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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2457 OF 2011

1 M/s. J. Gala Enterprises
A partnership firm registered
under the Indian Partnership
Act, 1932 having its office
at 267/71, Narshi Natha Street,
Veermani Market, Masjid,
Mumbai – 400 009.

2 Mr. Ankit Bharat Gala,
Partner of the Petitioner No.1
having his office at 267/71,
Narshi Natha Street,
Veermani Market, Masjid,
Mumbai – 400 009. ..Petitioners.

Versus.

1 The State of Maharashtra
Through the Government Pleader
having his office at High Court,
Mumabi.

2 Secretary, Urban Development
Department having its office
at Mantralaya, Mumbai – 400 032.

3 Maharashtra Housing & Area
Development Authority,
A statutory authority constituted
under the Provisions of the
Maharashtra Housing and Area
Development Act, 1976 with
its head office at Griha
Nirman Bhavan, Bandra -

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Kurla Complex, Bandra (E),
Mumbai – 400 051.

4 The Chief Officer,
M.B.R. & R. Board, MHADA,
having office at Griha
Nirman Bhavan, Bandra -
Kurla Complex, Bandra (E),
Mumbai – 400 051.

5 Municipal Corporation of
Greater Mumbai, a statutory
Corporation constituted
under the Bombay Municipal
Corporation Act, 1988,
having its address at
Mahapalika Marg,
Opp. C.S.T. Mumbai – 400 001. ... Respondents.

Dr. Virendra Tulzapurkar, Senior Advocate with Mr. Sanjay V. Kadam and Ms. Apeksha Sharma i/b M/s. Kadam & Co. for the petitioners.
Ms. P.D. Anklesaria, Special Counsel i/b Mr. P.G. Lad, AGP for the respondent nos.1 to 4 – State.
Ms. K.R. Punjabi for respondent no.5 – BMC.

CORAM : A.M. KHANWILKAR &
K.K. TATED, JJ.

Judgment Reserved on : **FEBRUARY 06, 2013**
Judgment Pronounced on : **MARCH 20, 2013**

JUDGMENT: (PER K.K.TATED, J.):

1 Heard learned counsel for the parties.

2 By this Writ Petition, under Article 226 of the Constitution of India, for enforcement of fundamental rights under Articles 14,

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19(1)(g) and 300A, the Petitioners seek declaration that clause 10(a) of Appendix III under Regulation 33 (7) of the Development Control Regulations for Greater Mumbai, 1991 as embodied in the Notification dated 21st May, 2011 is unconstitutional, ultra-virus, void, illegal and of no effect.

3 A few facts of the matter are as under:

In or about 1992, the Petitioners purchased property being a piece and parcel of land bearing City Survey No.1A/782, 2/783, 783, 784, 785 and 786 of Mazgaon Division known as Doctors Compound, ad-measuring about 11968 square meters situated at D.L. Marg, Chinchpokli (East), Mumbai – 400 012. The said property consists of 17 cessed structures and 11 non-cessed structures. Near about 220 families were occupants/tenants in respect of the said property. The Petitioners with the consent of the occupants/tenants decided to redevelop the said property and, therefore, they submitted an appropriate proposal to the Respondents. Till the year 1999, every eligible occupant was entitled to 180 square feet carpet area. Consequently, in keeping with the principles of balance and equity,

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the developer/owner who undertook the responsibility of providing 180 square feet to each of the eligible occupiers, was subject to his proper compliance of duties, entitled to exploit 2 FSI on the given property.

4 Thereafter, the Respondent Nos.1 and 2 vide notification dated 25th January, 1999, increased the minimum area to be provided to each eligible occupier to 225 square feet i.e. an additional 45 square feet carpet area. Regulation 33 (7) (8) and Clause 10 (a) of Appendix III under Regulation 33 (7) of the Development Control Regulations for Greater Mumbai, 1991, were also modified as under:

> *"(7) Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation – For reconstruction/redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-operative Housing Societies of Landlords and/or Occupiers of a cessed building of 'A' category in Island City, which attracts the provisions of MHADA Act, 1976, and for reconstruction/ redevelopment of the buildings of the Corporation constructed prior to 1940, the floor space index shall be 2.5 on the gross plot area or the FSI required for Rehabilitation of existing tenants plus incentive FSI as specified in Appendix III, whichever is more:*
>
> *Provided, however that with the previous approval of the Government, MHADA/Corporation shall*

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be eligible to get additional incentive FSI over otherwise permissible FSI as specified in Annexure -III of these Regulations:

Provided further that in cases of composite redevelopment scheme for plot having 'A' category as also 'B' category cessed building the above FSI shall be available:

Provided further that in cases of reconstruction/ development of buildings which have been declared as unsafe by the BHAD Board prior to monsoon of 1997, the above FSI will be available irrespective of category of cessed building.

Provided further, that reconstruction/ redevelopment undertaken by proposed Co-operative Housing Societies of Landlords and/or Occupiers of cessed building of 'B' category, and where composite development is undertaken by different owners of 5 or more plots the FSI required for Rehabilitation of existing tenants plus incentive FSI as specified in Appendix III will be available."

"(8) Construction for housing the dishoused – For the construction of the building by the Corporation in the category of "Housing the Dishoused" in the Island City for the purpose of Housing those who are displaced by the projects undertaken by the Corporation for implementation of proposals of the development plan, the FSI shall be 4.00. Such additional FSI will not be available when owner undertakes development as in Sr. No.1(e) in Table 4."

