructure in the city of Mumbai.

(b) The petitioners in Writ Petition No. 379 of 2003 prayed for a writ of mandamus or a writ in the nature of mandamus to demolish the unauthorised portion of unauthorised construction which was under consideration for regularisation and for a direction against the Municipal Corporation and the Municipal Commissioner to blacklist the architects, builders /developers and construction companies in which they were partners or directors. The prayers in Writ Petition No. 2822 of 2003 were for appointing a Committee under a chairmanship of any retired High Court Judge to investigate the grievances made by the petitioners against the regularisation orders passed by the Municipal Commissioner as also for a declaration that a Circular being Circular No. AMC/R/3258 dated 30.7.1995 may be declared as ultra vires of the D. C. Rules, M.R.T.P. Act and N.M.C. Act. The petitioners lastly sought a direction from this Court against the Bombay Municipal Corporation requiring them to make necessary investigation and enquiries in regard to the illegal construction of buildings through the Anti Corruption Bureau.

(c) Writ Petition No. 379 of 2003 was filed first in point of time on 21.1.2003. On 22.1.2003, a Division Bench of this Court issued a notice before admission and granted ad-interim relief in terms of prayer cl. 10(e) of the said writ petition, by the grant of which, the proposal to regularise unauthorised development in all the 154 buildings came to be stayed. The stay then granted, subject to a modification referred to hereinbelow, was continued from time to time and subsists today.

(d) By a further order dated 18.2.2003 passed in Writ Petition No. 379 of 2003 the Court modified the ad interim order to the extent that the Corporation was permitted to consider the proposals for regularisation, if the Corporation wished to do so, in accordance with the provisions of law subject to the direction that no final action would be taken by the Corporation and the tentative decision made would be placed before this Court. This modification was granted in view of the submission by the Counsel for the Municipal Corporation and the petition was also admitted on that date.

(e) On 26.8.2003, an affidavit-in-reply of one Shri J.S. Sane, the Chief Engineer

(Development plan) employed by the Bombay Municipal Corporation, came to be affirmed on behalf of the respondents and was duly filed in this Court. In the said affidavit it was stated that in pursuance of the order of this Court dated 18.2.2003, the proposals for regularisation had been scrutinised in accordance with the law, existing policies and circulars by the concerned department of the Corporation and had thereafter been put up to the higher authorities, such as Chief Engineer (DP), Director (ES & P) and ultimately to the Municipal Commissioner. That out of 154 buildings in respect of which proposals were received the Municipal Commissioner had taken decisions to regularise 111 cases by levying penalty as per the prevailing policy. These 111 cases were as detailed in Exh. 1 to the said affidavit. That in 19 cases, the order of regularisation had already been passed prior to the order of the Court dated 22.1.2003 granting an ad interim stay to the consideration of the proposal. These 19 cases were as detailed in Exh. 2 to the said affidavit. That in 17 cases, tentative decisions as regards the proposals could not be taken as the matters were sub-judice in Courts. Such cases which were subjudice were those contained in Exh. 3 to the reply. That in 7 cases, after scrutiny, the respondents had come to the conclusion that the irregular constructions in these cases could not be regularised for various reasons such as non purchase of T.D.R. or the plots falling within the CR Zone. It was submitted that necessary orders rejecting the proposals for regularisation had been passed and that demolition action was being taken in these cases.

(f) On 13.9.2003 this Court passed an order permitting the petitioners in Writ Petition No. 379 of 2003 and the intervenor therein (who was also the petitioner in Writ Petition No. 2822/2003) to take inspection of the 111 proposals which had been tentatively approved by the Municipal Commissioner. It is not in dispute that the said inspection was given.

(g) On 1.12.2003 the petitioners filed an affidavit-in-rejoinder dealing with the tentative orders passed in about 85 out of the 111 cases in which the buildings were sought to be regularised by the Municipal Commissioner. It was contended in this affidavit that in the said 85 cases concessions have been given and deficiencies have been improperly condoned under the Development Control Regulations, 1991. It was contended that the deficiencies which have been condoned were violating the provisions with respect to minimum open space requirement, areas of staircase, corridors, stilts being added to the F.S.I, and condonation regarding a second lift. It was contended that no particulars of the T.D.R. certificates obtained had been given and such certificates had not been enclosed alongwith the application for regularisation. It was contended that the reasons/grounds given for the regularisation were not those as laid down under the Development Control Regulations, 1991. (For short, D. C. Regulations or D.C.R.).

(h) On 19.12.2003 on behalf of the respondents, an additional affidavit of one Mr. A. T. Shintre who was Executive Engineer (D. P.) (H. K./East) Ward came to

be filed in Writ Petition No. 379 of 2003. By the said affidavit the various circulars which contained the policy relating to regularisation of unauthorised constructions were placed on record.

(i) During the pendency of Writ Petition No. 379 of 2003, several persons affected by the grant of interim relief as stated aforesaid, filed Notice of Motions and Chamber summons for being added as a party and/or for vacating the interim relief. The numbers of these Notice of Motions and Chamber Summons are as under :

Notice of Motion Nos. 448/2003, 171/2004, 169/2004, 147/2004, 116/ 2004, 92/2004, 79/2004, 192/2004, 193/2004, 26/2004, 190/2004, 434/ 2003, 148/2004, 149/2004, 150/2004, 423/2004, 295/2003, 296/2003, 264/ 2003, 283/2003, 263/2003

Chamber Summons Nos. 60/2004, 64/2004. 80/2004, 59/2003, 127/ 2003, 93/2003 and 100/2004 in Writ Petition No. 2822/2003.

(j) On 18.11.2002, the second of these two petitions i.e. Writ Petition No. 2282 of 2003 came to be filed by the Brashtachar Nirmulan Sangathana, Mumbai and Anr.

(k) On 15.1.2004, a common order was passed in both the aforesaid Writ Petitions allowing all the intervention applications. As a result, the above mentioned Notices of Motion and Chamber Summons survived only to the extent that they sought the vacation of interim orders. On that day 3 sets of compilations dealing with and containing the relevant papers concerning the 111 proposals and titled as "Proposal File Nos. 1, 2 and 3 were taken on record. They were prepared by the petitioner in the second petition and contained photo copies of the municipal documents of which inspection was taken earlier.

