

~ñITEM NO.1E  
(For orders)

COURT NO.15

SECTION IX

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).20279/2013

(From the judgement and order dated 13/05/2013 in PILP No.43/2012  
of The HIGH COURT OF BOMBAY)

JANHIT MANCH & ANR.

Petitioner(s)

VERSUS

STATE OF MAHARASHTRA & ORS.

Respondent(s)

Date: 25/04/2014 This Petition was called on for orders today.

For Petitioner(s) Ms. Garima Prashad, Adv.

For Respondent(s) Ms. Ruby Singh Ahuja, Adv.  
R.5 Ms. Deepti Sarin, Adv.

Ms. Anisha Mitra, Adv.  
Mr. Jaiveer Shergil, Adv.  
Mr. Saurabh Aggarwal, Adv.  
Mr. Lalit Kataria, Adv.  
M/S. Karanjawala & Co.

Ms. Asha Gopalan Nair, Adv.

R.2,3,4 Mr. J.J. Xavier, Adv.  
Mr. S. Sukumaran, Adv.  
Mr. Anand Sukumar, Adv.  
Mr. Bhupesh Kumar Pathak, Adv.  
Ms. Meera Mathur, Adv.

Hon'ble Mrs. Justice Gyan Sudha Misra  
pronounced separate order of the Bench comprising Her  
Ladyship and Hon'ble Mr. Justice V. Gopala Gowda.  
Hon'ble Mr. Justice V. Gopala Gowda orally pronounced  
separate dissenting judgment in the matter. Reasoned  
judgment to follow.

In view of the difference of opinion, matter be  
placed before Hon'ble The Chief Justice of India for  
placing the same before another Bench for hearing.

(NAVEEN KUMAR)  
COURT MASTER

(S.S.R. KRISHNA)  
ASSISTANT REGISTRAR

(Two Signed orders are placed on the file)  
IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 20279 / 2 013

JANHIT MANCH & ANR.

.. PETITIONERS

Versus

STATE OF MAHARASHTRA & ORS.

..RESPONDENTS

ORDER

GYAN SUDHA MISRA, J.

1. This special leave petition has been filed against the judgment and order dated 13.05.2013 passed by the Division Bench of the High Court of judicature at Bombay in PIL No.43 /2012 whereby the High Court has rejected certain issues which were raised by the PIL-petitioners and allowed them in favour of Respondent No.5; other remaining issues were remanded to the Municipal Commissioner, Greater Mumbai (MCGM for short) for re-consideration and re-examination. Specifically stated, the Division Bench of the High Court was pleased to conclude that the construction of Public Parking Lot (PPL for short) is not illegal as alleged by the PIL-Petitioners and hence Respondent No. 5, will be entitled to utilize the incentive Floors Space Index (FSI for short) arising from the construction of PPL. The High Court further held that the FSI which has been permitted on account of the refuge area is excessive and the Corporation needs to reconsider the same. The High Court also noted regarding the Corporation having stated, that certain aspects of the matters were required to be reconsidered by the Commissioner so that FSI against certain categories will have to be now counted. Hence the High Court issued consequential directions holding therein that:

(i) The Public Parking Lot cannot be held illegal as contended by the Petitioner and the Respondent No.5 cannot be deprived from claiming incentive FSI accrued therefrom for the Residential Building, if otherwise available in law. The High Court observed that other aspects will be considered by the Commissioner, Corporation at the time of issuance of Occupation Certificate. The High Court also held at item (ii) of its direction recorded in the concluding para, that the FSI granted in respect of refuge area is excessive and hence the Commissioner was directed to re-examine the said issue

and rework FSI accordingly. However, the Commissioner

was also directed to determine after ascertaining

the

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factual position as to whether Respondent No.5 is entitled

to claim FSI in lieu of set back area.

The High Court

further held that the decision of the Commissioner as

regards servant toilets, height of habitable floor, amenity

floors and toilets over kitchen cannot be termed as

unreasonable or arbitrary. The High Court further refused

to interfere with the decision of the Commissioner to permit

height of service floors at 8.40 meters. But in 5 matters

where the MCGM had raised doubts viz. (passages,

entrance refuge, swimming pools, structural columns, set

back FSI), the High Court remanded the matter to the

Municipal Commissioner for reconsideration as per law.

The High Court thus specifically held that the construction

of PPL was legal due to which additional FSI could be

claimed by Respondent No.5.

2. The PIL-petitioners, however, feeling aggrieved by

the High Court order have filed this special leave petition,

but before dealing with the same, factual details to the

extent it is relevant may be recorded. It appears that a

public interest litigation was filed on 1.3.2012 by an NGO

Janhit Manch /Petitioners herein in the High Court of

Bombay alleging that the sanctioned building plan known

as 'Palais Royale' approved by the Municipal Council of

Greater Mumbai was contrary to the provisions of

Development Control Regulations 1991 (DCR).

3. The petitioners came up with a case before the High

Court that the construction carried out by the respondent

No.5 herein was in brazen violation of the fundamental and

essential provisions of the Development Control

Regulations 1991 ("DCR"), the Maharashtra Regional Town

Planning Act, 1966 (MRTP Act) without valid

commencement certificate during the operation of Stop

Work Notices. It was further alleged by the petitioners that there was grant of illegal, unjustified and arbitrary concessions by respondent No.3 and the construction was with the active collusion and connivance of respondent Nos. 2 to 4. It was alleged that the respondent No.3 indulged in rampant illegalities and the building known as "Palias Royale" was constructed by the respondent No.5 under various independent heads, whereby the respondent No.5 builder had illegally availed and amassed additional FSI of which the legitimate FSI consumed was reduced.

4. The respondent No.5 who contested the writ petition first of all raised preliminary objection before the High Court regarding maintainability of the PIL and submitted that although the petition was sought to be projected and styled as PIL, in fact, it was a malicious private interest litigation. It was stated that the petitioner had approached the High Court with unclean hand and has been selective in challenging the impugned order. It was added that although the petitioner has dressed up its petition as a PIL, it had very casually prayed for quashing of permissions granted in respect of other projects. It has been alleged that behind the PIL petition filed by the petitioners who are also developer /b uilder have intentionally and selectively caused loss to the contesting respondent No.5 in order to gain advantage for themselves. It was contended that the PIL petition in the High Court itself was an attempt to stall the project launched by the respondent No.5 which is already completed and just when it was about to be completed, the petitioners at the behest of the a rival developer with whom this respondent has certain disputes in relation to another parcel of land being part of the respondent's larger property, the forum of PIL was sought to be misused for settling private scores.

5. However, the Division Bench which heard the PIL petition brushed aside the preliminary objection and went

into the merits of the matter. The PIL petition filed by the petitioner sought to question the legality of 56 storeyed residential building known as Palias Royale and a public parking lot ('PPL' for short ) adjacent to it constructed by the respondent No.5 situated at Worli Mumbai. As per the case of the PIL petitioners, the structures were erected in violation of planning norms and use of discretionary powers by the Municipal Commissioner to grant concessions to the respondent No.5 which is excessive and bad in law. The petitioners thus challenged approvals granted to the petitioners and commencement certificates in respect of the residential building and public parking lot ('PPL' for short). A Writ of Mandamus was therefore sought by the petitioners for demolition of additional floors of the residential building beyond 43 floors.

6. Thus, it appears that the public interest petitioners' grievance in brief is that a 15 storeyed public parking lot as well as the 56 storeyed residential building which had been constructed by the respondent No.5 on its property at Worli Mumbai admittedly as per duly sanctioned plan is in violation of various provisions of the Maharashtra Regional and Town Planning Act 1966 as well as Development Control Regulations. The petitioners further alleged that the respondent Nos. 2 to 4 in connivance with the developer- respondent No.5 has permitted the construction to progress which is in violation of the Development Control Regulation.

7. In order to appreciate the controversy, the salient facts and features of the matter in so far as it is relevant for considering the contesting plea of the parties may further be noted which disclose that on 24 th January, 2005 the Architect of the respondent No.5 submitted a complete proposal alongwith plans to the office of the Municipal Corporation, Greater Mumbai (MCGM). On 24 th February,

2005, a commencement certificate was granted to respondent No.5 for the proposed commercial building and for car sales and service centres. Thereafter, plans were amended from time to time and finally on 20 th August, 2010 and 8 th February, 2011 the plans were approved for construction of a public parking lot (PPL) with its potential available under regulation 33 (24) of the Development Control Regulations (referred to as DCR) which is applicable in the city of Mumbai. Plans for residential building were also approved which were as under:

i) Residential building: 2 Basements + lower ground + entrance level + parking levels + amenity levels + Girder + Service Floor + Stilt / refuge + 13 th to 54 th floors + 55 & 56 (AC Plant) + terrace.

ii) Public Parking Lot: 3 basement + lower ground +

stilt + 15 floors.

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On 30 th December 2006, the Chief Fire Officer had granted a certificate which accorded no objection with certain directions as regards the refuge area. Thereafter on 6 th August, 2010, the Chief Engineer of the Corporation issued a Letter of Intent in favour of respondent No.5 in respect of the PPL. In the Letter of Intent, it was informed that the State Government has granted approval in principle for construction of multi- storeyed PPL under DCR 33(4) for accommodating 900 public parking spaces. The Letter of Intent specified certain conditions upon which it was issued and commencement certificate upto plinth level was also issued on 1 st October, 2010. The plans for three level basement + ground + 15 floors of the public car parking were approved and Intimation of Disapproval (IOD) was also issued on 20 th August, 2010. On 22 nd June, 2011, certain general directions came to be issued to restrict the public parking lots under DCR 33 (24) only upto four floors in the city of Mumbai. These directions although were subject matter of challenge in several petitions, the same were finally resolved when the Municipal Corporation was

directed not to act on the basis of certain circulars. On

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30 th October, 2010, a Concession Report was prepared by the Assistant Engineer wherein it was stated that the Architect proposed amended plans for residential building to utilize the additional FSI as available as per DCR 33(24). Approval was also sought to allow additional typical sky apartment alongwith elevation features and several other permissions were sought which is not required to be related in detail since the same are not relevant to the controversy involved and it would be sufficient to state that the Concession Report was finally endorsed by the concerned officers of the Corporation and it was granted by the Commissioner.

