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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO. 40 OF 2021

Asif Abdul Sattar
of Mumbai, adult, age 41 years, Indian Inhabitant, Occupation-Business
Income about 4.90 lacs p.a. residing at Room No. 32, 5th Floor, 29/31 Jainab Manzil, Narayan Dhuru Marg,
Pydhonie, Mumbai-400 003
Pan Card No. AMFPM0313F
AADHAR Card No. 3280 1022 8263 ... Petitioners

Versus

1. State of Maharashtra,
Urban Development Dept.
through Government Pleader,
Original Side, High Court, Bombay

2. Maharashtra Housing & Area Development Authority,
having address at Griha Nirman Bhavan, Bandra (E),
Mumbai-400 051

3. The Chief Officer
Mumbai Building Repairs and
Reconstruction Board
having address at Griha Nirman
Bhavan, Bandra (E),
Mumbai-400 051

4. Municipal Corporation of Gr.
Mumbai, Established under
Mumbai Municipal Corporation
Act, 1888 and having address at
Mahapalika Bhawan, Fort,
Mumbai-400 001

5 Iqbal Singh Chahal
The Hon'ble Municipal
Commissioner of Municipal
Corporation of Gr. Bombay having
his Office at Mahapalika Bhawan,
Mahapalika Marg, Fort,
Mumbai-400 001

6 Vinod Chithore of Mumbai
Indian inhabitant & employee of
MCGM as Chief Engineer
(Development Plan) having his
office at Mahapalika Bhawan,
Mahapalika Marg, Fort,
Mumbai-400 001

7 Rajendra Jadhav of Mumbai
Indian inhabitant & employee of
MCGM as Executive Engineer
(Buildings & Proposal) having his
office at Mahapalika Marg, Fort,
Mumbai-400 001

8 Nasir Adam Patel of Mumbai
Indian inhabitant & employee of
MCGM as Senior Engineer
(Buildings & Proposal)having his
office at Mahapalika Marg, Fort,
Mumbai-400 001

9 Abhay Bagayatkar of Mumbai
Indian inhabitant & employee of
MCGM as Assistant Engineer
(Buildings & Proposal) having
his office at Mahapalika Marg,
Fort, Mumbai-400 001

10. M/s. Rubberwala Housing &
Infrastructure Ltd.
a Company incorporated under
the Companies Act, 1956 having
its address at 382/B, Pavwala
Building, Ground Floor, Room No.
4, Grant Road, Mumbai-400 007
and
Rubberwala House, Dr. Nair Road,
Agripada, Mumbai-400 011 ... Respondents

Mr. Shishir Joshi a/w. Mr. Chetan Mhatre i/b. Ms. Priti Joshi for the Petitioner.

Mr. Aspi Chinoy, Senior Advocate a/w. Mr. Joel Carlos and Ms. Rupali Adhate for MCGM.

Mr. Anil Anturkar, Senior Counsel a/w. Mr. Ashish Kamat, Mr. Ankit Lohia, Ms. Kausar Banatwala, Mr. Pratik Shah, Ms. Neuty N. Thakkar, Ms. Paluck Bengali and Ms. Vanati Sadh i/b. Mr. Tushar Goradia for Respondent no. 10.

Mr. P. G. Lad a/w. Ms. Sayali Apte and Ms. Shreya Shah for Respondent nos. 2 and 3 – MHADA.

Mr. Himanshu Takke, AGP for the State of Maharashtra.

Mr. Ganesh Harne- Executive Engineer.

Mr. Jayant Walwatkar, Asstt. Engineer, DP, 'D' Ward.

Mr. Nasir Patel, Sub-Engineer, DP, 'D' Ward.

CORAM : S.V. GANGAPURWALA, ACJ. &
SANDEEP V. MARNE, J.

RESERVED ON : 10 FEBRUARY 2023
PRONOUNCED ON : 20 FEBRUARY 2023

JUDGMENT (Per Sandeep V. Marne, J) :-

A. THE CHALLENGE

1. Petitioner, claiming to be a public spirited person, has instituted the present Public Interest Litigation challenging decision of Municipal Commissioner dated November 12, 2020 approving proposal for grant of FSI 3.00 under Regulation

33(7) on gross plot area and FSI 1.00 under Regulation 33(18) on net plot area, as well as all subsequent approvals including approval dated August 8, 2021, in respect of redevelopment of the property 'Pila House-Platinum' CS No. 990, Patthe Bapurao Marg, Girgaum Division, Mumbai 400 007 ('**Project'**). He further seeks directions to the Municipal Corporation of Greater Mumbai ('**MCGM**') to demolish part of the structure which is in excess of cap/limit on the maximum permissible FSI @ 4 on net plot area as per Regulation 33(18)(III) & (IV) read with Regulation 30A(12) of Development Control and Promotion Regulations for Greater Mumbai, 2034 ('**DCPR 2034'**). He further seeks direction to MHADA to acquire and possess the surplus built-up area of 664.31 sq.mtrs and fungible FSI thereon for appropriation thereof to the dis-housed occupants of cessed buildings. He further seeks action against respondent nos. 5 to 9 (Municipal Commissioner, Chief Engineer & other officials) under the provisions of the Indian Penal Code 1860 and the Prevention of Corruption Act 1988 and initiation of disciplinary proceedings for allotting FSI in excess of cap/limit on maximum permissible FSI @ 4.00 on net plot area.

B. FACTS

A brief narration of facts, as a prologue to our judgment, would be necessary. For better understanding of facts, it would also be necessary to briefly explain some of the concepts by making reference to few provisions of DCPR, which we have done.

B.1 BACKGROUND FOR FILING PIL

2. Petitioner carries on business of selling sweets as a partner in the shop 'Suleman Usman Mithaiwala' and stays in the vicinity of the project and is a regular passer-by of the area for his business. He noticed an old building popularly known as 'Pila House' being demolished in the year 2013-14 for redevelopment. As redevelopment was taking several years, he made enquiries with MCGM when he came across the fact of several occupants not being certified as eligible for rehabilitation and not being paid transit rent- compensation for a long period. He therefore sought recourse under the Right to Information Act, 2005 and procured various records relating to the project from offices of MCGM in August 2021. Some of the documents were also available from the website of MCGM. He then consulted an architect, who on promise of anonymity, provided information to about the relevant laws,

sanctions, approvals and concessions sought and/or granted in respect of the project.

B.2 CESSED BUILDINGS

3. The building 'Pila House' was a cessed building. Category A cessed buildings are those which are constructed prior to 1940 and have outlived their life. Chapter VIII of Maharashtra Housing and Area Development Act, 1976 ('**Act of 1976**'), provides for repairs, reconstruction, etc of cessed buildings through Mumbai Repairs & Reconstruction Board (**MBRRB**). Under the Act of 1976, certain area in a reconstructed building is required to be provided to MBRRB for housing of occupiers of cessed buildings which cannot be reconstructed. In the present case, MBRRB has issued No Objection Certificate (**NOC**) dated April 23, 2010 to the project *inter alia* stating that the exact surplus area shall be determined after receipt of plans approved by MCGM. The NOC was revised by MBRRB on September 24, 2012 directing that surplus area of 664.31 Sq. mtrs shall have to be surrendered to MHADA, after ascertainment from approved plans.