"(9) Repairs and reconstruction of cessed buildings and Urban Renewal Scheme:- For repairs and reconstruction of ceased buildings and Urban Renewal Scheme undertaken by the Maharashtra Housing and Area Development Authority or the Mumbai Housing and Area Development Board or Corporation in the Island City, the FSI shall be 4.00 or the FSI required for

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rehabilitation of existing tenant/occupiers, whichever is more."

"10.(a) In case of redevelopment schemes already in progress, if full occupation permission has not been granted, then Co-operative Society of the landlords and/or the occupiers or of the Corporation building may convert the proposal in accordance with these regulations subject to submitting structural stability certificate from the licensed Structural Engineer."

(emphasis supplied)

5 The Respondents – State of Maharashtra then issued notification dated 2nd March, 2009, modifying clause 2 of Appendix III of Regulation no.33 (7) and clause 10 (a) of the Development Control Regulations for Greater Mumbai, 1991 replacing 225 square feet area by 300 square feet which read thus:

"20.90 sq.mt. (225 sq.ft.)" area is modified and replaced as "27.88 sq.mt. (300 sq.ft.) (fixed)" appearing in clause 2 of Appendix III of Regulation No.33(7)."

"(i) Clause (15) – An amount of Rs.5000/- per sq.mt. shall be paid by the owner/ developer/ society as additional development cess for the builtup area over and above the normally permissible FSI, for the rehabilitation and free sale components. This amount shall be paid to the Corporation in accordance with the time schedule for such payment as may be laid down by the Commissioner, MCGM provided the payment of installments shall not go beyond the completion of construction. This amount shall be used for Scheme to be prepared for the improvement off-site Infrastructure in the area around the development. The

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above development cess shall be enhanced @ 10.00% every three years.

(ii) Clause (16) – As per the provisions of clause 2, each residential/non residential occupant shall be rehabilitated only for carpet area mentioned in the said clause No.2 and such areas shall be clearly shown on the building plan submitted to the Corporation/ MHADA."

"10(a) In case of redevelopment schemes already in progress and building is not completed up to plinth level then proposal may be converted in accordance with the above modified regulations. However, such conversion is optional and not binding." (emphasis supplied).

6 Thereafter, the Respondents – State of Maharashtra issued another notification dated 21st May, 2011 modifying Regulation 33(7) and clause 10 (a) providing 300 square feet area to the occupant/tenant. Modified Regulation 33(7) and Clause 10 (a) read thus:

"Clause No.2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to minimum fixed carpet area of 27.88 sq. mt. (300 sq.ft.) and maximum carpet area upto 70 sq.mt. (752 sq.ft.) as provided in the MHADA Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

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above development cess shall be enhanced @ 10.00% every three years.

(ii) Clause (16) – As per the provisions of clause 2, each residential/non residential occupant shall be rehabilitated only for carpet area mentioned in the said clause No.2 and such areas shall be clearly shown on the building plan submitted to the Corporation/ MHADA."

"10(a) In case of redevelopment schemes already in progress and building is not completed up to plinth level then proposal may be converted in accordance with the above modified regulations. However, such conversion is optional and not binding." (emphasis supplied).

6 Thereafter, the Respondents – State of Maharashtra issued another notification dated 21st May, 2011 modifying Regulation 33(7) and clause 10 (a) providing 300 square feet area to the occupant/tenant. Modified Regulation 33(7) and Clause 10 (a) read thus:

"Clause No.2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to minimum fixed carpet area of 27.88 sq. mt. (300 sq.ft.) and maximum carpet area upto 70 sq.mt. (752 sq.ft.) as provided in the MHADA Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

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Provided that if carpet area for residential purpose exceeds 70.00 sq.mt. (753 sq.ft.) the cost of construction shall be paid by tenant/occupant to the developer. The cost of construction shall be as per Ready Reckoner rate of that year. However, the carpet area exceeding 70.00 sq.mt. (753 sq.ft.) shall be considered for rehab FSI but shall not be considered for incentive FSI.

Clause No.4. The tenements in the reconstructed building shall be allotted by the landlord/occupants cooperative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board. The prescribed percentage of the surplus built up area as provided in the Table in the Third Schedule of the MHADA Act, 1976, shall be made available to the MR & RB for accommodating the occupants in transit camps or cessed buildings which cannot be constructed, on payment of an amount as may be prescribed under MHADA Act, 1976.

Provided that the area equivalent to the market value (The Market Value shall be as per the Ready-Reckoner rate of that year) of area admissible as per the prescribed percentage of built-up area can be made available within the same municipal ward of MCGM.

Clause No.5. The FSI to rehabilitation of existing tenants/ occupiers in a reconstructed building and incentive FSI that will be available shall be as under:

(a) In case of redevelopment of 'A' Category cessed building undertaken by landlord and/or Co-operative Housing Societies of landlord and/or occupiers, the total FSI shall be 3.00 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI, whichever is more.