8. While the special leave petition was heard, this Court was informed by the counsel for the parties that pending consideration of the present special leave petition, Municipal Commissioner in pursuance to the order of remand passed by the impugned order of the High Court referred to hereinbefore at para 1, after giving the respondent No.5 an opportunity of hearing, passed a detailed order on 12.09.2013. The said order dated 12.09.2013 has thereafter been challenged by the respondent No.5 in writ petition No.2223 / 2013 and the same is pending before the Bombay High Court. The PIL

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Petitioners herein had sought to intervene in the pending writ petition but have withdrawn the same unconditionally.

9. Learned senior counsel Mr. Naphade, appearing for the petitioner has contended that the passing of the order by the Municipal Commissioner or the pendency of the writ petition shall not in any manner affect the maintainability of the present petition, as the present petition raises further serious issues which have far reaching implications and have a bearing on the public at large, especially given the unique problems which are faced by the residents of

the city of Mumbai due to such unplanned and illegal development. It was further stated that Developers like the present one, should not be permitted to flout the law and that the constitutional courts should not permit the Developers to breach the law. It was also contended that by the impugned order certain issues have been conclusively decided in favour of respondent No.5 and certain issues have been remanded to the Municipal Commissioner for reconsideration as per law.

10. Mr. Naphade during the course of his arguments further strenuously argued that issues relating to height of Service Floor, height of habitable floor, as also permitting amenity floor free of FSI are contrary to the provisions of DCR and the High Court ought not to have conclusively decided the same. It was further submitted by Mr. Naphade that the Municipal Commissioner in exercise of power under 64 (b) of DCR could not have permitted variation in the dimensions without there being any hardship caused. A contention was also raised by the petitioner regarding the height of the Service Floor giving rise to serious apprehension of potential misuse of the same.

11. Responding to the arguments, the learned Attorney General appearing for respondent Nos.2 to 4 the Municipal Corporation of Greater Mumbai has contended that the Municipal Commissioner rightly exercised his discretion under 64 (b) to permit additional heights which is merely a variation in dimension and not in FSI i.e. floor space index.

12. Learned Attorney General however further stated that the High Court ought not to have decided the issue of construction of the residential building beyond 43 rd floor and upto 56 th floor without a valid Commencement Certificate as mentioned in para 29 (e) of the impugned order. In support of the said contention, Learned Attorney General has placed reliance on Section 45 (2) of the MRTD



Act and it is contended that issuance of Commencement Certificate is mandatory under Section 45 (2). It was still further contended that though the plans of residential building have been sanctioned by MCGM for the full 56 floors, Commencement Certificate has been endorsed only upto 43 rd floor top. The endorsement of the commencement certificate from 44 th Floor to 56 th Floor was dependent on handing over the Public Parking Lot to Respondent No.2. It was also urged that while sanctioning of the building plans upto 56 floors had been approved on 8 th February, 2011, a condition was imposed that the Commencement Certificate shall be endorsed as per the approved plans. It was further submitted that commencement certificate was lastly endorsed on 18 th November 2011 only upto 43 rd floor top as per the approved plans dated 8 th February 2011. It was therefore contended that the construction of the residential building beyond 43 rd floor without handing over the PPL was illegal. The learned Attorney General pointed out that the MCGM was restrained from taking any action against this construction by interim order of the City Civil Court. During the course of arguments, the Learned Attorney General also stated that while the said 13 floors from 43 rd to 56 th floor could be sustained even if the PPL was taken over upto the 4 th floor as per the Municipal Commissioner's order of 12.09.2013 yet if the said order of the Municipal Commissioner is to be implemented in its entirety, the said 13 floors may be required to be demolished on account of revised FSI calculations. In this particular case, it is rather curious that the MCGM, being a planning authority which is expected to abide by its own sanctions, should keep changing its stand, in spite of having given its sanction after considering the various expert reports like structural engineer, chief fire officer, etc and after following its rules,

regulations and procedures. However, this is under consideration of the Bombay High Court under the pending writ petition No. 2223 / 2013.

13. On the other hand Dr. Abhishek Manu Singhvi and Mr. P.S. Patwalia, Learned Senior Counsels appearing on behalf of the Respondent No.5 stated that the present petition has been filed at the instance of rival developers and Mr. Bhagwan Das Rayani is himself a Developer apart from the Chairman of the Petitioner namely Prakash Khatiwala, who is also involved in the real estate business which has been suppressed from this Court. The Petitioner therefore has approached the Court with unclean hands and the Petition should be dismissed.

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14. On the contrary, it was submitted by the Learned Senior Advocates for Respondent No.5, that plans for the residential building of 56 floors had been duly sanctioned by MCGM on 08.02.2011 while the Public Parking Lot for 900 cars was sanctioned by the State Government and the plans for the said PPL of 15 floors had been sanctioned by MCGM on 20.08.2010. MCGM has in the affidavits / wr it ten submissions filed by it from time to time, categorically stated that all the plans stand duly approved. As regards the Commencement Certificate, it was contended that the issue of endorsement of the Commencement Certificate beyond 43 rd floor was solely dependent on handing over the Public Parking Lot against which additional FSI could be claimed towards floor beyond 43 rd floor. It was contended, as held by the High court that the Public Parking Lot is legal and Respondent No.5 cannot be deprived of incentive FSI. Further, Section 45 read with Section 48 of the MRTD Act as well as Regulation 5 and 6 of the Development Control Regulations, contemplate that issuance of a Commencement Certificate upto the plinth level is mandatory and further endorsement of Commencement Certificate is only a ministerial act / procedural formality. It

was contended further that considering the submissions made by the MCGM, the High Court has therefore, rightly held that once the PPL is handed over, necessary endorsement on the Commencement Certificate will be made. It was contended that the Respondent No. 2 to 4 /Municipal Corporation or Municipal Commissioner have not filed any SLP challenging the impugned order and in fact have accepted the impugned order and further, the Municipal Commissioner has passed order in pursuance to the High Court's direction which is now subject matter of challenge before the High Court. It was lastly submitted that the Respondent No.5 has constructed the residential building upto 56 floors but the Respondent has also constructed the Public Parking Lot of 15 floors which holds him eligible for additional FSI. Admittedly, both the constructions are in accordance with the sanctioned building plans and various permissions granted by Respondent No. 2 to 4 from time to time. It is statutorily recognized under section 51 of the MRTP Act, that the permission granted can not be modified and /or revoked when substantial progress has been made. Hence any observation by this Court on matters which has been conclusively decided by the High Court vide the impugned order will seriously prejudice the Respondent No.5 as the Writ Petition against the order of the Municipal Commissioner dated 12.09.2013 passed after remand is pending consideration before the Bombay High Court.

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15. After having considered the rival contentions of the parties in the light of the findings of the High Court recorded in the impugned order, it appears that the issue relating to Service area, height of habitable areas and amenity floors as well as its potential misuse have been dealt with by the MCGM while granting the sanction to the building plan and as submitted by the Learned Attorney

General, the same is within the discretionary power of MCGM and MCGM having exercised such discretion keeping in mind the height of the building, the same does not call for interference by this Court.

16. Serious concerns were raised by counsel for the contesting parties about the effect of paragraph 29(3) of the impugned judgment. This Court had accordingly directed parties to file their affidavit on this aspect and clarify their stand. Accordingly, the parties have filed their affidavits on 24.03.2014. Paragraph 29 (e) is reproduced hereinafter for facility of reference:

"At this stage considering the fact that there is a sanctioned plan which permits the Respondent No.5 to construct upto 56 floors, we do not think

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it necessary to intervene and issue a drastic order of demolition on the ground that the work is carried out beyond the commencement certificate. When the statutory body has not yet taken final decision in the matter, it will not be appropriate to prejudge the issue and direct demolition."

17. In addition to the latest affidavit filed by the Respondent No. 2/ Municipal Corporation, our attention was also drawn to the affidavits as well as the Written Submissions filed by them on earlier occasions in the Bombay High Court wherein MCGM has categorically taken a stand that the construction was in accordance with the sanctioned plan and therefore the Public Interest Litigation ought to be dismissed as being devoid of merits. The MCGM had also stated on earlier occasions that the Commencement Certificate will be endorsed as per the sanctioned plan of 8 th February 2011 once the Public Parking Lot is handed over.

18. In so far as the respondent No.3 Municipal Commissioner of Greater Mumbai is concerned, the learned Attorney General Mr. G. E. Vahanvati who had appeared on behalf of the Municipal Commissioner and was also directed to get an affidavit filed on behalf of the Municipal

Corporation, Greater Mumbai has fairly referred in the

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affidavit that this Court had directed the parties in the matter to express their stand explicitly by way of an additional affidavit in pursuance to which the respondent Corporation has deposed that the High Court of Bombay had issued certain directions vide impugned judgment and order in para 36 giving its findings with regard to issues No.7 and 8 and for rest of the issues directions were given to the Municipal Commissioner / M u n i c i p a l Corporation to re-examine the issues set out at points (ii) to (vi) in para 36. It has been stated that in pursuance to the order and directions of the High Court, the Municipal Commissioner has passed an order on 12.09.2013 whereby the Municipal Commissioner has addressed all the issues which he was required to determine as per the impugned order. It has been accepted on behalf of the Municipal Corporation that a fresh writ petition No.2223 / 2013 has been filed in the High Court at Bombay and the same is pending. However, the PIL petitioner had filed an application for intervention but the same was withdrawn subsequently on 19.10.2013. Hence, the pending writ petition before the High Court is essentially between the respondent No.5 and respondent Municipal Corporation.