(l) On 11.3.2004, an affidavit-in-reply of one Mr. A.S. Khade, Executive Engineer (D. P) came to be filed on behalf of the respondents in Writ Petition No. 2282 of 2003. (i.e. the second petition.) In this affidavit it was contended that the Writ Petition was not maintainable as a Public Interest Litigation. On the merits of the case a reference was made to the affidavit-in-reply filed by J.S. Sane (Chief Engineer) D. P. in Writ Petition No. 379 of 2003 and the same was reiterated and confirmed. In this Writ Petition also a chamber summons bearing Chamber Summons No. 100/2004 was taken out by one of the affected party.

3. In this background of facts, the 2 main writ petitions alongwith Notices of Motion and Chamber Summons filed in both the petitions were listed on the board us and we have heard all the parties.

4. Concessions made by the petitioner

In the course of the arguments, the petitioners Counsel submitted that if required, the reliefs sought may be moulded. They made certain concessions which are listed as under :

(a) The petitioner in Writ Petition No. 379 of 2003 stated that he would not press prayer Clause (b) in the petition which pertained to blacklisting of Architects, builders/developers and construction companies in which they are partners or directors. This concession was made because all such persons were not before the Court and would be affected if such a prayer was granted.

(b) That the petitioners in both the Writ Petitions would not press the petitions in respect of 17 cases which have not been considered as they were sub judice in various Courts.

(c) That the petitions would not survive in the 7 cases where the Bombay Municipal Corporation had rejected the proposal for regularisation and that these persons could pursue their remedies in law after receipt of the orders of the Bombay Municipal Corporation rejecting their applications for regularisation.

(d) That out of the 19 cases which had been regularised prior to the grant of ad interim relief in Writ Petition No. 379 of 2003, they would have no objection if the case covered in Notice of Motion No. 26 of 2004 taken out one Mr. Deepak Dhawan was regularised, because in the said case no concession of what so ever nature had been granted. As a result of this concession on behalf of the petitioners and upon perusing the papers in the said Motion, we are also of the opinion that the case involved grant of no concession. In the said case though the order of regularisation had been passed without grant of any concessions, the same has not been communicated because this Court has passed ad interim relief in all 154 cases in the meanwhile. In view of this concession made by the petitioners, as also in view of the fact that Counsel appearing for the Bombay Municipal Corporation stated that no concession of whatsoever nature has been granted in this case, the Advocate for the applicants sought leave to withdraw this Notice of Motion. We therefore, permit withdrawal of the Motion and further permit the respondents to issue the regularisation orders of the structure involved in this case. Mr. Virag Tulzapurkar instructed by R.M.G. Law Associates appeared for the applicant intervenor in this Notice of Motion.

(e) The petitioners made a similar concession in respect of the premises which form the subject matter of Notice of Motion No. 79 of 2004 taken out by Lavlesh Classic Developers Pvt. Ltd., concerning the construction of a club house which pertained to the case at Serial No. 55 in Exhibit-I to Shri Sane's affidavit, as the said case also involved no concession. In view of the said concession and a statement made by Counsel appearing for the respondent -Corporation that they had no objection in releasing the regularisation order, the said Notice of Motion on the application of the applicant is allowed to be withdrawn subject to direction that the regularisation order may be issued by the Bombay Municipal Corporation in the said case also. Mr. Bookwala instructed by Lllani Shah & Co. represented the applicants. The challenge therefore, remains to 128 (111+9-2) regularisations.

5. The preliminary objections :

Three preliminary objections to the maintainability of these petitions were raised on behalf of the respondents. These were as follows :

(a) In so far as Writ Petition No. 379 of 2003 was concerned, it was pointed out that the prayers were only against the final grant of proposal. It was contended that as of now only tentative orders had been passed. The argument was that the petitioners could avail of a statutory appeal contemplated by Section 47 of the Maharashtra Regional and Town Planning Act, 1966 (M.R.T.P. Act in short). We are unable to appreciate this contention. Firstly, the tentative orders passed were directed to be placed before this Court for consideration and were subject to the condition that no final action would be taken. The provision of appeal cannot therefore, come into operation at this stage. Apart from this in the 128 cases in which the bone of contention survives in this petition, the regularisation permission has already been granted. The concerned builders/ developers cannot be aggrieved by a decision of regularisation and to that extent cannot be an aggrieved party. At the highest they could challenge the quantum of penalty. In so far as the 7 cases in which regularisation permission has been refused, the petitioners have already conceded that they cannot press the petitions against such builders/developers. In so far as the 17 cases where the matter is sub-Judice and hence not considered, the question of filing an appeal does not arise. Apart from this, the present petitions are filed as Public Interest Litigation and the petitioners in these petitions cannot be said to be aggrieved by any order granting permission on conditions or refusing permission u/s 45, within the meaning of Section 47 of the Maharashtra and Town Planning Act, 1966. This remedy is not available to the third parties like them and their only option is to canvass petitions of the present nature.

(b) As regards Writ Petition No. 2822/2003, the preliminary objection was that the petitioners in this petition had earlier filed one Writ Petition bearing No. 375/2003 for similar reliefs. That this earlier petition came to be dismissed on 18.2.2003, in view of the pendency of the present Writ Petition No. 379/2003, with liberty to intervene in this writ petition. It was pointed out that the petitioners in Writ Petition No. 2822/2003 had infact been allowed to intervene in Writ Petition No. 379/2003 and therefore, these petitioners were estopped from filing a separate writ petition. This objection apart from being highly technical, is untenable. Writ Petition No. 2822/2003 is admitted long ago and the same is today for final hearing. The prayers in the present Writ Petition are not exactly the same as those in Writ Petition No. 379/2003 or even in the earlier Writ Petition No. 375/2003. Writ Petition No. 375/2003 was not disposed of on merits as can be seen from the order dated 18.2.2003 and therefore, there is no question of Writ Petition No. 2882/2003 being hit by principles akin to the principle of resjudicata.

(c) It was then contended by the respondents that the aforesaid two writ petitions could not be said to be "in public interest". It was argued that the petitioner in Writ Petition No. 379/2003 had categorically averred in the petition

that he was personally affected by the regularisation of one of the buildings. In order to show as to what could be said to be a Public Interest Litigation, reliance was placed upon the Judgment of the Apex Court in the case of Ashok Kumar Pandey Vs. The State of West Bengal and Others, and observations of the Apex Court contained in paragraphs 12 and 14 of the said judgment which were as under :

"12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bonafide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs,"

"14. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motive, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

In the facts of this case, we find that the grievance of the petitioners is one which concerns public interest and the well being of citizens of Mumbai. We find nothing to indicate that the petitioners have approached this Court with any mischievous intention. In fact, the conclusions that we reached herein under would vindicate the stand of the petitioners. We find no merits in the preliminary

objections.