(d) In case of composite redevelopment undertaken by the different landlords and/or Co-op. Housing

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Societies of landlords and/or occupiers jointly of 2 or more plots but not more than 5 plots with 'A', 'B', and 'C' category cessed buildings the FSI permissible will be 3.00 or FSI required for rehabilitation to existing occupiers plus 60% incentive FSI, whichever is more; Provided, however, that if the number of plots jointly undertaken for redevelopment is six or more the incentive FSI available will be 3.00 or FSI required of rehabilitation for occupiers plus 70% incentive FSI whichever is more."

Clause No.17.A corpus fund is to be created by the Developer which will take care of the maintenance of the building for a period of 10 years.

Clause No.18.Restriction on transfer of tenements shall be governed by provision of Rent Control Act till Co-op. Society is formed and after that the same shall be governed by the provision of Maharashtra Co-op. Society's Act.

Clause No.19. Non Deduction of non-cessed structure area in the schemes of 33(7) for FSI purpose.

In case of mix of the structures i.e. cessed & non cessed structures and if the area of non cessed structures existing prior to 30/9/69, area of land component under non-cessed structure works out upto a limit of 25% of plot area, then FSI shall be considered on total plot area. If this area exceeds 25% of the total area, then area above 25% shall be deducted from plot area. FSI for deducted area shall be as per regulation 32 and the remaining plot area shall be as per 33(7)."

"Clause No.10(a) In the case of Redevelopment Scheme in progress and such schemes where LOI has been issued and <u>if the construction of rehab building is not completed up to plinth level</u>, then Owner/Developer/Co-op. Housing Societies with the prior approval of Govt. may convert the proposal in

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> *accordance with modified regulations only regarding size of tenements and loading of FSI, insitu. However such conversion is optional and shall not be binding."*
> *(emphasis supplied)*

7. In view of the amended provisions of Regulation 33(7) and Clause 10 (a), Petitioners applied to the authority for allowing them to avail of the benefits provided in the Notification dated 21st May, 2011 for the buildings they had already constructed or were under construction. Their request was rejected by the authority on the ground that as per clause 10 (a), in case of redevelopment scheme in progress and such schemes where LOI has been issued and the construction of rehab building is completed up to plinth level, the Owner/Developer/Co-op. Housing Societies are not entitled to the benefits under the amended provisions.

8 The learned Senior Counsel Mr. Tulzapurkar appearing on behalf of the Petitioners submits that the grant of additional FSI and increase in the allotable area for rehabilitation as was done previously could have been made applicable to all redevelopment schemes under the Development Control Regulation 33 (7) which are incomplete and where Occupation Certificate is not granted subject to

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the buildings satisfying the condition of the stability and structural strength. However, by the impugned Government Resolution, it is provided that the benefit of the Notification dated 21st May, 2011 would be available only "if the plinth level is not completed". In other words, if construction has gone beyond plinth level, then the benefit would not be available. He submits that there is no justification for restricting the benefits of the Notification to the schemes where the construction up to plinth level is not completed. He submits that what is relevant according to the Petitioners is the stability and structural strength of the buildings, therefore, the criteria which has been adopted for making the benefits of the notification available has no nexus to the object sought to be achieved by the amendment and, therefore, impugned clause 10 (a) is violative of Article 14 of the Constitution of India. He submits that the Government issued Notification dated 2nd March, 2009 laying down that the carpet area of residential tenement to be allotted for rehabilitation would be 300 square feet. It was provided that the notification will come into force on such day as the modification is published in the Government Gazette. The State Government consequent to Govt. Resolution dated

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2nd March, 2009 issued notification dated 21st May, 2011. However, perusal of Notification dated 21st May, 2011 shows that it proceeds on the basis that existing minimum carpet area to be allotted for the purpose of rehabilitation is 225 square feet, thereby, implying that the modification made by Notification dated 2nd March, 2009 had not come into force. However, in the communication dated 16th November, 2009, addressed to the Principal Secretary in the Urban Development Department of the Government of Maharashtra by the Deputy Director of Town Planning, it is stated that the modification made by notification dated 2nd March, 2009 has come into force. Even in the report submitted by the same Deputy Director dated 16th November, 2009 to the Principal Secretary, it is stated that while issuing the draft notification, pursuant to which notification dated 21st May, 2011 was issued, cognizance of the modification made by notification dated 2nd March, 2009 has not been taken. He submits that if clause 10 (a) of the notification dated 21st May, 2011 is given effect, only those occupants of category 'A' building whose rehabilitation building has not reached the stage of completion of the plinth construction would be entitled to larger area. In other words,

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in case the construction of rehabilitation building has crossed the stage of plinth construction then though without compromising on the strength of the structure and stability of the building with suitable modification in sanctioned building plan, occupants will have to be given larger area. The owner is not able to do so because in view of the impugned clause 10 (a) he will not be able to get the increased F.S.I. Grant of larger area to the occupants and consequent increased F.S.I. should depend on the stability and strength of the building and not on the fact whether construction of the plinth has been completed or not. In case, construction of the plinth is completed before 21st May, 2011 nothing prevents the owner from demolishing the constructed portion and restart all over again so that he can avail of the benefits under notification dated 21st May, 2011. But though some owners may be in a position to construct a building in which larger area can be given to the occupant without demolition of a portion of the construction he is not permitted to do so. This is arbitrary and, volative of the Article 14 of the Constitution of India.