19. It has been further stated in the additional affidavit

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of the Municipal Corporation / M u n i c i p a l Commissioner that as per Section 45 (2) of the MRTTP Act read with the provisions of Development Control Regulations DCR 33 (24), Floors Space Index (FSI) for additional floors 44 to 56 was solely dependent on the incentive FSI. This was dependent upon compliance of mandatory pre- conditions of handing over the PPL which has not been fulfilled by the respondent No. 5 till date. It was brought on record that as per Intimation of Disapproval (IOD) the commencement certificate as per the IOD and the relevant provisions of

Section 45(2) the commencement certificate originally obtained upto the plinth level was required to be endorsed at the stage of every construction. While the commencement certificate was endorsed for construction of the residential building upto 43 floors, respondent No.5 had constructed residential building upto 56 floors without there being any commencement certificate. Even if therefore, plans may have been sanctioned to construct the residential building upto 56 floors, the respondent No.5 is not authorized to construct any floor beyond the floor for which commencement certificate is obtained /endorsed. It has been stated that the observations contained in para 29 (e) of the impugned judgment to the effect that "the question is whether the action of the respondent No. 5 to continue construction upto 56 floors is so patently illegal as to warrant an order of the demolition, it is to be noted that the plans which are sanctioned upto 56 floors of the construction per se is not in violation of the sanctioned plan. The Corporation has placed on record that before occupation certificate is granted these aspects will be considered. Section 52 of the MRTTP Act envisages different categories of construction. Once the construction is found to be falling in the category of construction enumerated in Section 52, then a notice under Section 53 of the MRTTP Act is issued. It has been stated by the respondent Municipal Corporation that at this stage it is open to the respondent No.5 developer to make an application for regularization as per the Act and the circulars and it is open to the Corporation to consider the requests as per law. Since the Corporation has not yet taken a final decision in the matter, it has not granted occupation certificate to the respondent No.5. It has been pointed out in the additional affidavit that at this stage considering the fact that there is a sanctioned plan which permits the respondent No.5 to construct upto 56 floors, the High Court did not think it

necessary to intervene and issue a drastic order of  
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demolition on the ground that the work is carried out  
beyond commencement certificate. The observations of the  
High Court has further been referred to wherein it is  
stated: "when the statutory planning body has not yet  
taken a final decision in the matter it will not be  
appropriate to prejudge the issue and direct demolition".  
The respondent Municipal Corporation therefore has stated  
that the issue regarding demolition may not be treated as  
conclusive and binding and the High Court may be at  
liberty to examine the contentions raised on behalf of the  
Municipal Corporation regarding the legality and validity of  
the construction made by the respondent No.5 and whether  
the construction is in conformity with the relevant  
provisions of the said Act and the DCR. It therefore, has  
been urged by the respondent No.3 Municipal Corporation /  
Municipal Commissioner that the High Court may decide  
the pending writ petition bearing No. 2223 / 2013  
uninfluenced by any finding, observation made in the  
impugned order dated 13.05.2013 and in particular para  
29 (e) as also such other contentions as may be available to  
the respondent Corporation.

20. In so far as the additional affidavit filed by the  
respondent No.5 in terms of the order of this Court dated  
11.03.2014 is concerned, it has stated that during<sup>22</sup>  
pendency of this special leave petition, respondent No.3  
passed an order on 12.09.2013 exceeding its authority  
holding against respondent No.5 by deciding not only the  
issues that were remanded, but re-opened the issues  
conclusively decided by the High Court . The said order of  
Municipal Commissioner, therefore, is under challenge in  
writ petition No. 2223 / 13 by respondent No.5 in the  
Bombay High Court and the same has been admitted and  
posted for final disposal. The PIL petitioners did file the

chamber summons for impleadment in the said writ  
petition but subsequently withdrew the same  
unconditionally.

21. The concerns however have been raised by the  
petitioners and respondent Nos. 2 to 4 about the  
observations made by the High Court in the impugned  
judgment and referred to in this Court's order also dated  
11.03.2014, are stated to be misconceived and not tenable  
either in law or in equity. But according to the averment of  
respondent No.5, the respondent Nos. 2 to 4 have already  
accepted the impugned judgment and in fact acted upon  
the same by holding hearings and passing the order dated  
12.09.2013; hence the observation of the High Court  
cannot be interfered with by the Municipal Commissioner  
or the High Court in the subsequent writ petition which is  
pending consideration for settling other issues. It has been  
further stated that this special leave petition has been filed  
by the PIL-petitioners and not by the respondent nos. 2 to  
4 / Municipal Corporation / Municipal Commissioner and  
Chief Engineer, hence it is inconceivable that respondent  
Nos. 2 to 4 should be permitted to request that the  
observations should not weigh with the High Court while  
considering the pending writ petition as respondent No.2  
has chosen not to file any SLP against the impugned  
judgment and order and hence cannot be permitted to  
claim any relief in the SLP which has been filed by the PIL  
Petitioner and not by the respondent- Municipal  
Corporation / Municipal Commissioner. The respondent  
No.3 therefore having found itself in an inconvenient  
position in as much as it has accepted and implemented  
the judgment of the High Court by holding hearings and  
passing the order dated 12.09.2013 has at the same time  
in no uncertain terms exceeded its authority by reopening  
issues which were conclusively decided by the High Court  
and was not remanded to the Commissioner for its



reconsideration. It has been stated that it is in this background that the respondent No.3 being exposed to the potential contempt of court proceedings, that the said respondent is seeking to cover up this over- reach of his authority. It has been further stated that the impugned judgment is binding on respondent Nos. 2 to 4 and the said respondent cannot be permitted to go against the impugned judgment without due process of law and without challenging the impugned judgment.

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22. As regards the request of the petitioners for making any observation reopening the issues that stand concluded, it has been submitted that on the one hand the petitioners are aggrieved by the impugned judgment leading up to filing of the present SLP and on the other hand the petitioners seem to be satisfied with the order dated 12.09.2013 passed by respondent No.3. In this background, the petitioners who have withdrawn from the writ petition pending in the High Court, in which they did intervene and later withdrew the intervention application unconditionally, cannot be allowed to urge for reopening the entire issue. Hence it has been contended that the petitioners are not entitled to seek any observation pertaining to the judgment by which certain issues stand concluded.

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23. It has further been urged that the respondent Nos. 2 to 4 in course of the arguments relied upon the observation wherein the High Court observed that at this stage considering the fact that there is a sanctioned plan which permits the respondent No.5 to construct upto 56 floors on condition of handing over Public Parking Lot, the High Court did not think it necessary to intervene and issue a drastic order of demolition on the ground that the work is carried out beyond the commencement certificate when the statutory body has not yet taken final decision in

the matter. It will therefore not be appropriate to prejudge the issue and direct demolition which requires no interference as per the submission.

24. It was submitted by the respondent No.5 that although amended plan of residential building were undisputedly sanctioned upto 56 floors on 8 th February, 2011 and admittedly the commencement certificate was also endorsed on 18.11.2011 upto 43 floors construction upto 56 floors could have been permitted in view of its entitlement of additional FSI on account of its construction of Public Parking Lot. In support of the said arguments,

reliance was also placed on section 45 (2) of the MRTTP Act and it was contended that issuance of commencement

certificate (CC) is mandatory under Section 45 (2) and on that basis it was contended that the said floors are

constructed as per law. The respondent had further

submitted in its counter affidavit dated 10.01.2014 filed before this Court with respect to the work carried out

beyond 44 floors to 56 floors that absence of endorsement

of commencement certificate beyond 44 floors is a ministerial Act and the substantial rights are governed by

the sanctioned plan. It was submitted that the stop work

notice under Section 354 (A) of the MNCP Act was stayed

by the City Civil Court in Suit No.2942 / 2011 vide order

dated 24.12.2011, but no appeal was preferred by the

respondent No.2- Municipal Commissioner against the said

order. It was submitted that the observations of the High

Court in the impugned judgment pertaining to the

sanctioned plans and commencement certificate are

nothing but reconstruction of the facts which are

undisputed by the PIL petitioners as well as respondent

Nos.2 to 4 in the PIL and affidavits filed before the High

Court. It has further been stated that it is an undisputed

fact that the plans of the residential building and PPL are

duly sanctioned after examining the factual position as

asserted by the petitioners and confirmed by  
respondent Nos.2 to 4 in the affidavits as well as written  
submissions that the complete plans are duly sanctioned  
and the High Court has recorded the aforesaid findings. It  
has been further submitted that respondent Nos.2 to 4 in  
the written submissions filed in the High Court submitted  
that the issue regarding commencement certificate will be  
considered in accordance with the MCGM policies and in  
accordance with law keeping in mind the decision which  
would be rendered in the pending suit in the learned city  
civil court before grant of occupation certificate. This very  
submission of the MCGM was accepted by the High Court  
and is the basis of the High Court order on the  
commencement certificate. Hence, respondent Nos.2 to 4  
should not be permitted to resile from this position.

25. It has therefore been urged that there is no infirmity  
in the impugned judgment as regards its finding on the  
issue of sanctioned plans and endorsement of  
commencement certificate above 44 floors to 56 floors is  
concerned, as the same is in accordance with law and with  
the ratio laid down by this Court in the matter of Muni  
Suvrat- Swami Jain S.M.P. Sangh Vs. Arun Nathuram  
Gaikwad and others, reported in (2006) 8 SCC 590

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wherein this Court has held that the High Court cannot  
impede the exercise of discretion of the Municipal  
Commissioner by the issuance of mandatory order. It was,  
therefore, submitted that the concern now raised by the  
respondent Nos. 2 to 4 that the High Court should be  
directed to decide the pending writ petition No. 2223 / 2013  
being uninfluenced by the observation pertaining to  
commencement certificate and sanctioned plan in the  
impugned order dated 13.05.2013 of the High Court is an  
attempt to allow the erroneous order passed by the

Municipal Commissioner exceeding its authority to attain finality without the High Court considering the legality of the same in the pending writ petition. It has been further submitted that the respondent No. 5 has constructed the residential building of 56 floors and PPL of 15 floors strictly in accordance with the sanctioned building plans and various permissions granted by respondent Nos. 2 to 4 from time to time. It was, therefore, urged that it is statutorily recognized under Section 41 of the MRTTP Act that the permission granted cannot be modified or revoked when there is substantial compliance. All these issues arise for the consideration in the pending writ petition before the High Court of Bombay and would necessarily have to be gone into by the High Court. Hence, any clarification or observation in this respect by this Hon'ble Court will seriously prejudice the contentious issues in the pending writ petition before the High Court and the High Court of Bombay be directed to expeditiously decide the same in accordance with law.

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26. It has been finally urged by the respondent No.5 that in public interest and national interest this Court be pleased to direct respondent Nos. 2 to 4 to take over PPL constructed by respondent No.5 and confer the consequential benefit to respondent No.5 including the endorsement of commencement certificate as per the approved plan dated 08.02.2011.

