15
2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION NO. 96 OF 2013

Nitesh Mohanlal Doshi,
An Indian Inhabitant of Mumbai,
Occupation -Business,
having address at:
Tambakuwala Bldg., Bhavani
Shankar Road, Dadar (W),
Mumbai-400 028. ....Petitioner

Vs.

1 The State of Maharashtra,
Through Urban Development Department,
Mantralaya, Mumbai-400 032,
Through Government
Pleader, High Court.

2 The Municipal Commissioner,
Mumbai Municipal Corporation, a
statutory body constituted under
the provisions of Mumbai Municipal
Corporation Act, 1888 having its
office at Mahapalika Marg, Fort,
Mumbai 400 001.

3 The Executive Engineer,
Bldg Proposal (City-I), having its
office at E-ward office Bldg, 3rd floor,
Byculla, Mumbai 400 008.

4 India Bulls Properties Private Limited,
A company incorporated under the
provisions of Indian Companies Act,
1956 having office at India Bull
Finance Centre, Tower A, 14th floor,
Senapati Bapat Marg,
Elphinston Road,

Mumbai-400 013. ....Respondents.

Mr. Rakesh K. Agarwal for the Petitioner.
Mr. A.B. Ketkar, AGP for Respondent No.1.
Ms. Trupti Puranik for Respondent Nos. 2 and 3.
Dr. Milind Sathe, Senior Advocate with Mr. Ashish Kamat with Mr. Saket Mone with Mr. Vishesh Kalva i/by Vidhi Partners for Respondent No.4.

CORAM : ANOOP V. MOHTA AND
F.M. REIS, JJ.
RESERVED ON : 24 SEPTEMBER 2014.
PRONOUNCED ON : 30 SEPTEMBER 2014.

JUDGMENT:- (PER ANOOP V. MOHTA, J.)

Rule, returnable forthwith.

Heard finally, by consent of the parties, specifically at the instance of Petitioner, who insisted for early order/disposal of the matter.

2 The Petitioner, by this Public Interest Litigation, has invoked Article 226 of the Constitution of India and prayed for following reliefs:-

(a) *".....writ in the nature of certiorari quashing and setting aside permission granted and plan sanctioned by respondent no.3 authority on 16th October, 2102 permitting respondent no.4 to load TDR to the tune of 11612.78 sq. mtrs along with fungible FSI granted on said TDR to the tune of 4078.40 sq. mtrs. On said plot*

viz. Plot bearing C.S. No. 882 admeasuring about 5888.14 sq. mtrs. popularly known as agency compound, Jupiter Mill lane, between Jaganath Bhatankar and Fitwala Road, Mumbai 400 013;"

(b) *".....directing respondent no 2 and 3 to count FSI of excess parking on the various parking floors for the purpose of computation of FSI to the respondent no 4;"*

(c) *".....directing enquiry in the present project of respondent no 4 on plot of land viz. Plot bearing C.S. No. 882 admeasuring about 5888.14 sq. mtrs. ....."*

(d) *".....grant order of injunction restraining the respondent no 4 from doing any further construction work on the said plot....."*

3 Respondent No.1 is the State of Maharashtra. Respondent No.2 is the Municipal Corporation of Greater Mumbai (for short, MCGM), a statutory body constituted under the provisions of Mumbai Municipal Corporation Act, 1888 (for short, "MMC Act"). Respondent No.3 is the official of Respondent No.2. Respondent No.4 is a owner and developer of plot of the land which was originally belonging to Ahmedabad Jupiter Spinning and Weaving Company Limited (for short, "Jupiter Mills").

4 The Petitioner's brief synopsis is as under:-

On 15 July 2005, by registered conveyance, Respondent No.4 purchased plot of land bearing CS No. 882, admeasuring 5888.14 sq. mtrs. from National Textile Corporation (South Maharashtra) Limited. (for short, "NTC"). On the basis of registered conveyance and on the basis of plot area certificate given by the architect, Respondent No. 4 submitted proposal for a development of plot admeasuring 5888.14 Sq. mtrs under Regulation 58 of Development Control Regulations for Greater Bombay, 1991 (for short, "DCR") under the Maharashtra Regional and Town Planning Act, 1966 (for short, "MRTP Act"). On 16 May 2008, Respondent No.3 raised objection to the plot area and directed Respondent No.4 to submit proposal for area admeasuring 4981.38 sq. mtrs. Respondent No.3 deducted area of about 604.36 reserved for Municipal Chowki from the plot, area of about 250.04 being VLT land area and further area of about 118.02 sq. mtrs. for internal road for the slum pocket.