9 He further submits that the impugned clause 10 (a) is completely unreasonable and untenable in as much as no logical,

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objective and pragmatic reasoning for the same can be deduced much less be satisfactorily accepted. The impugned clause creates an unwarranted, illegal and unlawful divide and inequality amongst the developers/builders without rhyme or reason. He submits that the Petitioners are ready and willing to comply with all other formalities as required by Development Control Rules and/or in existing Rules and Regulations, so that they can provide maximum benefit to the occupants. He submits that the restriction imposed by the Respondents in clause 10 (a) is against justice, equity and good conscience and the said restriction is liable to be struck down.

10 On the other hand, the learned counsel Ms. P.D. Anklesaria appearing on behalf of the Respondent nos. 1 to 4 – State - MHADA vehemently opposed the present Petition. She submits that the Petitioners had knowledge of notification dated 2nd March, 2009, that conversion is permissible only before the completion of the plinth level work, but they continued with the construction and even completed the rehab buildings with notice. She submits that amendment of the said paragraph 10 (a) from time to time was made

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under and according to the provisions of Section 37 (2) of the Maharashtra Regional Town Planning Act, with public notice of the draft of the proposed amendment inviting objections and suggestions from the public. No objections and/or suggestions were received from the Petitioners. Therefore, the Petition filed by the Petitioners is liable to be dismissed on the ground of laches.

11 Ms.Anklesaria further submits that changes/amendment made in clause 10 (a) in Appendix III [Regulation 33(7)] of the Development Control Regulations for Greater Mumbai, 1991 is a policy decision of the Government taken in public interest. It is not liable to be challenged unless the Petitioners show that it is arbitrary and malafide. The whole purpose of the change is to provide safety and stability to the occupants of the redeveloped building and also to avoid the possible delay and inconvenience likely to be caused to the occupants who are homeless and those who are staying in transit camps. Therefore, there is no substance in the present Petition and the same is liable to be dismissed.

12 The Respondent nos. 3 and 4 – MHADA have also filed their written submissions.

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13 After hearing both the sides at length, the principal point which emerges for consideration in the present Writ Petition is: "whether the restriction imposed in the amended clause 10 (a) in Appendix III [Regulation 33 (7)] of the Development Control Regulations for Greater Mumbai, 1991, is violative of Article 14 of the Constitution of India?"

14 To determine the point involved in the present Petition, it is necessary to reproduce some of the provisions of the Development Control Regulations for Greater Mumbai, 1991. The Regulation 33 (7) of Appendix III reads thus:

"APPENDIX III
[REGULATION 33 (7)]
REGULATIONS FOR RECONSTRUCTION OR REDEVELOPMENT OF CESSED BUILDINGS IN THE ISLAND CITY BY LANDLORD AND/OR CO-OPERATIVE HOUSING SOCIETIES (D.C. REGULATION NO.33(7))

1.(a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 per cent of the occupiers of the old building.

(b) All the occupants of the old building shall be re-accommodated in the redeveloped building.

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2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject of the minimum carpet area of 20.90 sqmt. (225 sqft.) and/or maximum carpet area upto 70 sqmt. (753 sqft.) as provided in the MHADA Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

3. The list of occupants and area occupied by each of them in the old cessed building shall be certified by the Mumbai Repairs and Reconstruction board and the irrevocable written consent as specified in 1(a) above shall be certified by the Board.

4. The tenements in the reconstructed buildings shall be allotted by the landlord/occupants' co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board. The prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area Development Act, 1976, shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants in transit camps or cessed buildings which cannot be reconstructed, on payment of an amount as may be prescribed under MHADA Act, 1976.

5. The FSI for rehabilitation of existing tenants/occupiers in a reconstructed building and incentive FSI that will be available shall be as under:

(a) In case of redevelopment of "A" category cessed building undertaken by landlord and/or co-operative Housing Societies of landlord and/or occupiers, the total FSI shall be 2.5 of the gross plot area of the FSI required for rehabilitation of existing occupier plus 50% incentive FSI, whichever is more.

(b) In case of redevelopment scheme of "B" category cessed building undertaken by landlord and/or co-operative Housing Societies of landlord and/or

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occupiers, the total FSI shall be the FSI required for rehabilitation of existing occupier plus 50% incentive FSI.

(c) In case of composite redevelopment of 'A', 'B', and 'C' category cessed buildings declared as dangerous by the Board before Monsoon of 1997, FSI available for redevelopment undertaken by the landlord and/or co-operative Societies of landlord and/or occupiers, will be as available for 1A category cessed buildings vide sub-clause (a) above.

(d) In case of composite redevelopment undertaken by the different landlords and/or Co-operative Housing Societies of Landlords and/or occupiers jointly of 2 or more plots but not less than 5 plots with 'A', 'B' and 'C' category cessed buildings the FSI permissible will be 2.5 of FSI required for rehabilitation of existing occupiers plus 60% incentive FSI, whichever is more.

Provided however, that if the number of plots jointly undertaken for redevelopment is six of more the incentive FSI available will be 2.5 or FSI required of rehabilitation for occupiers plus 70% incentive FSI whichever is more.

6. The entire FSI available under clause 5 shall be allowed to be utilised on plot/plots under redevelopment scheme. However, if the owner/society so desires can avail the incentive FSI in the same plot or can avail the benefit of Transferable Development Rights to be used in suburbs or extended suburbs in accordance with the Regulations as given in appendix VII.

