

(2008) 08 BOM CK 0084

In the Bombay High Court

Case No : Writ Petition No. 2296 of 2007

The BEST Workers Union

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Development Control Regulations for Greater Bombay, 1991 — Regulation 9
Maharashtra Regional and Town Planning Act, 1960 — Section 154, 2(21), 21(4), 22, 22A
Mumbai Municipal Corporation Act, 1888 — Section 460K, 460Q

Citation : (2008) 5 ALLMR 848 : (2008) 110 BOMLR 2692

Hon'ble Judges : S.B. Mhase, J; A.A. Kumbhakoni, J

Bench : Division Bench

Advocate : V.M. Thorat, instructed by Pramod Patil, for the Appellant; Pradip Jadhav, AGP for Respondent Nos. 1 and 6, C.U. Singh and S.M. Modle, for MCGM for Respondent Nos. 2 and 3, D.G. Dhanure, instructed by M.V. Kini and Co. for Respondent No. 4, V.A. Thorat, D.G. Dhanure, Vaibhav Sugdare, instructed by M.V. Kini and Co. for Respondent No. 5, Janak Dwarkadas, Parimal Shroff, Subodh Joshi, Radhika Kalpatrai, instructed by Parimal Shroff and Co., for the Respondent

Final Decision : Dismissed

Judgement

A.A. Kumbhakoni, J.

In view the peculiar facts and circumstances of this case the learned Counsels appearing on behalf of all the parties requested us that instead of hearing them for admission of this petition, particularly on the issue of interim relief, we may hear all of them for final disposal of this petition at the admission stage itself, as in their submission they would be advancing similar arguments for both the purposes. Even otherwise this petition raises such issues which require detail scrutiny at our hands. Hence we grant Rule and make it returnable forthwith. All the learned Counsels appearing on behalf of the Respondents waive service of

the rule on the respective respondents. We have heard all of them for couple of hours each for almost seven consecutive working days and reserved the judgement, which is being delivered today.

1. The petitioner is a Recognised Representative Union of workers of "Brihan Mumbai Electric Supply and Transport Undertaking" (hereinafter referred to as the "BEST" for the sake of brevity), which is an Undertaking of the Municipal Corporation of Greater Mumbai (hereinafter referred to as the "said Corporation" for the sake of brevity). The 2nd Respondent herein is the said Corporation and 4th Respondent herein is the BEST. 5th Respondent herein is the General Manager of BEST who has been made party by his name. The 1st respondent is the State Government.

2. The dispute between the parties in the present petition is in respect of a piece of land. Normally, we would have referred to it as "a plot". However, we are not doing so as there is controversy amongst the parties as to whether in law, this piece of land in issue can be referred to as "a plot" or not. This piece of land which is the subject matter of the present writ petition admeasures 27,913.93 sq. meters and is a part of Survey No. 6 (part) i.e. City Survey No. 1(Part) of Village Goregaon, Oshiwara, Mumbai, (hereinafter referred to as "the suit property" for the sake of brevity). For the purpose of identification of the suit property, at least in the beginning, we must state that the suit property has been marked as "Plot No. 2A" by the BEST in its records, though it is the specific contention of the Respondents that the larger portion of CTS No. 1(part) which admeasures 1,54,082.40 sq. meters (hereinafter referred to as "the said large track of land" for the sake of brevity) has not been sub divided into various plots in the eyes of law. We will refer to this controversy at some length at an appropriate stage hereunder. Be that as it may.

3. In the beginning we give hereunder the admitted, but only relevant, Chronology of Dates and Events to understand the facts of the case with some precision. This Chronology will be also handy at the later stage of this Judgment when we will be considering the contention of one of the contesting Respondents i.e. Respondent No. 7, the Developer, that this Petition is liable to be dismissed on the ground of delay and laches, apart from other grounds taken up in defense.

13th April 1973 :By way of Land Acquisition Award bearing No. LAQ 6748 an area of 95,721 sq. meters out of Survey No. 6 was acquired for Staff Housing of BEST workers and was handed over to the BEST.

29th August,1974 : By way of Land Acquisition Award bearing No. LAQ 280 an area of 5836.14 sq. meters out of Survey No. 6 was acquired for Staff Housing of BEST workers and was handed over to the BEST.

23rd October,1989 : A Lay Out Plan for subdividing the said large track of land was prepared. In this Lay out Plan, the suit property has been marked as Plot No. 2A.

11th May, 1993 : The Revised sanctioned Development Plan prepared under Maharashtra Regional and Town Planning Act, 1960 (hereinafter referred to as "the MRTTP Act") came into force in which the said 7 large track of land including the suit property was reserved for "BEST Bus Depot, Scrap Yard and Housing.

Various portions of the said large track of land used by the BEST for following purposes:

(a) 1,69,30.91 sq.mts. Constructing 10 buildings for Staff Housing

(b) 5,025.01 sq.mts. Scrap Yard.

(c) 7,557.05 sq.mts. Goregaon Bus Depot.

(d) 6,540.75 sq.mts. Oshiwara Depot.

17th October,1995 : The BEST submitted a proposal with the State Government seeking permission to use that portion of the said large track of land which by this time was still laying vacant for commercial purpose, in addition to the purposes for which it was reserved under the aforesaid revised Development Plan.

19th November,1997 : The State Government issued an order u/s 154 of the MRTTP Act directing the said Corporation to take steps to carry out requisite amendments in the Regulation no 9 of the Development Control Regulations, 1991 (hereinafter referred to as the "said DCR") by taking steps u/s 37(1) of the MRTTP Act. However, the said Corporation failed to publish the Notice accordingly within a period of 60 days from the aforesaid Directives.

24th August, 2004 : In view of the failure of the said Corporation to take steps u/s 37 of MRTTP Act 1960 accordingly, the State Government itself issued a Notice in exercise of its powers under Sub section 1(A) of Section 37 of the MRTTP Act.

6th/8th Sept.2004 : The said Notice was published in the local newspapers. 9th Sept, 2004 : Said Notice was published in a Government Gazette.

13th May, 2005 : The Deputy Collector of Town Planning submitted a report in this regard to the State Government.

24/27th July 2006 : The Government published requisite Notification u/s 37 of the MRTTP Act effecting amendment in Regulation No. 9 of said DCR. Sept. 2006 : BEST issued Tenders inviting bids for the development to be carried out at the suit property. In all 66 tenderers purchased tender forms. The reserved rate of payment of non refundable deposit was notified as Rs. 23,941/- per sq. meters. 8 t h September, 2006 :Pre-bid meeting was held. 18th September, 2006 : Bids of 9 tenderers were opened. One tenderer was disqualified due to submission of invalid Solvency Certificate. The 7th Respondent offered highest bid and quoted rate of Rs. 57,000/-(as against the reserved bid of Rs. 23,941/-) per sq. meter for payment of non refundable deposit. Thus, the 7th Respondent was adjudged as the highest bidder.

18th May, 2007: The 7th Respondent paid Rs. 2,23,95,87,000/-(Rs. Two Hundred

Twenty Three crores Ninety Five Lacs and Eighty Even Thousand Only) @ Rs. 57,000/- per sq. meter for 39,291 sq. meters to the 4th respondent. The 4th Respondent executed Agreement for Development with the 7th Respondent.

14th June, 2007 : The 7th Respondent received an IOD for the development of the suit property.

21st June, 2007 : The 7th Respondent received Commencement Certificate to commence the construction.

It is the case of the 7th Respondent that up till now the construction has proceeded substantially and that the 7th Respondent has put in or spent about Rs. Thirty Cr. towards the developmental activities carried out at the suit property, including Rs. 2.23 Cr. Towards stamp duty and registration fees etc. 9 t h October 2007 : Present Writ Petition filed.

4. The Petitioners have filed this Petition in the light of the aforesaid Chronology of Events, impugning or challenging:

(i) Validity, legality and propriety of aforesaid Notification dated 27.7.2006 issued by the State Government in exercise of its powers u/s 37(2) of the MRTP Act whereby Regulation No. 9 of said DCR has been amended;

(ii) The decision of the 5th Respondent of allotting the suit property to the 7th Respondent for commercial development;

(iii) Resolution dated 6.11.2006 of the BEST approving the Agreement with the 7th Respondent for development of the suit property.

(iv) Building and other plans sanctioned by the said Corporation permitting the 7th Respondent to put up construction and/or make development on the suit property.

5. The Petitioners have raised following issues for consideration of this Court by way of the present Writ Petition:

(I) Whether the suit property is affected by Coastal Regulation Zone Notification and Mangroves ?

(II) Whether the Notification dated 27th July, 2006 amending Regulation No. 9 of the said DCR is liable to be struck down on the ground of non-compliance with the procedure prescribed by Section 37 of MRTP Act, 1960?

(III) Whether the suit property is a separate plot prepared on account of an alleged approved sub division of original Survey No. 6(Part) i.e. CTS No. 1 (Part)?

(IV) Whether the Resolution dated 6.11.2006 passed by BEST is sustainable in law and in view of the facts of the case?

(V) Whether the Agreement dated 18.5.2007 entered into between 5th and 7th Respondent and all consequential Agreements/Contracts/Writings/Permissio ns/

Sanctions are sustainable in law and in view of the facts of the case

6. Instead of reproducing at this stage the entire submissions of the petitioner followed by entire replies thereto given by the Respondents, we propose to set out submissions of Petitioner and the Respondents herein along with our conclusions in that regard, point-wise or issue-wise for the better appreciation of the rival contentions.

7. POINT NO. 1 : Delay and Latches The Respondents, particularly, the 7th Respondent has contested the Petition on the ground that the present Writ Petition suffers from delay and latches. It is contended on behalf of the 7th Respondent that by the time the present petition was filed in this Court, the 7th Respondent had already been out of pocket by at least Rs. 223,95,87,000/- towards only the non-refundable deposit made in terms of their successful bid and consequent aforesaid Agreement of Development dated 18th May, 2007. In addition thereto, it is contended by the 7th Respondent that the 7th Respondent has spent amounts towards stamp duty and registration fee for getting the aforesaid agreement duly stamped and registered. It is further contended that the 7th respondent has also incurred additional expenses to the tune of about Rs. 30,00,00,000/- (Rs. 30 crores) in pursuance of the Development Agreement for the purpose of actually conducting developmental activities at the suit property after it was granted IOD on 14.6.2007 and Commencement Certificate on 21.6.2007.