6. Petitioners' contention on merits

On the merits of the case the contentions raised by the petitioners can be summarised as follows :

(a) The grant of various concessions in respect of the irregular structures were not in accordance with the intent, spirit and letter of the Development Control Regulations for Greater Bombay, 1991. That the only discretionary powers of the Municipal Commissioner to grant relaxation and permit the modification of dimensions described by the Development Control Regulation was provided u/s 64(b) of the said Regulations. That this could be done only in those cases where clearly demonstrable hardship was caused. Such hardship could not be that of the builders/developers who had erected an illegal structure in violation of law. Even in such cases the Commissioner was enjoined with the duty to record reasons in writing and permit only by a special permission, any of the dimensions prescribed by the regulation to be modified except those relating to F.S.I, unless otherwise permitted under these Regulations and also provided that such relaxation would not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and neighbourhood.

(b) That as the power of relaxation given to the Municipal Commissioner under D.C.R. 64(b) can only be exercised by grant of a special permission, delegation of such powers was expressly excluded by reg. 63 of the D. C. Regulations. However, in the present cases such modification and relaxations were admittedly granted not by the Municipal Commissioner but by his subordinate officers such as the Director (Engineering Services and Projects). It was contended that in this view of the matter, the concessions granted as aforesaid were illegal and liable to be set aside.

(c) It was contended that in practically all the cases, the record indicated that a noting had been put up by a subordinate Engineer of the concerned Ward and thereafter signatures were appended in approval by the Deputy Chief Engineer, Chief Engineer, Director (ES & P) and Municipal Commissioner. While affixing his signature, apart from a very few cases (in which the Municipal Commissioner had written the remark "discuss") not in a single case had the Municipal Commissioner separately and independently dealt with the subject matter of regularisation on merits. It was contended that in the original noting, there was no reference to any "clearly demonstrable hardship" for granting the modification/relaxation. It was further contended that neither at the stage of preparing the original noting, nor at the stage of affixing signature of the higher authority including Municipal Commissioner was there anything to indicate that the relaxation granted would not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood. In fact, there was nothing to suggest that these aspects were even examined. In this connection, it was further pointed out that where additional floors had been

put up, no inspection regarding the structural safety had been carried out by the Bombay Municipal Corporation. To certify that the proposed regularisation of additional floors would not affect structural safety, the Bombay Municipal Corporation had solely relied upon a bare certificate of the Structural Engineer hired by the builders/developers or their architect.

(d) It was contended that amongst the relaxations given, in some cases, some were in respect of a "requirement" such as lift, and that such a requirement could not be said to be a relaxable "dimension" within the meaning of reg. 64(b) of the D.C. Rules.

(e) It was contended that the use of T.D.R. (Transferable Development Right) which was permitted under reg. 34 of the D. C. Regulations, 1991 could not be permitted in a manner so as to decrease the minimum recreational/amenity/open spaces required to be maintained compulsorily under reg. 23 of the D.C. Regulations or the side and rear open spaces as required to be kept under reg. 29 of the said Regulations.

(f) That the premium being charged for regularisation/retention was arbitrary and the deterrent.

7. Reply of not Respondents :

On behalf of the respondents, by way of reply, it was contended as under :

(a) As regards the contention raised in paragraph 6(a), above, it was submitted for the respondents that an application for regularisation and retention of any Illegal structure was essentially an application u/s 53(3), read with Section 44 of the M.R.T.P. Act, when faced with a notice u/s 8(3) of the M.R.T.P. Act. That while deciding such an application, the planning authority was required u/s 46 of the M.R.T.P. Act to consider the application having "due regard" to the provisions of any draft or final plan under the M.R.T.P. Act. It was contended that the Development Control Regulations were a part of plan contemplated under M.R.T.P. Act and the words "having due regards to" did not mean "having regard only to". That the words "having due regards to" were not a letter or words of limitations, but words of general guidance. The planning authority was ofcourse, required to bear in mind the provisions of the Development Control Rules, 1991 but after having done so, it was for the planning authority to decide the application for retention and grant what it considered to be reasonable relief for the purpose. In support of this proposition, strong reliance was placed upon the Judgment of the Apex Court in the case of M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, ; and the observations of the Apex Court contained in paragraph 29 of the said Judgment which are as under :

Be that as it may, the expression "having regard to" must be understood in the context in which it is used in the Statute. See Dwarampudi Nagaratnamba Vs. Kunuku Ramayya and Another, . These words do not mean that the Government cannot, after taking into account the matters mentioned in Clauses (a) to (d),

consider any other matter which may be relevant. The expression is not "having regard only to" but "having regard to". These words are not a fetter; they are not words of limitation, but of general guidance to make an estimate. The Government must, of course, address itself to the questions to which it must have regard, and, having done so, it is for the Government to determine what it is empowered to determine with reference to what it reasonably considers to be relevant for the purpose.

The argument was that the Development Control Regulation being in the nature of "guiding principles", the planning authority has residuary powers under the provisions of the M.R.T.P. Act while deciding an application u/s 53(3) read with Section 44 for retention and exercise of these powers was not necessarily fettered or limited by the limitations contained in reg. 64(b) of the Development Control Regulations, 1991. It was submitted that while exercising such residuary powers, the Bombay Municipal Corporation could take into account the hardship of the builders/developers as long as its action was not arbitrary and that the construction sought to be regularised was not in violation of any Rules or Regulations existing on the date of passing of the order of regularisation.