5 On 27 December 2005, Respondent No.4, submitted a proposal for development of plot and obtained IOD from Respondent No.2 and 3 authority. After getting IOD, Respondent No.4 submitted

various plans and amendments therein on 11 June 2007, 31 December 2007, 15 October 2009 and 11 January 2011. On 30 October 2010, Respondent No.4 obtained a permission from Minister of Environment and Forest i.e. prior to passing of the impugned permission and plans by Respondent No.3-authority. On 1 January 2012, the new/amended DCR (Fungible FSI) brought into force. On 12 January 2012, issued a connected circular/procedure. On 16 October 2012, Respondent No.3 passed plan submitted by architect of Respondent No.4, wherein the net plot area for construction was shown 4719 sq. mtrs.. In the office note sheet of Respondent No.3, it is recorded that the NTC has sold area admeasuring 11612.78 sq. mtrs. FSI (for short, "Floor Space Index") towards MCGM Recreation Ground (for short, "RG") to Respondent No.4. Respondent No.4 was permitted to load the TDR purchased from NTC on the plot and Respondent No.3 also granted fungible FSI admeasuring 4078.40 sq. mtrs. on the TDR. On 17 May 2013, plans were amended by Respondent No. 4 with permission to load TDR to the tune of 11612.78 sq. mtrs. and fungible FSI to the tune of 4078.40 sq. mtrs. On 18 May 2013, admittedly, full CC (Commencement Certificate) was granted to Respondent No.4. Hence the Petition is filed in August

2013.

(a) The Petitioner has raised issues with regard to the **car parking** which is tabulated as under:-

Under old DCR	Under amended DCR dated 6 January 2012	Actually proposed car parking
108 i.e. 1.10 times of 98 residential flats under Regulation 36	220 i.e. 2.50 times of 98 residential flats under Regulation 36	359 excess 251 under old DCR and 139 under amended DCR

(b) In respect of **Fungible FSI;** the Petitioner has raised the following issue:-

Under old DCR	Under amended DCR dated 6 January 2012	Actually proposed fungible FSI
No concept of fungible FSI	35% over and above permissible FSI (not TDR)	After completion of 25th floor under old DCR (having open balcony etc.), the benefit of fungible FSI is granted on TDR of 11612.78 sq. mtrs.

(c) Issue with regard to **the TDR** under the head "area of MCGM" RG, TDR as per DCR 58(1)(b) to the extent of 11612.78 sq. mtrs., and permitting Respondent No.4 to

load fungible FSI to the TDR to the extent of 4078.40 sq. mtrs. on the land and above the basic plot.

6 There is no issue with the construction in question, apart from the provisions of MMC Act, also governed by DCR, circulars and clarifications issued from time to time relating to the same. There are specific provisions for development of lands of Cotton Textile Mills, which is a complete code itself for all the purposes and related aspects. The relevant extract of Regulation 58 of the DCR under the MRTP Act, as amended/modified from time to time, is as under:-

> ***"58 Development or redevelopment of lands of cotton textile mills.***
>
> ***(1) Lands of sick and/or closed cotton textile mills.*** *With the previous approval of the Commissioner to a layout prepared for development or redevelopment of the entire open land and built-up area (* * *) of a sick and/or closed cotton textile mill and on such conditions deemed appropriate and specified by him and as a part of a package of measures recommended by the Board of Industrial and Financial Reconstruction (BIFR) for the revival/rehabilitation of a potentially viable sick and/or closed mill, the Commissioner may allow:*
>
> *(a) The existing built-up areas to be utilised-*
>
> *(i) for the same cotton textile or related user subject to observance of all other Regulations;*

(ii) *for diversified industrial user in accordance with the industrial location policy, with office space only ancillary to and required for such users, subject to and observance of all other Regulations;*

(iii) *for commercial purposes, as permitted under these Regulations:*

(b) Open lands and balance FSI shall be used as in the Table below-

Sr. No.	*Extent*	*Percentage to be earmarked for Recreation Ground/Garden/Playground or any other open user as specified by the Commissioner*	*Percentage to be earmarked and handed over for development by MHADA for Public Housing/for mill worker's housing as per guidelines approved by Government to be shared equally*	*Percentage to be earmarked and to be developed for residential or commercial user (including users permissible in residential or commercial zone as per these Regulations) or diversified industrial users, as per industrial Location Policy, to be developed by the owner*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
1.	*Upto and inclusive of 5 Ha.*	*33*	*27*	*40*
2.	*Between 5 Ha. And upto 10 Ha.*	*33*	*34*	*33*
3.	*Over 10 Ha.*	*33*	*37*	*30*

Notes:-

(i) *In addition to the land to be earmarked for recreation ground/garden/playground or any other open user as in column (3) of the above Table, open spaces, public amenities and utilities for the lands shown in columns (4) and (5) of the above Table as otherwise required under these Regulations shall also be provided.*

(ii) *Segregating distance as required under these Regulations shall be provided within the lands intended to be used for residential/commercial users.*

(iii) *The owner of the land will be entitled to Development Rights in accordance with the Regulations for grant of Transferable Development Rights as in Appendix VII in respect of lands earmarked and handed over as per column (4) of the above Table. Notwithstanding anything contained in these Regulations, Development Rights in respect of the lands earmarked and handed over as per column (3) shall be available to the owner of the land for utilisation in the land as per column (5) or as Transferable Development Rights as aforesaid.*