B.3 Relevant Provisions Of Development Control Regulations

4. Regulation 32 of the Development Control Regulations of the Greater Mumbai, 1991 (**DCR 1991**) permitted zonal FSI of 1.33 for Island City of Mumbai. Regulation 33 (7) provided for redevelopment of cessed buildings and permitted higher FSI for rehousing of occupiers of cessed buildings than the zonal FSI. As per amendment effected on May 21, 2011, FSI of 3.0 is permissible under DCR 33(7). Regulation 33 (24) provided for additional incentive FSI for multi-storey Public Parking Lot (**'PPL'**) to be used on the same plot within the overall cap/limit of total maximum permissible FSI.

5. DCPR 2034 were notified w.e.f. May 8, 2018. Regulation 9(6)(b) permits applicability of DCPR 2034 to ongoing partially completed works. The scheme of incentive FSI for redevelopment of cessed building is continued under the DCPR-2034 as Regulation 33 (7). The scheme of incentive FSI for PPL is also continued with change in the number of Regulation as 33 (18). Under Regulation 30 (A)(12), development of plots under a combination of various schemes is permissible provided that the FSI does not exceed the total permissible FSI

under Regulations. The cap/limit of total permissible FSI of 4.00 is retained in DCPR 2034.

B.4 Concept of Gross Plot Area & Net Plot Area

6. The gross plot area is the actual size of the plot taken up for development, in the present case, the area on which the cessed building was situated. Net plot area is the reduced area on account of mandatory handing over of some of the areas to MCGM. So far as present case is concerned, the gross plot area is reduced on account of two mandatory provisions relating to road set back area and amenity open space area. Without delving further into the exact provisions for handing over of set-back area and amenity area (since there is no dispute on this), suffice it to state that the figures of gross and net plot area in the present case are as under:

Gross Plot Area	**4675.62 sq.mtr**
(Less) Set Back Area	390.18 sq. mtr
(Less) Amenity Open Space Area	74.99 sq.mtr
Net Plot Area	**4210.45 sq.mtr**

B.5 Processing Of Proposals Of Respondent No. 10

7. Respondent No. 10 is a developer, who submitted proposal for redevelopment of 'Pila House Plot' under

Regulation 33(7) of DCR 1991 sometime in 2010. As stated above, MBRRB issued NOCs from time to time for such redevelopment. Intimation of Disapproval and Commencement Certificate were issued by the MCGM in 2013 approving the proposal for redevelopment under Regulation 33(7) of DCR, 1991. In the year 2017, Respondent No. 10 applied for amendment of development permission for the purpose of availing benefit of additional incentive FSI by proposing to construct multi-storied PPL under Regulation 33 (24) of DCR 1991. By letter dated April 7, 2017, Respondent No. 10 informed MCGM that as per the then prevailing practice, FSI cap @ 4.00 was being applied on net plot area and that the same needed to be applied on gross plot area so that MCGM can get more public parking spaces. As per the details given in Petition and various file notings attached, it appears that various hierarchical officers of MCGM approved file notings for permitting FSI @ 4.00 on gross plot area. The then Municipal Commissioner (Mr. Ajoy Mehta) however returned the proposal vide decision dated May 26, 2017. Though he did not comment specifically on permissibility of computing maximum FSI on gross plot area, he remarked that set back area needed to be deducted from calculation of 4 FSI cap.

8. After coming into effect of DCPR 2034, Respondent No. 10 submitted fresh proposal for availing FSI 3.00 under Regulation 33(7) on gross plot area and FSI 1.00 under Regulation 33(18) on net plot area. When the proposal reached succeeding Municipal Commissioner (Mr. Pravin Pardeshi), it was returned on June 6, 2019 on various counts with a specific remark that '*FSI permissible shall be on Net Plot Area*'.

9. Respondent No. 10 thereafter addressed letter dated August 10, 2019 to MCGM clarifying that while computing FSI 3.00 on gross plot area under Regulation 33(7) and FSI 1.00 on net plot area under Regulation 33(18), the set-back area is already deducted and the same was already approved by the then Municipal Commissioner. The file was again put up before the then Municipal Commissioner (Mr. Pravin Pardeshi) who once again returned it vide his decision dated November 12, 2019 directing Chief Engineer (Vigilance) to examine lapses in processing the proposal. This is how, according to Petitioner, the proposal for permitting FSI 3.00 under Regulation 33(7) on gross plot area was thrice rejected by the Municipal Commissioner on June 26, 2017, June 6, 2019 and November 12, 2019.

10. Petitioner alleges that after appointment of Respondent No. 5 (Mr. Iqbal Chahal) as the Municipal Commissioner on May 8, 2020, Respondent No. 10 once again addressed letter dated July 17, 2020 claiming FSI 3.00 on gross plot area and FSI of 1.00 on Net plot area, this time by deducting the set-back area and amenity area. Petitioner further alleges that the new Municipal Commissioner, by disregarding the earlier refusals by his predecessors, approved the proposal on November 12, 2020 without assigning any reasons. On the basis of the approval granted by Respondent No. 5 on November 12, 2020, Respondent No. 10 sought full amendment of plans with FSI 3.00 on gross plot area under Regulation 33(7) and FSI 1.00 on net plot area under Regulation 33 (18) and further requested for fungible FSI for rehabilitation component and also for sale component. Such amended plans came to be approved on August 8, 2021. The decision of Municipal Commissioner dated November 12, 2020 and approval of plans on August 8, 2021 are subject matter of challenge in the present petition.

B.6 Allegation of Excess FSI

11. In the manner indicated above, petitioner alleges grant

of excess FSI by MCGM in favour of respondent no. 10 for the project. Allegation is premised on an assertion that the total FSI for combination of various incentive schemes can never exceed the cap/limit of 4.00 on net plot area. However on account of grant of incentive FSI of 3.00 under DCPR 33(7) for redevelopment of cessed building on gross plot area and incentive FSI of 1.00 for multi-storied PPL on net plot area under DCPR 33 (18), the total FSI granted exceeds the cap/limit of maximum permissible FSI of 4.00 under Regulation 33(18)(III) & (IV) read with Regulation 30A(12). It is Petitioner's contention that both incentive FSI for redevelopment of cessed building [33(7)] and PPL [33(18)] must be calculated on net plot area so that the total permissible FSI does not exceed 4.00. Petitioner alleges that on multiple occasions in the past, the successive Municipal Commissioners had issued specific directions to restrict the combined incentive FSI on net plot area. However Respondent No. 5 (incumbent Municipal Commissioner), in connivance of Respondent Nos. 6 (City Engineer), 7 (Executive Engineer-Buildings & Proposal), 8 (Senior Engineer- Buildings & Proposal) and 9 (Assistant Engineer- Buildings & Proposal) overruled the decisions of earlier Municipal Commissioners

and illegally approved proposal on November 12, 2020 for grant of FSI under Regulation 33 (7) on gross plot area and FSI under Regulation 33 (18) on net plot area, resulting in a situation where the total FSI for the project has crossed the limit of maximum permissible FSI 4.00. That as against permissible FSI of 22,736.43 sq. mts, Respondent No. 10 has illegally been granted FSI of 24,620.37 sq. mts. This is how additional FSI of 1883.94 sq mts is alleged to have been illegally offered to Respondent No. 10. That after adding fungible FSI @ 35%, illegality is further compounded. Petitioner has levelled serious allegations of corrupt practices against Respondent Nos. 5 to 9.