(b) As regards the contentions recorded in paragraph 6(b), it was submitted that the modification/relaxation which could be granted by the Municipal Commissioner u/s 64(b) of the Development Control Regulations could also be granted by the Director (Engineering Services and Projects) appointed u/s 54(a) of the Bombay Municipal Corporation Act, 1988. It was contended that the functions of the Director (Engineering Services and Project) were embodied in Section 56(b) of the B.M.C. Act and he could exercise such powers as the Municipal Commissioner may depute to him from time to time. It was argued that u/s 56(3) of the B.M.C. Act all acts and things performed and done by the director (Engineering Services and Projects) During his tenure in the said office or In virtue thereof, were for all purposes to be deemed to have been performed and done by the Commissioner himself. The further argument was that the limitations on the delegation of powers contained in reg. 63 could not override the provisions of Section 56 of the B.M.C. Act. Thus it was argued that the grant of concessions by the Director (Engineering Services and Projects) was permissible and legal and by virtue of Section 56(3) all such acts and things performed and done by the Director were, by fiction of law, deemed to have been performed and done by the Municipal Commissioner. Apart from this, it was contended that though the concessions by way of relaxation and modification u/s 64(b) of the D.C. Regulations were granted much earlier in point of time by the Director (Engineering Services and Projects), yet this aspect was referred to in the tentative orders which were signed by the Municipal Commissioner and hence, the Municipal Commissioner could be said to have ratified his orders.

(c) (i) As regards the contention contained in paragraph 6(c), it was submitted that once the Municipal Commissioner has put his signature below the noting, in law he was deemed to have applied his mind to what was stated in the noting

and to have accepted the reasoning contained in the noting as his own. In the circumstances, reasons given in the noting could be said to be the reasons given by the Municipal Commissioner. It was contended that judicial notice could be taken of the great hardship which would be caused to the builders/developers, to the residents of the building and to the purchasers who had parted with large amounts and it was not necessary to record and incorporate all these hardships into the order of the Municipal Commissioner. It was also contended that in every case it was not required to mention as to whether the concessions granted under reg. 64(b) would not affect the health, safety, fire safety, structural safety, and public safety of the inhabitants of the building and the neighbourhood. The submission was that if this was not so stated, the Courts could presume that the relaxation would not affect these requirements unless it could be shown that they had in fact, affected the health safety, fire safety, structural safety and public safety of all the inhabitants of the building and the neighbourhood. In so far as the certificate of structural safety was concerned, it was submitted that, it was not the practice of the Bombay Municipal Corporation to conduct an enquiry into the structural safety where additional floors had been built. It was submitted that the Structural Engineer whose certificate was relied upon by the builders/developers/ architect was a licensed Engineer of the Bombay Municipal Corporation and that the production of his certificate by the builders/developers/ architect was sufficient to satisfy that the building even with additional floors was structurally safe.

(ii) To support the contention that the signature of the Municipal Commissioner below the noting would amount to a reasoned order, reliance was placed by the respondents on the judgment of the Apex Court in the case of *The Municipal Corporation of Greater Bombay Vs. P.S. Malvenkar and Others*, and the following observations of the Apex Court found in paragraph 6 of the said judgment which are as under :

The question as to whether the post of Executive Assistant to the General Manager validly existed on the relevant date or not does not require to be gone into as we are satisfied that the impugned order terminating the respondent's services was in fact and in reality passed by the General Manager himself who was the competent authority as defined by Clause (e) of Standing Order 3 and was merely communicated by his Executive Assistant to the respondent. This is amply borne out from the material placed before the Labour Court. The draft of the termination order (Exhibit 41) which has been duly proved by Dandekar who was working as Personnel Officer on the relevant date clearly shows that it was put up before the General Manager by the Superintendent of the Consumers Department and was duly approved and initialled by the former. In this state of affairs, we are unable to appreciate the observations of the Industrial Court that since the decision to terminate the service of an employee is an act consciously to be undertaken and performed by the concerned officer, the mere initialling of the draft order by the General Manager was not enough to make it an authenticated order of termination.

(d) As regards the contention contained in paragraph 6(d), it was submitted that though a requirement like a lift could not be said to be a "dimension", yet such a deficiency could be condoned by the Municipal Commissioner under the residuary powers inherent and vested in the Planning Authority, which powers authorise the authority acting through an empowered officer to decide an application u/s 53(3) read with Section 44 of the M.R.T.P. Act.

(e) As regards the contention contained in paragraph 6(e) by way of a reply, it was argued that the use of T.D.R. was admittedly, permitted under the D.C. Regulations in the manner which was specified therein. The contention was that in so far as minimum open spaces required under reg. 23 or reg. 29 are concerned the said spaces were merely a multiplication of "dimensions" and since dimensions provided under D.C. Regulations could be modified under reg. 64(a), the requirement of compulsory open spaces whether for recreation or otherwise could also be relaxed in exercise of powers under reg. 64(b) of the said Regulations,

(f) That as regards the contention contained in paragraph 6(f) it was contended that the Bombay Municipal Corporation levied the premium in accordance with policy contained in internal administrative documents like noting, minutes of meeting or Circulars, Reliance was placed on documents annexed with the affidavit of A. T. Shintre dated 19.12.2003 which encompassed the policy relating to levy of premium.

8. With the assistance of Counsel of both the parties as well as some of the interveners, we have perused the record before us. It cannot be disputed that in the case of 128 structures, flagrant violations of the municipal permissions taken/required to be taken and the Development Control Regulations are sought to be regularised.

The nature of some of the concessions/regularisations granted/sought to be granted can be stated as under :

(a) That additional floors (over and above the original approved floors) constructed are sought, to be regularised and relying inter alia on the Certificate given by the builder on the aspect of structural stability.

(b) That construction work commenced in the absence of a commencement certificate is sought to be regularised.

(c) That deficiencies in open spaces are permitted to be reduced by granting concessions by way of modification/relaxation under regulation 64(b) of the D. C. Regulations.

(d) That concessions for using staircase, lift, lobby area, free from F.S.I, are sought by way of concessions under reg. 35(2)(c) by charging premium.

(e) That requirements under the D.C. Rules such as number of lifts for a building are sought to be relaxed by grant of a concession.

(f) That the minimum size of shop is allowed to be reduced by way of concession granted under reg. 64(b).

(g) That commercial premises such as a restaurant are sought to be permitted on the higher floor by way of concession under reg. 64(b).

(h) That excess balconies are sought to be permitted by way of concession under reg. 64(b).