27. On a scrutiny and analysis of the contesting plea of the PIL petitioner, statutory authorities viz. Municipal Corporation, Municipal Commissioner and the contesting respondent No.5 / the builder developer, it is manifest that the most contentious issue inter alia is with regard to construction of the floors beyond 43 rd floor that is 44 th floor upto 56 th floor which comes to 13 floors. It is in regard to these 13 floors that the objections have been raised by the Municipal Commissioner stating that these 13 floors from

44 to 56 should not have been constructed in spite of the sanctioned plans and all approvals granted in this regard, in view of the provisions in the MRTTP Act which envisages that even though the plans are duly approved by the competent authority, commencement certificate is required at every level and in absence of commencement certificate, if the construction has been raised merely on the basis of the approved building plans, the same would be treated as illegal.

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28. However, it could be noticed that in so far as PIL petitioner is concerned, Mr. Naphade representing them had not contested the construction of additional floors beyond 43 rd floor. What was contested was that the height of one floor which as per the sanctioned plan was 8 meter was extended to 13 meter which would affect public interest. In addition, over all submissions were advanced on behalf of the PIL petitioners that construction of the building was affecting public interest in the area as it was sought to claim additional FSI which ought not to have been permitted. Thus, while the PIL petitioners essentially was aggrieved of grant of permission to the respondent No.5 for additional FSI, the Municipal Commissioner went a way ahead by submitting that construction of additional 13 floors without commencement certificate beyond 43 floors was contrary to the MRTTP Act.

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29. Learned counsel for the contesting parties although had advanced arguments in support of their respective plea referred to hereinbefore as also by way of additional affidavit, the counsel for the parties ought to abide by what they had submitted before the Court in course of their oral submissions whereby counsel for all the three contesting parties agreed that this SLP be rendered infructuous in view of the fresh writ petition filed by the respondent No.5 herein bearing writ petition No.2223 / 2013 and the parties

agreed that as the Municipal Commissioner had passed a fresh order after the impugned judgment and order by the High Court was passed, it will be appropriate to leave it open to the parties to approach the High Court and get the matter decided conclusively . This Court merely by way of abundant caution had directed all the contesting parties to express their stand explicitly by way of an additional affidavit and in pursuance to the same the additional affidavits have been filed by the PIL petitioners, by the respondent Municipal Corporation, Greater Mumbai as also the builder developer / respondent No.5 which have been extensively incorporated hereinabove but have now sought to reopen the controversy even in regard to those issues which were not remanded before the Municipal Commissioner.

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30. On perusal of the same, I have noticed that the PIL petitioners thus have somewhat deviated from what was submitted orally as it has sought to re-open even those issues which conclusively stand decided by the High Court vide the impugned order which although is under challenge before this Court only at the instance of the PIL petitioners, the scope of the pending writ petition in the High Court is sought to be extended at the instance of the Municipal Corporation and the PIL Petitioner. This in my view is contrary to what was urged by way of oral submission whereby counsels for all the sides had agreed that the matter may be left open to be decided by the High Court in the pending writ petition bearing No. 2223 / 2013 which obviously would confine to only those aspects which were left open by the High Court vide its impugned order. As already stated, there was some contest in regard to the observation sought by this Court on the issue whereby the High Court has held that all issues except those issues which has been conclusively decided by the High Court should be left open to be decided by the Municipal

Commissioner which is a subject matter of challenge in the  
subsequent writ petition which is pending consideration. 33

31. However, I have noted that the learned counsels representing respondent No.5 have submitted that plans for the residential building of 56 floors had been duly sanctioned by Municipal Corporation, Greater Mumbai on 08.02.2011 while the public parking lot for 900 cars was sanctioned by the State Government and the plans for the said PPL of 15 floors had been sanctioned by the Municipal Corporation, Greater Mumbai also on 28.10.2010. The Municipal Corporation, Greater Mumbai has in the affidavit / written submissions filed by it from time to time had categorically stated that all the plans stand duly approved. As regards the commencement certificate, it was contended that the issues of endorsement of the commencement certificate beyond 43 rd floor was solely dependent on handing over of the PPL and it was stated that the High Court has already held that the PPL is legal and hence respondent No.5 cannot be deprived of the additional FSI towards construction of PPL. Further Section 45 read with Section 48 of the MRTP Act as well as regulation 5 & 6 of the Development Control Regulations contemplate that issuance of the commencement certificate upto the plinth level is mandatory and further endorsement of commencement certificate is only a ministerial / procedural act. Be that as it may, it was contended further that considering the submissions made by the MCGM, the High Court has rightly held that once the PPL that is public parking lot is taken over, necessary endorsement of the commencement certificate will be made.

32. I find substance in the plea that the respondent Nos.2 to 4 having not filed any SLP challenging the impugned order, have in fact accepted the impugned order and further Municipal Commissioner having passed the order on 13.09.2013 based on the impugned order which is now subject matter of challenge before the High Court, could not have traversed beyond the direction of the High Court so as to reopen even those issues which were not left open for reconsideration. It is no doubt true that the respondent No.5 has constructed the residential building upto 56 floors but the respondent has also constructed the PPL upto 15 floors, which holds it entitled for additional FSI which is to be adjusted towards additional floor. 34

Admittedly, both the constructions are in accordance with the sanctioned building plans and the various permissions granted by the respondent Nos. 2 to 4. It is further statutorily recognized under Section 51 of the MRTP Act that the permission / approval granted cannot be modified

or revoked when substantial progress has been made.

Hence any observation by this Court will seriously prejudice respondent No.5 as the writ petition against the order of the Municipal Commissioner dated 12.09.2013 is pending consideration before the High Court.

33. Besides the affidavit filed by the Municipal Corporation, attention of this Court was also drawn to the affidavits as well as written submissions filed before the High Court of Bombay where Municipal Corporation, Greater Mumbai has categorically taken a stand that the construction was in accordance with the sanctioned plan and therefore PIL ought to be dismissed as being devoid of merits. It may be reiterated that MCGM also stated that the commencement certificate will be endorsed as per the sanctioned plan of 8 th February, 2011 once the PPL is handed over.

34. It is to be further noted that certain change in policy regarding PPL had also taken place after sanction of the PPL in favour of respondent No. 5. The PPL has been constructed by the respondent No.5 clearly in accordance with the sanctioned plan and in consonance with the policy decision which has received due approval of the State Government. The High Court having considered all these aspects therefore, has rightly held that the construction of PPL having been completed in accordance with the sanctioned plan as noted earlier coupled with the fact that the said PPL is due to be handed over to the Corporation free of cost for the use of general public, the view taken by the High Court in my opinion requires no interference.

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Once that is complied the respondent No.5 will be held entitled as per Rule to avail of the incentive FSI which will validate the construction upto 56 th floors and hence entitled for the commencement certificate in pursuance to the approved building plan granted at the initial stage itself after which the construction had started.



35. Thus taking into consideration, the plea of the contesting parties and in view of the directions of the High Court which had remanded the matter to the Municipal Commissioner to consider only on limited issues, the matter could not have been decided by the Municipal Commissioner beyond the terms of the order of remand of the High Court. I therefore endorse the direction of the High Court that the Respondent No.5 was entitled to additional FSI since the PPL constructed could not be held as illegal. Thus, if the Public Parking Lot is allowed to be taken over for public use by the respondent State through the Municipal Corporation which essentially was an impediment for non- issuance of commencement certificate for floors beyond 43 rd story and it is an admitted position that the building plan was duly sanctioned even upto 56 floors, the commencement certificate beyond 43 floors could not have been legally denied as the direction in regard to Public Parking Lot (PPL) clearly resolves the deadlock. Thus, when the construction of PPL is legal and the same is being offered by the respondent No.5 for public use, the MCGM obviously was legally bound to consider whether consequential benefit of grant of commencement certificate could at all be withheld. Hence, MCGM should consider taking over the PPL forthwith from the respondent No.5 that has already been constructed and consider granting consequential benefit to the Respondent No.5 by granting commencement certificate for the additional floors beyond 43 rd floor which has been constructed as per the sanctioned plan.

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36. The PIL petitioners however has also questioned aspects like the height of habitable floors, service floor, amenity floor, swimming pool, refuge area etc. etc. but had never questioned the construction of additional floor from 43 to 56. What was urged was that the height of service floor is more than 8 meters which was approximately 13 meters which should not have been permitted and Mr. Naphade had focused his argument essentially on this part.

37. Having thus noticed all the relevant aspects, it is

obvious that at least those issues which stand settled by the judgment and order of the High Court and had not been remanded to the Municipal Commissioner for being reopened by confining its direction to only those issues which were referred to the Municipal Commissioner for consideration and were then considered, expanding its ambit which is under challenge at the instance of respondent No.5, cannot be allowed to be reopened before the High Court in the writ petition which is pending adjudication since the Municipal Commissioner had no authority to traverse beyond the directions of the High Court.

38. The question as to whether the issue decided conclusively by the High Court vide its impugned judgment should be allowed to be reopened at the instance of the Municipal Corporation, do not arise at all as it cannot be overlooked that this SLP has not been filed by the Municipal Commissioner or the Municipal Corporation but has been filed by the PIL petitioners who had never raised any question in regard to non- issuance of commencement certificate. It may further be reiterated that it is not the case of the Municipal Corporation that the constructions beyond 43 floors is contrary to the sanctioned plan. What has been urged by the MCGM even without filing any SLP against the impugned judgment and order is that construction beyond 43 rd floors although was approved upto 56 floors by the plan which had been sanctioned, the construction beyond 43 rd floors should not have been done without a commencement certificate which had been withheld due to the dispute which emerged on account of the construction of the Public Parking Lot..