7. Construction or reconstruction of old building falling under reservation/zones contemplated in the Development plan shall be permitted in accordance with the provision of notification No.TBP 4392/4080 A/RDP/UD-11, dated 3rd June, 1992 issued under Section 31 of the MR & TP Act.

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(a) Redevelopment/reconstruction in any zone shall be allowed to be taken in site without going through the process of change of zone. For the industrial user the existing segregating distance shall be maintained from the existing industrial unit.

(b) Any plot under non-buildable reservations ad-measuring only upto 500 sqmts may be cleared by shifting the existing tenants from that site.

(c) The stipulation of 33 per cent of area under non-buildable reservation may be reduced by the Government/Commissioner to the extent necessary where there are height and such other restrictions.

(d) For other buildable reservations on lands where guidelines approved by Government under Section 31 of the Maharashtra Regional and Town Planning Act are not available, built-up area equal to not more than 15 per cent area of the entire plot or 25 per cent of the area under reservation in the plot, whichever is less, shall be made available free of cost for Municipal Corporation or for any other appropriate Authority.

(e) Where a Development Plan Road passes through redevelopment scheme area, the entire FSI admissible under this regulation for the area of the road may be given in the same site, on the remainder of the plot.

(f) Contravening structures in Town Planning Scheme regulations shall also be included in the redevelopment scheme FSI for the same will be as under Development Control Regulation 33 (15) or as provided in this regulation whichever is more.

8. Relaxation in building and other requirements for rehabilitation. Notwithstanding anything contained in these regulations, the relaxations

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incorporated in regulations No.33 (10) of these regulations shall apply.

9. 20% of the incentive FSI can be used for non-residential purposes otherwise permissible in the Development Control Regulations.

10. (a) In case of redevelopment scheme already in progress, if full occupation permission has not been granted, then Co-operative Society of the landlords and/or the occupiers or of the Corporation building may convert the proposal in accordance with these regulations subject to submitting structural stability certificate from the licensed Structural Engineer.

(b) In case of redevelopment of buildings undertaken by MHADA, where construction is in progress, whether the area of new tenement should be 20.90 sqmt. or otherwise the question shall be decided by MHADA in each case. However, if area of tenements is not increased to 20.90 sqmt. then development will have to be carried out as per approved plan and FSI.

11. The FSI as in sub-regulation (7) of Regulation 33 should be allowed by the Commissioner only after Mumbai Repairs and Reconstruction Board is satisfied that the said redevelopment proposal fulfills all conditions to be eligible for the benefits under these regulations.

12. In case of redevelopment of cessed buildings, the concessions regarding exclusion of areas from computation of FSI for general buildings stipulated in Regulation 35(2) of DCR for Greater Mumbai 1991 shall apply.

13. Since the permissible FSI in clause 5 of this Appendix is dependent upon the number of occupiers and the actual area occupied by them, no new tenancy created after 13.6.1996 shall be considered. Further unauthorised constructions made in the cessed

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buildings shall not be considered while computation of existing FSI. However, the occupier may be allowed to declare whether the tenement is residential or non-residential.

14. For smooth implementation of the redevelopment shcme undertaken by owners and/or Co-operative Housing Society of the occupiers, the temporary transit camps may be permitted on the same land or land situatead elsewhere belonging to the same owner/developer with the concessions permissible under SRS project under Regulation 33 (10) of these regulations. Such transit camps should be demolished within one month from the date of occupation certificate granted by the Corporation of the reconstructed buildings.

Note:- All irregulations/modifications mentioned above shall not be applicable to the areas which are affected by Coastal Regulation Zone Notification issued by Ministry of Environment and Forest, Government of India vide Notification dated 19th February, 1991 and orders issued from time to time."

(emphasis supplied)

15 The definition of "plinth" in Regulation 2 (71) reads thus:

"2. (71) "Plinth" means the portion of a structure between the surface of the surrounding ground and surface of the floor immediately above the ground."

16 Clause 10 (a) – The amended clause 10 (a) as per notification dated 25th January, 1999 reads thus:

"10.(a) In case of redevelopment schemes already in progress, if full occupation permission has not been granted, then Co-operative Society of the landlords and/or the occupiers or of the Corporation building may convert the proposal in accordance with

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> *these regulations subject to submitting structural stability certificate from the licensed Structural Engineer."* (emphasis supplied)

17 As per the Government Resolution dated 2nd March, 2009, amended clause 10 (a) reads thus:

> *"10(a) In case of redevelopment schemes already in progress and building is not completed upto plinth level then proposal may be converted in accordance with the above modified regulations. However, such conversion is optional and not binding."*
> (emphasis supplied)

As per the Government Resolution dated 21st May, 2011, clause 10 (a) reads thus:

> *"10(a) In the case of Redevelopment Scheme in progress and such schemes where LOI has been issued and if the construction of rehab building is not completed up to plinth level, then Owner/Developer/Co-op. Housing Societies with the prior approval of Govt. may convert the proposal in accordance with modified regulations only regarding size of tenements and loading of FSI, insitu. However, such conversion is optional and shall not be binding."* (emphasis supplied)

18 It is to be noted that the main object of the Respondents is to provide maximum benefit to the occupiers to be rehabilitated; but at the same time, they have to see the safety and stability of the building also. Safety designs means the integration of Control measures in the design process to eliminate or if this is not reasonable or practicable