(iv) *Where FSI is in balance but open land is not available, for the purposes of column (3) and (4) of the above Table, land will be made open by demolishing the existing structures to the extent necessary and made available accordingly.*

(v) *Where the lands accruing as per columns (3) and (4) are, in the opinion of the Commissioner, of such small sizes that they do not admit of separate specific uses provided for in the said columns, he may, with the prior approval of Government, earmark the said lands for use as provided in column (3).*

(vi) *It shall be permissible for the owners of the land to submit a composite scheme for the development or redevelopment of lands of different cotton textile mills, whether under common ownership or otherwise, upon which the lands comprised in the scheme shall be considered by the Commissioner in an integrated manner."*

7 By circular dated 12 January 2012, Respondent Corporation published a procedure to be followed for implementation of the modified provisions for certain DCR. The relevant extract for the purpose of the present Petition are as under:-

Sr. No.	Status	Proceed to be followed
1)	.....	
2)	Where I.O.D./I.O.A. has been granted and building is nor completed.	a) Owner has an option to continue the last approved plans/I.O.D., however, these modified regulations will apply for the proposed work beyond approved plans. b) Alternatively, if owner desires to avail benefit of amended regulations, for entire potential including last approved plans, then the entire proposal will have to be in conformity with the modified regulations in toto.

3)	...	
4)	...	
5)	...	

6) *In case of redevelopment under regulation 33(7), 33(9) & 33(10) excluding clause no.3.11 of Appendix-IV of Development Control Regulation 1991, the fungible compensatory F.S.I. Admissible on rehabilitation component only shall be granted without charging premium.*

8 Regulations 1 to 57 are for development and/or redevelopment in the Mumbai Region. But, Regulation 58 is specific for a development/redevelopment of the Cotton Mills Area. The class, so created, cannot mixed up for any such development. It has to develop as per the respective scheme. There is no challenge to such different code/scheme. We have to see whether the development of Cotton Mills Land is within the policy so framed, not only from the point of view of Regulations 1 to 57.

9 The new development rules from January 2012 take into consideration the area for balcony, flower bed, terrace, voids, niches to be counted in the FSI.

10 The compensatory fungible FSI upto 35% for Residential and 20% for Industrial and Commercial Developments. The calculation based upon Regulation 58 is a matter, mainly for MCGM to check and grant. The aspect of relevant "premium" to be paid by the builders/developers is also covered by the scheme. There is clear area called as "Free of FSI" "Inclusive of FSI". The aspect of TDR option in addition to the fungible compensatory FSI, subject to permission/approval, is also within the realm of the authorities.

11 The Apex Court in ***Bombay Dyeing and Manufacturing Co. Ltd. Vs. Bombay Environmental Action Group and Ors.***[1] clearly endorsed in paragraph Nos.149 to 153 which read thus:-

> *"149. Indisputably, though, the Regulations made by the State which is a piece of subordinate legislation should be read in the light of the statutory scheme made under the legislative act as also having regard to the constitutional scheme as contained in Articles 14, 24, 48A and 51A(g) of the Constitution of India, but while doing so the effect and purport for which such amendment were brought about cannot be lost sight of. The amendments carried out in the MRTP Act from time to time and clearly the provisions of Sub-section (2) of Section 26 of the MRTP Act point out that the State had been leaning towards environmental aspects but that was not the sole objective.*

1 2006 Vol. 108(1) Bom.L.R. 0738= AIR 2006 SC 1489

150. The title of the regulation reads as a modification to DCR 58. It was, therefore, not in substitution of the resolution of 1991 nor was it framed by way of recasting thereof.

151. In the marginal note, the expression "development or redevelopment" of land of cotton textile mills has been mentioned. What, therefore, in focus was the land of cotton textile mills. The expression "land", thus, plays an important role. Although a marginal note may not be determinative of the content of the provision, it may act as an intrinsic aid to construction. (See Smt. Nandini Satpathy v. P.L. Dani & Anr.- para 33)[2]

152. The expression "development or redevelopment" in the marginal note does not advance the contention of the writ petitioners that DCR 58 does not frame change of user to non-textile mill users. Indisputably, having regard to the provisions of the entire Regulation, DCR 58 is a special provision. It is a self-contained code. It provides for a large number of things. The State while making the said legislation was required to provide for almost all the eventualities in respect of the different categories of cotton textile mills. They could be, apart from the sick mills referred to BIFR; (a) closed, (b) non-closed mills intending to modernization, (c) non-closed mills intending to shifting, (d) sick mills which have not been referred to BIFR under SICA and, thus, no scheme wherefore was made. There were multiple options and one mill or the other may fall in more than one category. A closed mill may come within the purview of DCR 58(1)(a) or 58(1)(b) or 58(6). Some of the NTC mills also may come within one or

2 AIR 1978 SC 1025=1978 Cri.LJ 968= (1978) 2 SCC 424

more categories. It is possible and in fact some of the mill owners had opted for one or more of the multiple options of development/redevelopment activity in terms of the said regulation. By way of example, Ruby Mill opted for both modernization and shifting and permission had been granted therefore. The fact that DCR 58 is a self-contained code is evident from Sub-regulation (8) which provides that funds accruing to a sick, closed or mill requiring modernization or shifting shall be credited to an escrow account, which shall be utilized only for revival/ rehabilitation, modernization or shifting of the industry. Sub-regulation (9) provides a mechanism for putting this into place. The State, not only endeavoured to take care of needs of various categories of cotton textile mills but also made attempts to find out a solution having regard to the fact that the 1991 Regulations did not work. By framing DCR 58, therefore, a mechanism was sought to be provided for achieving the purpose of providing some relief to all players in the field.