B.7 Issue of Surplus Area

12. As observed above, the exact surplus area to be surrendered to MHADA was to be ascertained after approval of final plans by MCGM and the NOCs issued by MBRRB were thus conditional. Serious allegations are levelled by Petitioner in Para 72 to 87 of the Petition alleging that Respondent No. 10 was in the process of wriggling out of its obligation to hand over surplus area to MHADA by engineering various methods. It is contended that handing over of such surplus area is

mandatory for the purpose of rehousing of occupants of cessed buildings which cannot be redeveloped. It is alleged that there are as many as 29,723 occupants of cessed buildings who are dis-housed due to collapse of/or unsafe buildings. We do not find it necessary to record events and contentions relating to handing over of surplus area in view of the readiness expressed by Respondent No. 10 to hand over the requisite surplus area and also in the light of the affidavit dated February 10, 2023 tendered by MHADA confirming that 103 flats have been handed over by Respondent No. 10 to MHADA and that the surplus built-up area to be handed over to MBRRB is NIL.

C. Order Passed By This Court On December 5, 2022

13. Having briefly narrated the facts of the case and before proceeding ahead, it would be apt to make a reference to the Order passed by this Court on December 5, 2022 after taking into consideration the preliminary objections raised by MCGM and Respondent No. 10 about maintainability of the present petition and lack of *bonafides* on his part. The Order reads thus:

1. Upon demolition of an old building, viz., 'Pila Building', large-scale redevelopment took place upon obtaining permission from the Municipal Corporation of Greater Mumbai, so much so that construction up to the 17th floors of three separate buildings had been completed. It is at that stage, this PIL petition came to be instituted on 16th November, 2021. The petitioner alleges that a decision dated 12th November, 2020 (Exhibit-T) was taken by the Municipal Commissioner, Mr. Iqbal Singh Chahal (respondent no.5), permitting 3 (three) FSI on Gross Plot Area under Regulation 33(7) of the Development Control & Promotion Regulations, 2034 (hereafter "the DCPR-2034", for short) and 1 (one) FSI on Net Plot Area under Regulation 33(18) thereof without assigning any reason whatsoever and by completely ignoring the earlier orders dated 26th May, 2017, 6th June, 2019 and 12th November, 2019 made by his predecessor Municipal Commissioners. It is claimed that such decision is arbitrary, perverse, illegal and mala fide.

2. In paragraphs 8 and 9 of the petition, the petitioner describes himself as a regular passerby of the area for his business purposes. While redevelopment was taking some time, he came to learn from certain occupants of Pila Building that they were not certified as eligible for rehabilitation by the Chief Officer, Mumbai Building Repairs and Reconstruction Board (respondent no.3) and also that certain occupants, not declared eligible though eligible, were not even paid transit rent compensation for a long period. This triggered inquiries by the petitioner resulting in he obtaining information of brazen violation of the provisions of the DCPR-2034 by the respondent no.5 while granting permission for redevelopment to the developer (respondent no.10).

3. In paragraph 69 of the PIL petition, serious allegations have been levelled against the respondent no.5 by the petitioner of accepting illegal gratification and that thereby he has committed offence under the Prevention of Corruption Act, 1988 and the Indian Penal Code. Despite being impleaded as respondent no.5 by name, Mr. Iqbal Singh Chahal has not countered such serious allegations levelled against him in paragraph 69 of the PIL petition by filing a counter affidavit.

4. We have heard Mr. Chinoy, learned senior advocate appearing for the Municipal Corporation of Greater Mumbai

and Mr. Samdani, learned senior advocate appearing for the respondent no.10, to raise multiple objections to the maintainability of the PIL petition. Not only is the bona fide of the petitioner questioned but also, gross delay and laches in approaching the Court is raised as a ground for dismissing the petition. Mr. Samdani by referring to a further affidavit filed by the respondent no.10, indicates the manner in which construction has progressed over the years since the basement work started on 5th November, 2017. In addition, he has raised the point of creation of third-party rights in favour of interested buyers of the under- construction buildings. However, we record Mr. Samdani's statement that eventually if it is found that the respondent no.10 has to give up certain additional area in favour of the respondent no.3, it is willing to do so.

5. In several decisions, the Supreme Court has cautioned the High Courts not to entertain any petition styled as a public interest litigation without testing the bona fides of the litigant approaching the Court. The statements made in paragraphs 8 and 9 of the PIL petition give us reason to suspect that the petitioner might have been set up by some of the occupants who are aggrieved by reason of not being certified as eligible occupants for rehabilitation as well as for receiving transit rent compensation. Also, the allegations levelled against the respondent no.5 would have to be proved by the petitioner should there be a challenge to the veracity thereof by the respondent no.5 and the petitioner is put to strict proof thereof.

6. We, therefore, wish to put the petitioner on terms in exercise of power conferred by rule 7A of the Bombay High Court Public Interest Litigation Rules, 2010. The petitioner is required to deposit a security amount of Rs.2,00,000/- (Rupees Two Lakh Only) within a period of a fortnight from date. Once such deposit is made, the petitioner shall inform the learned advocate on record for the Municipal Corporation. Thereafter, the respondent no.5 shall have time till 9th January, 2023 to file his counter affidavit. If counter affidavit by the respondent no. 5 is filed, the petitioner may file his rejoinder affidavit thereto by 14th January, 2023.

7. Should the petitioner fail to succeed in his claim, the security deposit shall stand forfeited.

> 8. In the event of the security deposit being made, the PIL petition shall be listed on 16th January, 2023, 'high on board', for further consideration. If the deposit is not made, the PIL petition shall stand dismissed without reference to the Bench.

In pursuance of the Order passed by this Court on December 5, 2022, Petitioner has deposited amount of Rs. 2,00,000/- on December 8, 2022.

D. Submissions

14. We have heard Mr. Shishir Joshi the learned counsel for Petitioner, Mr. Aspi Chinoy the learned Senior Advocate for MCGM, Mr. Anil Anturkar learned Senior Advocate for Respondent No. 10, Mr. P. G. Lad the learned counsel for MHADA and learned AGP for State Government. Submissions made by Mr. Joshi, Mr. Chinoy and Mr. Anturkar are briefly captured below:

D.1 Submissions On Behalf Of Petitioner

15. Appearing for Petitioner, Mr Joshi the learned counsel would first meet the objection about maintainability of PIL raised by MCGM and Respondent No. 10. He would submit that Petitioner, being a resident at nearby vicinity of the project, is disturbed by the fact that excess construction than the one permissible under DCPR is being put up by Respondent No. 10

thereby completely disturbing the town planning norms. That other developers would cite the example of Respondent No. 10 and demand additional FSI in a similar manner. That if such constructions are permitted, it will result in putting pressure on infrastructure in Girgaum area, which is already congested. That the object of Petitioner behind filing the present Petition is just to ensure that no developer is permitted to construct in excess of permissible FSI under the DCPR. He would therefore urge that the present Petition is filed for *bonafide* purposes in larger public interest.