39. I deem it appropriate to observe at this juncture that if the builder developer proceeds with the construction without approval of sanctioned plan and the commencement certificate is withheld due to violation of

the approved building plan, the construction would be fit for demolition without iota of doubt, but in this particular case the commencement certificate appears to have been withheld merely on account of a dispute between the Municipal Corporation and the respondent No.5 /b uilder regarding non- delivery of Public Parking Lot (PPL) for public use to be handed over to the respondent- state by the respondent No.5- builder developer due to some change in the policy decision and stop work notice and the commencement certificate beyond 43 floor appears to have been withheld due to the said dispute which is clearly borne out from the averments of the MCGM and the respondent No.5. However, the stop work notice had been stayed by order of the City Civil Court against which the Municipal Corporation did not even file an appeal and the construction in the meantime is complete. Therefore, if the respondent No.5 has now offered to handover the PPL to the respondent - state and the Municipal Corporation for the use of public, issuance of commencement certificate beyond 43 rd floors cannot be withheld specially when the same holds Respondent No.5 entitled to additional FSI. It needs to be understood by all the contesting parties herein and may be highlighted that it is not the case of the PIL petitioners and in fact no question regarding non- issuance of the commencement certificate had been raised, nor the Municipal Corporation had contested that the construction beyond 43 floors is illegal as it is contrary to the sanctioned plan, but the question regarding commencement certificate had become an issue since construction of PPL and handing over of the PPL to the State authorities was a contentious issue. But once it is finally held that the Respondent No.5 is entitled to additional FSI due to handing over of Public Parking Lot to the Municipal Corporation for the use of the Public, the consequence

obviously is bound to follow as withholding of PPL primarily appears to be a reason for non- issuance of commencement certificate.

40. In view of the above, I do not deem it appropriate to interfere with the findings of the High Court rendered in the impugned judgment and order so as to permit reopening of such issues which stand settled. Hence this SLP is dismissed to that extent; accordingly, the consequential relief of grant of commencement certificate for the additional floors cannot be withheld specially when they are admittedly constructed as per approved sanctioned plan.

41. In so far as the other remaining issues are concerned on which the Municipal Commissioner has already passed an order which were referred to him for consideration, the same are subject matter of challenge before the High Court and the same obviously will get addressed by the High Court in the pending writ petition bearing No.2223 / 2013.

42. Under the aforesaid circumstance, this special leave petition in so far as the issues which are a subject matter of consideration by the High Court in the pending writ petition bearing No. 2223 / 2013 is concerned, is dismissed as infructuous as the same obviously will be considered and decided by the High Court in accordance with law. In so far as the remaining issues are concerned which has been decided conclusively by the High Court in the impugned judgment and was not remanded to the Municipal Commissioner, shall stand concluded in terms of the finding and direction of the High Court recorded in the impugned order since the same were never referred to the Municipal Commissioner so as to observe and permit it to be kept open. Hence this SLP is dismissed in regard to those issues which have been decided conclusively by the High Court vide the impugned judgment and order and

unequivocally was not remanded to the Municipal Commissioner for review or reconsideration.

.....J.  
(GYAN SUDHA MISRA)

New Delhi;  
April 25, 2014

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IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2014  
(Arising out of SLP(C) No. 20279 of 2013)

JANHIT MANCH & ANR. ...APPELLANTS  
  
Versus  
  
STATE OF MAHARASHTRA & ORS. ... RESPONDENTS

J U D G M E N T

V. GOPALA GOWDA, J.

Leave granted.

2. My sister Justice Gyan Sudha Misra has delivered the Judgment today in this matter by dismissing the Special Leave Petition holding that it has become infructuous. I am in respectful disagreement with the view expressed by Her Ladyship in this matter. As I received draft judgment in the evening of 24th April, 2014, I could not deliver judgment. I am of the view that the leave has to be granted and civil appeal has to be allowed. In the proceedings, it is stated that reasons would follow, that is why I am releasing this reasoned judgment.

1

Pursuant to the order of the High Court of Judicature at Bombay dated 13.05.2013 passed in Public Interest Litigation Petition No. 43 of 2012 filed by the appellants, 13 issues of violations and breach of

Development Control Regulations for Greater Mumbai, 1991 (for short "the DCR") and the Maharashtra Regional and Town Planning Act, 1966 (for short "the MRTP Act") were raised.

3. Out of the 13 issues raised in the said writ petition, which were in two parts, six issues (in Part-A) were remanded to the Municipal Commissioner for reconsideration and re-examination and (Part-B) Eight issues were finally decided by the High Court in the aforesaid writ petition (one issue being remanded in part). Pursuant to the said order of MCGM, six issues were decided vide order dated 12.09.2013.

4. Being aggrieved by the order dated 12.09.2013 respondent No. 5 challenged the correctness of the same by filing W.P. No. 2223 of 2013 before the High Court of Judicature at Bombay.

For the sake of ready reference, the issues pending

for adjudication before High Court and this Court is highlighted in the following table:-

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1.	PUBLIC PARKING LOT (PPL) AND STOP WORK NOTICES;	PENDING (From plinth to 15th floors)	PENDING (From 5th to 15th Floor)
2.	CONSTRUCTION OF FLOORS 43 RD TO 56 TH OF THE RESIDENTIAL BUILDING	OF PENDING	--
3.	REFUGE AREA/FIRE - ESCAPE PASSAGES TO BE COMPUTED	-	PENDING
4.	SET-BACK AREA	-	PENDING
5.	HEIGHT OF HABITABLE FLOORS	PENDING	-
6.	PASSAGES AT MANOR - LEVEL, PASSAGES IN FRONT OF THE FLATS, SWIMMING POOLS	-	PENDING
7.	SERVICE FLOORS	PENDING	-
8.	AMENITY FLOOR	PENDING	-
9.	FSI OF DUPLEX FLOORS	-	PENDING
10.	SERVANT TOILETS	PENDING	-

11.	STRUCTURAL COLUMN	-	PENDING
12.	TOILETS AT DUPLEX LEVEL	PENDING	-
13.	FLOWER BEDS AREA	PENDING	-
	TOTAL ISSUES PENDING	8 IN SUPREME COURT	6 IN HIGH COURT
	IN HIGH COURT AND IN SUPREME COURT		

Therefore, the learned sister Her Ladyship held

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that the challenge made in relation to the other issues in this appeal has become infructuous and has been dismissed by Her Ladyship in the Special Leave Petition by recording Her reasons to which I am in respectful disagreement and of the view that certain factual and legal contentions arise before the High Court in Part-A, and 7 issues were not decided. The correctness of the same are challenged in this appeal raising certain questions of law and grounds in support of the same.

5. After hearing the legal contentions advanced by both the parties, Mr. Shekhar Naphde the learned senior counsel who appeared on behalf of the appellants and Mr. Goolam E. Vahanvati, Attorney General along with Mr. R.P. Bhatt, learned senior counsel who appeared on behalf of respondent Nos. 2 to 4, Dr. A.M. Singhvi and Mr. Paramjit Singh Patwalia, learned senior counsel on behalf of respondent No. 5, I am of the view that this Special Leave Petition has not become infructuous. I intend to consider the legal questions raised and answer the same by advertng to certain necessary relevant facts.

Brief facts are stated hereunder for examining the

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factual and rival legal contentions urged on behalf of the parties and I answer the same by recording reasons in this judgment :-

6. The appellant no. 1 herein, a non-governmental organization, filed Public Interest Litigation No. 43 of 2012 before the High Court of Judicature at Bombay

questioning the legality of the permission granted in favour of respondent No. 5 regarding construction of 56 storied residential building known as 'Palais Royale' and a public parking lot (for short "PPL") adjacent to it situated at Worli, Mumbai. The challenge in the writ petition by the appellants herein is regarding the approval and commencement certificate issued in respect of the residential building and PPL upto 43rd floors of the building in question. The order by the MCGM, Mumbai dated 12.9.2013, would clearly indicate the challenge of the sanctioned permission and commencement certificate issued upto 43rd floor for construction of residential building by the respondent No.5 who is the owner of the property bearing Cadastral Survey Nos. 288, 289, 309, 310, 1/1540, 2/1540, 3/1540, 1547, 1548, 1549, 1/1539 and 1550 of Lower

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Parel Division at Ganpatrao Kadam Marg, Worli. The larger property is sub-divided in 9 sub-plots in the following manner:

No. 1	A tenanted building
No. 2	A residential building known as Ansal Heights
No. 3	Municipal Primary School
No. 4	Play Ground
No. 5	In dispute
Nos. 7 and 8	are with the Maharashtra Housing And Area Development Authority (MHADA)

The Corporation No. 5B-6 admeasuring 28,409.57 sq. mtrs. is the subject-matter of the petition, as it is on this plot that the residential building and PPL are being constructed as per sanctioned permission accorded by respondent No. 2. The plans were amended from time to time and a residential building was subsequently proposed. On 20.8.2010 and 8.2.2011, the plans were approved for construction of a PPL with its potential available under Regulation 33(24) of the DCR as applicable in the city of



Mumbai.

7. On 7.5.2011, the respondent No.2 received a letter

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from respondent No. 5 informing that all conditions of intimation of disapproval (IOD) as well as amended plans have been complied with and the respondent No. 5 completed work upto plinth level as per the approved plan. Respondent No. 5 called upon the MCGM to check the plinth and grant further commencement certificate.

8. On 16.7.2011, MCGM, Mumbai issued a notice under Section 354(A) of the Mumbai Municipal Corporation Act (for short "MMC Act") to respondent No. 5. stating misrepresentation was made to it while submitting plans by way of showing amalgamation of leasehold and free hold plots.

Thereafter, MCGM carried out an inventory on 22.7.2011 in which it was noted that the work of residential tower was carried out up to 180 meters (36 floors) within the commencement certificate granted on 6.7.2010 and the work of PPL was in progress up to plinth level. On 11.11.2011, another inventory was carried out wherein it was recorded that the work of residential building was up to 180 meters and the work of PPL was up to plinth level.

9. On 29.11.2011, MCGM issued another notice to respondent

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No. 5 under Section 51 of the "MRTP Act", wherein it is stated that a circular modifying the policy regarding PPL in the city is issued on 22.6.2011 prescribing certain conditions. It was stated that as per the Circular, the height of PPL would be limited to ground + 4 floors and 2 basements. A notice was called upon respondent No. 5 not to carry further constructions and respondent No. 5 was directed to show cause as to why the commencement certificate issued on 10.10.2010 should not be revoked or

modified as the respondent No. 5 had not carried out the construction beyond plinth.

To the notice dated 29.11.2011, respondent No. 5 replied on 14.12.2011 stating that Section 51 of the MRTP Act was not applicable to the facts of the case placing on record the various steps taken for construction of the PPL.

10. Again on 19.12.2011, MCGM issued notice under Section 53(1) of the MRTP Act to respondent No. 5 stating that the work of construction of PPL from 1st to 6th floor (entire) and 7th to 9th floor (part) which was beyond the permission granted in commencement certificate dated 10.10.2010 was

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illegal being without permission.