8. It was contended by the learned Senior Counsel appearing on behalf of the 7th Respondent, in the aforesaid background that the Notification, issued u/s 37 of the MRTTP Act is dated 20.7.2006 and that the present petition has been filed as late as on 9.10.2007. He drew our attention to the Chronology of the Events set out at the threshold of this Judgment and submitted that in the meantime the 7th Respondent has acted bonafide in taking various steps and in spending the huge amounts. He relied on the following two judgments of the Hon"ble Supreme Court to submit that we should not exercise our discretionary writ jurisdiction in entertaining this writ petition, in view of the unexplained delay and latches on the part of the petitioners.

(1) The Moon Mills Ltd. v. M. R. Meher, President Industrial Court, Bombay and Ors. Reported in [AIR 1967 Supreme Court 1450] (paragraph 6)

(2) Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others,

9. On the other hand, the learned Counsel appearing on behalf of the petitioner contended that in the petition itself, the petitioner has set out various steps which the petitioner took after the petitioner became aware of the modifications/ amendments sought to be made in the said DCRs by the State Government and the steps that were taken by the BEST towards disposal of the suit property. The petition has been filed by the petitioner as expeditiously as possible after exhausting various remedies available in law and only after realising that the

petitioners were not getting justice at the hands of other Authorities and by taking recourse to other remedies available to them in law.

10. The Supreme Court in the case of Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, has held that in India each case will have to be considered on its own facts and that such issue of delay and latches is one of discretion of the court to follow from case to case. Similar observation also can be found in the case of Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, .

After having considered the rival submissions in this regard in the proper perspective, we are of the view that the present petition cannot be thrown out merely on the ground of delay and latches. This writ petition raises important issues of law which need to be dealt with extensively by us. Even otherwise the Chronology of the Events set out at the threshold of this Judgment will certainly demonstrate that the petitioners have filed this petition on 9.10.2007; whereas the 7th respondent paid the amount of consideration set out herein above and got the agreement in issue executed only on 18.5.2007. The IOD has been issued on 14.6.2007 and the Commencement Certificate has been issued on 21.6.2007.

11. These dates in particular show that the petition has been filed within five months from the execution of the Agreement in issue and within about three and half months of issuance of IOD and /or Commencement Certificate. In this regard, we cannot over look the fact that the petitioner is a recognised representative of workers of the BEST and is trying to enforce its alleged rights and/or claims against organisations like BEST, the said Corporation, the State Government and obviously financially sound 7th respondent who has capacity to invest hundreds of crores of rupees in a development project.

12. Considering the overall strength and weakness of the contesting parties and the Chronology of Events set out at threshold of this Judgment, we are of the view that the petition does not suffers from such gross delay and latches that it need not even be entertained by us on these grounds alone.

13. It was also contended on behalf of the respondents that the conduct of the petitioner is blame worthy in as much as the impugned modification and/or amendments in the said DCRs related to three sites of the BEST and that the petitioner was prosecuting its claim and making grievance only in respect of the suit property. In other words, it is contended that the petitioner was not raising even an eyebrow in regard to three sites of the BEST situate at Mahim, Kurla and Dahisar which were also affected by the amendment/modification of the said DCRs in issue and that the petitioner was selectively making a grievance about the suit property alone.

14. The learned Counsel appearing on behalf of the 7th respondent relied on the Judgment of the Supreme Court delivered in the case of State of Maharashtra Vs. Digambar,) to buttress his submission that in view of this blame worthy conduct

of the petitioner, we should not exercise our extra-ordinary discretionary constitutional writ jurisdiction under Article 226 of the Constitution in the present case. The aforesaid Paragraph 19 reads thus:

19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

15. The learned Counsel appearing on behalf of the petitioner on the other hand contended that in as much as the modification/amendment effected in the said DCRs is concerned, the same has impact on the aforesaid three sites as against the suit property in a factually and actually different manner. In as much as the suit property is concerned, it forms part of the said large track of land and that excepting housing, the other purposes for which the said large track of land is reserved for the development have been already accomplished on account of the developments that have already been carried out by the BEST at various portions of said large track of land other than the suit property. It is contended on behalf of the petitioners that no part of the properties of the BEST situated at Mahim and Dahisar are reserved for housing of workers of the BEST and that at the property of BEST situate at Kurla quarters for workers of BEST were already provided which at present are being redeveloped. On the basis of these factual contentions it is submitted on behalf of the petitioners that the petitioner was justified in filling this petition only in respect of the suit property and in not raising any objection in respect of the other three properties of the BEST situate at Mahm, Kurla and Dahisar.

16. In view of the aforesaid nature of controversy it is to be noted that the Respondents have not placed on record the factual details in regard to the sites of the BEST situate at Mahim, Kurla and Dahisar enabling us to assess the impact of the modification/amendment effected in the said DCRs which are impugned by the present writ petition, on those properties. In absence of any factual details in that regard, we are unable to appreciate the contentions raised on behalf of the respondents in this regard, especially on account of the aforesaid factual dispute raised in that by the Petitioner. Even otherwise only because the petitioners have not raised any objection in regard to other sites, and have raised objections in regard to only the suit property, it cannot be said that the conduct of the petitioners is blame worthy to such an extend that we should refuse to exercise our extra-ordinary constitutional writ jurisdiction in this regard and even refuse to examine the case even in regard to the suit property. In as much as the suit property is concerned, in the context of the said large track of land and in the

background of various factual aspects of the matter brought on record as to its actual user, we are of the view that it is necessary for us to examine the legal issues raised by the petitioner.

17. In our view, mere fact that the petitioners have not questioned the correctness of the impugned notification and/or amendments/modifications effected in the said DCRs in regard to other aforesaid three sites of the BEST, cannot detain us in examining the correctness thereof in regard to the suit property. If ultimately we find that the impugned notification and/or amendments/modifications effected in the said DCRs are illegal, unsustainable in law and in view of the facts of the case, it may not be just and proper to let the same go without any scrutiny by us on the ground that the petitioners have let it go in regard to other three sites of the BEST.

18. In view of the aforesaid factual background of the present case, we are of the view that none of the aforesaid three judgments of the Supreme Court apply to the facts of this case. In our view, the facts of the present case are eloquent enough to reject the contention of the respondents that the present petition is required to be thrown out and need not be considered on the ground of delay and/or laches as also on the ground of alleged blameworthy conduct of the petitioner. We will therefore proceed to consider the rival contentions raised by the parties on merits.

19. POINT NO.2: Whether the suit property is affected by Coastal Zone CRZ Notification: It is the contention of the petitioner that part of the suit property is affected by Coastal Zone Regulation Notification and that part of the suit property is also covered by mangroves. It is, therefore, contended by the Petitioner that the development on the suit property is not permissible in law and on this count also the development in issue is unsustainable in law and in view of the facts and circumstances of the case.

20. An affidavit-in-reply has been filed by the 7th respondent dated 7.12.2007 making out a case that the 7th respondent has made necessary applications to MOEF under Environmental Impact Assessment Notification seeking necessary clearance and that the application is pending with MOEF.

However, in the affidavit-in-reply filed on behalf of the corporation dated 31.1.2008, it has been clarified that the suit property is only partly affected by CRZ-II and it is not that the entire suit property comes under CRZ-II. This affidavit further explains that the 7th respondent has submitted plans for putting up construction on such area of the suit property which is not affected by CRZ-II. In other words the contention is that the construction of buildings proposed by the 7th respondent is not on such area of the suit property which is covered by CRZ-II, but is on such area of the suit property which is not affected by CRZ-II. It is, therefore, contended on behalf of the respondents that there is no violation of CRZ Notification.

21. The learned Counsel appearing on behalf of the petitioner in his usual

fairness has conceded that the aforesaid explanation and/or clarification given by the said Corporation is not disputed by the petitioner. Thus, the noncontroversial factual position which now has emerged, is clear as under:

- (i) That the entire suit property (known as plot No. 2-A) is not affected by CRZ-II.
- (ii) The 7th respondent has proposed to put up construction on such portion of the suit property which is not at all covered/affected by CRZ-II.

22. In view of the aforesaid facts the objection of the petitioner to the effect that the impugned transaction is illegal on account of the violation of CRZ Notification does not survive.

23. The respondents have further by the same affidavit dated 31.1.2008 filed on 4.2.2008 specifically and categorically stated that the suit property known as plot No. 2-A is not at all affected by mangroves. This categorical contention of the respondents is not disputed by the learned Counsel appearing on behalf of the petitioner. We, therefore, need not deal with this factual non-controverted aspect any further.

24. We therefore conclude that the developmental activities permitted by the said Agreement and proposed to be carried out in pursuance thereof by the 7th respondent, on the suit property known as plot No. 2-A, is neither contrary to CRZ Notification nor is it covered/affected by mangroves.

25. Point No. 3: Validity of Notification dated 27.7.2007 issued u/s 37 of MRTP Act, 1960:

A large track of land was acquired under the Land Acquisition Act as and by way of compulsory acquisition from private owners/holders prior to 1975. The acquisition was for the purpose of staff housing of BEST workers. The suit property forms part thereof. As stated herein above, in the Development Plan brought into force in accordance with the MRTP Act 1960, the same property came to be reserved for BEST Bus Depot, Scrap Yard and Housing. However it is pertinent to note that in the Development Plan itself separate portions of the said large track of land were not shown separately for each of these purposes for which the use of said large track of land was so designated. In other words the designation so made was a consolidated one for the entire large track of land taken together and not purpose-wise and/or area-wise separate designation.

26. It has come on record that in the said large track of land activities have already been carried out by the BEST to comply with the purposes for which the aforesaid reservations were provided in the entire reserved site i.e. said large track of land. There is no dispute between the parties that on the said large track of land not only Scrap Yard, Bus Depot have been constructed but also on a portion thereof a Housing Society of BEST workers has been put up which is known as "Ankur Co-operative Housing Society". Admittedly, out of the said large track of land, the suit property is the only portion which at the relevant time, when the aforesaid action u/s 154 of the MRTP Act was taken, was open and

available for the development.