16. On merits, Mr. Joshi would take us through various provisions of DCR 1991 and DCPR 2034. He would submit that the scheme of DCR 1991 or that of DCPR 2034 is such that the overall FSI under various schemes combined together can never exceed 4.00 on net plot area. That the net plot area is the one on which the development is to be carried out and therefore the area of gross plot (which is not even available for development) cannot be taken into consideration for computation of FSI under any scheme. That permitting FSI 3.00 on gross plot area under Regulation 33 (7) would result in breach of cap of maximum permissible FSI under Regulation

33 (18). That when there is a specific prohibition under Regulation 33(18) on crossing the cap of FSI 4.00, MCGM cannot offer excess FSI to Respondent No. 10. Mr. Joshi would highlight the fact that the proposal of Respondent No. 10 for FSI on gross plot area was thrice rejected by the previous Municipal Commissioners on May 26, 2017, June 6, 2019 and November 12, 2019 and that the incumbent Municipal Commissioner has erroneously ignored those rejections while sanctioning the proposal on November 12, 2020 without recording a single reason.

17. Referring to provisions of Regulation 6(b), Mr. Joshi would contend that even the discretionary powers in cases involving demonstrable hardship cannot be used in a manner which would result in enlargement of permissible FSI.

18. Mr. Joshi would then address us on the second aspect of avoidance on the part of Respondent No. 10 in handing over the surplus area. He made detailed submissions on requirement of handing over surplus area and how Respondent No. 10 has been avoiding to hand over the same. However as observed above in view of statements made on behalf of Respondent No. 10 about willingness to hand over the requisite

surplus area, so also affidavit of MHADA certifying that the surplus area to be handed over to MBRRB is 'Nil', we are not recording the submissions of Mr. Joshi on this aspect.

19. In support of his contentions, Mr. Joshi would rely upon following judgments:

(a) *Tata Cellular vs. Union of India*[1]

(b) *BVG India Ltd. vs. State of Maharashtra & Ors.*[2]

(c) *Supertech Limited vs. Emerald Court Owner Resident Welfare Association & Ors.*[3]

(d) *Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environment Action Group & Co.*[4]

(e) *Kerala State Coastal Zone Management Authority vs. State of Kerala Maradu Municipality & Ors.*[5]

(f) *Pune Municipal Corporation vs. Promoters & Builders Association*[6]

(g) *Rajendra Thacker & Ors. vs. Municipal Corporation of Greater Mumbai and Ors.*[7]

(h) *Sunbeam Enterprises vs. Municipal Corporation of Greater Mumbai and Ors.*[8]

(i) *Asian Resurfacing of Road Agency Pvt. Ltd. & Ors. vs. Central Bureau of Investigation.*[9]

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1 1994 (6) SCC 641
2 2021 DGLS(Bom.) 392.
3 2021 DGLS (SC) 405
4 2006 AIR (scw) 1392
5 2019 (&) SCC 248
6 2004 (10) SCC 796
7 2004 (106) Bom L.R. 598
8 2019 DGLS (Bom.) 508
9 2018 (16) SCC 299

(j) *Noida Entrepreneurs Association vs. Noida & Ors.*[10]

(k) *Shankara Co-op Housing Society Ltd. vs. M. Prabhakar & Ors.*[11]

(l) *Uday Gagan Properties Limited vs. Sant Singh & Ors.*[12]

(m) *Secretary, Ministry of Chemicals & Fertilizers, Government of India vs. Cipla Limited and Ors.*[13]

(n) *Nanasaheb Vasantrao Jadhav vs. State of Maharashtra and Ors.*[14]

(o) *State of Odisa vs. Pratima Mohanty*[15]

D.2 Submissions on Behalf of MCGM

20. Mr. Chinoy, the learned Senior Advocate appearing for MCGM would oppose the petition and support the decision of the Municipal Commissioner. He would rely upon provisions of Regulation 33(7) (1) which specifically permits grant of FSI on gross plot area. He would submit that no departure is made in the present case by permitting FSI 3.00 under Regulation 33(7) on gross plot area and FSI 1.00 under Regulation 33(18) on net plot area, as the decision is consistent with generality of past approvals in all cases. That both before and after the decisions of earlier Municipal Commissioners dated May 26, 2017 and June 6, 2019, the very same Municipal

10 2011 (6) SCC 508
11 2011 (3) SCC 569
12 2016 (11) SCC 378
13 2003 (7) SCC 1
14 2022 DGLS (Bom.) 280
15 2021 DGLS (SC) 942

Commissioners in all other cases of combined development under Regulations 33(7) and 33(12)/33(18) have permitted FSI 3.00 on gross plot area and FSI 1.00 on net plot area by passing reasoned orders. That Petitioner has selectively chosen the present case, for reasons which are not *bonafide*. That the decisions of earlier Municipal Commissioners taken on May 26, 2017 and June 6, 2019 putting cap of FSI 4.00 on net plot area were inconsistent with generality of decisions taken by them in other cases. He would highlight decisions of those Municipal Commissioners in other cases where they permitted FSI 3.00 on gross plot area and FSI 1.00 on net plot area. He would submit that in a similar situation where there was combination of schemes under Regulations 33(7) and 33(12), Municipal Corporation had sought clarification of the State Government and by exercising powers under provisions of Regulation 4(3), the State Government had issued clarification on April 13, 2022. As per the clarification, while permitting combination of incentive FSI claimed under Regulations 33(12) and 33(7), FSI 3.00 can be on gross plot area whereas the rest of the FSI 1 can be allowed on net plot area.

21. Mr. Chinoy would then demonstrate as to how putting cap/limit of FSI 4.00 on net plot area would defeat the entire objective behind providing incentive FSI for constructing multi-storied PPL. That such a cap results in the developer receiving lesser FSI than permissible incentive FSI of 1.00 for having constructed public parking building. That if developers are allowed lesser FSI than permissible incentive FSI of 1.00, they would not come forward to construct public parking buildings, thereby defeating the entire objective behind offering incentive FSI for public parking schemes.

D.3 Submissions on Behalf of Respondent No. 10

22. Mr. Anturkar, the learned Senior Advocate appearing for Respondent No. 10 would also oppose the petition raising preliminary objection of delay and lack of bonafides on part of the Petitioner. He would submit that grant of FSI 3.00 under Regulation 33(7) on gross plot area and FSI 1.00 under Regulation 33(18) on net plot area is perfectly in order and there is nothing in the DCPR which prohibits doing so. Mr. Anturkar would take us through the provisions of DCPR 2034. He would submit that under DCR 30(12) combination of various incentives schemes is permissible, which also includes

combination of scheme of redevelopment of cessed building in Island City under Regulation 33(7) with the scheme of multi storied PPL under Regulation 33(18). Referring to the clarification issued by the State Government in a similar case, he would submit that even though the clarification is subsequent to the decision of the Municipal Commissioner, the directives of the State Government only clarifies which was always there. That the clarification of the State Government is not in the nature of directions under section 154 of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act) and would therefore apply to the present case as well.

23. Mr. Anturkar would then submit that no special dispensation is given to respondent no. 10 in the present case as same formula has been applied in cases of Ameen Ganpatrao, Architect and Marine Drive Hospitality. Mr. Anturkar would further submit that it is well settled law that if more than one interpretations are possible, the one that makes the scheme of Regulations workable must be accepted.