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minimum risk to the health and safety throughout the life of the structure being designed. Safety design is based on the principle that everyone has a right to be protected from unnecessary risk of injury or harm. Initially, occupants were entitled to 180 square feet area in redevelopment. Thereafter, it was increased to 225 square feet vide Government Resolution dated 25th January, 1999. At that time, the Government Policy was that in case of redevelopment of building where the construction is in progress and occupation certificate is not issued the owner/developer would be entitled to additional FSI i.e. 2.5. Thereafter, clause 2 of Appendix III of Regulation No. 33(7) was amended by the Government Resolution dated 2nd March, 2009. It increased the carpet area to 300 sq.ft. and stipulated that for availing the benefits under the Resolution the construction of a building must not have been completed up to the plinth level. Thereafter, by notification dated 21st May, 2011, the Government sanctioned the modification to the Regulation No. 33(7) of DC Rules. However, this Resolution does not make reference to the increase in FSI norms. Moreover, the condition that if redevelopment scheme is already in progress and building is not completed upto plinth level, only then

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the proposal can be considered in accordance with modified Regulation, is bereft of any logic. In that, in cases where the developer/builder is able to substantiate and satisfy the Authorities that the construction already put up by them, albeit beyond the plinth area, was a stable structure and can safely bear the additional load due to increase of FSI, there can be no tangible reason to deny the benefit of amended Regulations. The core element for permitting usage of additional FSI after the construction of the building is already commenced, ought to be stability of the structure to bear the additional load and not the the stage of its construction. Indeed, if the construction is an ongoing one and has not reached the stage of issuance of occupation certificate, coupled with the possibility of the already constructed structure being stable enough to take the load of additional FSI, which is otherwise permissible as per the amended Regulation, would have deleterious and serious civil consequences for the owner/builder of having been permenantly deprived of the additional FSI. Whereas, similarly placed persons may avail of additional FSI merely because their construction work had not exceeded the plinth level. Such classification has no nexus with

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the object sought to be achieved in the context of the stability of the structure to bear the additional FSI load. Therefore, the condition provided in clause 10(a) as amended by Resolution dated 2nd March 2009 and notified on 21st of May 2011, that in order to avail of the benefits provided therein, the owner or developer must not have completed the construction exceeding the plinth level has no rational to or nexus with the object sought to be achieved. To wit, the safety of the occupiers/tenants in the reconstructed building.

19 The argument of the State Authorities that the Certification to be done by the Architect of the Project regarding structural stability is always very subjective; and there is no guarantee that the structural stability of the building is completely secured. This argument completely overlooks the known commercial practice and host of literature by authorities on the subject regarding methodology to be followed before issuance of structural stability certificate and regarding structural engineering and structural strengthening mechanisms. For, it may be useful to refer to the work of M.J.Monteiro & Prof. N.J.Pathak titled as "Structural Soundness of Buildings" in International Journal of Earth Sciences and Engineering ISSN 0974-5904,

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Volume 04, No 06 SPL, October 2011, 00.677-680; paper titled "Non-destructive Testing of Concrete – Structural Engineering Forum" available on http://www.sefindia.org/forum/download.php?id=5862&sid=3875205f1fe60a101c8d5cb6c8166da0; by Kumar K.Ghosh, Vistasp M.Karbhari titled "Assessment of FRP Composite Strenghtened Reinforced Concrete Structures at the component and Systems Level through Progressive Damage and Non-Destructive Evaluation" published in the Journal `Structural Systems' Research Project of the University of the California; by Suresh Chandra Pattanaik titled "Structural Strengthening of Damaged R.C.C. Structures with Polymer Modified Concrete" available on *http://www.drfixitinstitute.com/dowload/ microconcrete-publication.pdf;* by Tarek Alkhrdaji, Ph.D., P.E. and Jay Thomas titled "Structural Strengthening Using External Post-Tensioning Systems" appearing in Journal 'Structural Practices' of July, 2009 available on *http://www.structuremag.org/article.aspx?articleID=932;* by Tarek Alkhrdaji, Ph.D., P.E. and Jay Thomas titled "Keys to Success: Structural repair and strengthening techniques for concrete facilities" with specific reference to significant number of facilities in the Unites States which were constructed during the first half of the 20th Century using reinforced or prestressed concrete materials available on *http://www.cenews.com/magazine-article-gostructural.com-may-2004-keys to*

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higher benchmark than the benchmark prescribed for permitting additional FSI in respect of building when construction has not exceeded the plinth level. That restriction may be a reasonable and permissible restriction but applying the yardstick of the level of construction completed, as in this case – plinth level, by itself, is completely ignoring the element of adequacy of strength or stability of structure already constructed to take the additional load. As aforesaid, it is known commercial practice of strengthening the existing building by means of reinforcement of the columns to make it stronger and stable. By that process, the stability of the structure can be enhanced to the level required, so as to take the burden of additional FSI. This can be insisted by the Municipal Authorities keeping in mind the safeguards provided under the extant building Regulations, before issuance of occupation certificate for such building. The safeguards in the building Regulations to ensure stability and safety of the building and obligation of the owner or developer to carry out the work in accordance with those Regulations can be discerned from Regulation 6 of the Development Control Rules, which reads thus:

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"6. ***Procedure during construction:-***