153. The said Regulations were framed under Section 22(m) of the MRTP Act for controlling and regulating the use and development of land. They are not, and cannot be, treated to be provisions for compulsory acquisition of land. It also does not provide for reservation and/or designation in a development plan."

and observed that this regulation is a complete code (a self-contained code) for the development of Cotton Mills in question. These provisions of DCR should apply notwithstanding anything contained in any other provisions of DCR. All the parties, therefore, are bound

and need to develop the Cotton Mills property within the framework of this Regulation.

12 There is material on record to show that all these lands of mills have been developed, principally as per Regulation 58 of DCR by assessing, calculating and demarcating the area as per the Rules including MHADA portion, open space, RG and used FSI on such RG.

13 Respondent No.4, resisted the prayer by filing reply dated 11 July 2014. Respondent Nos. 2 and 3 also resisted the Petitioner's case and claim by filing reply dated 16 July 2014. The Petitioner has filed rejoinder dated 30 July 2014 and reiterated his own case.

14 It is relevant to note that the Respondent-Corporation by detailed reply, not accepted the case of the Petitioner and averred as under:-

> *"4) I say that the IOD in respect of the said building was issued on 27.12.2005 for building comprising of ground + three upper floors (Office) and plans were amended as follows.*
>
> *1) first amendment on 11.6.2007 for 2 level basement*

+ stilt to 3rd floor (office),

2) *2nd amendment was done on 31.12.2007 for 2 level basement + stilt to 5th upper floor (IT Office)*

3) *3rd amendment was done on 15.10.2009 for 2 level basement + stilt to 17th parking floors + 18th service floor + 19th and 20th fitness centre + 21st to 35th floor (residential)*

4) *4th amendment was done on 11.1.2011 for 2 level basement + ground to 13th parking floor + 14th fitness centre + 15th to 25th floor (residential)*

5) *5th amendment was done on 16.10.2012 for 2 level basement + ground to 13th parking floor + 14th fitness centre + 15th to 48th floor (residential)*

6) *6th amendment was done on 17.5.2013 for 2 level basement + ground to 13th parking floor + 14th*

fitness centre + 15th to 48th floor (residential)

The said plans were amended on certain terms and conditions stated therein. I crave leave to refer to and rely upon the copy of the IOD and sanctioned plans as and when produced.

6) I further say that on 16.10.2012 and 17.5.2013 the proposal submitted by the Respondent No.4 through its Architect was sanctioned bearing the area of the plot for construction reflects 4719.17 sq. mt. and plot area for F.S.I. is shown as 4981.04 sq. mt. which is inclusive of set back area. I crave leave to refer to and reply upon the copy of the said plans as and when produced.

7) I say that N.T.C. has allowed Respondent No.4 to use the said TDR/FSI to the extent of 1,25,000 sq. ft. out of the total FSI/TDR available to NTC under the provisions of DCR 58 as amended from time to time. In terms of the approved IDS, NTC was required to surrender the land of 34,576 sq. mt. to MCGM in compliance of the said approval under DCR 58. Accordingly NTC has handed over the advance possession of the land to MCGM towards the part share

of MCGM RG as per approved IDS. MCGM has scrutinize an approved the modification has proposed in the amended IDS layout submitted on 19.04.2011 and conveyed its approval by letter dated 14.2.2012 as per provisions of DCR 58 alongwith copy of approved layout plan.

8) I say that the concept of fungible F.S.I. was introduced by State Government through its notification dated 06.01.2012 by permitting fungible compensatory F.S.I. not exceeding 35% for residential development over and above the admissible F.S.I. by charging premium @ 60% for residential development at ready reckoner rate. I say that the Respondent No.4 is not using the benefit of fungible compensatory F.S.I. in the construction of first 25th floor as they were already constructed when the policy of fungible compensatory F.S.I. was introduced. There is no change to the original sanctioned plan for the first 25 floors. Hence fungible compensatory F.S.I. was not insisted for first 25 floors. I therefore, deny that the plans sanctioned by the Respondents suffers from any illegalities.

9) I say that the Respondent No.4 has also obtained the Environment clearance in terms of Environment Impact Assessment Notification of 2006 and obtained the same on 30.10.2010. I say that as per the said certificate, Respondent has put up the modified proposal date 16th October 2012 and 17th May 2013.