27. It is the contention of the BEST that it was at the relevant time suffering huge financial losses to the tune of about Rs. 450 Crores per annum and that it had no means of getting over these losses. In the absence of any financial resources worth the name, it is contended by the BEST that the only option available for it was to permit commercial activity at the suit property along with other properties of the BEST situate at Mahim, Kurla and Dahisar and thereby generate funds to wipe out the losses. It is therefore contended by the BEST that way back in 1995, as reflected by the aforesaid Chronology of Events, a proposal was moved by the BEST with the State Government seeking permission to commercially exploit the suit property. On account of specific reservation provided in the Development Plan over the suit property, which did not include and/or which did not enable such commercial exploitation of the suit property, it became necessary to carry out appropriate amendments and/or modifications in the Development Plan.

28. There were two modes available to bring about such a change. One of them was to modify the reservation/designation itself to include a commercial use of the suit property and the other one was to amend the said DCRs permitting such a commercial use of the said large track of land, in addition to the use of the property for the purpose for which it was designated in the Development Plan.

It appears that the State Government chose the other option, viz. effecting amendment/modification in the said DCRs. Consequently, the State Government issued a direction u/s 154 of the MRTP Act, 1960 to the said Corporation for taking appropriate steps for effecting requisite amendment/modification in Regulation No. 9 of the said DCR. The facts will indicate that inspite of such a direction of the State Government, the said Corporation did not take any steps in that direction, within 60 days. Consequently, the State Government started the process of modification at its own level as contemplated by Sub-section (1A) of Section 37 of the MRTP Act.

29. As reflected by the aforesaid Chronology of Events, the State Government issued Public Notices, one in the English newspaper and the other one in Marathi (i.e. local language) newspaper and called for objections. It has been brought on record by way of the Affidavit filed by Dy. Director of Town Planning Greater Mumbai, dated 7.1.2008 that only one objection from Prakash Chhabria and 41 others was received in response to the aforesaid Public Notices.

30. The Notification in issue itself mentions that, not only after the Deputy Director of Town Planning, Greater Mumbai submitted its report to the Government but also after considering the suggestions/objection received and after consulting the Director of Town Planning, Maharashtra State, the State Government has issued the impugned Notification in exercise of powers conferred on it by Sub-section (2) of Section 37 of the MRTP Act, 1960. This Notification dated 27.7.2006 is impugned by the present Writ Petition.

31. The only ground on which the legality and/or validity of the impugned Notification is questioned by the present Writ Petition is that mandatory prescribed procedure has not been followed by the State Government while issuing the impugned Notification.

32. The First contention of the petitioner is that u/s 37 it is mandatory to consult the Director of Town Planning before issuing such a Notification and that the Director of Town Planning was not consulted.

33. On the other hand it is the contention of the respondents that as a matter of fact the Director of Town Planning has been consulted before issuance of impugned Notification and that it is accordingly stated in the impugned Notification itself.

34. The impugned Notification specifically states thus:

And whereas, considering the suggestions/objections and after consulting Director of Town Planning, Maharashtra State, Government is of the opinion that the said modification shall be sanctioned with some changes;

35. We had called for the original file of the State Government which dealt with the aforesaid Notification. Perusal of the file shows the Director of Town Planning was in fact consulted and that at page number 309 of this file the remarks/submissions of the said Director addressed to the Principle Secretary Urban Development Department can be found. Thus on verification of the record it does appear that in fact the said Director was consulted by the State Government. Therefore we do not find any substance in the said objection of the petitioner.

36. The second contention of the petitioner is that it was necessary for the State to serve Notice on all persons affected by the proposed modification and that the proposed modification was affecting the petitioner (in as much as it was affecting the BEST workers). According to the Petitioners such a Notice having been admittedly not served on the petitioner, the impugned Notification has been issued in non compliance with the aforesaid mandatory provisions of issuance of Notice to affected persons.

37. The reply of the respondents is that firstly public notices were admittedly issued and that therefore it was not necessary to issue separate notice to either the petitioner or any of the BEST workers. Secondly according to the Respondents in law such a notice is required to be served only on the "persons affected" by the proposed modification. It is further submitted that neither the petitioner nor the BEST workers to whom the petitioner represents are "persons affected" by the proposed modification. It is therefore submitted that though admittedly no notice has been specifically served on the petitioner prior to the issuance of the impugned Notification, it will not render the impugned Notification invalid for non compliance with mandatory procedure.

38. In as much as the second contention of the petitioner as to non service of Notice on the petitioner is concerned, Sub section (1AA) (a) of Section 37 of the

M RTP Act, 1960, reads thus:

(1AA) (a) Notwithstanding anything contained in Sub-sections (1), (1A) and (2), where the State Government is satisfied that in the public interest it is necessary to carry out urgently a modification of any part of, or any proposal made in, a final Development Plan of such a nature that it will not change the character of such Development Plan, the State Government may, on its own, publish a notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice and shall also serve notice on all persons affected by the proposed modification and the Planning Authority.

39. A bare perusal of the aforesaid provision clearly demonstrates that the State Government is required to issue a Public Notice in the Official Gazette and in such other manner as may be determined by it for inviting objections and suggestions in respect to the proposed modification. In addition to such a Public Notice, the law requires the State Government to "also serve" Notice on all persons affected by the proposed modification. The term "also serve" clearly shows that in addition to Public Notice, independent Notice is also required to be served on all persons affected by the proposed modification. We therefore hereby reject the contention of the respondents to the effect that the Public Notice was admittedly issued, one in local language and one in English language in widely circulated newspaper and that therefore it was not necessary to serve a separate Notice on the petitioner. If at all the petitioner can satisfy that the petitioner was "person affected by the proposed modification" then obviously it was mandatory for the State Government to serve an independent Notice on the petitioner even though two Public Notices were issued in the local newspapers by the State Government. We therefore hold that mere issuance of Public Notice u/s 37 of the MRTP Act is not enough compliance with the provisions of the said Act but in addition thereto it is necessary for the State Government to "also serve" notice on "all persons affected" by the proposed modification.

40. We will however hasten to add that such additional service of Notice is required to be effected only on "all persons affected" by the proposed modification and therefore now it will have to be determined as to whether the petitioner can be said to be "person affected" by the proposed modification.

41. In regard to this aspect of the matter a serious controversy is raised and arguments at length were advanced before us by the contesting parties. The gist of the same is as under:

It is the contention of the petitioner that it is a Recognised/Approved Representative Union of the Workers of the BEST and that one of the uses for which the suit property has been designated in the Development Plan is housing for BEST workers. Therefore according to the petitioner if any modification in the said Regulations were sought to be made whereby the use of the property in

dispute was being permitted for a purpose other than "housing of BEST workers", obviously, the BEST workers would be deprived of the property reserved for the purposes of their housing and consequently the BEST workers were adversely affected by such a Notification. As the petitioner was/is the Representative Approved/Recognised Union of the BEST workers, the State Government ought to have issued Notice at least to the petitioner union, if not to each and every BEST worker, in regard to the proposed modification.

42. Admittedly, such Notice not having been served either on the petitioner Union or on any one of the BEST workers, in the submission of the petitioner the impugned Notification was issued in breach of mandatory provisions of Section 37 of the MRTP Act, 1960.

43. On the other hand, it is the contention of the respondents that neither the petitioner nor the BEST workers as such can be said to be "persons affected" by the proposed modification. It is submitted by the Respondents that the reservation i.e. designation of the entire property including the suit property in the Development Plan was for various purposes, one of which was housing. It is not that the suit property was itself separately and specifically reserved for housing of BEST workers. It was further submitted that admittedly out of the site so designated, large portion has already been used for providing housing to the BEST workers by way of leasing out portion thereof to Ankur Co-operative Housing Society formed by the BEST workers. It was submitted by the Respondents that how much portion of the entire designated site is to be used for a particular purpose for which it is reserved, when many such purposes are collectively provided by such consolidated reservation was and has to be left to the discretion of the BEST i.e. the management and that its workers cannot have any say in that regard. It was also further contended by the Respondents that if at all any person was affected by such a modification, at the highest it would be BEST itself and not the workers of the BEST. It was further contended that providing housing to the workers was a privilege of the BEST and the workers had no right as such, to claim housing accommodation.

44. In this regard reliance was placed by the Respondents on the Division Bench Judgment of this Court delivered in the case of *Parisar an Organisation and Others Vs. State of Maharashtra and Others*, wherein it is observed as under:

In our view, both the submissions made by Shri Shivade deserve to be rejected. So far as the general public is concerned publication of notification in the Official Gazette inviting objections and suggestions is enough. Individual notices are required to be served on the persons actually and factually affected by the proposed modification. The expression used in this behalf in the section is "and shall also serve notice on all persons affected by the proposed modification." As regards the publication of notification in the two newspapers and the submission of the proposal by the planning authority to the State Government within a week thereof, it is not possible to accept Shri Shivade's argument in the absence of evidence.

45. It was therefore contended on behalf of the Respondents by relying on the aforesaid portion of the observation on which we have supplied our emphasis that such individual notices are required to be served only on the person who are "actually and factually affected" by the proposed modification and that since neither the petitioner nor the BEST workers were "actually and factually affected" by the proposed modification, no Notice was required to be served on either of them and consequently for non service of such notice as claimed by the petitioner issuance of the impugned Notification cannot be faulted.

46. It is submitted by the Respondents that the term "person affected" must be given the same meaning as "person aggrieved" or "aggrieved party" as defined in the Black's Law Dictionary 8th Edition Page No. 1154 which reads thus:

" aggrieved ", adj.(of a person or entity) having legal rights that are adversely affected; having been damaged by an infringement of legal rights.

" aggrieved party " A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment-Also termed party aggrieved; person aggrieved [Cases: Action -13; Appeal and Error - 15; Federal Civil Procedure - 103.2. C.J.S. Actions - 57- 63; Appeal and Error - 168]

47. We find considerable force in the contentions raised on behalf of the respondents in this regard. A perusal of the MMC Act, 1888, will demonstrate that neither any legal right is created in favour of the workers of the BEST nor any corresponding legal obligation is cast on the BEST to provide housing to the workers of the BEST. Upon a specific query in that regard, the learned Counsel appearing on behalf of the petitioner was also unable to point out any provision of law creating any such right in favour of workers of BEST or any corresponding obligation cast on the BEST to provide housing to the workers of the BEST.

48. A feeble attempt however was made by the learned Counsel appearing on behalf of the petitioner to spell out such a right and/or obligation by contending that the BEST has agreed to provide housing to its workers in terms of an agreement and/or a settlement between the BEST and its workers. Neither any such agreement nor any such settlement has been produced on record. We were not able to find out any specific contention to this effect either in the petition or in any of the bulky rejoinders filed on behalf of the petitioner. Consequently, in absence of any material on record, we are unable to accept the contention of the petitioner that either such a right or such an obligation exist in law, on the basis of which it can be said that workers of the BEST have a legal right enforceable against the BEST for providing housing accommodation to them.