24. Lastly Mr. Anturkar would submit that so far as handing over of surplus area is concerned MHADA has clarified in its additional affidavit that after handing over of 103 flats to the

MBRRB, the surplus built up area to be surrendered to MBRRB is Nil. In support of his contentions Mr. Anturkar would rely on the following judgments:

(a) *K.P.Varghese vs. Income Tax Officer, Ernakulam and Anr.*[16]

(b) *Sarthi Seva Sangh & Anr. vs. MCGM & Ors.*[17]

(c) *R & M Trust vs. Koramangala Resident Vigilance Group and Ors.*[18]

D.4. Submissions Of Behalf Of Petitioner In Rejoinder

25. In rejoinder, Mr. Joshi would contend that if law prohibits something, concept of "workability" becomes irrelevant and that even in an ambiguous situation, specific provision of law must be followed without any exception. He would further refer to the definition of FSI under section 2 (61) of the DCPR 2034 in support of his contention that since FSI is the quotient of the ratio of plot area, FSI cannot be segregated. All types of FSI must be computed on the plot area available for development. In so far as the clarification issued by the Urban Development Department of the State Government is concerned Mr. Joshi would contend that the clarification of Urban Development Department would tantamount to

16 (1981) 4 SCC 173
17 PIL No. 43 of 2022
18 (2005) 3 SCC 91

provisions of additional FSI which is in violation of the DCPR as well as provisions of Section 37 of the MRTP Act. That without resorting to modification of development plan under section 37 of the MRTP Act such additional FSI cannot be conferred.

F. Reasons and Analysis

F.1 Preliminary Objections

26. Both MCGM and respondent no. 10 have raised objections about maintainability of the present PIL filed by petitioner both on the ground of delay in filing the same as well as lack of *bonafides* on his part. We first deal with objection of delay. The objection is essentially referable to the factum of substantial progress of construction at the site at the time of filing of the PIL. However, what is challenged in the present petition is the approval dated November 12, 2020 granted by the Municipal Commissioner. The Petitioner had no grievance about approval of plans as well as construction put up at the site prior to November 12, 2020. His grievance essentially relates to Municipal Commissioner's approval dated November 12, 2020, which according to the Petitioner, has resulted in grant of excessive FSI of 1883.94 sq.mtrs. plus fungible FSI. The amended plans for construction based on impugned approval

were sanctioned on August 8, 2021. Thus the cause of action for filing the present petition arose on November 12, 2020 and August 8, 2021 and present petition filed on 15 November 2021 cannot be said to suffer from delay or latches. We therefore repel the objection of delay. Since there is no delay in filing the petition, reliance of Mr Anturkar on judgment in ***R & M Trust*** (supra) is misplaced.

27. So far as the second objection about lack of bonafides on the part of Petitioner is concerned, we propose to deal with the same at latter part of the judgment after discussing merits. Also of relevance is the fact that this court has already passed order dated December 5, 2022 directing payment of security deposit of Rs. 2,00,000/- as a condition precedent for entertaining the PIL. Petitioner has deposited the amount and therefore we would proceed to first deal with merits of contentions raised by Petitioner.

F. 2 PERMISSIBILITY OF COMPUTATION OF FSI ON GROSS PLOT AREA

28. A short issue that is involved in the present petition is whether FSI under Regulation 33(7) can be allowed on gross plot area while restricting the FSI under DCPR 33(18) on net plot area. Petitioner's contention is that by allowing FSI under

DCPR 33(7) on gross plot area, the cap/limit of maximum permissible FSI 4.00 is breached and that respondent no. 10 is allowed excessive FSI beyond the cap/limit of FSI 4.00. We have already dealt with the concept of gross plot area and net plot area. As observed above, on account of handing over of two areas viz. (i) road set back area and (ii) amenity space area, the size of the gross plot area on which the building 'Pila House" was located stands reduced and what is actually available for development is only net plot area. The gross plot area of the plot was originally 4675.62 sq. mtrs and after deducting set back area of 319.18 sq. mtr and amenity open space area of 74.99 sq. mtr, the net plot area reduced to 4210.45 sq. mtr. What is essentially done in the present case is, FSI 3.00 under Regulation 33(7) is granted on gross plot area of 4675.62 sq. mtrs, whereas the FSI 1.00 under Regulation 33(18) is granted on plot area of 4210.45 sq. mtrs.

29. We must observe at the very outset that DCR 1991 or DCPR 2034 do not specifically provide that maximum permissible FSI of 4.00 must be calculated on net plot area alone. For the sake of convenience, we reproduce DCPR 33 (18) governing multi-storeyed PPL which seeks to put cap/limit of maximum permissible FSI @ 4:

Reg. 33(18) Multi Storey Public Parking Lot (PPL) – of DCPR-2034 provide for Cap on Maximum Permissible FSI of 4.00 :-

(III) The incentive FSI given on this account will be over & above the Zonal (basic) FSI permissible under any other provisions of DCPR. This incentive FSI shall allowed to be used on the same plot in conformity with DCPR/DP, within the overall cap/ limit of the total maximum permissible FSI as given at (VII) below.

(IV) The incentive FSI permissible under this Regulation against BUA of the PPL, shall be 50% of the BUA of the PPL, shall be 50% of the BUA of the PPL, such that the total permissible FSI including the incentive FSI under this regulation does not exceed as detailed below :

Plot Area	Maximum Permissible FSI
Up TO 2000 sq.m	3.00
Above 2000 sq.m	4.00

30. Regulation 30(A)12) of the DCPR 2034 reads thus :

> "The Development of plots under combination of various regulations shall be permissible, but the maximum permissible FSI on plot shall not exceed the permissible FSI limit prescribed in respective regulations".

31. It is on the basis of provisions of Regulation 33(18) (III) and (IV) as well as Regulation 30(A)(12) of the DCPR 2034 that petitioner alleges violation of FSI norms by asserting that excessive FSI of 1883.94 sq.mtrs is extended by MCGM to respondent no. 10. However, both Regulation 33(18) (III) and

(IV) as well as Regulation 30 (A) (12) do not provide that maximum permissible FSI must be calculated on net plot area alone. On the contrary, Regulation 33(7) specifically provides for grant of incentive FSI on gross plot area. Relevant provision of Regulation 33(7) reads thus:

> **33(7) Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation**:
>
> (1) For reconstruction/redevelopment to be undertaken by same or different landlords or Co-operative societies of landlords and Cooperative Housing Societies (existing or proposed) of existing tenants or by Co-op. Housing Societies of landlords and/or occupiers of a cessed building existing prior to 30/9/1969 in Island City, which attracts the provisions of MHAD Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation existing prior to 30.09.1969, **FSI shall be 3.00 on the gross plot area** or FSI required for rehabilitation of existing tenants plus incentive FSI as specified in sr. no 5(a) below whichever is more.

32. Thus there is specific provision in Regulation 33(7) for computation of incentive FSI 3.00 on gross plot area. As against this, Regulation 37 (18) is silent about computation of incentive FSI for construction of PPL on gross or net plot area. This is the reason why Municipal Commissioner has approved grant of FSI 3.00 under Regulation 33(7) on gross plot area while restricting FSI 1.00 under Regulation 33(18) on net plot area.

F. 3 Anomalous Situation Arising Out of Restricting FSI on Net Plot Area

33. It has been the contention of MCGM that computation of total FSI under combined schemes of Regulation 33(7) and 33(18) on net plot area would result in a situation where a developer does not actually get to utilise the entire permissible incentive FSI of 1.00 under Regulation 33(18) for construction and handing over multistorey PPL to MCGM. That developers incur huge costs towards construction of such multistorey PPL and if they are denied whole of permissible incentive FSI 1.00, they would be disinterested in building multistorey PPL.