9. On perusing these orders, we noticed a consistent and uniform procedure and method being used by the builders/developers/architects for obtaining regularisation. The *modus operandi* can be better understood if a sample tentative order of regulation said to be passed by the Municipal Commissioner is reproduced. In respect of one of the building at serial No. 31 to Exh. 1 in the affidavit of Mr. Sane, the reasons for permitting proposed regularisation are detailed in the note prepared by the Engineer of the Ward as under :

In this case, owner Mrs. Nilam A. Vazir through her Architects M/s. Pushkar Consultants applied for building permission for Stilt + 3 upper floors on 4.1.90 u/s 337 of the M.M.C. Act at plot bearing CTS No, 284/21 of Village Marol, Andheri (East). The said plot is part of layout approved vide CE/ 27/BSII/LOKEN and known as Lalji Layout. The permission was granted initially and I.O.D. was issued to Mrs. Nilam A. Vazir on 17.12.91 for Stilt + 3 upper floors by restricting F.S.I, to 0.75 for want of P.R.C. In words, C.C. upto top of stilt was granted on 29.6.93. Full C, C. granted as per approved plan on 17.12.96. Architect submitted amended plan claiming staircase/lift: area free of F.S.I, and T.D.R. adm. 530.00 sq.mt. Accordingly, plans for Stilt (Pt) Gr. (Pt) 7 upper floor were approved on 6.4.2002 and full C.C. was granted as per approved plan on 23.5.2002.

Again Architect submitted plans in lieu of T.D.R. adm. 100.00 sq. mt. proposing part 8th floor over earlier approved floors.

Thereafter, some concessions were involved for approving the plans as mentioned below.

1. Deficiency in open space by charging premium upto 23.16%
2. Staircase, lift, lift lobby area free of F.S.I, by charging premium.
3. To condone deficiency of second lift by charging premium.

These concessions were approved on 5.8.02 by Dir. (E.S.& P.) as per the power vesting in M. C. u/s 64(b) of D. C. Reg. 1991, which are subsequently delegated to Dir. [E.S. & P] u/s 63 of D. C. Reg., 1991. After approval of concessions, owner purchased T.D.R. The report to allow utilisation of T.D.R. as per Reg. No. 34 of D.C. Reg. 1991 was sent to Ch. Eng. (D. P.)/Dir. (E.S.& P.)'s approval on 24.9.2002. Approval to utilisation of T.D.R. was granted on 26.11.2002.

On routine inspection, it was observed that, the work was completed upto part 8th floor beyond approval given upto stilt (PI) + Gr. (PI) + 7 floors. Thus part 8th

floor construction was beyond approval. Hence, this office had issued stop work notice u/s 354A of M.M.C. Act on 27.9.2002.

In response to the above action, owner through his architect applied to this office for regularisation of the work carried out beyond C.C. requested to (i) regularise the work carried out beyond C.C./beyond approval at 1 5% of the land rate as per regularisation policy circulated vide AMC/R/3258 dated 30.7.85 amended upto date and in view of circular under No. CHE/1077/DPC/Gen as work of beyond approval was carried out after sanctioning of necessary concessions and while utilisation of T.D.R. was in process.

(ii) to withdraw the stop work notice issued u/s 354-A of the M.M.C. Act.

The plans will be issued, penalty will be recovered and stop work notice will be withdrawn after receipt of the order from the Hon"ble High Court in the matter. Penalty will be recovered at double the rates.

Submitted please.

It is this note which is ultimately signed by his superiors and ultimately by the Municipal Commissioner. We find that similar notes have been put up in almost all of the 128 cases in which regularisations are sought to be made. From the above sample order as also upon reading other orders, we find that the modus operandi which is used for effecting the regularisation consists of the following steps :

(a) Initially the developers/builders/architect submits a particular building plan for sanction. They obtain the sanction as also the commencement certificate.

(b) That the building is erected in violation of approved plan and/or the commencement certificate and even additional floors are added.

(c) That even before purchase of T.D.R., concessions/modification/relaxation are got approved from the office of the Director (Engineering Services and Projects).

(d) Thereafter, the builders/developers/architects go about shopping for T.D.R. in the market.

(e) An application for regularisation of the unauthorised structure is then made either on the basis of acquired T.D.Rs. on the basis of an agreement to purchase T.D.R. or on the ground of having acquired lands/development rights in lands in the adjoining areas.

(f) On these regularisation applications, noting are made by the Engineers at the Ward level and signatures then put therein below upto the level of Municipal Commissioner and that such notes with the further signature of such officers are produced as being the tentative decisions for regularisation.

10. Relevant statutory provisions :

Before dealing with the submissions raised in the matter, it would be convenient

to reproduce certain relevant provisions of the Maharashtra Regional and Town Planning Act, 1966, Development Control Rules, and The Mumbai Municipal Corporation Act, 1888.

(A) Relevant sections of the M.R.T.P. Act are as follows :

Section 44 (relevant part)

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

(Proviso not quoted)

Section 45 (relevant part)

Grant or refusal of permission : (1) On receipt of an application u/s 44 the planning Authority may, subject to the provision of this Act, by order in writing.

(i) grant the permission, unconditionally:

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

(iii) refuse the permission.

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

(Sub-section 3 to 6 are not quoted).

Section 46 : Provisions of Development plan to be considered before granting permission : The planning authority in considering application for permission shall have due regard to the provisions of any draft or final plan or proposal published by means of notice submitted or sanctioned under this Act.

"Section 53.- Power to require removal of unauthorised development- (1) Where any development of land has been carried out as indicated in Sub-section (1) of Section 52 the planning authority may, subject to the provisions of this section, serve on the owner a notice requiring him, within such period being not less than one month, as may be specified therein after the service of the notice, to take such steps as may be specified in the notice.

(a) in cases specified in Clause (a) or (c) of Sub-section (1) of Section 52, to restore the land to its condition existing before the said development took place.

(b) in cases specified in Clause (b) or (d), of Sub-section (1) of Section 52, to secure compliance with the conditions or with the permission as modified :

Provided that, where the notice requires the discontinuance of any use of land, the planning authority shall serve a notice on the occupier also.

(2) In particular, such notice may, for purposes of Sub-section (1) requires,-

- (a) the demolition or alteration of any building or works;
- (b) the carrying out on land of any building or other operations; or
- (c) the discontinuances of any use of land

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission u/s 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, and pending the final determination or withdrawal of the application the mere notice itself shall not affect the retention of buildings or works or the continuance of such use.

(4) The foregoing provisions of this Chapter shall, so far as may be applicable apply to an application made under Sub-section (3).

(5) If the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand, or if such permission is granted for the retention only of some buildings or works, or for the continuance of use of only a part of the land, the notice shall stand withdrawn as respects such buildings or works or such part of the land as the case may be, and thereupon the owner shall be required to take steps specified in the notice under Sub-section (1) as respects such other buildings, works or part of the land.