49. All workers/employees do not acquire a right, merely on account of their employment, to claim housing accommodation from their employer. Such a right has to be acquired by the employees/workers in law. In other words, unless by operation of some law, the employees/workers acquire a right of claiming housing accommodation from their employer, the employees/workers do not get

a right against their employer to claim housing accommodation for themselves only on account of their employment. In law, therefore, in absence of any condition of service or contract of service or rule/regulation, it is always a privilege of an employer to provide housing to its employees/workers.

50. Having come to a conclusion that there is no legally enforceable right in favour of the BEST workers to claim housing accommodation from the BEST, as discussed herein above, it cannot be said that the workers of the BEST are deprived of any property meant for providing housing to the BEST workers by the impugned Notification/modification. It cannot be said that BEST workers are "affected" by such an action. In other words neither the BEST workers nor the petitioner who represents them are "persons affected" by an action, which results into user of a property meant for housing of BEST workers, for a purpose other than housing of BEST workers. Of course this will also include any step taken in that direction such as the change of user.

51. In our view, inasmuch as the applicability of the said provision of Section 37 of the MRTP Act is concerned, the term "person interested" will not include each and every person who may be "interested" in such a land as we say in the common parlance. In the context of Section 37 of the MRTP Act 1960, when we refer to the term "person interested", it always means a person having some right which is recognisable in law, over or in respect of such a property in respect of which such an action u/s 37 is taken. A person who in common parlance is only "interested" in a land having no such right which is recognisable in law, therefore, cannot be termed as a "person affected" by an action u/s 37 of the MRTP Act, 1966.

52. In as much as the said DCRs are concerned, the same are framed u/s 22(m) of the MRTP Act. It is now settled position of law that making of DCRs or effecting amendments thereto is a legislative function and that Section 37 of the MRTP Act is to be used as repository of the legislative powers for effecting amendment to the said DCRs. This legislative power of amending DCRs is delegated to the State Government. In this regard, reliance can be placed on the following two Judgments of the Supreme Court:

1. Pune Municipal Corporation and Another Vs. Promoters and Builders Association and Another, .
2. Promoters and Builders Association of Pune Vs. Pune Municipal Corporation and Others, .

53. Consequently, we hold that by the modification and/or amendment affected by the Notification dated 27.7.2006 in issue neither the BEST workers nor the petitioner who represents them has been affected and therefore both of them do not fall within the category of "persons affected" as contemplated by the aforesaid provisions of Section 37 of the MRTP Act, 1960.

54. In the result, we hold that though the respondents were legally bound to

serve notice on "all persons affected" by the proposed modification, in addition to the Public Notice issued by them, the respondents were not legally bound to serve such separate notice of the proposed modification either on the workers of the BEST or on the petitioner who represents them, while effecting modification or amendment vide Notification dated 27.7.2006 in issue. Obviously therefore for non service of such a notice it cannot be said that any procedural defect has crept in, while issuing Notification dated 27.7.2006 in issue.

55. We are also supported in this regard by the Judgment delivered by Division Bench of this Court in the case of PARISAR, an Organisation & Ors. (supra) whereby it has been specifically observed that u/s 37 individual notices are required to be served on the persons "actually and factually affected" by the proposed modification. As we have come to a conclusion that neither the BEST worker nor the petitioner who represents them, can be said to be "persons actually and factually affected" in the eyes of law, by the proposed modification effected by the Notification dated 27.7.2006, the same cannot be said to be defective on that count.

56. It may not be out of place, in addition to the aforesaid legal aspect of the matter, to note herein that in the said large track of land (of which the suit property forms part), admittedly following portions have already been utilised for providing housing to the BEST workers:

10425.00 sq. meters on Ankur Co-operative Housing Society (of BEST workers)

33344.20 sq. meters BEST Undertaking Staff Housing.

3717.77 sq. meters BEST Undertaking Staff Housing.

57. As mentioned herein above, said the large track of land has been collectively and in a consolidated manner designated in the Development Plan for BEST Bus Depot, Scrap Yard and Housing. The Development Plan does not specify as to how much area out of the said large track of land is to be used for housing and how much is to be used for other purposes set out in the designation.

Considering this aspect of the matter, it will be for the BEST to decide as to what extent an area out of the said large track of land is to be used for the aforesaid three purposes for which the entire said large track of land has been designated in a consolidated manner. Having admittedly used the aforesaid portions of the land out of the very same said large track of land for housing, it cannot be said that in law the BEST was duty bound to use the suit property also only and only for housing the BEST workers. In other words neither the BEST workers nor the petitioner in law are entitled to compel the BEST to use the suit property only and only for the purpose of providing housing to the BEST workers and not for any other purpose.

58. It has also been brought on record on behalf of the BEST that the BEST has constructed 52 buildings for BEST Staff Quarters which consist of 1,353 tenements, in the West Zone area. It is stated in this affidavit dated 29.2.2008

that out of these 1,353 tenements, 165 tenements were lying vacant. In as much as South Zone is concerned, this affidavit states that there are 28 buildings for BEST Staff Quarters consisting of 1,373 tenements, out of which 1 tenement was still vacant. In regard to the North East Zone, this affidavit states that there are 42 buildings comprising of 1,424 tenements, out of which 33 tenements were vacant. This affidavit further states that there are 7 MHADA Staff Quarters for BEST Staff consisting of 608 tenements, out of which 8 tenements were still vacant. The affiant of the aforesaid affidavit therefore has categorically emphasised that on the date of filing of the Affidavit total 207 tenements were laying vacant and were available for BEST Staff/Employees and has given the detailed Zone wise break up of these vacant tenements in this affidavit.

59. In the Rejoinder dated 25.3.2008 filed on behalf of the petitioner in response to the aforesaid affidavit, it is stated in paragraph 7 that 164 tenements were lying vacant in Santacruz area because they were not habitable and were not repaired for a long time. It is contended that the tenements at Kurla were actually got vacated by BEST itself for redevelopment. This rejoinder insists that there was still long waiting list of 208 employees who are awaiting for the allotment of service quarters. Be that as it may.

60. If there are service quarters available which can not be occupied for want of requisite repairs/maintenance the remedy for the petitioner is to get the same repaired and/or properly maintained by the BEST so that the same become habitable and available for the BEST workers. The facts will remain that though there does not appear to be any legal obligation cast on the BEST to provide housing to its staff/workers it has in fact made the aforesaid provision to make housing accommodation available to its workers/staff. In view of this and such other aspects of the matter set out herein above, it cannot be said that by putting the suit property to a use other than providing housing to its workers, BEST has "factually and actually" affected its workers. On this additional ground also, even on facts apart from the aforesaid legal aspect of the matter, it cannot be said that either the BEST workers or the petitioner who represents them are "persons affected" by the Notification dated 27.7.2006 in issue.

61. It is contended on behalf of the petitioner that the modification and/or amendment effected by the aforesaid exercise in issue was of substantial nature and, therefore, attracted Section 22A (b) & (f) of the MRTP Act, 1966. It is, therefore, submitted that modification so made being major modification and not minor modification, the aforesaid action undertaken by the respondents by virtue of Section 37 of the MRTP Act, 1966 is unsustainable in law.

62. First and foremost, this contention is not raised specifically by the petitioner in the present proceedings. There are no pleadings worth the name made by the petitioner in this regard. That apart, for the reasons set out hereunder, we do not find any force in this contention.

63. By the exercise in issue performed by the respondents u/s 37 of the MRTP

Act, 1966, all that is done is that regulation No. 9(iv)(c) and (d) of the said DCRs has been modified by adding explanatory note at sr. No. (v) below Table 4 contained in regulation 9 of the said DCRs. This note reads thus:

(v) sites reserved for BEST Undertaking such as BEST Bus Depot, BEST Bus Station, BEST Terminus, BEST Bus Station and Staff Quarters, BEST Bus Depot and Transport Carriage may be developed by the BEST Undertaking for the specified purpose coupled with commercial user subject to the following conditions:

(a) The built up area of such commercial user shall not exceed 30% of the total permissible floor area.

(b) Out of such permissible commercial user 50% built-up area not exceeding of the total permissible commercial user may be permitting on the ground floor. While remaining floor area for commercial user may be permitted on the upper floor.

(c) Extent of built-up area proposed to be used for commercial purpose shall be such that it does not adversely affect the principal user.

(d) The proposal for such composite user shall be cleared by Additional Commissioner of Police (Transport), Mumbai.

(e) Considering the strategic location of reserved sites with reference to the volume and nature of the traffic in the vicinity of the reserved site, Municipal Commissioner shall have right to prescribe additional condition as deemed fit and also restrict the commercial area to the justifiable extent.

(f) Provision for separate parking shall have to be provided as per prevailing norms in such a way that it does not affect movement of BEST buses as well as the traffic of road.

(g) the above commercial user shall be permitted on plot having area of 2000 sq. mtr. & above.

(h) If there is any storage of diesel/petrol or any explosive material on the plot, then the above commercial user is permissible by maintaining segregating distance between them as decided by the Chief Fire Officer.

64. Thus, by the action taken u/s 37 of the MRTP Act, 1966, all that the respondents have done is that a note is added at sr. No. (v) below Table 4 contained in regulation 9 of the said DCRs. This explanatory note which is added deals with only and only "the sites reserved for BEST Undertaking" which are obviously very few in the entire development plan of the city of Mumbai. As compared to the entire area covered by the development plan as also by various reservations made therein, the area covered by such reservations meant for BEST Undertaking is very very small. It is obvious that addition of the aforesaid explanatory note is going to affect only the sites that are reserved for BEST undertaking only. Thus the modification so made by adding explanatory note No.

(v) below Table 4 contained in regulation 9 of the said DCRs can by no stretch of imagination bring in any change and/or modification and/or amendment in either in the entire development plan as such or such change which is contemplated by the Section 22A - (b) & (f) of the MRTP Act, 1966. Obviously, therefore, for such a modification and/or amendment, it cannot be said that the provisions of Section 22A - (b) & (f) of the MRTP Act are attracted, as contended by the petitioner. These provisions read thus:

22A. In Section 29 or 31, the expression "of a substnatial nature" used in relation to the modifications made by the Planning Authority or the officer appointed by the State Government under Sub-section (4) of Section 21 (hereinafter referred to as " the said Officer") or the State Government, as the case may be, in the Draft Development Plan means,-

(a) ...