11. Being aggrieved by the notices, respondent No. 5 filed Civil Suit No. 2492 of 2011 before the City Civil Court, Mumbai challenging the notices issued by MCGM and contended that it had carried out construction as per sanctioned plan and construction has reached up to 9th floor. It was contended by respondent No. 5 that it had applied for commencement certificate on 7.5.2011 which was neither granted nor refused and therefore it is deemed to have been granted. The City Civil Court Judge by order dated 24.12.2011, granted ad interim order and observed that respondent No. 5 - the plaintiff had undertaken that he would not carry out construction in contravention of sanctioned plan. The City Civil Court Judge granted relief as under:

(1) ad interim relief;

(2) Deft/MMC is restrained from taking action in view of impugned notice;

(3) MMC was directed to file reply by 10.1.2012.

12. Preliminary objection was raised by respondent No.

5 regarding locus of the appellants to move this petition in public interest before the High Court. It is the case of Respondent No. 5 that it was involved in a litigation with M/s Kalpataru Properties Pvt. Ltd. that M/s Kalpataru Properties has set up the present appellants. It is further contended by the learned counsel for the respondent No. 5 that the Chairman of appellant No.1- Mr. Rayani is himself a developer and the petition is not in public interest but is meant for settling a private dispute. The Division Bench of the High Court adverted to certain relevant provisions of the MRTTP Act in this case namely, Sections 44, 45, 46 and 51 which are extracted below :-

"44. Application for permission for development 1(1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make in application writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed:

45. Grant or refusal of permission :-

(1) On receipt of an application under Section 44 the Planning Authority may, subject to the provisions of this Act, by

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order in writing-

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

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

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

Act.

51. Power of revocation and modification of permission to development....."

13. The Division Bench also referred to DCR 2(11) regarding building, DCR 5(5) regarding Procedure for obtaining Development Permission and Commencement Certificate, DCR 6(4) regarding procedure during construction, DCR 30(e) regarding features permitted in open spaces, DCR 33(24) regarding Additional Floor Space

Index which may be allowed in certain <sup>11</sup> categories and referred to the incentive FSI given in favour of the respondent No. 5 and additional FSI on built up parking area with certain conditions, DCR Regulation 35(2) (iv) regarding Floor Space Index Computation and clause (iv) which is about the area not to be counted in FSI and DCR 38(4) deals with requirements of parts of buildings and other requirements. The Division Bench also noted the submissions with regard to the challenge made by the appellants and arguments advanced on behalf of the respondents in respect of PPL and the contention advanced on behalf of respondent No. 5 that letter dated 7.5.2011 under DCR 6(4) for issuance of further commencement certificate and the application having not been refused, deemed to have been granted. At paragraph 29 of the impugned order it is referred that construction of additional floors from 44 to 56 was solely dependent on the incentives FSI and till date mandatory precondition of handing over the PPL has not been fulfilled by the respondent NO. 5.

14. At para 29 (b) it is subsequently stated regarding

submission on behalf of the appellants, <sup>12</sup> that no commencement certificate has been issued to construct the residential building beyond 43rd floor. However, it has

constructed the residential building up to 56th floors without having obtained commencement certificate.

Therefore, the construction is in breach of law and it should not be permitted to be regularized. It is further stated that the work in the main building has reached

completion and in spite of the pendency of suit, the respondent No. 5 has undertaken the construction in a hurried manner.

15. The learned counsel for respondent No. 5, on the other hand stated that the grant of commencement certificate is only a ministerial action and substantive rights of the parties are governed by the sanction of plans. It is further submitted by the learned counsel that the work has been carried out as per the sanctioned plan and non-endorsement of commencement certificate is not a breach of the DCR. It is also submitted that the position has been recognized under Section 53 of the MRTTP Act and

in such situation, there is an option for regularization under Section 44 of the MRTTP Act. The learned counsel has placed on record circulars dated 17.6.2006 and 6.7.2005 and 4.2.2011 in respect of regularization.

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16. At para 29 (e) of the impugned judgment, the High Court noticed the factual aspect regarding building plans of respondent No. 5 for the residential building which are sanctioned up to 56 floors. It further noticed the fact that the commencement certificate has been issued only till 43rd floors and examined the question as to whether the action of the respondent No. 5 to continue construction up to 56 floors is so patently illegal so as to warrant an order of demolition.

17. The Division Bench of the High Court observed that the plans are sanctioned up to 56th floors and the

construction per-se is not in violation of the sanctioned plans. The Division Bench further referred to the submission made on behalf of the MCGM that before occupation certificate is granted, the aforesaid aspects of construction without commencement certificate will be considered and referred to Section 52 of the MRTTP Act

which envisages different categories of constructions.<sup>14</sup> Once a construction is found to be as falling in the category enumerated in Section 52, then a notice under Section 53 of the MRTTP Act is issued. And at this stage, it is open to the developer to make an application for regularization as per the Act and the circulars. Since the MCGM has not yet granted occupation certificate to the respondent No. 5, the same has not taken a final decision in the matter. The High Court considering the fact that there is a sanctioned plan permitting the respondent No. 5 to construct up to 56th floors, it did not think it necessary to interfere and issue a drastic order of demolition on the ground that the work is carried out beyond commencement certificate. Particularly, the statutory planning body has not yet taken final decision in the matter, it will not be appropriate to prejudge the issue and direct demolition.

18. Aggrieved by the non-consideration of this important aspect along with other 6 issues which are referred to in the table mentioned above in the additional affidavit filed by the appellants, this civil appeal is filed by the

appellant also on the ground of various other deviations regarding not following the guidelines issued regarding refuge area contained in DCR 44(7) and also deviation from the National Building Code regarding fire protection and FSI of structural column.

At paragraph 36 of the impugned judgment, directions

were given to respondent Nos. 1 and 2 to reconsider and re-examine 6 issues out of 13 and the petition was disposed of in the above terms.

19. On the ground of non consideration of remaining 8 issues in the writ petition, this civil appeal has been filed raising certain questions of law regarding concessions granted under DCR 64(b) in the light of the express bar against the grant of concessions in respect of FSI contained in DCR 64(b) and non compliance with the mandatory and obligatory precondition of the builder-respondent No. 5 to make out a case of 'demonstrable hardship' and a reasoned and coherent finding thereon being arrived at by respondent No. 3, as required by DCR 64(b).

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This civil appeal was heard at length on different dates.

20. The learned senior counsel on behalf of the appellants Mr. Shekhar Naphde submits that the Division Bench of the High Court has failed to exercise its power under Article 226 of the Constitution of India despite the fact that respondent No. 5 had illegally availed and amassed additional FSI amounting to about 66,449.85 sq. mtrs. out of a total FSI of 1,21,165.76 sq. mtrs. of which the legitimate FSI consumed was only 54,715.19 sq. mtrs. which was amassed through blatant and brazen breach of the fundamental provisions of the MRTP Act and DCR.

Learned senior counsel on behalf of appellants further submitted that DCR 64(b) requires the party seeking concessions to make out a case of demonstrable hardship for seeking such a concession. There was no such case of attempt made out by respondent No. 5, let alone there being a reasoned finding of demonstrable hardship

arrived at by respondent No. 3. Yet, despite the aforesaid arguments being advanced before the High Court, the same were not considered.

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It is the further contention of the appellants that the High Court has, contrary to the statutory provisions of law held at paragraph Nos. 36(vii) and 36(viii) that the decision of the Commissioner in respect of the aforementioned concessions cannot be termed as illegal or arbitrary and is not to be interfered with. This finding of the High Court is contrary to the plain and express provisions of the DCR.

Regarding refuge area, it is contended that the same is required to be segregated and kept open as a safety measure in case of any emergency. Also, by definition, a refuge area cannot have any direct access from the habitable premises and cannot be sold or attributed to any flat or its occupants.

21. It is further contended by the learned senior counsel for the appellants that respondent No. 5-builder has fraudulently and illegally constructed a total refuge area of 52452.99 sq. mtrs (39446.91 on habitable floors+13006.08 as individual floors) while the total permissible refuge area when calculated at 4% is only

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2188.60 sq. mts. for the entire building. The MCGM fraudulently and illegally allowed refuge areas/fire escape passages free of FSI to the tune of 95.87%, which is astronomical and exorbitant in nature. In sum and substance, these extensive refuge areas are illegal and are not refuge areas but have been constructed and sold by the builder-respondent No. 5 to flat owners as decks/terraces.

It is further contended that respondent Nos. 2 to 4



filed an Affidavit dated 18.9.2012 in the writ petition before the High Court and admitted that the refuge area is far in excess of the permissible limits. Despite the said fact being noticed by the High Court in paragraph 36 (ii) of the impugned order, it has failed to direct the Corporation to demolish excessive Refuge Areas and instead it has directed the MCGM to re-examine the issue and rework on the FSI.

It is the further case of the appellants herein that the High Court committed manifest error in abdicating its duty to adjudicate the disputes brought before it. However, apart from the issue of Refuge Areas, it has

directed respondent No. 3 to examine the <sup>19</sup> issues of construction beyond 43rd floor of the Main Building which has been done without obtaining commencement certificate as required under Section 45(2), FSI in lieu of Set Back Areas, passages at Manor Level and entrances, private swimming pools and deck areas, FSI in respect of structural columns, lack of NOC from the High Rise Committee, and Height of Habitable Areas above 4.2 meters. The High Court proceeded on the erroneous factual position that the Corporation-respondent No. 2 stated that it would 'reconsider' these issues. No such submissions have been made by respondent Nos. 2 to 4 earlier. In fact, the Affidavit filed on behalf of the said respondents dated 18.9.2012 admits that these areas could not have been granted free of FSI and are to be calculated in the FSI consumed. Thereby, the High Court is patently mistaken in proceeding on such a footing and ought to have rendered a decision on these issues.

22. The builder-respondent No. 5 opted for a PPL scheme to be constructed and handed over to the Corporation in lieu of which incentives FSI was to be received. The PPL

was however constructed upto 15 floors vide sanction of Building Plans after obtaining of Commencement Certificate only upto plinth level. While the sanction was for 15 floors and the first Commencement Certificate was granted up to plinth level, the second commencement upto 15 floors is stated to be on "deemed basis" and the 'deemed' status. This is entirely illegal and fraudulent since on 7.5.2011, when the second commencement certificate was applied for, it was premised on the fact that the first commencement certificate had been exhausted by completion of construction upto plinth level. In fact, in the month of July, 2011, it was recorded by the respondent No. 2 in an inventory report dated 22.7.2011 that construction upto plinth level was not completed. In the circumstances, the PPL has been constructed, inter alia, without following the due process of law.