(1) Construction to be in conformity with Regulations.—*Owner's liability:—Neither the grant of permission nor approval of the drawings and specifications, nor inspections by the Commissioner during erection of the building, shall in any way relieve the owner of such building from full responsibility for carrying out the work in accordance with these Regulations.*

(2) ***Notice for start of work:***—*The owner shall give notice to the Commissioner of his intention to start work on the building site in the form given in Appendix XV. The owner may start the work after 7 days have elapsed from the date of the service such notice to the Commissioner or earlier, if so permitted.*

(3) Documents at site. —

(I) Results of tests: — *Where tests of any material are made to ensure conformity with the requirements of these Regulations, records of the test data shall be kept available for inspection during the construction of the building and for such period thereafter as required by the Commissioner.*

(ii) Development permission:—The person to whom a development permission is issued shall, during construction, keep—

(a) posted in a conspicuous place, on the site for which permission has been issued, a copy of the development permission; and

(b) a copy of the approved drawings and specifications referred to in Regulation 5 on the site for which the permit was issued.

(4) Checking of plinth columns upto plinth level:—*The owner through his licensed surveyor, engineer, structural engineer or supervisor or his architect shall give notice in the form of Appendix XVI*

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to the Commissioner on completion of work upto plinth level to enable the Commissioner to ensure that the work conforms to the sanctioned plans. The Commissioner may inspect the work jointly with the licensed technical personal or architect within fifteen days from the receipt of such notice and either give or refuse permission for further construction as per the sanctioned plans in the form in Appendix XVII. If within this period, the permission is not refused, it shall be deemed to have been given provided the work is carried out according to the sanctioned plans.

(5) ***Deviation during constructions:***—*If during the construction of a building, any departure of a substantial nature from the sanctioned plans is intended by way of internal or external additions, sanction of the Commissioner shall be necessary. A revised plan showing the deviations shall be submitted and the procedure laid down for the original plans heretofore shall apply to all such amended plans. Any work done in contravention of the sanctioned plans, without prior approval of the Commissioner, shall be deemed as unauthorised.*

(6) ***Completion certificate:***—*The owner, through his licensed plumber, shall furnish a drainage completion certificate to the Commissioner in the form in Appendix XIX. The owner through his licensed surveyor/engineer/structural engineer/supervisor or his architect, who has supervised the construction, shall furnish a building completion certificate to the Commissioner in the form in Appendix XX. These certificates shall be accompanied by three sets of plans of the completed development. The Commissioner shall inspect the work and, after satisfying himself that there is no deviation from the approved plans, issue a certificate of acceptance of the completion of the work in the form in Appendix XXI.*

(7) ***Occupancy Certificate:***—*On receipt of the acceptance of completion certificate in the form in*

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Appendix XXI, the owner, through his licensed surveyor/engineer/structural engineer/supervisor or his architect, shall submit to the Commissioner a development completion certificate in the form in Appendix XVIII with three copies of the completion plan, one of which shall be cloth mounted for record. The Commissioner may inspect the work and after satisfying himself that there is no deviation from the sanctioned plans, issue an occupancy certificate in the form in Appendix XXII or refuse to sanction the occupancy certificate within 21 days from the date of receipt of the said completion certificate, failing which the work shall be deemed to have been approved for occupation, provided the construction conforms to the sanctioned plans. One set of plans, certified by the Commissioner as the completed plans, shall be returned to the owner alongwith the occupancy certificate. Where the occupancy certificate is refused or rejected, the reasons for refusal or rejection shall be given in intimation of the rejection or refusal.

*(8) **Part occupancy certificate:**—When requested by the holder of the development permission, the Commissioner may issue a part occupancy certificate for a building or part thereof, before completion of the entire work, as per the development permission, provided sufficient precautionary measures are taken by the holder to ensure public safety and health. The occupancy certificate shall be subject to the owner's indemnifying the Commissioner in the form in Appendix XXIII."* *(emphasis supplied)*

21 The argument of the respondents that by allowing loading of additional FSI after the construction has exceeded the plinth level, it would immediately entail in delay and inconvenience to be caused to the occupants who are homeless and accommodated in the transit

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camps, does not commend to us. The delay in completion of work cannot be solely attributable to change and modification of approved plans whilst the construction is in progress. It is not unknown, rather it is common practice of submitting successive amended plans to the originally approved plans, in most cases. There may hardly be any case when the amendment of the approved plan is not proposed whilst the construction work is in progress. Thus, the justification of having a norm only if the construction of the building has not exceeded upto a particular level on this count, does not stand to reason; much less it cannot stand the test of reasonableness, as predicated in Article 14 of the Constitution of India.