10) I say that the Respondent No.4 has complied with the terms and conditions of IOD, C.C. & DCR and hence, full commencement Certificate granted by Respondent on 18.05.2013. I say that Respondent No.4 has carried out the work on C.S. No. 882 in accordance with plan sanctioned by these Respondents from time to time."

7 Mills Permissible Integrated Development Scheme (IDS)

15 There is no issue that out of 25 NTC Mills, a proposal of integrated development scheme (for short, "IDC") along with the multi Mill aggregation for 7 number of NTC Mills including, Kohinoor Mills, Mumbai Mills, Jupiter Mills, Elphinstone Mills, Apollo Mills and its properties i.e. Morarka Bungalow, India United Mills and New Hind Textile Mills have been approved subject to amended IDC along

with chawl. We are concerned with, the Jupiter Mills and its land so referred above and the related sanctioned plans.

16 It is relevant to note that the development of 7 mills was carried out by NTC as IDS with sanction from Board of Industrial Finance and Reconstruction (BIFR) under DCR 58, as the same was permissible. There is nothing wrong in treating the areas of these mills as one plot and therefore, the areas to be surrendered under DCR 58 (1) (B) to MHADA and MCGM required to be calculated with respect to each of them and to be placed at one location. The development rights in respect of the areas earmarked for the RG and surrendered to the Corporation, can be utilized on the balance area of the mill plot as per Column V. Therefore, the entire FSI of all the 7 mills, as generated by virtue of surrender of land to the Corporation under Column III to utilize the same in any area under column V, is permissible. There are documents to show that the RG FSI of 34576 Sq. mtrs., has been generated, out of which, a part was auctioned and sold to Respondent No.4. FSI of 11612.78 sq. meters utilized by the Respondent is nothing but the FSI generated under Clause III and which can be utilized under clause V of the table

appended to DCR 58.

17 Therefore, the FSI generated under DCR 58 and the NTC is entitled to use any of the portion of the 7 mills. All the parties acted and proceeded accordingly as the same was well within the framework of law. Therefore, the submission of Petitioner that the development rights of FSI generated under DCR 58 as TDR, is unacceptable.

18 It is relevant to note that National Textile Corporation (Western Region) (NTC) had submitted Integrated Development Scheme (IDS) of its textile mills in Mumbai (for 7 mills) under DCR 58 (1)(a) and (b) read with 58(6) and the same was approved by Respondents 2 and 3 on 27.10.2004. It was amended from time to time. In compliance with Regulation 58, 34576 sq. mtrs. land was surrendered to MCGM. NTC handed over advance possession of the entire land of the Indian United Mill Nos. 2 and 3 to MCGM towards part share of RG as per the approved IDS on 7 January 2009. Against the surrender of the land to MCGM, NTC became eligible to use the RG/FSI/TDR within the IDS amended from time to time as per the provisions of DCR 58 (1)(a) &(b) to the

extent of 45987 sq. mtrs. (34576 sq. mtrs. x 1.33 = 494,995 sq.ft.)

19 NTC invited tender for sale of the part of RG/FSI/TDR on 21.02.2011. Respondent No.4 agreed to purchase 1025 sq. mtrs. for sum of Rs.140 crores only. Respondent No.4 ultimately paid the entire price consideration. The MCGM scrutinised and approved the modification as proposed and conveyed approved to lay out plans subject to conditions mentioned thereon 14.02.2012 thereby allowed Respondent No.4 to utilise the RG, FSI and TDR to the extent of 1,25,000 sq. ft out of the total RG, FSI, TDR available to NTC. An agreement for sale and transfer dated 12.03.2012 (Exhibit-"H") registered with the office of Sub Registrar for selling/assigning TDR so referred above.

20 Respondent No.4, resisted the Petition on various grounds by filing affidavit dated 11 July 2014 along with supporting documents and has averred that the civil construction upto 43 floors has been completed and the third party rights in respect of the flats constructed and under construction in the building in question have been already created. A list is accordingly annexed with the Petition, including the list of flat purchasers who have executed agreements are

duly registered with the Competent Authorities. The agreements registered with the prospective purchasers are also with them, based upon Deed of Conveyance dated 15 July 2005 registered with the Office of Sub Registrar. For acquiring the property have also spent more than Rs.600 crores since 2005 till the date of construction activities. The requisite premium also paid to the Authorities on acquisition of the FSI and on its ongoing cost for the construction of the building. The first Commencement Certificate obtained on 1 September 2006 and proceeded to construct on the basis of terms and conditions of IOD, CC and other permissions granted by the Competent Authority as recorded above. They have been complying with the DCR in question. The Petitioners after getting IOD from Respondents 2 and 3 submitted various plans and amendments to it from 11 June 2007, 31 December 2007, 15 October 2009 and 11 January 2011. Respondent No.3 sanctioned the plan on 16.10.2012 where an area of the plot for construction was 4719.19 sq. mtrs. and the plot area for FSI is 4181.04 sq. mt which was inclusive of setback area. The sanctioned plan along with the approval dated 16.10.2012 is a part of record.