It is further contended that upon the valid construction of a PPL building and its being handed over to the Corporation along with the title, the builder could use incentive FSI to construct the Main Building over 43 floors going up to 56 floors. As a matter of fact, the

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construction of the main building has not been handed over to the Corporation. Yet, the construction of the Main Building has progressed upto and beyond the 56th floor during the pendency of the present matter before the High Court and this Court.

23. It was the further contention of the appellants that the PPL could not have been built upto the 15th floor since the scheme was brought down to 4 floors by virtue of a circular issued by the Corporation dated 22.6.2011. The roll-back of the scheme was premised on the fact that PPL over 4 floors were found to be unfeasible and self-

defeating and contrary to Public Interest as it would cause further traffic congestion, as also it was found to be impractical to transport vehicles to floors higher than the 4th floor. DCR 33(24) (iv) provides that the proposed development shall be further subject to such conditions as mentioned/ prescribed by the Municipal Commissioner and the builder could not have built upto 15th floor in the presence of the above conditions and show cause notice dated 29.11.2011. This notice was not challenged by the builder-respondent No.5. Therefore, the PPL building could

not have been constructed and thus the question<sup>22</sup> of construction beyond 43 floors of the main building using the incentive FSI does not arise. The builder-respondent No. 5 submitted a lengthy reply to notice dated 29.11.2011 but raised no defense of any 'deemed' commencement certificate. The High Court, however, relied upon Section 51 and 52 of the MRTTP Act and the case of Kohinoor CTNL Infrastructure v. MCGM (W.P. NO. 143 of 2012 decided on 9.7.2012) stating that by the time the circular was issued, "substantial progress" had been made in the PPL building and therefore, the circular was of no avail. It is also urged that the High Court failed to consider that in such large projects, Section 51 was not meant to be an escape. This is not a case of hardship of an individual but is a huge commercial project. In this view, the High Court could not have come to the aid of such a builder/project under Article 226 of the Constitution of India.

24. It is further submitted that even otherwise, plea of "substantial progress" under Section 51 could not have been pressed into service, since the "substantial progress" contemplated by Section 51 and 52 has to be in accordance with law as held in the case of Kohinoor CTNL

Infrastructure (supra) and not illegal substantial progress. Further, since there was a "stop work notice" in force from 22.7.2011 till 11.11.2011, and then again from 14.12.2011 to 24.12.2011, any progress on the PPL after the inventory of 22.7.2011 was ex facie, illegal and in violation of the said Stop Work Notice.

25. It is further contended that the High Court committed a grave error in law by refusing to place any reliance on the inventory reports of the Corporation which disclosed the falsity of the substantial progress as well as the deemed permission, that too on the sole ground that the same was not signed by the representative of respondent NO. 5. The finding of the High Court at paragraph 28(n) of the impugned order is contrary to and in derogation of DCR 8, which contains no such requirement of an inventory report apart from Section 114 of the Evidence Act, which raises a legal presumption in favour of its authenticity.

26. In the context of the PPL and the construction of

the Main Building beyond the 43rd floor<sup>24</sup> without a commencement certificate and without the incentive FSI having accrued, the High Court has committed a manifest error by relying merely on the sanctioned plans and ignoring the lack of commencement certificate in order to determine whether the construction is illegal/unauthorized and has set a dangerous precedent in the city of Mumbai at a time when there is already rampant unauthorized construction. Further the commencement certificate is a tool that the legislature in its wisdom chose to incorporate in the MRTP Act as a check and control mechanism to ensure that construction activities are in accordance with law and regulatory provisions which could not have been ignored by the builder-respondent No5. It was brought to the notice of the High Court but the same

was overlooked by giving irrelevant reasons which were neither valid nor proper. Therefore, the High Court has rendered Sections 45 and 69 of the MRTTP Act otiose and redundant by effectively ruling that construction can be carried out de-hors of a commencement certificate and can be later regularized by applying to the Corporation under

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Section 51 of the MRTTP Act. This ruling of the High Court is totally contrary to the judgment of this Court in the case of Dipak Mukherjee v. Kolkata Municipal Corporation & Ors.<sup>1</sup>. Further, it is contended by the learned counsel that it is now settled position of law that no equity can be claimed by any party on account of money having been expended and/or in illegal or unauthorized construction having either been completed or having reached an advanced stage though the appellants cited more than eight decision before this Court as well as in support of the propositions of the law. Despite this, the High Court without making a reference to the above decisions, let alone dealing with or distinguishing them, has erroneously stated at para 29(e) that it is open to the developer to make an application for regularization and has declined from passing a purportedly drastic order of demolition by inter alia taking cognizance of the workforce employed, third party agencies appointed, investments made and expenses incurred by respondent No. 5. and has erroneously legitimized the PPL (and consequently the illegal construction of "Palais Royale" beyond 43 floors). It

1 AIR 2013 SC 927

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ought not have directed the Corporation to take possession of the PPL from the builder respondent No. 5 and also could state that FSI claimed by respondent No. 5 in lieu of Set Back Areas also could never have been claimed by it for the reason that two separate communications by two

independent Government Departments being the respondent No. 2 itself in 1992 and the Urban Land Ceiling Authority in 2004, respondent No. 5 have already received compensation for Set Back Areas, and therefore, could not also have received FSI in lieu thereof. Secondly, the claim is contrary to Circular dated 8.7.1987 which requires a party claiming FSI in lieu of Set Back Areas to do so within 12 years from the date of handing over of Set Back Areas. In the present case, the same was handed over in 1976 and is therefore time-barred. Yet the High Court has directed the respondent No. 3 to re-examine/reconsider this issue purporting that respondent No. 2 is verifying the exact position from the Urban Land Ceiling Department without appreciating that it has failed to do so in the 15 months when the matter was pending before the High Court despite respondent Nos. 2 to 4 having undertaken to do so

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in its pleadings as well as during arguments.

27. It is, therefore, contended by the appellants that almost the entire layout and construction of Palais Royale and the PPL is illegal and fraudulent. The appellants in this appeal raise substantial issue of law that has direct bearing on public interest since the same has a fundamental effect on the interpretation and validity of the DCR as also the provisions of the MRTTP Act particularly Section 45(2) and Section 69 and the directions issued in the impugned judgment in relation to the seven (7) issues are only decided on the merits of the case with reference to the legal question raised in the PIL petition. Therefore, the appellants are before this Court and the Special Leave Petition has not become infructuous merely because the Commissioner has complied with the directions issued in the impugned order dated 13.5.2013 by passing his order dated 12.9.2013. Moreover, this order is under challenge before the High Court in

W.P. No. 2223 of 2013 at the instance of the builder-respndent No.5. The issues in the said case are very narrow and limited when compared to the issues raised in

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the PIL petition which are not adverted to and considered by the High Court. Therefore, the appellants requested this Court to grant relief as prayed in this civil appeal.

28. The learned Attorney General on behalf of the Corporation contented that since the builder-respndent No. 5 has not fulfilled the mandatory precondition of handing over of PPL, the construction of the aforesaid floors of the building is in breach of law and should not be regularized contrary to the observation made by the High Court. Further, the High Court made an observation on the basis of the written statement filed by the Corporation wherein it has placed on record that work in the main building has reached completion. In spite of the pendency of the suit, the respndent No. 5 has undertaken construction in a hurried manner. The learned Attorney General also submits that the impugned order in the original suit is wholly untenable in law for the reason that the order of the Civil Court in Civil Suit No. 2492 of 2011 dated 24.12.2011 observed that the builder-plaintiff has undertaken that they would not carry construction in contravention of sanctioned plan. This

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means that the construction could be made only after getting endorsement made by the MCGM extending the commencement certificate. This is a mandatory requirement under Section 45(2) of the MRTP Act from 44th floor to 56th floor. However, the commencement certificate was issued and endorsed on 18.11.2011 by the Superintending Engineer, Assistant Engineer of the Corporation upto the 43rd floor of the building. In fact, the learned Attorney General

placed reliance upon the letter written by the authorized signatories for Talati & Panthaky-Associated Pvt. Ltd. to Corporation-MCGM which was received on 14.11.2011 with reference to the residential building in sub-plot in question belongs to the private builder with reference to File No. EB/987/GS/A which is extracted hereunder:-

"With reference to the above subject, we hereby submit you compliances of I.O.D. conditions. Some of the conditions we will comply before issue of further C.C.

You are therefore requested to kindly scrutinize the same and grant us further C.C. at the earliest and oblige."

In view of the said letter, the plea taken before the High Court in the PIL which is reiterated in this appeal

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by the learned senior counsel is only an after thought and the said contention is wholly untenable in law. In fact, in the month of July, 2011, it was recorded by the respondent No. 2-Corporation, in an inventory report dated 22.7.2011 that construction upto plinth level was not completed. Therefore, the PPL has been constructed upto 15th floor without following the due process of law. Therefore, the handing over of the PPL to the Corporation is totally impermissible in law and further the direction issued in this regard in the impugned order by the High Court is wholly untenable in law.

29. The claim on behalf of respondent No. 5 regarding the regularization as provided under Sections 51 and 52 of the MRTTP Act placing reliance upon the case of Kohinoor CTNL Infrastructure (supra) by the builder is not permissible as the entire construction is illegal, unauthorized without obtaining the commencement certificate.

30. Learned senior counsel Dr. A.M. Singhvi appearing on behalf of respondent No. 5 rebutted the aforesaid



contentions contending that the PIL is not maintainable, the appellants have no locus standi and there is no public interest involved in this case. Therefore, the High Court should have rejected the writ petition particularly on the issue of delay and laches. The first appellant is in association with the builders and therefore, the High Court could have rejected the writ petition as it is not a public interest litigation.