(6) If within the period specified in the notice or within the same period after the disposal of the application under Sub-section (4) the notice or so much of it as stand is not complied with the planning authority may ;-

(a) prosecute the owner for not complying with the notice; and where the notice requires the discontinuance of any use of land any other person also who uses the land or cause or permits the land to be used in contravention of the notice; and

(b) where the notice requires the demolition or alteration of any building or works or carrying out of any building or other operations, itself cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the planning authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operational and recover the amount of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under Clause (a) of Sub-section (6) shall, on conviction, be punished with Imprisonment for a term (which shall not be less

than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees) for every day during which such offence continues after conviction for the first commission of the offence.

Section 152 (relevant part)

Power of planning authority or development authority to be exercised by certain officers. Notwithstanding anything contained in Section 151, the powers and functions of a planning authority or New Town Development Authority shall for the purpose of Sections 25, 43, 44, 45, 46, 49, 51, 53, 55, 56, 58, 89, 90, 107, 112, 126(l)(b), 135, 136 and 142 be exercised and performed by the following officers, namely :

(i) in the case of a Municipal Corporation by the Municipal Commissioner or such other officer as he may appoint in this behalf.

(B) Relevant provisions of the Development Control Regulations for Greater Mumbai, 1991 are as under :

Regulation 63 Delegation of powers :

Except where the Commissioner's special permission is expressly stipulated the powers or functions vested in him by these Regulations may be delegated to any municipal official under his control, subject to his revision if necessary and to such conditions and limitations, if any, as he may prescribe. In each of the said Regulations, the word "Commissioner" shall, to the extent to which any municipal official is so empowered, be deemed to include such official.

Regulation 64 Discretionary powers :

(a) In conformity with the intent and spirit of these Regulations, the Commissioner may :

(i) decide on matters where it is alleged that there is an error in any order, requirement, decision, determination made by any municipal officer under delegation of powers in regulation or interpretation in the application of these Regulations;

(ii) interpret the provisions of these Regulations where a street layout actually on the ground varies from the street layout shown on the development plan;

(iii) modify the limit of a zone where the boundary line of the zone divides a plot with the previous approval of Government; and

(iv) authorise the erection of a building or the use of premises for a public service undertaking for public utility purpose only, where he finds such an authorisation to be reasonably necessary for the public convenience and welfare, even if it is not permitted in any land use classification.

(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed by these Regulations to be modified, except those relating to floor space index unless otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood.

(C) Relevant provisions of the Mumbai Municipal Corporation Act, 1888 :

Section 54(A) (relevant part) :

"Appointment of the Director.- (1) Subject to confirmation by the State Government, the Corporation may at any time, and from time to time, appoint a person to be the Director (Engineering Services and Projects), fit shall appear to it expedient to do so.

"Section 56.- Functions of Commissioner] [the Director and a. Deputy Commissioner:

(1) [The Commissioner, the Director] or a Deputy Commissioner] [or an Additional Deputy Commissioner] so appointed shall be subordinate to the Commissioner and, subject to his orders, shall exercise such of the powers and perform such of the duties of the Commissioner as the Commissioner shall from time to time depute to him;

(2) ...

(2A) ...

(3) All acts and things performed and done by [the Director or a Deputy Commissioner] [and an Additional Deputy Commissioner], during his tenure of the said office and in virtue thereof, shall for all purposes be deemed to have been performed and done by the Commissioner.

11. On this background, when we consider the rival submissions, we must record that at the outset, Counsel for the respondents submitted that none of the cases which form the subject matter of this petition involve any direct violation of F.S.I, as of today. In those cases where additional construction has been erected, prior to making an application for regularisation, the concerned builder/developer has either purchased T.D.R. or acquired rights or development rights in the adjoining lands so as to ensure that there would be no violation of F.S.I., as prescribed, on the date when the application is made.

12. In the matrix of the aforesaid facts and provisions of law, in our view, there is no difficulty in asserting that, the power of the Municipal Commissioner to permit the retention of an unauthorised development flows from Section 53(3) read with Sections 44 and 45 of the M.R.T.P. Act, 1966.

13. However, what we find is that the manner in which such powers should be

exercised and the limitations on the exercise of such powers are contained in Section 46 of the M.R.T.P. Act, 1966, read with reg. 64(b) of the Development Control Regulations for Greater Mumbai, 1991. These two provisions are to be read together and harmoniously. When the Municipal Commissioner is considering an application for permission to retain an unauthorised development, he is required by Section 46 to have "due regard to" to the provisions of any draft or final plan or proposal published under the M.R.T.P. Act, 1966. It is an admitted position before us that the Development Control Regulations for Greater Mumbai, 1991 are a part of such plan. We accept that the words "shall have due regard to" would not mean "shall only have regard to" but in our view, they cannot be construed to mean "shall have disregard to". Even accepting that the Development Control Regulations for Greater Mumbai, 1991 are in the nature of guidelines, such guidelines cannot be disregarded or violated. The D. C. Regulations are made in details to rule out any ambiguity. They have been sanctioned by the State Government u/s 31(1) of the M.R.T.P. Act. Obviously the express provisions therein are meant to be followed. The exercise of powers by the Municipal Commissioner will therefore, be constrained by the limitations contained in reg. 64(b) whenever the power exercised is under the said provisions. The power to give concessions by way of relaxation under reg. 64(b) can only be done in specific cases where a clearly demonstrable hardship is caused as provided thereunder. This hardship is not only the self created hardship of the builders/developers/architects but the Commissioner is also required to take into account the hardship which may be caused by the proposed modification to other directly affected persons such as residents, purchasers and neighbours. While exercising his powers, if any of these persons make a representation, the Commissioner would be duty bound to take into account such representation. Besides, what can be modified/relaxed u/s 64(b) are only "dimensions prescribed by these Regulations". By the term dimension what is meant is length, breadth, height, area and volume. The order passed must indicate that the Commissioner applied his mind to the existence of demonstrable hardship. It must also indicate that the Commissioner had applied his mind to ensure that the grant of such modification/relaxation will not affect the health, safety, fire safety, structural safety of the inhabitants of the building or neighbourhood. Since Section 64(b) requires that the order of the Commissioner granting modification/relaxation should be passed for reasons to be recorded in writing by special permission, the Municipal Commissioner cannot delegate these powers in view of the constraints on his powers of delegation contained in reg. 63 of the Development Control Regulations for Greater Mumbai, 1991. In our view, the provisions of Section 56 of the Mumbai Municipal Corporation Act, 1888 cannot be relied upon to contend that the Municipal Commissioner can delegate his powers u/s 64(b) notwithstanding the constraints on delegation as contained in Regulation 63 of the Development Control Regulations For Greater Mumbai, 1991. The powers and duties of the Commissioner which the Commissioner can depute to the Director (Engineering Services and Project) are the powers which he exercises under the Mumbai

Municipal Corporation Act, 1888 and not the powers conferred upon him by the M.R.T.P. Act, 1966. The delegation of powers and duties to be performed by the Municipal Commissioner under the M.R.T.P. Act, 1966, in every case where he has to give "special permission", is expressly prohibited by reg. 63 of the Development Control Regulations for Greater Mumbai, 1991. The Municipal Commissioner is required to give due regard to these aspects while deciding an application for retention u/s 53(3) read with Sections 44, 45 & Section 46 of the said Act.