34. Both Mr. Chinoy and Mr. Anturkar have demonstrated this resultant anomaly, which would be clear from the following comparative chart:

	Illustration A (As desired by Petitioner) [Sq mtrs]	**Illustration B** (As granted by MCGM) [Sq mtrs]
Gross Plot Area	100	100
Area handed over to MCGM	20	20
Net Plot Area	80	80
FSI 3.00 under Reg 33(7)	240 (on net plot area)	300 (on gross plot area)
FSI 1.00 under Reg. 33(18)	80 (on net plot area)	80 (on net plot area)
Total FSI	320	380
FSI actually permitted for constructing PPL	20	80

Thus, as against entitlement of FSI of 80 sq. mtrs (FSI 1.00 on net plot area of 80 sq. mtrs), the developer may end up in actually receiving additional FSI of just 20 sq. mtrs for constructing multistorey PPL if contention of Petitioner is to be accepted.

35. It is on account of the anomaly demonstrated above that both MCGM as well as State Government appear to have taken a stand that with a view to enable the developer to actually and fully utilise the entire permissible incentive FSI of 1.00 under Regulation 33(18), the incentive FSI under Regulation 33(7) is required to be computed on the gross plot area.

F.4 Allegation of Departure Made by Municipal Commissioner

36. Now we turn to Petitioner's allegation that the incumbent Municipal Commissioner (Respondent no. 5) has extended a favour to respondent no. 10 for extraneous considerations by deliberately ignoring/overreaching earlier three decisions of his predecessors rejecting the same proposal on May 26, 2017, June 6, 2019 and November 12, 2019. We have already referred to the decisions of the earlier Municipal Commissioner Mr. Ajoy Mehta dated May 26, 2017 and Mr. Pravin Pardeshi

dated June 6, 2019 and November 12, 2019. It is contended on behalf of MCGM that the said decisions are in fact departures from the decisions taken by the very same officers in other proposals, both before and after their decisions in present case. This is demonstrated by the MCGM in the form of the affidavit of respondent no. 6 which reads thus:

> (a) In the case of a joint development proposal under DCR 33(7) and DCR 33(24) at Bhavani Shankar Rd Mahim, the Chief Engineer had suggested that the question whether the Cap of 4 FSI was to be computed on Net plot area, or whether FSI of 4.00 should provide for FSI 3.00 on gross plot area under DCR 33(7) and FSI 1.00 on net plot area under DCR 33(24) or calculating FSI 4.0 on gross plot area without any deduction for R.G., should be referred to the Govt for clarification. The then Municipal Commissioner Mr. Ajoy Mehta had endorsed his remarks/decision thereon dated 12.09.2016 - '*In this case the basic proposal is under DCR 33(7) wherein the FSI permissible is on gross plot area. Further the non cess component is also within 25% of plot area and is also eligible.* ***Hence the FSI shall be allowed without deduction of 15% R.G.*** *Since the basic proposal is eligible for computation of FSI on gross plot area without deduction of R.G. the plot area for computation of FSI 4 in case of 33(24)* ***shall be considered on gross plot area.*** *Hence there is no need to refer matter to U.D. for clarification of any issue which is crystal clear*'.
>
> (b) In the present case No. EB/3820/DA the then Deputy Chief Engineer and Chief Engineer had put up note that the FSI should be computed at 3.00 on gross plot area under DCR 33(7) i.e. 14,026.86 sq.mtrs and 1.00 on gross plot area under DCR 33(24) i.e. 4765.62 sq. mtrs resulting in a total FSI of 18,702.48 sq. mtrs which was less than 4.00 computed on the gross plot area. The Municipal Commissioner had however noted on 26.5.2017 that "the PPL Permissible in DCR 33(24) is excluding reservation, hence the setback area shall be deducted for calculation of 4.0 FSI Cap".

(c) In the same case the Chief Engineer had put up a note dt 14th May 2019 recommending FSI 3.00 on the gross plot area [i.e. 3 x 4675.62 sq.mtrs = 14,026.86 sq.mtrs] under DCPR 33(7) and FSI 1.00 on the net plot area [i.e. 1 x 4285.44 sq.mtrs : 4285.44 sq.mtrs] under DCPR 33(18) : aggregating to combined FSI 18,670.58 sq.mtrs. The then Municipal Commissioner Shri Praveen Pardeshi had endorsed remarks thereon dated 06.06.2019 "FSI permissible shall be on net plot area.". When the proposal was resubmitted for approval by considering FSI 3.0 on gross plot area and incentive FSI 1.0 for PPL was considered on net plot area, the then Municipal Commissioner Shri Praveen Pardeshi has endorsed remarks dated 12.11.2019 as '1) Please re examine the proposal with respect to the concessions submitted for approval, earlier remarks in Note Sheet dated 6.06.2019 and report thereon while resubmitting the proposal.' He had also directed an inquiry as to why the file was not put up to him with required compliances.

(d) However when another proposal under file number CHE/CTY/0936/F/N/337(NEW)-Amend(4) (old file No. EB/7531/FN/A) was put up for approval under combination of Reg 33(7) & 33(18) by considering total FSI 4 on gross plot area. The then Municipal Commissioner Shri Praveen Pardeshi has approved the proposal vide note sheet dated 23.01.2020 by endorsing - ***'The then MC vide No. MCP/5186 dated 08/09/2016 has given directions as per the DCR in the issue.*** *As per the same, the permissible additional FSI component (1.0) under DCPR 33(18) for PPL shall be restricted on net plot area*'. Accordingly Mr Praveen Pardeshi, the then MC had in 2020 followed the earlier reasoned decision of Municipal Commissioner Mr. Ajoy Mehta given in MCP/5186 dated 8.9.2016 that "***the plot area for computation of FSI 4 in case of 33(24) shall be considered on gross plot area.".***

(e) In another case : File No. EB/1525/C/A re Ward C, the then Municipal Commissioner **Mr. Praveen Pardeshi had on 17.2.2020 once again approved FSI 3.00 on the gross plot area under DCPR 33(7) and FSI 1.00 on the net plot area** under DCPR 33(19) – necessary resulting in a total FSI which would be 4.13 on the Net plot area but within FSI 4.00 on gross plot area.

(f) In an earlier case re File No. EB/5814/D/A in Ward D the Chief Engineer had recommended FSI 3.00 on gross

plot area under DCPR 33(7) and FSI 1.00 on net plot area under DCPR 33(18) – aggregating to less than FSI 4.00 on gross plot area [but which would amount to FSI 4.19 if net plot area was considered] to the Municipal Commissioner. This recommendation / proposal had been made on the basis of the decisions dated 08.09.2016 and dt 23.01.2020 and 17.2.2020 in similar cases. The Municipal Commissioner had approved the same on 16.10.2020.