Secondly, it is contended by him that the directions issued to the Commissioner in the writ petition was complied with by the Commissioner vide his order dated 12.9.2013 and the writ petition is filed by the builder-respondent No. 5 questioning the correctness of the same. Therefore, this appeal has become infructuous and the learned senior counsel prayed for dismissal of the appeal as no question of law would arise for consideration of this Court. It is also contended that the contentions urged on behalf of the appellants was an after thought contrary to the earlier stand taken by them before the High Court in the PIL petition. The stand of the respondent Nos. 2 to 4 that construction of the PPL beyond

plinth level upto 15th floor and 44th to 56th floor is  
 illegal and unlawful since the same was made without obtaining commencement certificate, is wholly untenable in law for the reason that by issuance of commencement certificate when the Corporation has issued sanctioned plan as provided under Section 45(1) of the MRTTP Act, it granted permission with certain conditions on the application filed under Section 44 of the Planning Authority and made endorsement for issuance of commencement certificate in the prescribed form that has

been issued upto plinth level and upto 43rd floor. Application was filed for grant of commencement certificate from 44th to 56th floor and non communication regarding non grant of the same by the respondent Corporation within 16 days amounts to deemed grant of issuance of commencement certificate in favour of the respondent No. 5 to proceed with the construction of the building as per sanctioned plan is the legal contention urged by the learned senior counsel on behalf of the respondent No.5.

31. Therefore, it is urged that the contention urged on

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behalf of learned senior counsel for the appellants and Attorney General on behalf of the respondent Nos. 2 to 4 is wholly untenable in law, and is liable to be rejected and the appeal should be dismissed as it has become infructuous.

32. The learned senior counsel for the respondent Mr. P.S. Patwalia placed strong reliance upon the provisions of Section 51 of the Municipal Corporation Act read with DCR and circulars issued by the state government which provides for regularization of unauthorized construction to be considered by the Corporation. Therefore, by placing reliance on government order dated 18.6.2010, the learned counsel contented that there is no merit in this appeal as contended by the appellants in public interest litigation.

33. In the background of the said rival legal contentions urged on behalf of the parties, I have examined the impugned judgment with reference to the pleadings and the additional affidavits placed on record by the parties pursuant to the directions issued by this Court after

hearing the learned senior counsel on behalf of the

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parties vide order dated 11.3.2014. I have carefully perused the detailed written statement filed by the appellants and I proceed to pass the judgment by assigning following reasons:-

34. The preliminary objection raised by the learned senior counsel for the respondent No. 5 - Dr. A.M. Singhvi that it is not public interest litigation is not maintainable in law is wholly untenable for the reasons that the High Court in Para 22 of the impugned judgment states that it has examined this aspect of the matter regarding locus of the appellants who moved this petition in public interest. With reference to the said contention the High Court has categorically recorded a finding to the following effect:-

"22....We do not think that the present public interest litigation can be dismissed at the threshold only the ground that the petitioners do not have locus to question decisions and actions of the Corporation. It is not the cases for the respondent No. 5 that petitioners are directly involved in litigation against the respondent No. 5. Several issues are raised in this petition, especially regarding the exercise of discretionary power by the Commissioner. Such legal issues concern several cases of multi storied building in City of Mumbai. It cannot be said that there is no public

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interest involved in adjudication of these issues. We therefore overrule the preliminary objection raised by the respondent No. 5 and proceed to examine the challenge on merits."

Further, it has stated that it is not the case of respondent No 5 that the appellants are directly involved in litigation against the builders.

Specially, regarding the exercise of discretionary power by the Commissioner such legal issue is not uncommon in the city of Mumbai.

Therefore, it cannot be said that there is no public interest involved in the writ petition No. 43 of 2012

filed by the appellants.

35. In view of above, the said finding recorded by the High Court is against respondent No. 5, which is not challenged by filing a separate Special Leave Petition questioning the correctness of the same. Without challenging the same, respondent No. 5 is entitled to question the finding in this appeal by invoking its right under order 41 Rule 33 CPC but I intend to address the issue. Question has been raised in this appeal regarding the function of the Commissioner with respect to

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Regulation 64 DCR for granting more than 1.5 meters FSI under the pretext of 8.40 meters for PPL. For exercise of such power the reasons contemplated that demonstrable hardship has to be disclosed, has not been done. Further, sanctioned plan under Section 45 read with Regulation 35(2) is a colourable exercise of power and the same is accepted by the High Court in relation to certain aspects and the Commissioner was directed to reconsider and re-examine the same. The directions issued to the Commissioner in the impugned order has been accepted by him and he re-examined and passed order dated 12.9.2013. The same is challenged in the writ petition referred to supra. Further, as could be seen from the various legal questions raised in this case pointing out that the issuance of the extra FSI, more than the permissible limit has been given in exercise of power under Regulation 64 (b) making use of the said area for the benefit of the builder-respondent No. 5 and the other areas for construction of the building from 44th floor to 56th floor has been made beyond plinth level to 15th floor and 44th floor to 56th floor without obtaining the necessary

commencement certificate by applying as provided under

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Section 45(2) and (3) read with relevant regulations in the prescribed form. The non consideration of the same by the High Court on seven issues in Part 'A' and other issues in Part 'B' would certainly affect the public interest as held by this Court in the case of S.P.Gupta v. Union of India<sup>2</sup>, Janta Dal v. H.S. Choudhary<sup>3</sup> and comprehensive decisions referred to in State of Uttaranchal v. Balwant Singh Chauhan<sup>4</sup>. By exercise of power in a colourable manner, the builder was permitted to have more FSI under the pretext of PPL and construction of the building from 15th floor to 43rd and upto 56th floor without obtaining commencement certificate which is mandatory in law. This practice is illegal and therefore, it would certainly affect the public interest and violate provisions of Section 45 and Section 69 of the MRTTP Act and Regulations 35(2) and 64 of DCR. This amounts to violation of Rule of Law. Therefore, in my view writ petition filed by the appellants is maintainable and appellants have locus to question the action of the

2 (1982) 2 SCR 365  
3 (1992) 4 SCC 305  
4 (2010) 3 SCC 902

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respondent Nos. 2 to 4 and illegal action on the part of the builder-respondent No. 5 in constructing unauthorized construction and the delay and latches raised cannot be pressed into service. According to the submissions made on behalf respondent Nos. 2 to 4 the illegality is in perpetuation which cannot be allowed. Therefore, the cause of action delay and latches cannot be attributed to the appellants to reject this appeal or public interest litigation. Hence, the said contention is held against respondent No. 5.

36. As can be seen from the impugned order with reference to the legal grounds in the PIL though the same has been adverted to by the High Court at paragraph 29(b) (c) (d)

and (e), the same are wholly untenable in law. The said finding and reasons recorded by the High Court is contrary to the provisions of Section 45(2) read with Regulations 33 and 34 and are not examined by the High Court in proper perspective. The construction of building without obtaining commencement certificate, which is the condition incorporated in the sanctioned plan permission granted under Section 45(1) in favour of the builder-respondent

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No.5 after adverting to Section 53 of the MRTTP Act, is wholly untenable in law.

37. Once a construction is found to be as falling in the category of constructions enumerated in Section 52 then a notice under Section 53 of the MRTTP Act is issued. The High Court in the impugned judgment has erroneously observed that it is open to the developer to make an application for regularization of the building as per the Act and the circulars and it is open to the Corporation to consider the requests as per law. Further, it has observed that yet the Corporation has to grant commencement certificate in favour of the builder and it has not taken final decision in the matters. The sanctioned plan permits the builder-respondent No. 5 to construct upto 56 floors. Therefore, the High Court has erroneously held that it has not felt it necessary to intervene and issue a drastic order of demolition on the ground that the work is carried out beyond commencement certificate. Particularly when the statutory planning body has not yet taken final decision in the matter and therefore it has gravely held that it will not be appropriate to prejudge the issue and direct

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demolition of the building in question. The High Court failed to take into consideration these aspects though the legal principle laid down by this Court in catena of cases was brought to its notice, it has either adverted or

distinguished the same. Therefore, I am of the view that the High Court has not examined the legal issues raised by the public spirited appellants in the PIL petition which has rendered the decision of the High Court contrary to the legal principle laid down by this Court in the case of Dipak Mukherjee (supra) wherein it has relied upon following catena of cases in support of the proposition of law.

"3. In K. Ramadas Shenoy v. Town Municipal Council, Udipi the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:

"28. An illegal construction of a

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cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

29. The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the

residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction."

4. In *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* this Court approved the

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order passed by Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed:

"7. ... Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and bye-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits."

(Emphasis supplied)

6. In *Shanti Sports Club v. Union of India* this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the appellant on the land acquired for planned development of Delhi to be illegal and observed:

"74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws,

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master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the



present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the

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Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc...."

38. In view of the aforesaid decisions and various other decisions, the finding and reasons recorded by the High Court are contrary to judgments of this Court. Therefore, in my considered view the legal issues raised in this regard requires reconsideration by the High Court. Hence, I am of the view that submission made on behalf of the appellants both on facts and legal grounds are well founded and the same must be accepted by me. The said view is supported by learned Attorney General Mr. G.E. Vahanvati on behalf of the respondents 2 to 4 by placing reliance upon Dipak Mukherjee case (supra) wherein this

Court placed reliance on catena of decisions of earlier

decisions of this Court with regard to the <sup>45</sup> similar situation of illegal and unauthorized construction. The

said principles have to be applied to the fact situation which has been done by the High Court. Therefore, in my considered view, apart from not obtaining commencement certificate, construction even in respect of PPL and from 44th floor to 56 floors and further the grant of higher FSI area are in deviation of the Rules and Regulations. This matter requires re-examination by the High Court.

Therefore, I am of the view that this civil appeal is allowed. The matter is remanded to the High Court with a direction to club the PIL along with writ petition filed by builder-respondent No. 5, wherein orders were passed by the Commissioner pursuant to the direction contained in the impugned judgment in which proceedings the respondent NO. 5 is directed to implead the appellants. The High Court is directed to hear both the cases and dispose the same expeditiously on merits by giving opportunity to all the parties involved. However, I must mention that the observation made by me on violation of law by respondent No. 5 in building the PPL and the extra floor in the

building shall not prejudice the case <sup>46</sup> of the parties before the High Court.

39. The High Court is directed to consider the same and dispose the matter independently by considering the rival legal contentions that would be urged on behalf of the parties, with reference to the provisions of the MRTTP Act, DCR and law laid down by this Court in catena of cases

referred to supra and dispose of the petitions expeditiously.

.....J.

.....  
[V. GOPALA GOWDA]

New Delhi,  
April 25, 2014