14. However, there might exist a situation where the Municipal Commissioner may be called upon to consider the regularisation of certain aspects of an unauthorised development which may not fall within the meaning of the word "dimensions" contained in reg. 64(b) of the Development Control Regulations for Greater Mumbai, 1991. He may grant a retention of aspects other than "dimensions" in exercise of his powers contained under the scheme comprising of Sections 44, 45, 46 and 53 of the M.R.T.P. Act, 1966. However, while doing so, he will be bound by all constitutional restrictions including those under Article 14 and will not be in a position to act arbitrarily, unreasonably or unfairly. Since Section 46 enjoins upon him the duty to have due regard to the provisions of a plan, it would also not be permissible to him to regularise any structure which would be in violation of any provision of the Development Control Regulations for Greater Mumbai, 1991 as existing on the date when he passes an order of regularisation.

15 (i) On the question of premium, the petitioners have contended that the premium being charged for regularisation/retention is arbitrary and a pittance. The orders are vague about the exact amount of premium levied, and such amount is not quantified. On behalf of the respondents, our attention was drawn to noting/circulars-dated 10.7.1974, 29.8.1991, 21.10.1991, 2.5.1998, 2.5.1995 and 24.11.1995 as well as Minutes of meeting held between Chief Engineer (D.P.) with Dy. Chief Engineer (D.P.)-I held in G/North Ward. According to the Bombay Municipal Corporation, these documents, at various places contain the administrative policy of the Bombay Municipal Corporation to charge premium for grant of concessions. In our view, firstly, the premium chargeable in such cases for regularising structures should essentially be in the nature of damages cum penalty. In order for a premium to be rational and fair, the same must contain three ingredients. Firstly, it must be sufficient to compensate persons having interest in the authorised portions of the structure for any loss of amenity, requirement or facility suffered by them which they are forced to suffer by such regularisation/retention. Secondly, it must incorporate an amount that would be reasonably have to be spent by the Municipal Corporation for additional infrastructure if required to be provided on account of the regularisation/retention. And lastly, it must have a component of fine. The premium should be deterrent in order to discourage a casual or deliberate violations of rules, regulations and the law pertaining to land development.

(ii) In this connection, the Counsel for the petitioners cited two judgments of this Court i.e. a judgment of the Division Bench of this Court in the case of West Coast Builders Pvt. Ltd. and Another Vs. The Collector of Bombay and Others, where in paragraph 18 of the said judgment this Court has observed as under :

There was a growing tendency amongst the builders to flout each and every regulation framed by the Bombay Municipal Corporation and State Government to regulate the construction in this City. The powerful lobby of the builders are under the impression that office of the Collector and the office of the Bombay Municipal Corporation can be taken for granted and the rules and regulations can be openly flouted by producing forged documents. The manner in which the appellants have constructed the building by flouting every rule and thereafter by manipulating the things to persist with violations makes it clear that the appellants have no respect for rules and regulations and purely out of monetary consideration are willing to by pass every restriction. It is fortunate that the Collector and the Municipal Commissioner in the present case have not fallen pray to the tactics of the appellant and have not hesitated to pass orders which are absolutely necessary. We hope and trust that the order passed by the Commissioner would be a lesson to all others who are still under the impression that everyone in this country can be purchased and any construction can be made with a view to earn huge profits. If such actions are permitted, then the day will not be long when the city and its surroundings will stand totally ruined. In our judgment, it does not lie in the mouth of the appellants that illegal construction should not be demolished. We refuse to accede to the desperate pleas made by the appellants that the demolition should be avoided on appellants seeking regularisation by payment of fine. In our judgment, the appellants cannot be permitted to regularise illegalities by offering payment of amounts.

(iii) The other judgment relied upon was again a Division Bench judgment of this Court in the case of Bombay Environmental Action Group Vs. The Bombay Municipal Corporation and Others, the Division Bench of this Court had observed as under :

Both the learned Counsel submitted that as the shell of the building has already been erected by the year 1984 the cancellation of the sanction granted by the Corporation would lead to financial loss. We are not at all impressed by the claim made about financial loss. It has repeatedly come to our notice that in the city of Bombay, builders by joining hands with the officers of the Corporation openly flout every conceivable rule, including Development Control Rules. The builders are under the impression that once the shell of the building is illegally constructed then the Court can be persuaded to take a sympathetic view and permit the construction even though in total breach of every legal provision. The Development Control Rules were enacted by the State Government as it was realised that unregulated construction is put up by the builders at every nook and corner of the city leading to serious problems and causing serious hardship

in providing civic amenities to the citizens. It is not a secret that the land available in the island city of Bombay is very limited and the prices are shooting up to an unimaginable level. Taking advantage of the situation the Builders lobby is exploiting the need of the people by setting up illegal constructions and it is unfortunate that in indulging in these illegal activities assistance is secured from some of the officers of the Corporation. It is only because of the continuous efforts of the groups like the petitioners that illegalities are brought to the attention of the Court, Once it is found that the grant of sanction to the construction of the building Arihant was in total breach of law, then we would be failing in our duty if the Builders are permitted to regularise the illegalities by offering to make payment. Time has come when everyone should realise that rule of law is not a purchasable commodity and illegalities will not be tolerated merely because someone is willing to offer payment in lieu of violating the law.