(g) **Accordingly, the then Municipal Commissioner Mr. Ajoy Mehta's cryptic decision dt. 26th May 2017, was contrary to his earlier detailed / reasoned decision/Note dt 12.09.2016.** Moreover although the then Municipal Commissioner Pardeshi had initially by his decision/notes dt. 6.06.2019 & 12.11.2019 stipulated that the Cap of FSI 4.00 should be computed on the net plot area, subsequently by his decision on the Note 23.01.2020, Municipal Commissioner Mr. Praveen Pardeshi had specifically directed that the Earlier Municipal Commissioner Note / reasoned decision dt 08.09.2016 should be followed and applied. Thereafter Municipal Commissioner Mr. Praveen Pardeshi had on 17.2.2020 once again approved FSI 3.00 on the gross plot area under DCR 33(7) and FSI 1.00 on the net plot area under DCPR 33(18) – necessarily resulting in a total FSI which would be 4.13 on the Net plot area but within FSI 4.00 on gross plot area. On the basis of the above I had re File No. EB/5814/D/A in Ward 'D' recommended FSI 3.00 on gross plot area under DCR 33(7) and FSI 1.00 on net plot area under DCR 33(18) – aggregating to less than FSI 4.00 on gross plot area [but which would amount to FSI 4.19 if net plot area had been considered] to the Municipal Commissioner and he had approved the same vide endorsement/decision dt. 16.10. 2020. It may also be noted that unless the FSI Cap of 4.00 is computed on the gross plot area, it would not be possible to avail / consume the incentive FSI 1.00 under DCPR 33(18) in cases of joint development under DCR 33(7) and DCR 33(24)/33(18) and this would defeat the object of providing such incentive FSI under DCR 33(24)/33(18) i.e. to encourage and promote the construction of PPLs.

(h) In the present case on 17.07.2020 developer had submitted representation to Hon'ble M.C. and Hon'ble M.C's endorse thereon "Pls put up the facts" under no, MGC/A/3933 dated 21.07.2020. Accordingly, in view of the above, I had, while drawing attention to the earlier

> contrary decision dt. 6.06.2019 of Municipal Commissioner Mr. Praveen Pardeshi put up detailed report and had once again recommended and sought approval "To allow FSI 3.00 on gross plot area as per DCPR 33(7) and 1.0 FSI on net plot area, excluding set back area and AOS as per DCPR 33(18)". It was on this recommendation that the Municipal Commissioner had once again [i.e. similar to his earlier decision re File No. EB/5814/D/A in Ward 'D' dt. 16.10.2020] had approved my above proposal/recommendation.
>
> *(emphasis supplied)*

37. Though petitioner has filed a rejoinder to the affidavit of respondent no. 6, the factual position with regard to the above instances has not been controverted by him. Thus it is clear that the MCGM has consistently followed the policy of allowing FSI under Regulation 33(7) on gross plot area and incentive FSI under other schemes such as Regulation 33(18) or 33(24) on net plot area, while allowing development under combination of schemes under Regulation 30(A)(12)

38. MCGM has thus successfully demonstrated before us that the three decisions of the previous Municipal Commissioners taken on May 26, 2017, June 6, 2019 and November 12, 2019 were in fact departure from professed policy. We therefore do not find any exception being made by the incumbent Municipal Commissioner (respondent no. 5) in permitting FSI 4.00 under Regulation 33(7) on gross plot area and FSI 1.00 under Regulation 33(18) of net plot area.

F. 5 Clarification by State Government

39. To make the case of MCGM stronger, it has also relied upon the clarification given by the State Government in a similar case involving redevelopment of property under combination of Regulations 33(7) and 33(12) of the DCPR 2034. MCGM had made a reference vide letter dated May 14, 2021 to the State Government as under: -

> I. Whether the clarification dtd. 11.09.2008 given in respect of redevelopment in combination of Regulations 33(7) & 33(15) can be extended to the proposals which are being developed in combination of Regulations 33(7) & 33(12) of DCPR-2034, since there is change in the regulation no. as stated at sr.no.1.
>
> II. Whether FSI 4.0 can be allowed on gross plot area while processing the proposal in combination of Regulation 33(12) & 33(7).

40. Regulation 4(3) of DCPR 2034 provides for resolution of question or dispute with regard to interpretation of the Regulations by the State Government and reads thus:

> **Reg. 4(3)** If any question or dispute arises with regard to interpretation of any of these Regulations the matter shall be referred to the State Government which, after considering the matter and, if necessary, after giving hearing to the parties, shall give a decision on the interpretation of the provisions of these Regulations. The decision of the Government on the interpretation of these Regulations shall be final and binding on the concerned party or parties.

41. The State Government answered the reference made by MCGM by considering all the provisions of DCPR 2034 clarifying that in respect of proposal involving combination of schemes under Regulations 33(7) and 33(12), FSI 3.00 under Reg. 33(7) be computed of gross plot area and balance FSI 1.00 under Reg. 33(12) be computed on net plot area. Thus, in similar circumstances the State Government has issued a clarification that supports action taken by MCGM. The clarification merely clarifies the position which already existed and would therefore govern present case as well. However, Mr. Joshi has submitted that the clarification issued by the State Government is irrelevant for the present case as the case under reference involved combination of schemes under Regulation 33(7) and 33(12), which is different from combination schemes under Reg. 33(7) and 33(18). He has submitted that Regulation 33(12) deals with development of contravening structure included in final plot of a town Planning Scheme and removal and re-accommodation of tolerated structures falling in the alignment of road. We fail to understand as to how mere difference in the scheme which is sought to be combined with another scheme under Regulation 33(7) would make the clarification issued by the State

Government inapplicable to the present case. Mr. Joshi has also contended that the State Government's clarification is subject matter of another petition, which is pending in this Court.

42. As observed above, the State Government is conferred powers under Regulation 4(3) to decide on interpretation of the Regulations and interpretation given by the State Government is final and binding. Even otherwise we do not find that the interpretation placed by the State Government in respect of cap/limit on maximum permissible FSI in respect of proposal involving combination of schemes under Regulation 33(7) and 33(12) to be erroneous. However, since the clarification is not under challenge, we do not express any final opinion on the same. The issue of correctness of clarification issued by State Government would be decided in that petition and we do not wish to comment upon correctness of that clarification while deciding this petition. We only take note of that clarification to repel Petitioner's allegation that the decision of Respondent No. 5 is unprecedented and in violation of earlier decisions of his predecessors.

43. As contended by Mr. Anturkar, even if there two interpretations possible, the one that would make operation of Regulations workable will have to be accepted. As demonstrated above, interpretation placed by MCGM and the State Government, in our opinion, would make the entire scheme of PPL workable when combined with the scheme under Regulation 33(7). We would accordingly uphold such interpretation and reject the one sought to be placed by Petitioner. He has also placed reliance on judgment of the Apex Court ***K. P. Varghese*** (supra), in which the Apex Court has held that if plain meaning and literal construction of the statute results in absurdity, injustice and unconstitutionality, Courts must construe the statute having regard to the object and purpose which the legislature had in mind for enacting the provision and in the context of the setting in which it occurs and with a view to supress the mischief sought to be remedied by the legislation.

44. Mr. Joshi has contended that even while exercising discretionary powers by Municipal Commissioner under Regulation 6 in a case involving demonstrable hardship, he cannot grant FSI in excess of permissible cap/limit. However

we need not be go into the issue of correctness of this contention as the Municipal Commissioner has not used the discretionary powers under Regulation 6 in the present case.

45. Mr. Joshi's contention about requirement to modify development plan under section 37 of the MRTP Act for permitting FSI as approved in the present case also does not merit any consideration in view of our finding that FSI cap/limit has not been breached in the present case.

46. We are therefore unable to hold that MCGM has accorded any excessive FSI to respondent no. 10. In view of specific provision in DCPR 2034 permitting computation of FSI 3.00 under Regulation 33(7) on gross plot area, the action of MCGM be found fault with.