21 It is clear from the plain reading of Regulation 58 that for

the cotton mills development the utilisation of TDR governed by the provisions of Regulation 58 and not only Regulation 34 and/or Appendix VII of DCR 1991. Regulation 58 (b)(iii) itself carved out an exception for use of development rights which also can be used as TDR which are not the subject of Regulation 34 and/or Appendix II, as sought to be contended. NTC itself in its lay out, IDS claimed TDR and got approval from the MCGM and based upon the same allowed Respondent No.4 to utilise it after auction in open market to the tune of 11612 sq. mtrs.

Fungible FSI/TDR

22 So far as the fungible FSI is concerned, the same was introduced vide its Notification dated 6 January 2012. Under Regulation 34(4), Respondent No.2 by a special permission, permitted the fungible compensatory FSI not exceeding 35% for residential development over and above the admissible FSI by charging premium at the rate of 60% for residential development. Regulation 34 (4) is applicable where IOD, IOA has been granted, but building is not completed, plot lay out where IOD is granted by partial development and where the fungible is usable as regular FSI. There is nothing to

show that Regulation 35(4) anywhere debars and/or prohibits calculation of fungible compensatory FSI of TDR loaded and/or to be loaded on such property. Respondent No.4, therefore, in view of the provisions, claimed entitlement of compensatory fungible FSI on the TDR loaded in the property and got the benefits to the tune of 4078 sq. mtrs. Respondent-Corporation has also granted requisite permission/approval for the same as the same was within the frame work of law and the record.

23 The submission is made by Respondent No.4 that they are not using the benefits of fungible compensatory FSI in the construction of first 25 floors as they have already constructed when the policy of compensatory fungible FSI was introduced by Respondent No.1. Therefore, there was no such proposal for any change in the original plan sanctioned for those already constructed floors. The learned counsel appearing for the Petitioner is unable to point out any debarring provision and/or negative provision for such mechanism to claim fungible FSI. The circular read and referred by the learned senior counsel appearing for Respondent No.4, on the contrary shows that as option was available with the

developer/builder/owner to opt for such change in the original plan, if so desire, but in view of the construction of 25 floors on the date of Notification, and as the same is not possible and feasible, not opted for fungible FSI for those constructed floors. Therefore, we are not inclined to accept the case that TDR to the tune of 11612 sq. mtrs. purchased by Respondent No.4 cannot be permitted to load in the plot as alleged. This is also for the reason that as Appendix VII as sought to be contended is not applicable exclusively (but for computation) for the purpose of TDR as contended, in view of specific provisions of the Cotton Mills Land. The submission and interpretation so made by the learned counsel appearing for the Petitioner referring to these Regulations, is unacceptable. Having once opted for fungible FSI above 25 floors and as the same is permissible and as there is no bar and as Respondent-Corporation has accordingly permitted/approved the action, we are declined to accept the interpretation given by the Petitioner in this regard. We find the permissions so granted and plan so sanctioned by Respondent No.3, for the above reason, is well within the frame work of law and the record. No case to interfere with the decision so taken by the authorities in question, at the instance of the Petitioner.

24 It is relevant to note that the concept of fungible FSI was introduced by DCR dated 6 January 2012 i.e. 35% over and above permissible FSI. The Development of 11612.78 sq. mtrs. by Respondent No.4 by acquiring the rights from NTC cannot be treated as TDR, also in view of DCR 35 (4), which is in force since 6 January 2012. The proviso makes the position very clear that this change regulation is applicable in respect of the buildings to be constructed and/or reconstructed only. The explanatory note itself provide the option to the owner/developer to use the same, pending the construction of building or for partial development also. This regulation will apply for the balance potential of the plot, where the IOD is already granted. It is clearly provided that the fungible FSI is usable as regular FSI, provided the development in Coastal Regulation Zone (for short, "CRZ") areas shall be governed by the Ministry of Environment and Forests Notification issued from time to time. Circular dated 12 January 2012, regarding the interpretation of this DCR 35 (4) is further clarified on the same line.

25 Regulation 35(4) permits that the *fungible* FSI can be

accorded in respect of loading of TDR. Therefore, the action of Respondents 2 and 3 permitting Respondent No.4 to load TDR to the tune of 11612 sq. mtrs. plus fungible FSI to the tune of 4078.48 sq. mtrs. is well within the purview of law. There is no illegality. The interpretation so sought by the Petitioner and/or the view so expressed, is unacceptable specifically in view of the specific provision so provided to deal with cotton mills property as contemplated in Regulation 58 so referred above. There is nothing on record to show that those provisions are inconsistent and/or any challenge is made in this regard by the Petitioner at least. The Supreme Court in ***Bombay Dying (supra)*** declared and reiterated the importance of Regulation 58 and thereby recognized a class to achieve the aim and object of it. Therefore, such classification and the special code so created just cannot be sidetracked at the instance of the Petitioner in such delayed public interest litigation.