(b)all changes which result in the aggregate to a reduction of any public amenity by more than ten per cent of the area provided in the planning unit or sector in a draft Development Plan prepared and published u/s 26 or published with modification u/s 29 or 31, as the case may be;

(c) ...

(d) ...

(e) ...

(f) alternation in the Floor Space Index beyond ten per cent of the Floor Space Index prescribed in the development Control Regulations prepared and published u/s 26 or published with modification u/s 29 or 431, as the case may be.

65. The petitioner has not raised any other contention in regard to the legality and/or validity of the aforesaid Notification dated 27.7.2006 and therefore we have no reason to interfere with the same and grant any relief in favour of the petitioner in this regard.

66. POINT NO. 4 :- Whether "Plot No. 2A" has been carved out in law as a separate plot or not:- The answer to the aforesaid question is truly going to be the most decisive factor in this case, which will be clear from the contentions of both the sides that are set out hereunder.

67. The said large track of land bearing CTS No. 1 (part) i.e. Survey No. 6 (Part) admeasures 1,54,082.40 sq. meters. The dispute between the parties is restricted to only an area admeasuring 27,913.93 sq. meters out of the said large track of land and is being referred to in this judgment as the "suit property".

68. The contentions raised by the petitioner in regard to this aspect of the matter in short are as under:

A Lay Out Plan was prepared by the BEST dividing the said large track of land into various plots. This lay out was sanctioned on 23.10.1989. In this sanctioned

lay out plan the suit property has been marked and/or numbered as "Plot No. 2/A". As the suit property has been separately carved out in the form of a "separate plot" it will have to be treated as a separate plot for all legal purposes, including calculation of FSI, applicability of DCRs and for all other aspects of the matter. In that event the entire development permitted by the transaction in issue becomes illegal, in as much as such development is permitted only and only with reference to the total area of the said large track of land and not with reference to the separate area of the suit property alone. In other words, the permitted Development in issue is impermissible under the DCRs, including amended and/or modified DCR No. 9 if the same is considered in relation to the area of only and only the suit property and not the total area of the said large track of land (of which the suit property is only a small part).

In view of the defence of the Respondents to the contrary, rejoinders have been filed by the petitioners dated 25.1.2008 and 25.3.2008. In these rejoinders apart from the original petition a case is tried to be made out by the petitioner that by and under the orders of the then Municipal Commissioner dated 23.10.1989, the aforesaid large track of land has been sub divided into plots and a plan also has been approved of this sub division bearing No. CE/759/LOP dated 23.10.1989, a copy of which is produced on record. This approved plan of sub division shows clear demarcation of various plots prepared out of the said large track of land, in which the suit property has been specifically shown/marked as Plot No. 2-A and is marked as reserved for "BEST Undertaking Staff Housing.

Even in the Agreement in issue dated 18.5.2007 the suit property has been described specifically as a separate plot carved out on account of the aforesaid sub division of the original large track of land, sanctioned by the Municipal Commissioner on 23.10.1989. In terms of DCR No. 21 preparation of a lay out for having sub division of plots is necessary when more than one building is proposed to be constructed on the large track of land. Admittedly, in the said large track of land various buildings have come up like that of Ankur Co-operative Housing Society, BEST Depot, etc. In law it would not have been permissible to carry out such activities on the portions of the aforesaid large track of land if the was not sub divided into plots. Therefore, in the submission of the Petitioners the fact that such activities were permitted shows that the said large track of land has already been sub divided and that the suit property is a separate plot which has been resultantly carved out on account of such sub division.

69. It is further pointed out by the Petitioner that even in the revenue records in regard to said large tract of land, an entry dated 21.6.1991 has been effected whereby a separate property register card has been prepared in the name of Ankur Co-operative Housing Society Limited to which an area of 10,425.0 sq. mtrs. Area has been leased out by the BEST. A copy of the property register card is produced as Exh.3-A along with the affidavit-in-rejoinder dated 25.1.2008 filed on behalf of the petitioner. On this basis, it is contended that the said large tract

of land is not continued as one piece and/or one plot, but has been sub-divided.

It is further pointed out by the Petitioner that even a proposal bearing No. CHE/1229/LOP for amalgamation of all the sub-plots of the said large tract of land has been submitted and that such a proposal for amalgamation itself demonstrates that the said large tract of land has been sub-divided and that, only therefore, a need was felt to submit a proposal for amalgamation.

70. On the basis of these factual aspects of the matter, the contention of the petitioner is that the said large tract of land has been sub-divided into various sub-plots and that the suit property is one of such plots carved out of the said large tract of land and is a separate plot bearing "plot No. 2-A", which is the suit property.

71. On the other hand, the respondents have stoutly denied the contentions of the petitioner in this regard and it is claimed that the said large tract of land, in law, has not been sub-divided and continues to be a contiguous single piece of land. In as much as the allegations of the petitioner that the suit property is a separate plot is concerned, it is contended that only for identification purposes, the area of the suit property is marked as "plot No. 2-A" and not as a result of legal, authentic and authorized sub-division in terms of the MRTP Act, 1966 creating a separate plot out of the said large tract of land. It is the defense that though there was a proposal by way of lay-out plan for sub-dividing the said large tract of land, by letter dated 23.10.1989 bearing No. CE/579/LOP, the said proposal was made only approvable as per the DCRs., subject to the terms and conditions indicated therein. It is further submitted that by such order the lay-out was only made "approvable" and that by that order the lay out was not "approved" as such. The final approval to such a layout or the sub-division was to be accorded after the conditions of construction of internal roads, including lighting, sewerage, drainage, etc., was completed and spaces for recreation amenities were developed by BEST as was provided in the proposal for sub-division. It is, therefore, contended that since these conditions set out in the letter dated 23.10.1989 were not and have not been fulfilled by the BEST, the permission for lay-out/sub-division never fructified into effecting legal sub-division of the said large tract of land and the same remained pending at the stage of only an "approvable lay-out", which has not resulted into creation of a separate sub-plot i.e. the suit property.

72. It is further the case of the respondents that in law, sub-division of land requires not only sub-division in the Municipal records, but also corresponding sub-division of records maintained by the Collector under the Maharashtra Land Revenue Code resulting into preparation of separate property register cards with new city survey numbers assigned to each sub-division so made. In the present case, admittedly, no such separate record has been prepared and/or maintained by the Collector in regard to the suit property. On this ground also the respondents contend that the suit property is not and can not be treated as a separate plot as claimed by the petitioner.

73. Section 2(21) of the MRTP Act, 1966 defines the term "plot" thus:

(21) "plot" means a portion of land held in one ownership and numbered and shown as one plot in a town planning scheme;" Admittedly, the suit property does not fall within this definition even if the case of the petitioner is accepted at its face value. Admittedly, the suit property is not numbered and shown as one plot in the town planning scheme. In terms of the town planning scheme the suit property is still a part of City Survey No. 1 equivalent to part of Survey No. 6. Consequently, the suit property cannot be termed as "a plot" as defined by the MRPT Act, 1966.

74. The contention of the petitioner is factually correct that not only in the tender notice (exh.`C" to the petition), but also in the agreement in issue dated 18.5.2007, the suit property is referred to specifically as "plot No. 2-A" and it is also stated therein that the same is "a sub-divided plot of land" out of a large tract of land bearing C.T.S. No. 1(Pt.), survey No. 6(Pt.) of village Goregaon and that it admeasures 27,913.92 sq. mtrs. However, only because the documents issued by BEST and/or executed by BEST refer to the suit property as a "sub-divided plot" it does not necessarily mean that in law also the suit property is a "sub-divided plot". The suit property will be considered in law as a separate plot resulted on account of sanctioned and/or approved sub-division of the said large tract of land in issue only and only if the alleged sub-division of the said large tract of land is approved and/or sanctioned in accordance with law. Otherwise, the suit property will continue to be only and only a part of the said large tract of land as one piece and will not have an separate identity as "a plot".

75. Though the petitioner has heavily relied on the order dated 23.10.1989 as an order resulting into approval/sanction of the lay-out/sub-division of the said large tract of land, unfortunately, even a copy thereof was not produced on record for our consideration by the petitioner. What the petitioner has produced on record is only the lay-out plan which no doubt marks the suit property as "plot No. 2-A". However, mere marking on the lay-out plan of the suit property as "plot No. 2-A" will not make it a separate and independent plot, especially in terms of the applicability of the said DCRs. This is more so in view of the specific defense of the respondents that the said order dated 23.10.1989 on which reliance is placed by the petitioner is only a conditional order whereunder the sub-division of the said large tract of land in issue became only "approvable", that too conditionally. The copy of this order is produced by the 4th Respondent, the BEST, along with an affidavit dated 1st March 2008. The opening sentence thereof reads thus:

Your plans submitted of the layouts/subdivision of above plot along with your letter dtd. 4.7.89 are approvable as they are as per Development Control Rules, subject to the terms and conditions already intimated to you as per previous approval.

The petitioner has not satisfied us as to what were these terms and conditions and as to whether such conditions were/are in fact satisfied or not so that it

could be said that the layout in issue has been finally approved. The petitioner ought to have produced enough material on record to show that either by order dated 23.10.1989 sanctioning/approving the lay-out of the said large tract of land was approved unconditionally or that the conditions, if any, subject to which such lay out (resulting into sub-division of said large tract of land) was made approvable, are/were in fact fulfilled, enabling us in fact and law to draw an inference that the large tract of land has been subdivided creating the suit property as a separate plot. On the basis of whatever material available on record, it does appear that the proposal for subdivision of the said large tract of land in terms of the proposed lay-out was made only approvable, that too conditionally, by the said letter dated 23.10.1989. In absence of final approval it will not be possible for us to conclude and consequently hold that the aforesaid layout has been approved and that such approval has resulted into effecting sub-divisions of the said large track of land creating the suit property as a "separate plot" in law and in fact.