F. 6 Surplus Area

47. Now we turn to the next issue raised by petitioner with regard to alleged failure on the part of respondent No. 10 to hand over surplus area. It is petitioner's case that respondent no. 10 is avoiding to handover surplus area as contemplated under section 103I(3) of the Act of 1976. According to him such surplus area would be 664.31 Sq. mtrs, since sale

component in the building is mixed used i.e. residential and commercial. Though detailed pleadings are raised in the petition and submissions are made before us with regard to the issue of surplus area, the entire issue is put to rest on account of additional affidavit filed by MHADA on February 13, 2023, thereby producing letters dated April 25, 2022 of respondent no. 3 and September 13, 2022 of respondent no. 10. By letter dated April 25, 2022 respondent no. 3 has put on record that keys of total 109 flats were handed over to MBRRB towards surplus area. Later by letter dated September 13, 2022, respondent no. 10 inquired with MBRRB as to the exact surplus built up area to be surrendered to the board, if any, as per the NOCs dated April 23, 2010 and September 24, 2012. MHADA has responded the said query by letter dated September 28, 2022 conveying that the surplus built up area be surrendered to MBRRB is NIL. We therefore do not see any violation on the part of respondent no. 10 even with regard to the aspect of handing over of surplus built up area to MBRRB.

F. 7 Judgments Cited on Behalf of Petitioner

48. What remains now is to deal with the various judgments relied upon by Mr. Joshi:

(i) ***Cipla Limited*** *(supra)* is relied upon in support of contention that policy has to be followed in a uniform manner, However we have already held that impugned approval in the present case appears to be in line with the uniform policy adopted by MGCM. In all other cases except abrasion, on two occasions in the present case itself, MCGM has allowed FSI 3.00 On gross plot area and FSI 1.00 on net plot area in combination of schemes.

(ii) ***Tata Cellular*** *(supra)* lays down broad principles on interference by courts in administrative actions particularly in the matters of tenders and contracts. The judgment, far from assisting the case of the petitioner, actually militates against him as the Apex Court has held that courts cannot substitute its own opinion/decision in place of the one taken by the administrator. In the present case both MCGM and the State Government have interpreted provisions of DCPR to mean that FSI under Regulation 33(7) can be computed on gross plot area. The interpretation is supported by provisions of Regulation 33(7) and is plausible. We cannot sit as an appellate authority over the same.

(iii) Reliance on the judgment of this Court in ***BVG India Ltd*** *(supra)* is again of little assistance to the case of the petitioner. That case involved challenge to tender conditions and while deciding the issue about validity of tender conditions, this court has discussed legal principles on authority of the State and its instrumentalities to enter into contracts and principles of judicial review in such contracts.

(iv) ***Supertech Limited*** *(supra)* and ***Kerala State Coastal Zone Management Authority*** *(supra)* are relied upon in support of contention that the principles of equity cannot be invoked to regularise unauthorised construction put up in violation of Development Control Regulations. Since we have held MCGM has not granted excessive FSI to Respondent no. 10 in violation of DCPR, the judgment would have no application to the present case.

(v) ***Bombay Dyeing & Manufacturing Co. Ltd*** *(supra)* deals with the scope of entertainability of Public Interest Litigation. Since we have entertained the present PIL and decided contentions of the petitioner on merits, the

judgment would have no application. This judgment is also relied upon in support of the proposition that delay alone cannot be a reason for throwing out a PIL. We have already arrived at a conclusion that there is no delay in filing the present PIL. Therefore even on this issue, reliance on the judgment is unnecessary.

(vi) ***Pune Municipal Corporation*** *(supra)* is relied upon in support of contention that the State Government cannot make any changes to the Development Control Regulations on its own. The judgment is referable to the contention of Mr. Joshi that allowing additional FSI would require modification of the DCPR by following procedure under section 37 of the MRTP Act. We have already held that grant of approval by the Municipal Commissioner does not result in any excessive FSI beyond the cap/limit provided for in the DCPR. Therefore there is no question of any requirement for modifying the DCPR. The judgment is therefore wholly irrelevant.

(vii) ***Rajendra Thacker*** *(supra)* is relied in support of the contention that Municipal Commissioner cannot grant concession in violation of DCPR. We have already held

that no concession is granted by the Municipal Commissioner in violation of DCPR in the present case.

(viii) ***Sunbeam Enterprises*** *(supra)* is relied upon in support of contention that the planning authority must process development permission strictly in accordance with provisions of draft or final plan. We have already held that the approval granted by the Municipal Commissioner and plan sanction by the Municipal Corporation did not violate provision of DCPR in any manner and therefore the judgment has no application to the present case.

(ix) ***Asian Resurfacing of Road Agency Pvt. Ltd.*** *(supra)* and ***Pratima Mohanty*** *(supra)* relate to provisions of Prevention of Corruption Act, 1988. The same are possibly cited in support of prayer in the petition to take action against Respondent nos. 5 to 9 under provision of that Act. Since we do not find any violation/deviation on the part of Respondent nos. 5 to 9 with regard the provision of DCPR there is no question of directing any action to be taken against them.

(x) ***Shankara Co-operative Housing Society Ltd.*** *(supra)* and ***Uday Gagan Properties Limited*** *(supra)* are relied upon to defend the allegation of delay. However, since we have already held that there is no delay in filing the present PIL, it is not necessary to refer to those judgments.

F. 8 SECURITY DEPOSIT MADE BY PETITIONER

49. Having held that there is no violation of DCPR in grant of the impugned approval dated November 12, 2020, we now turn to the last aspect of the matter, which we have left to be decided in latter part of judgment. Both MCGM and Respondent No. 10 have mounted an attack on bonafides of Petitioner in filing the present PIL. True it is that Petitioner has selectively chosen the project for levelling serious allegations of FSI violation. This has raised doubts about his real intentions behind filing the present PIL. However, Petitioner seems to have been alarmed essentially on account of earlier 3 rejections of proposal of Respondent No. 10 by two distinct Municipal Commissioners. The Petition is filed on account of Respondent No. 5 taking a diagonally opposite view than the one taken by his predecessors in the present case

itself. Though the MCGM has successfully demonstrated that those decisions of previous Municipal Commissioners were in fact aberrations and that the decision of Respondent No. 5 is actually valid, it would be unfair to castigate Petitioner for filing present PIL. It was but natural for Petitioner to raise an alarm after noticing previous decisions of Municipal Commissioners. However, we must observe that Petitioner ought to have been careful in levelling allegations against high-ranking officials, particularly the Municipal Commissioner and Chief Engineer and ought to have avoided impleading them as parties in person and levelling any personal allegations against them. For such conduct, Petitioner deserves admonition.

50. Therefore, though we have held that all the contentions raised by Petitioners are unfounded and devoid of any merits, we do not propose to penalise him for having filed the present petition. Hence even though this Court, by order dated December 5, 2022, directed that failure of Petitioner in his claim would entail forfeiture of security deposit, on a deeper scrutiny of the matter, we refrain ourselves from directing forfeiture of security deposit.

G. ORDER

51. Resultantly, we do not find any merit in the petition. We accordingly proceed to pass the following order :

(i) Public Interest Litigation filed by petitioner is dismissed.

(ii) Petitioner is permitted to withdraw security deposit of Rs. 2,00,000/- deposited by him in this court.

(iii) Rule is discharged. There shall be no orders as to costs.

(SANDEEP V. MARNE, J.) (ACTING CHIEF JUSTICE)