22 The form of approval/disapproval of development work up to the plinth level is prescribed as per Regulation no.6 (4) in Appendix XVII which shows that Municipal Authorities have full power to verify whether the foundation/plinth can bear additional load if the developer/contractor avails of the benefit of amended clause 10(a) as per the Government Resolution dated 21st May, 2011. There is force in the argument of the petitioners that the impugned condition violates Article 14 of the Constitution, which provide for equality

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before the law. It is to be noted that the principles laid down by the Apex Court in the matter of **Ram Krishna Dalmia vs. Justice S.R. Tendolkar** reported in **AIR 1958 SC 538** for invalidity of the Act and/or the notification are as under:

> *"11. The principal ground urged in support of the contention as to the invalidity of the Act and/or the notification is founded on Article 14 of the Constitution. In Budhan Choudhry v. The State of Bihar [(1955) 1 SCR 1045] a Constitution Bench of seven Judges of this Court at pages 1048-49 explained the true meaning and scope of Article 14 as follows:*
>
> *" The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, Chiranjit Lal Choudhuri v. The Union of India [(1950) SCR 869] , The State, of Bombay v. F. N.Balsara [(1951) SCR 682], The State of West Bengal v. Anwar Ali Sarkar [(1952) SCR 284], Kathi Baning Rawat v. The State of Saurashtra [(1952) SCR 435] Lachmandas Kewalram Ahuja v. The State Of Bombay [(1952) SCR 710], Qasim Razvi v. The State of Hyderabad [(1953) SCR 581] and Habeeb Mohamad v. The State of Hyderabad [(1953) SCR 661]. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases,*

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namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish-

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be

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regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

12. A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution, may be placed in one or other of the following five classes:-

(i) *A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in Chiranjitlal Chowdhri v. The Union of India [(1950) S.C.R. 869],* The State of Bombay v. F. N. Balsara *[(1951) S.C.R. 682], Kedar Nath Bajoria v. The State of West Bengal [(1954) S.C.R. 30, S. M. Syed Mohammad & Company v. The State of Andhra [(1954) S.C.R. 1117] and*

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Budhan Choudhry v. The State of Bihar *[(1955) 1 SCR 1045.*

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in Ameerunnissa Begum v. Mahboob Begum [(1953) SCR 404] and Ramprasad Narain Sahi v. The State of Bihar [(1953) SCR 1129].

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in State of West Bengal v. Anwar Ali Sarkar [(1952)SCR 284], Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh [(1954) S.C.R. 803] and

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Dhirendra Krishna Mandal v. The Superintendent and Remembrancer of Legal Affairs *[(1955) 1 SCR 224].*

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the court will uphold the law as constitutional, as it did in Kathi Raning Rawat v. The State of Saurashtra *[(1952) SCR 435].*

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e. g., in Kathi Raning Rawat v. The State of Saurashtra *[(1952) SCR 435] that in such a case the executive action but not the statute should be condemned as unconstitutional.*

In the light of the foregoing discussions the question at once arises: In what category does the Act or the notification impugned in these appeals fall ?"

(emphasis supplied)

23 The above principles, restated by the Apex Court, have to be kept in mind while striking down any statute or any provision thereof on the ground that it offends the provisions of Article 14 of the Constitution of India which provides for equality before the law. In

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order to pass the test of permissible classification broadly two conditions must be fulfilled, namely; (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (2) that, that differentia must have a rational nexus with the object sought to be achieved by the statute in question.

24 In the present case, the classification made in the Resolution dated 21st May 2011 for availing of increased carpet area and loading of FSI, is on the basis of the stage of construction of the building (upto the plinth level). Thus, if a building is not completed upto the plinth level, the benefits provided in the said notification can be claimed; but the benefits cannot be claimed even if the construction already done above the plinth level is strong enough to withstand the load of additional FSI. For the reasons already discussed above, we find that the differentia provided therein for the classification, the two tests mentioned above are not fulfilled. Therefore, in our opinion, the impugned condition is hit by Article 14 of the Constitution of India and as such it is liable to be struck down.

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25 The objections raised by the Respondents about the delay and laches in filing the present Petition cannot be countenanced, if the condition incorporated in clause 10(a) is against the the mandate of Article 14 of the Constitution. In any case, in the present matter, it has been challenged at the earliest possible opportunity when the Authority refused to grant benefit to the Petitioners in terms of the Government Resolution dated 21st May, 2011. Therefore, there is no substance in the said objection raised by the Respondents.

26 According to the respondents, the petitioners are disentitled on account of their conduct, for having already entered private agreements and have challenged the provision only to profiteer by getting additional FSI. In the first place, the challenge to the impugned provision is on the touchstone of Article 14 and its permissibility as per the constitutional scheme. Further, besides this petition, there is at least one more petition filed in which the validity of the same provision and Government Resolution is put in issue. Therefore, this hyper technical objection of the respondents will not take the matter any further for the respondents. Accordingly, the same is negatived.

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27 In view of the above, we hold that the condition imposed by the Respondents under amended clause 10(a) of Development Construction Regulation 33 (7) in Appendix III of the Development Control Regulations for Greater Mumbai, 1991 i.e. "if the construction of rehab building is not completed upto plinth level", is liable to be struck down, and hence it is struck down. It is held that subject to the other provisions of the Act and the Regulations and in particular on fulfilling the technical requirement during construction as stated in Regulation 6 of the Development Control Rules, 1991 and including satisfying the Municipal Authority that the existing structure is strong enough to withstand the additional load due to additional FSI on the basis of Structural Stability Certificate from a licensed Structural Engineer as per the known norms in that regard, the Petitioners may be permitted to avail of the benefit of amended provisions of Government Resolution dated 21st May, 2011 i.e. additional FSI so as to provide for tenements in rehab building of 300 sq.ft. carpet area to all the allottees.

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28 The Rule is made absolute on the above terms.

29 No order as to costs.

(A.M. KHANWILKAR, J.)

(K.K. TATED, J.)

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