76. Moreover, the revenue record of the said large tract of land in issue also does not reflect any such sub-division of the same. Admittedly, the suit property does not have a separate property register card drawn up by the Collector enabling us to hold that the suit property is a separate plot created on account of approved legal sub-division of the said large tract of land. Mere marking of the suit property as "plot No. 2-A" on the plans of the BEST or mere references to the suit property made in various documents of BEST as "a sub-divided plot No. 2-A" will not make the suit property "a plot". In our view, such marking and/or references are found in the record only for the purpose of identification of the exact location and/or situation of the suit property forming part of the said large tract of land in issue admeasuring 1,54,082.42 sq. mtrs. It appears to us that for the purpose of convenience of identification of the area alone, the suit property is addressed and referred throughout by the BEST as "plot No. 2-A".

77. It is also pertinent to note that though a separate property register card was prepared in the revenue records in regard to the property leased out to Ankur Co-operative Housing Society Ltd., that has not resulted into actual sub-division of the said large tract of land. This is principally because though a lease was created in favour of Ankur Co-operative Housing Society Ltd., the lessor of the land continued to be the BEST. As there was no severance of ownership of the said large tract of land the same has continued to remain undivided. Mere creation of a separate property register card in the name of Ankur Cooperative Housing Society Ltd., in law has not resulted into effecting of sub-division of the said large tract of land.

78. We, therefore, conclude that the suit property is not a separate plot as defined by Section 2(21) of the MRTP Act, 1966 and cannot be considered for the purpose of this petition as an independent and separate piece of land inasmuch as the applicability of DCRs is concerned. In other words, the suit property will have to be considered in law, for all the purposes, especially for the applicability

of DCRs, as a portion of one single piece of large tract of land admeasuring 1,54,082.42 sq. mtrs.

79. POINT NO.6 : Legality of the permissions granted for the development that is being carried out at the suit plot by the 7th Respondent:

This issue is truly a fall out of the earlier issue framed and answered hereinabove which deals with the question as to whether the suit property is in law a "separate plot" or not.

80. It is the contention of the petitioner that the suit property is a separate plot which admeasures 27,913.93 sq. mtrs. and is carved out of the said large tract of land admeasuring 1,54,082.40 sq. mtrs. On the basis of this contention, the petitioner further submits that for the purpose of determining the extent to which development and/or construction is permissible (which can be carried out) on the suit plot, the area of the plot should be considered only and only as 27,913.93 sq. mtrs. i.e., the suit property and not 1,54,082.40 sq. mtrs. i.e., the said large tract of land.

81. Admittedly, the requisite permissions and/or sanctions and/or approvals have been granted in favour of the 7th respondent developer by the said corporation and/or other competent authorities in terms of the said DCRs by considering the said large tract of land as one single plot/unit admeasuring 1,54,082.40 sq. mtrs and not by considering the suit property as a separate plot/unit admeasuring 27,913.93 sq. mtrs. Therefore, if we come to the conclusion that the suit property is a separate plot, obviously, all the permissions/sanctions/approvals granted for carrying out developmental activities on the suit property will be contrary to the said DCRs and thus impermissible in law.

82. However, in terms of the aforesaid detailed discussions made and conclusions drawn by us, we will have to proceed on the basis that the suit property is not a separate plot as contemplated in law (and as contended by the petitioner) and that it is only a portion of the said large tract of land (as is the case of the respondents). Obviously, appropriate calculations for applicability of the said DCRs will have to be made on the basis that the suit property is a undivided part of the said large track of land admeasuring 1,54,082.40 sq. mtrs.

83. In as much as the issue of permissibility of extent of construction at the hands of the 7th Respondent is concerned, firstly, it is the case of the petitioner that the permissible FSI and other calculations in that regard are required to be made on the basis that the suit property is a separate plot. We have however herein above by a detailed reasoning rejected this contention of the petitioner that the suit property is a separate plot. We have held hereinabove that the same is a part and parcel of an undivided said large track of land admeasuring 1,54,082.40 sq. meters.

84. It was in the alternative submitted on behalf of the petitioner that in case if we hold that the suit property is not a separate plot but is an undivided portion

of said large track of land, even then the permission granted to the 7th Respondent to put up construction to the extent of 38,653.51 sq. meters is far in excess of the legally permissible limits even under the amended DCRs. In this regard, our attention was drawn by the learned Counsel appearing on behalf of the petitioner to the contentions raised by the petitioner on pages 25 and 29 of the writ petition and calculations given in the affidavit in reply filed on behalf of the 2nd Respondent, said Corporation dated 16.6.2008. Relying on the very same calculations given by the said Corporation, it is contended by the petitioner that the balance permissible FSI works out to 83,920.07 sq. meters and that 30% of the same works out to only 24,900 sq. meters and therefore the permission granted to the 7th respondent to put up construction to the extent of 38,653.51 sq. meters is far in excess of permissible limits.

85. It was further submitted on behalf of the petitioner that even under the amended DCRs i.e. DCR No. 9 the sites which were open and vacant alone are to be considered and therefore the areas which are already used by putting up scrap yard, bus depot, service quarters and/or Ankur Co-operative Housing Society from and out of the said large track of land will have to be executed. In the submission of the petitioner therefore even if for the sake of argument the suit property is not considered as a separate plot and it is considered as an undivided portion of the said large track of land, the FSI permitted to be utilised by the 7th respondent at the suit property of 30,653.51 sq. meters is far in excess of the permissible limits in law and that on this ground also the agreement in issue, the resolution in issue passed by the BEST and the consequent permissions/approvals granted to the 7th respondent are liable to be quashed and set aside.

86. On the contrary on behalf of the respondents it is contended that the true and correct interpretation of Explanation No. (v) introduced by way of amendment/modification in issue effected in DCR No. 9, will show that the area to be considered is not just open/vacant area out of the said large track of land, but total permissible area out of the entire site reserved for BEST Undertaking. Our attention has been drawn to the calculations set out in the affidavit of the BEST dated 30.11.2007, particularly, in paragraphs 9 and 11 thereof. On that basis, it is contended that 30% of the total permissible built up area (1,28,845.04 sq meters) works out to 38,653.51 sq. meters and that accordingly permissions/approvals have been granted to the 7th respondent and that therefore this Court may not interfere with the same.

87. Admittedly in terms of DCR 32(3), the FSI permissible at the suit property is one. In as much as the interpretation of Amended DCR No. 9 is concerned, the amended portion, viz. Explanation (v) is already set out by us herein above. A perusal of the same demonstrates that it deals with "sites reserved for BEST Undertaking" and development of such sites by the BEST Undertaking for the specified purpose coupled with commercial user thereof. Obviously, therefore the contention of the petitioner that the calculations of FSI will have to be made by

taking into consideration only open/vacant area out of the said large track of land is not correct. There is nothing in this explanation which can possibly warrant such a restrictive interpretation of the said provision. For the purposes of calculating FSI and for other purposes of calculations set out in the aforesaid Explanation No. (v) the entire area of "sites reserved for BEST Undertaking" will have to be considered. If so considered, the area of the entire said large track of land i.e. 1,54,082.40 sq. meters will have to be considered as the basis for the requisite calculations, as this entire area (and not just the suit property) is "a site reserved for the Best Undertaking". We therefore reject the contention of the petitioner to the contrary and hold that for the purpose of all the calculations to be made for determining permissible development at the suit property, area to be considered as basis will be the total area of the said large track of land i.e. 1,54,082.40 sq. meters and not just the area of the suit property i.e. 27,913.93 sq. mtrs.

88. Now, in as much as splitting of the aforesaid area is concerned, fortunately, there is no dispute as to the area which are actually used for putting up bus depot, scrap yard, staff housing and Ankur Co-operative Housing Society. There is also no dispute about balance area which is lying vacant. On the basis of these admitted facts and figures, calculations works out as under:

Area to be excluded : 2,500.00 sq. mts. Area handed over to the said Corporation 22,737.36 sq. mts. 15% Recreation Ground Net area of the plot after aforesaid exclusion works out to 1,28,845.04 sq. mts. And 30% of the aforesaid 1,28,845.04 sq. mts. works out to 38,653.51 sq. mts., which is permitted to be developed by the 7th Respondent.

Area so far consumed by the BEST 37,061.77 sq. mts. Staff Housing 5,025.01 sq. mts. Scrap Yard 7,557.05 sq. mts 6,540.75 sq. mts. Goregaon Bus Depot Oshiwara Bus Depot The total area thus consumed is 1,26,168.47 sq.mts., which leaves the BEST with 27,913.93 sq.mts i.e. suit property.

89. In regard to the aforesaid calculations, it is worthwhile to note that Sub clause (a) of the aforesaid Explanation No. (v) introduced by way of modification/ amendment of the DCR No. 9 shows that the built up area for commercial user is not to exceed 30% of the "total permissible floor area". The total permissible floor area of the said large track of land in terms of the aforesaid calculations works out to 1,28,845.04 sq.mts. Obviously, therefore the respondents were fully justified in law in permitting the 7th respondent to carry out development at the suit site to the extent of 30% of the aforesaid total permissible floor area i.e. 1,28,845.04 sq. mts. which works out to 38,653.51 sq. mts. The contention of the Petitioner that in accordance with the amended/modified DCR no 9, 30% has to be of the 83,920.07 sq.mts i.e. only balance permissible FSI available for the BEST as on the date of impugned transaction, can not be accepted. In our view the "total permissible floor area" {as set out by Clause (a) of the explanation (v) of the DCR No. 9} has to be considered of the "site reserved for BEST undertaking" and not just of the "available/balance FSI" as contended by the

Petitioner. Acceptance of such contention of the petitioner will amount to reading something into the said DCR that is not there, which of course is impermissible in law. Considering the case, from this aspect of the matter, it is clear that the development permitted to be carried out by the 7th respondent is strictly within the four corners of the amended provisions of the said DCR No. 9.

90. The aforesaid calculations will also further demonstrate that even after permitting the 7th respondent to carry out development to the extent of 38,653.51 sq. mts. FSI, the BEST still will be left with the balance FSI to the extent of 45,266.56 sq. mts. which can be utilised by the BEST in carrying out development at the said large track of land. This part of the calculations also further shows that the contention of the petitioner that the 7th respondent is permitted to carry out developments in excess of permissible FSI is far from the truth.

91. It also further needs to be stated that in paragraph 7 of the affidavit dated 31.1.2008 filed on behalf of the said Corporation, it is stated that the proposal for development submitted with it comprises of only residential buildings and that no commercial development is proposed on the suit property. It is further stated in this paragraph that the said Corporation has approved plans of residential buildings only.