26 We are not inclined to accept the submission that Respondent Nos. 2 and 3 illegally granted fungible area 4078.40 sq. mtrs. as TDR for above reasons referring to Regulation 35(4) as the same was introduced by amendment dated 6 January 2012 as it is

subject to premium also. The difference between FSI and TDR need no discussion but we have to consider the two specific Regulations while dealing with the present matter in question. We are declined to accept the case that grant of fungible FSI to the tune of 4078.40 sq. mtrs. and TDR of 11652.47 sq. mtrs. is illegal and so also the approved plans. The aspect of TDR in view of IDS and Regulation 58 and the share of respective authorities including the owner are not in dispute. There is no further dispute that the burden to provide area to the MCGM should be discharged at one place. The land of these mills treated as one plot. Accordingly, all the parties have acted upon. The submission that the development rights which was generated on account of surplus land surrendered to the MCGM, should be treated as TDR under Regulation 34, is unacceptable. In our view, those are development rights under Regulation 58(1)(b) as interpreted even by the Supreme Court in ***Bombay Dyeing Mfg. Co. Ltd. (Supra).*** The submission that Respondent No.4 purchased from NTC is regular TDR in the present facts and circumstances, is also not acceptable and so also the submission of alleged contravention to the Appendix – VII read with Regulation 34. The FSI generated under Clause-III, can be utilized under Clause-V of the Chart appended to DCR 58 and

accordingly used at the place/portion of the 7 mills as contemplated in IDS.

Private Terrace

27 So far as the issue with regard to the private terrace, there is no dispute that each terrace has access from common entry and each flat of the floor will have the personal terrace through the balcony. It is averred that the terrace admeasuring 297 sq. mtrs. = 3196 sq. ft. is provided in the plan sanctioned by Respondents 2 and 3 and thereby it is denied that "permitted to construct terrace having total area of 886.44 sq. mtrs."

28 The common passage and the area accessible to all the residents from common areas are clearly exempted from the FSI under DCR 35(2) (i) to (iii). Such areas, in view of above regulation, shall not be counted as FSI. This area prior to 6 January 2012 are computed in fungible FSI. No such areas have now been provided to the above 25 floors, which are constructed after 6 January 2012. The same is confirmed even by MCGM.

29 The interpretation and the submission of the Petitioner based upon Regulation 35 with regard to the terrace is also unacceptable, in view of the specific provisions and the permission so granted by the Respondent-Authorities.

Excess Car Parking

30 The Petitioner has also agitated the issue with regard to the excess car parking. There is no issue that Respondent No.4 on due permission constructed about more than 250 car parking space. Regulation 35(3) (xvi) of Regulations came into force on 6 January 2012. Therefore, those Regulations cannot be made applicable to the parking floors already constructed by Respondent No.4 under old Development Control Regulations.

31 DCR 36 deals with the car parking. The parking spaces/areas prior to 6 January 2012 were exempted from computing of FSI under DCR 35. 359 car parking spaces sanctioned and constructed prior to 6 January 2012. Therefore, the new DCR cannot

be extended to such car parking. The submission based upon clause 35(3) (xvi) that car parking space in excess of what is contemplated under DCR 35 (2) (vi), needs to be computed in the FSI, is unacceptable. This is wrong reading of the provisions by the Petitioner. Such amenities/facilities, therefore, as provided and as there is no restriction from providing a larger facilities/amenities and in view of above factual position, there is no case made out, as alleged, about any illegality and/or irregularities.

New DCR Regulations in question operate prospectively:-

32 Regulations 35/36) cannot be read in isolation specifically when we are of the view that the issue of car parking cannot be counted only as per the new DCR. Merely because plans were submitted after new DCR as it is difficult to dissect such developments based upon unamended DCR and even after new DCR . Both these Regulations need to be taken into consideration while calculating and/or assessing the alleged excess car parking. The submission that in May 2013, Respondent No.4 got plans sanctioned for 23 more floors, is also of no use in view of above. The submission that

Regulation 35(3) does not create any new right is unacceptable, contrary to the provision itself. We are of the view that the new Regulations are not clarificatory in nature, but decide and change substantial accrued rights of the parties. Therefore, to say that it applies retrospectively, is unacceptable. The new DCR amendments/Circulars and in view of specific DCR provisions, and as there is no specific clause to make it retrospective, we are inclined to observe that subject to the provision/option so provided, it apply prospectively.

33 The Petitioner, as recorded, is not even seeking demolition of parking space but the excess parking must be counted in FSI and therefore, submitted that the residential building upper floors be reduced and prevented from further construction, is also not acceptable for above reasons.

34 It is in the interest of people at large to frame the policy and permit or give incentive for parking or public parking lot. There is no specific restriction for the same. Therefore,. the parking issue cannot be the reason to disturb the legal construction/development in

the present case.

No MOEF Permission-

35 Respondent No.4 has placed on record the Environmental Clearance Certificates dated 30 October 2010, 16 October 2012 and 1 July 2013 as the construction exceeds 20,000 sq. mtrs. built up area. The Petitioner, therefore, did not press this issue with regard to the permission from MOEF. Even otherwise, as referred, those permissions are there, so no further discussion is necessary for the same.