(iv) Though in the aforesaid two cases the structures were erected in violation of F.S.I, rules which cannot be relaxed except to the extent permitted by reg. 64(b) of the D. C. Regulations, where relaxation/modification can be granted by way of a concession or where retention can be permitted, we feel that the premium to be levied should be deterrent so as to dispel any impression that the building regulations exist only for the purpose of blatant violation whenever one chooses and curb any inclination to indulge in such violations. Besides the penalties cannot be decided by the subordinate officers. Firstly there must be a power to impose the penalty granted by the law making authority and it must be imposed by the specified authority within and as per the norms laid down. In the matters before us, we find that by merely imposing penalty all these aspects are ignored.

16. In conclusion, we find that all the concessions which are granted under orders passed by the Director (Engineering Services and Projects) or any officer subordinate to the Municipal Commissioner prior to the stage of regularisation are without jurisdiction or authority and the question of grant of such concessions as well as the question of allowing the retention of unauthorised construction will have to be reconsidered by the Municipal Commissioner under Sections 44, 45, 46, & 53 read with reg. 64(b) of the M.R.T.P. Act. Similarly, any concession given by the Director (Engineering Services and Projects) or any officer subordinate to the Municipal Commissioner under any other provision of the M.R.T.P. Act which requires the special permission of the Municipal Commissioner, such as reg. 35(2)(c) will also have to be held to be bad in law and the question of granting of such concessions will also have to be considered afresh by the Municipal Commissioner.

17. We have gone through the files containing these 128 cases as produced by the petitioners. They are containing photocopies of the municipal decisions. We have heard the interveners appearing for various builders. These defect are on procedure as pointed out above as well as on the merits of these cases. We have mentioned one case only as a representative one but the defects subsist all throughout. The cases where T.D.R. is utilised is defended on the ground that

amenities are improved in the island city. That, however, cannot be at the expense of specific rights of the residents/ buyers of flats under the D. C. Regulations. The builders are not obliging anybody by buying the T.D.R. The Municipal Corporation cannot permit their use to reduce the amenities under the D.C. Regulations without compensating the affected persons. Besides reg. 64(b) speaks of health safeguards and neighbourhood. In all such applications whenever regulation is involved, the affected residents/buyers of the flats and residents at least in the immediate vicinity will have a right of hearing if they so desire.

18. We thus propose to dispose of the two petitions and interim applications therein by giving certain directions which flow from the discussion and the conclusions reached by us hereinabove.

19. It is thus directed that the tentative offers for regularisation in the 128 cases (111 cases where regularisation is proposed and 19 cases where regularisation was effected prior to the grant of interim relief, excluding the 2 cases mentioned in paragraphs 4(e) and 4(d) of this judgment) are not approved and these cases will be re-considered for regularisation/retention by the Municipal Commissioner in accordance with the following directions:

(a) That the power and duty to decide the question of retention/regularisation of any unauthorised development or grant of any modification/relaxation and which is required to be decided by this grant of a special permission will not be delegated by the Municipal Commissioner to any other officer. The Commissioner may take the opinion of the concerned Engineers but the final decision must be his for reasons to be recorded in writing (however the reasons may be brief, but they will be adequate).

(b) That while deciding such a question, the Municipal Commissioner will consider all representations made by affected parties on the questions in issue including any hardship or loss caused to them, which will include the affected residents/proposed buyers, and affected residents at least in the immediate neighbourhood.

(c) That if any unauthorised development is in violation of any dimensions pertaining to F.S.I, (unless where permitted by the Development Control Regulations), as on the date of decision, the same will not be regularised;

(d) If on the date of decision, the unauthorised development is found to be in violation of any rule, regulation or law, which violation cannot be waived/relaxed, then the said development should not be regularised. T.D.R. will not be permitted to reduce the amenities under the D.C. Regulations without adequately and fully compensating the residents/purchasers of the regular part of the structure for good reasons to be recorded in writing by the Commissioner.

(e) That the final order allowing retention must reflect application of mind as regards the "demonstrable hardship" for which the retention of an unauthorised development has been permitted;

(f) That similarly the final order allowing retention must indicate that the relaxation/concessions granted will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood;

(g) Where a question of structural modification involving a further burdening of a structure is involved, the structural safety will be certified by a structural engineer of B.M.C., who will grant such a certificate after inspecting the premises.

(h) If there is any loss of a facility, requirement or amenity suffered by any person/persons having interest in the authorised part of any further unauthorised development of which is sought to be retained/regularised, then such loss should be assessed at the market value of the concession granted and must form an ingredient computing premium. Whenever possible this ingredient may be directed to be distributed to the persons who suffer such a loss. In addition the B.M.C. may also add to the premium any amount which may be reasonably required to be invested by it to put up additional infrastructure, if any, in or around the regularised structure. An amount of fine for violation of law should be the third ingredient of the premium. The overall premium to be levied should be sufficiently deterrent so as to discourage a tendency to violate rules and building regulations. In the future, it will be desirable that the consent of such persons who would suffer any loss of facility, requirement or amenity should be filed along with an application for retention.

20. Before we part we would like to impress upon the Commissioner that reg. 64 contains the discretionary powers and by their very nature these are powers to be sparingly exercised in specific cases where a demonstrable hardship is caused. Thus this provision is to be utilised as an exception and not by way of a rule. In normal cases the D.C. Regulations must be applied as they are. What we find here is an unfortunate phenomenon of a planned subversion of these regulations by persons who are beneficiaries thereof, 128 cases is not a small number and it clearly shows a *modus operandi*. Besides demonstrable hardship will normally mean a situation arising inspite of attempting to follow the regulations. If a plan of a builder is sanctioned on a certain layout for certain number of floors normally no additional floors can be permitted. This undermines the strength of the building affecting the health and safety. The Commissioner will appreciate that he represents the interests of the citizens and must function as a watchdog. He must appreciate that these departures from rules for the benefit of a few is severally undermining the quality of life in urban areas. We record our appreciation for the petitioners for raising this issue, it is only such action and response thereto which restores the faith of the citizen in the democratic systems.

21. Rule is thus made absolute in the aforesaid terms with no order as to costs. All the pending Notice of Motions and the Chamber Summons also stand disposed off in view of the this judgment. The Municipal Commissioner to decide the applications for regulations expeditiously.

22. Although the petition is disposed of, Ms. Joshi in Writ Petition No. 2822/2003 points out that in her petition there are some additional prayers which are for taking action against the municipal officers and the architects. We are not dealt with those prayers in the present petition. It will be open for the petitioner to take appropriate proceedings.

Certified copy expedited.

Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this Court as a true copy.