92. In view of our aforesaid calculations, we also do not find any substance in the contention of the petitioners to the effect that permitting the 7th respondent to carry out development at the suit property to the extent of 38,653.51 sq. mts. amounts to permitting the 7th respondent to use the FSI of such other portion of the said large track of land which falls beyond the suit property and that therefore it amounts to using TDR (Transferable Development Rights) which is not permitted in law.

93. POINT NO.7 : What is the nature of "Agreement for Development" dated 18.5.2007 entered into by and between BEST and 7th respondent ? : As set out hereinabove, after following the procedure of inviting bids by way of public advertisement, the BEST selected 7th respondent as the successful bidder in as much as the 7th respondent offered maximum premium as and by way of non-refundable deposit at the rate of Rs. 57,000/- per sq. mtr., for an area of 39,291 sq. mtrs. of the suit property. It has come on record that the 7th respondent accordingly deposited the entire amount which worked out to Rs. 2,20,32,21,000/- (Two hundred twenty crores thirty two lakhs twenty-one thousand only) with the BEST and that on deposit of such amount, the BEST has entered into "Agreement for Development" with the 7th respondent on 18.5.2007 (hereinafter referred to as the "said Agreement" for brevity sake). A copy of the Agreement has been produced as Exh.`2" by the petitioner along with its affidavit-in-rejoinder dated 25.1.2008. The annexures thereof have been separately tendered by the petitioner after conclusion of arguments, for the purpose of completion of record. However we do not think that these annexure produced subsequently, make any difference to the case of either the Petitioner

or that of any of the Respondents.

94. According to the petitioner, the said Agreement is an agreement which creates a lease and, therefore, the provisions of Section 460K and 460Q of the said Act, 1888 are attracted. It is the contention of the petitioner that as a result of the execution of the said Agreement, a lease in respect of the suit property stands created and, therefore, taking into consideration the aforesaid amount of huge premium, the provisions of Section 460K(b) and 460Q(d) are attracted to such a transaction. It is, therefore, submitted that the General Manager of the BEST who has executed the said Agreement was required to comply with the aforesaid provisions of law by obtaining prior approval of the said Corporation before execution of the said Agreement and that approval/permission of the said BEST committee was not sufficient compliance with the aforesaid provisions of law.

95. On the contrary, it is the contention of the respondents that the said Agreement by itself does not create any lease in favour of anyone and, therefore, the aforesaid provisions of law relied on behalf of the petitioner are not at all attracted to the facts and circumstances of the case. It is the case of the respondents that the said Agreement is only a development agreement and by itself the same does not create any leasehold rights as such either in favour of the 7th respondent or the nominees of the 7th respondent in the suit property. In the submission of the respondents, since the General Manager has obtained appropriate approval and/or sanction for execution of the said agreement from the BEST Committee, the said Agreement is legal, valid and enforceable in law. In support of this contention, the respondents relied on the Resolution dated 20.10.2006 passed by the BEST Committee, copies of which are also produced by the petitioner as Exh. 'E' to the petition.

96. The crucial issue, therefore, to be determined is as to whether the said Agreement is "an Agreement of lease" or an "Agreement to lease". In other words, it is to be determined as to whether the said Agreement is only an agreement whereby the BEST has agreed to create a lease in future or is it an agreement which by itself creates a lease in praesenti. In legal terms, it will have to be determined whether the said Agreement creates "a present demise" or not.

97. Before dealing with the aforesaid issue, we must take care of one interesting legal controversy raised as an offshoot of the aforesaid legal issue. It is thus : whether an assignment of "right to lease" an immovable property amounts to creating an interest in such an immovable property ?

98. Ownership of immovable property is a bundle of various rights. Obviously, one of such right is a "right to lease" such an immovable property. A right to sell is another such right from the aforesaid bundle of rights. Only to the aforesaid limited context a "right to sell" is something which is similar, if not higher, to a "right to lease" an immovable property. It is well-settled position of law that an "agreement to sell" does not create any legal interest in the immovable property.

Though an agreement to sell is enforceable in law, such an agreement does not by itself create any right, title or interest in the immovable property. Certainly, an "agreement to sell" creates rights which are similar (if not higher) in nature as are created by an "agreement to lease". We are, therefore, of the view that if an agreement to sell does not create any right in an immovable property, obviously, an agreement to lease also does not create any right in an immovable property.

99. We are, therefore, of the view that an "agreement to lease" does not create any right, title or interest in the immovable property. It creates only a right to obtain a deed of Lease in future. However an "agreement of lease" certainly creates rights in the immovable property as contemplated by the Transfer of Property Act. Thus, we will have to now examine the said Agreement to find out as to whether it is an "agreement to lease" or an "agreement of lease" to answer the issue as to whether the said agreement attracts the aforesaid provisions of Section 460 K and/or 460 Q of the said Act 1888.

100. The aforesaid question raised by the parties to the present proceedings as to the applicability of Section 460K and/or Section 460Q of the said Act 1888 will have to be answered only after finding out the true and correct purport and nature of the said Agreement. It will, therefore, be necessary to dwell into some of the important terms of the said Agreement to appreciate the exact nature of the transaction entered into by and between the parties to the said Agreement.

101. As the Agreement is very bulky and gives numerous details, it will not be convenient to reproduce herein the terms thereof. We will, however, prefer to mention hereunder generally as to the nature of the transaction the parties have entered into by virtue of the said Agreement.

102. The 7th respondent has agreed to pay the "nonrefundable premium" to the BEST. In fact, as set out hereinabove, the same is already paid by the 7th respondent to the BEST. In consideration thereof, the 7th respondent is permitted to enter upon the suit property and construct commercial/residential premises therein in terms of the aforesaid explanatory note No. (v) added below Table 4 contained in regulation 9 of the said DCRs. The 7th respondent is further granted a one time right to nominate the lessee(s) with respect to the premises that the 7th Respondent is permitted to construct at the suit property. The 7th respondent is entitled to receive consideration for such a nomination to be made by the 7th respondent. The 7th respondent is not liable to the BEST to account for such a consideration that the 7th Respondent will be receiving from its nominees. The 7th respondent is to intimate the names of such lessees and the name of the trade which will be conducted by such lessees in the allotted premises. BEST has agreed to lease out the constructed commercial/residential premises on carpet area basis to the lessee(s) so recommended by the 7th respondent, for which the BEST has agreed to execute the lease deed(s) with each of such lessee(s). BEST has also agreed and confirmed that it will execute any other related documents as may be required to be executed to prefect the title of the developer's nominees to the said constructed and allotted premises

as lessees of the such premises without any delay or demur, provided that the 7th respondent does not commit breach of any of its obligation under the said Agreement. It is further clarified by the said Agreement that once the 7th respondent nominates the names of the proposed lessees and the BEST enters into lease deed with such lessees in respect of the premises constructed and allotted by the 7th respondent at the suit property, the right of the 7th respondent to nominate such names of lessees will extinguish. In other words, it is clarified that in case of early termination of such proposed lease(s) for any reason whatsoever, the 7th respondent shall have no further right to nominate any name with respect to the premises under such lease(s). It is also agreed that the 7th respondent will be entitled to form or cause to be formed a society of such proposed lessees/nominees of the 7th respondent and that the BEST has agreed to execute an Indenture of Lease in respect of such property in favour of such proposed society, if any.

103. Inasmuch as the lease period is concerned, it is agreed to be initially of 60 years for which the monthly lease rent is agreed to be Rs. 1/- per sq. foot of built-up area for the first 30 years and Rs. 2/- per sq. foot of built-up area for the subsequent 30 years. Thereafter, the lease period is agreed to be renewable at monthly lease rent to be determined by the BEST. It is clarified that the lease rent shall be exclusive of all taxes. However, Clause 12 of the agreement states that the lease rent will commence from the date of receipt of Occupation Certificate from the said Corporation in respect of residential/commercial construction or 48 months from the date of the said Agreement, whichever is earlier. It further states that the 7th respondent shall be responsible for payment of the lease rent with respect to the entire constructed premises from the date of commencement of the lease rent. This clause further states that the lessee will be required to pay a deposit equivalent to 12 months' monthly lease rent in advance to the BEST.

104. The said Agreement sets out various terms and conditions subject to which the 7th respondent is to carry out the development in issue. Nothing turns on these terms and conditions and, therefore, we need not set out the same herein. Suffice it to say that the right to carry out development conferred by the said agreement on the 7th respondent is not unconditional, but the same is very much subject to compliance with certain terms and conditions.

105. A perusal of the said Agreement and the nature of transaction effected thereby, in short, as set out hereinabove will demonstrate that the said Agreement by itself does not create a lease in anybody's favour, much less either in favour of the 7th respondent or in favour of the nominees of the 7th respondent. There can be no manner of doubt that the said Agreement with certainty assures the 7th respondent that without any delay or demur the BEST will execute the lease deed and all other documents in favour of the nominees of the 7th respondent for creating a lease in favour of the nominees of the 7th respondent in respect of the portion of the premises/building that will be

constructed and allotted by the 7th respondent to such nominees. This commitment made by the BEST to the 7th respondent by virtue of the said Agreement, howsoever strong and/or unequivocal may be, still the same falls short of actual creation of a lease in favour of the nominees of the 7th respondent, there being no question of creation of any lease in favour of the 7th Respondent. The terms of the said Agreement clearly demonstrate that such leases assured by the BEST are to be created in future. Obviously, therefore, there is nothing in the said Agreement which can be read to mean that a 'present demise has taken place' by virtue of the said Agreement either in regard to the suit property or in respect of the building to be constructed thereon by the 7th Respondent.

106. The specific clause which requires the 7th respondent to pay the amount of lease rent to the BEST with the expiry of the period of 48 months from the date of the said Agreement does not by itself create a lease of the suit property in favour of the 7th respondent. This term appears to have been included in the said Agreement only as and by way of quantum of amount that will become payable by the 7th respondent to the BEST. By paying such an amount as agreed, the 7th respondent cannot acquire any lease-hold rights in the suit property nor can the 7th respondent thereby acquire any status of a lessee in law of the construction that may be put up by the 7th respondent on the suit property.