36 The pendency of the criminal proceedings- we are declined to comment upon in view of the pendency itself.

37 The submission is also made by the learned senior counsel appearing for Respondent No.4 that this petition is nothing but to extort money from Respondent No.4, which is an established real estate company having successfully completed various development projects in and around Mumbai city. We are concerned with the PIL and not the private allegations/litigation.

Delay, laches and fraud/misrepresentation-

38 In PIL considering the above events on record, the aspect of delay and laches also cannot be overlooked while passing the adverse order in such development, based upon the valid permission/approval since 27 December 2005, specifically when the Petitioner has knowledge as resident of the same area. The submission that as Respondent No.4 got permission in contravention to law and on playing fraud and, therefore, all actions/constructions are illegal and ought not to have been regularised and, therefore, the contention of delay so raised by Respondent No.4 need to be rejected is unacceptable in view of above reasons. The alleged "fraud" or "misrepresentation" for want of specific averments with particulars is also not acceptable as the permissions and sanctions so granted are well within the purview of law and the record. The following judgments, therefore, so cited by the Petitioner are distinguishable on facts and circumstances itself :-

a) Judgment in *Dighi Koli Samaj Mumbai Rahivasi Sangh vs.*

Union of India and Ors.[3], was referring to the environmental clearance of Dighi Port Development Project in terms of Coastal Zone notification. If case is made out, the power of High Court and/or Supreme Court to entertain Public Interest Litigation and to pass an appropriate order is settled position of law. The delay and/or laches are no ground not to pass appropriate order in writ petition. We are concerned with the valid scheme of development of cotton mill land as contemplated in Regulation 58 in question.

b) In *Janhit Manch and anr. v. State of Maharashtra*[4], this Court again reiterated that the Petition cannot be dismissed at threshold only on the ground of locus and/or delay and/or laches. In the present case, we have dealt with the merits of the matter and came to a conclusion so recorded above. Considering the public parking lot, it is observed that on completion, the concerned party would be entitled to avail of the incentive FSI. However, that was not a case of interpretation and/or development of cotton mills land like the present one in question. The scheme of other provision is different than this.

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3 2009(5) Bom.C.R. 97
4 2013 (5) Mh. L.J. 868

c) In *Deepak Kumar Mukherjee v. Kolkata Municipal Corporation and ors.*[5], is again a reiteration of the principle of controlling and passing orders if the constructions are illegal and/or unauthorised. There is no dispute with regard to this proposition, but facts and circumstances need to be read first before coming to that conclusion which, in the present case, is otherwise. This is not the case of unauthorised construction without any sanction and/or authority.

d) *M. I. Builders Pvt. Ltd vs. Radhey Shyam Sahu and ors.*[6] This also again on a foundation that "a judicial review of decision is permissible if the impugned action is against law or in violation of prescribed procedure or is unreasonable, irrational or malafide.". For the reason recorded on merits of the case, this judgment is also of no assistance to grant the prayers so made by the Petitioner.

e) *Bombay Dyeing & Mfg. Co. Ltd. (Supra)*, is the

5 AIR 2013 SC 927
6 AIR 1999 SC 2468 : (1999) 6 SCC 464

judgment dealing with Regulation 58 and redevelopment of cotton mills land – sick mills. The judgment read and referred earlier and based upon that we are inclined to observe that the issue of delay and laches are taken care of, as we have decided the merits of the matter on the basis of this judgment and its interpretation of Regulation 58. This judgment in no way supports the case of the Petitioner. However, it supports the submission of Respondent No.4 as well as the Corporation. We are also in the present case dismissing the Petition not only on the ground of laches and delay, but for the reason so recorded on the merits of the matter itself.

39 We cannot overlook the fact that the substantial progress as made out based upon the valid permission/approval granted by the MCGM, just cannot be modified and/or revoked as provided under the MRTP Act. This is not the case of irregularities and/or unauthorized construction based upon the no sanction and/or approved plans. The supporting affidavit and the material placed on record, even otherwise, from the point of view of MCGM, is also sufficient reason to reject the contention of the Petitioner that Respondent No.4 and/or

such person/parties/owner/developer has made unauthorized construction. We are inclined to hold that in view of the provisions of the Act and the circulars, the parties can be permitted to use and utilize old and new amended rules and regulations, unless specifically restricted and/or prohibited. These regulations/circulars, just cannot be used and utilized retrospectively and specifically when the parties have already acted upon the provisions prior to the amended policy and/or regulations. There is no such intimation and/or provision made to apply the same retrospectively except the option so provided. The decisions are based upon the then existing provisions of law.

40 The balance of convenience and equity lies in favour of the Respondents. The aspects of conduct, delay/laches, go against the Petitioner. Even otherwise, taking over all view of the matter for the above reasons no case, to interfere with the sanction/approvals and the construction based upon it, is made out. Therefore the following order:-

ORDER

(a) The present Writ Petition (Public Interest Litigation)

is accordingly dismissed.

(b) There shall be no order as to costs.

(F.M.REIS, J.) **(ANOOP V. MOHTA, J.)**