107. In as much as the issue as to whether a particular document creates a "present demise" or not, no doubt is always a question which is to be answered by considering the document in issue, terms thereof and the nature of transactions that the parties may have contemplated under the same. However, so far as legal aspect of creating "present demise" is concerned, the Supreme Court had occasion to deal with the same, basically in the light of provisions of Indian Registration Act, 1908. Observations made by the Supreme Court, though are in the context of provisions of Registration Act, 1908 and in the background of factual controversy involved in such matters, the same may be useful for considering the aforesaid question involved in this case. These observations can be found in the following few Judgments:

(a) Tiruvenibai and Another Vs. Lilabai, .

(b) State of Maharashtra and Others Vs. Atur India Pvt. Ltd., .

108. In the aforesaid Judgments, the Supreme Court has considered the distinction between "agreement to lease" and "agreement of lease". This distinction is considered by the Supreme Court by referring not only English law but also Indian Law.

109. The Supreme Court again placed reliance on the ratio of the Judgment delivered by it in Trivenibai's case (supra) while dealing with the case of Food Corporation of India and Others Vs. Babulal Agrawal, . The paragraph 10 thereof reads thus:

...There must be demise of the property in praesenti. But an agreement for securing another agreement or deed in future would not be such an agreement or document which may require registration. Clause 8 of the agreement did not create any right in praesenti nor was there any immediate demise of the property. It was only an executory agreement. The construction of the plinths, it seems, had yet to start with other facilities and amenities. On completion, such a certificate was to be obtained from the defendant. It was thereafter that the possession was to be handed over under the lease agreement which was to be executed between the parties. The construction was to be strictly in accordance with the directions and specifications of the defendant. Condition 9 also contemplated that if the structure was found defective or workmanship was faulty, the defendant could refuse to take possession of the premises and the earnest money was liable to be forfeited. Hence it is evident that no possession, right or title had passed on in praesenti at the time of execution of the agreement, and there were many prior conditions attached thereto. Such an agreement, in our view, has been rightly held to be only an executory agreement and not an agreement creating rights in the immovable property, hence not compulsorily required to be registered. It was a mere agreement between the parties which was not registered but was admissible in evidence.

110. These Judgments and such other judgments delivered by the Supreme Court in this regard have crystalised the law on the point as to distinction between the nature of document, which is a "Agreement of Lease" and "Agreement to lease". The crux of this distinction is to find out as to whether the document in issue creates or does not create "a present demise". If the document and/or transaction creates a lease in praesenti then the same is an "Agreement of Lease". On the other hand, if the document is only executory in nature and instead of creating a lease in praesenti only assures and/or promises to create such a lease in future, the same is "Agreement to Lease".

111. In view of the aforesaid legal background as to the distinction between the aforesaid two different types of documents relating to lease and in view of the facts and circumstances of this case discussed in detailed herein above, we hold that the Agreement in issue dated 18.5.2007 is only executory agreement i.e. an "Agreement to Lease" and that the same is not an "Agreement of lease". Consequently, we conclude that the aforesaid Agreement in issue dated 18.5.2007 does not create any right, title or interest in favour of the 7th Respondent in praesenti and particularly such a right, title or interest as is contemplated by the provisions of Section 260Q of the said MMC Act, 1888.

112. One more important aspect of the matter is that in India, dual ownership is recognized in law. Therefore, leasing out the building i.e. the superstructure or a part thereof that will be constructed on the suit plot and leasing out the suit plot and/or area thereof will be two different aspects in law. In other words, creating a lease in respect of the superstructure is entirely different than creating a lease of the land on which the super-structure stands. If the said Agreement is

considered from this legal aspect of the matter, it will become clear that the said Agreement contemplates only creation of lease of the tenement and/or residential/commercial construction to be put up on the suit property and does not contemplate creation of a lease in anybody's favour in regard to the land underneath the construction i.e. the suit property or part thereof. Thus the said Agreement for this additional reason also does not in law, create any lease in favour of anybody inasmuch as the suit property or part thereof is concerned. The said Agreement only contemplates creation of a lease of the portion of the building that will be constructed on the suit property or part thereof by the 7th Respondent.

113. In view of the aforesaid discussion, we hold that the said Agreement is only an executory agreement which contemplates and, at the highest, assures execution of lease in future and does not create a lease in praesenti. We, therefore, conclude that the said Agreement does not create a 'present demise' in law and, therefore, is not a lease deed and further that the said Agreement does not create any right in the suit property in favour of the 7th respondent being only "Agreement for Development".

114. With the aforesaid conclusions we proceed to deal with the issue of applicability of the aforesaid provisions of Section 460 K and 460 Q of the said Act 1888. As this issue overlaps the next point framed for consideration we will deal with the same collectively as under.

115. POINT NO.8: Legality and validity of the Resolutions dated 6 t h November 2006 of the BEST and the Agreement for Development dated 18th May 2007:

As set out herein above, this issue needs to be answered, taking into consideration the nature of the said Agreement. The entire edifice of the case of the petitioner that the said Agreement is illegal is built on the foundation that the said Agreement creates a lease and/or in any case an interest in law, in the suit property, either in favour of the 7th respondent or in favour of the nominees of the 7th respondent. On the basis of such a foundation, the aforesaid argument is made by the learned Counsel appearing on behalf of the petitioner that the General Manager of the BEST has not obtained the requisite approval and/or permission and/or sanction from the said Corporation before executing the said Agreement and that therefore there is non-compliance with the provisions of Section 460 K (b) r/w 460 Q (d) of the said Act 1888.

116. However, as we have concluded hereinabove that the said Agreement does not create either lease in praesenti or any interest in law in favour of anybody in the suit property, in our view, the aforesaid provisions relied on behalf of the petitioner will not be attracted. The relevant portion of Section 460K and Section 460Q of the said Act, 1888 read thus:

460K. Making of contracts:- With respect to the making of contracts for the purposes of the Brihan Mumbai Electric Supply and Transport Undertaking) (including contracts relating to the acquisition and disposal of immovable

property or any interest therein, or any right thereto) the following provisions shall have effect, namely:

(a) ...

(b) no such contract for any purpose which, in accordance with any provision of the Chapter, the General Manager may not carry out without the approval or sanction of some other municipal authority, shall be made by him until or unless such approval or sanction has first been duly given ;

(c) no contract which will involve an expenditure exceeding ten lakhs rupees shall be made by the General Manager unless the same is previously approved by the Brihan Mumbai Electric Supply and Transport Committee:

Provided that, where the previous approval of the Committee is sought for any such contract by the General Manager, the Committee shall consider and dispose of such proposal within thirty days from the date of on which the item is first included in the agenda of any meeting of the Committee, failing which, the previous approval shall be deemed to have been given by the Committee for such Contract on the last day of the period of thirty days aforesaid. A report to that effect shall be made by the General Manager to the Committee;

(d) ...

(e) ...

460Q. Provisions governing disposal of municipal property:- With respect to the disposal of property vesting in the corporation for the purposes of the Brihan Mumbai Electric Supply and Transport Undertaking the following provision shall have effect, namely:

(a) the General Manager may, dispose of by sale, hire, hire-purchase or otherwise, any movable property belonging to the corporation not exceeding in value in each instance, two thousand rupees;

(b) the General Manager may grant a lease of any immovable property belonging to the corporation for any period not exceeding twelve months at a time:

[Provided that, every lease granted by the General Manager (other than a contract for monthly tenancy) the annual rent of which exceeds fifteen thousand rupees shall be reported by him, within fifteen days after the same has been granted, to the Brihan Mumbai electric Supply and Transport Committee];

(c) with the sanction of the [Brihan Mumibai Electric Supply and Transport Committee], the General Manager may dispose of, by sale or otherwise, any movable property belonging to the corporation of which the value does not exceed [one lakh rupees], and may grant a lease of any immovable property belonging to the corporation for any period exceeding one year, or sell or grant a lease in perpetuity of any immovable property belonging to the corporation for any period exceeding one year, or sell or grant a lease in perpetuity of any

immovable property belonging to the corporation the value whereof does not exceed [one lakh rupees] or the annual rental whereof does not exceed [ten thousand rupees];

(d) with the sanction of the corporation, the General Manager may lease, sell or otherwise convey any property, moveable or immovable, belonging to the corporation.

117. Considering the nature of the said Agreement, we are of the view that the provisions of Section 460K (c) alone are attracted. In our view, the provisions of Section 460-Q are not at all attracted, in the facts and circumstances of the case and that Section 460-Q will not govern and/or apply to the said Agreement. Section 460-Q will apply only when the property of the BEST is to be disposed of. In our view, the said Agreement does not dispose of the suit property. At the highest, the said Agreement may be read to mean that thereby a strong unequivocal commitment is made on behalf of the BEST by the General Manager with the previous approval and/or sanction of the BEST to dispose of the property of the BEST. However, the said Agreement certainly falls short of such actual disposal of the suit property. It has been brought on record that the BEST Committee has passed a resolution on 6th Nov. 2006 not only approving and/or sanctioning the tender in favour of the 7th respondent, but also approving and/or sanctioning the said Agreement executed in favour of the 7th respondent on behalf of the BEST. In view of the provisions of Section 460K (c), the General Manager was, therefore, legally competent to make the contract i.e., the said Agreement and, therefore, the said Agreement does not suffer from any legal infirmity.

118. It needs to be mentioned herein that on behalf of the BEST it is made clear that at an appropriate stage when an occasion will arise for the execution of the actual leases as contemplated/assured by the said Agreement, the BEST will take appropriate steps as required by the aforesaid provisions of the said Act

119. It was contended on behalf of the BEST that there are two classes of properties possessed by the BEST. The first one are those which belong to the said Corporation and are only given to the BEST for its user. The second one are those properties which are acquired directly by the BEST and therefore are held and possessed by the BEST. It was contended that the suit property falls in the second category and that it is acquired by the BEST and therefore that it is owned and held by the BEST. It was therefore contended on the basis of such a submission that the provisions of Section 260K and 260Q of the said Act 1888 will have to be considered accordingly.

120. We are unable to express our opinion and take a definite view in this regard, one way or the other, as no material adequate enough to perform such an exercise has been produced on record by either sides to show the source of acquisition of the suit property and its vesting in the BEST. In this case therefore we do not propose to venture into an exercise to determine the correctness or

otherwise of this contention raised on behalf of the Respondents. For want of adequate material to trace out the title of the BEST and decide as to whether or not the said Corporation has title/ownership of the suit property, we keep this issue specifically open.

121. Having considered all the contentions raised on behalf of all the parties and having found no substance in the case of the Petitioner we hereby dismiss this petition and discharge the Rule with no order as to costs.