Bombay High Court
Near Elphinstone College vs Maharashtra Housing & Area ... on 6 March, 2014
Bench: S.J. Vazifdar, K.R. Sriram

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1469 OF 2009

Official Trustee, State of Maharashtra, a
Statutory Authority under The Official Trustees
Act, 1913, being a Corporation Sole, having his
office at 2nd floor, Old Secretariat (Annexe)

Near Elphinstone College, M.G. Road,
Kala Ghoda, Mumbai - 400 032.

Versus

1. Maharashtra Housing & Area Development
Authority. ig

2. Mumbai Building Repairs & Reconstruction]

Board, both statutory bodies, under the]
Maharashtra Housing & Area Development Act]
having office at Griha Nirman Bhavan,]
Bandra (East), Mumbai - 400 051.]

3. State of Maharashtra, Through Urban

Development Department, Mantralaya,
Mumbai 400 032.

4. M/s. Earth Designers & Developers, a company]

incorporated under the Indian Companies Act,]
1956, having its registered office at 2/22,]
Earth House, Babu Gene Road, Mumbai]

5. Municipal Corporation of Greater Mumbai, a

Statutory Corporation constituted under the
Mumbai Municipal Corporation Act, 1888,
having its office at Mahapalika Bhavan,
Mahapalika Marg, Mumbai - 400001

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Mr. Kirit Hakani with Mr. Rahul Hakani for the Petitioner.

Mr. M.D. Naik for the Respondent No.1 & 2 - MHADA &

MBR&RB.

Mr. P.G. Lad. AGP, for the Respondent No.3 - State.

Mr. Aspi Chinoy, senior counsel with Mr. Pravin Samdani, senior counsel with Mr. Vatsal K. Merchant for the Respondent No.4.

Mr. Vinod Mahadik for the Respondent No.5 - BMC.

CORAM : S.J. VAZIFDAR, &

K.R. SHRIRAM, JJ.

ig THURSDAY, 06TH MARCH, 2014 JUDGMENT : [Per S.J. Vazifdar, J.]

1. Respondent No.1 is the Maharashtra Housing & Area Development Authority (MHADA). Respondent No.2 is the Mumbai Building Repairs & Reconstruction Board (MBR&RB). Respondent No.3 is the State of Maharashtra through the Urban Development Department (UDD). Respondent No.4 - M/s. Earth Design & Developers is the developer. Respondent No.5 is the Municipal Corporation of Greater Mumbai. ("BMC" or "Corporation")

2. The Official Trustee originally sought an order setting aside a notice dated 28th April, 2009, issued by respondent Nos.1 and 2 under SRP 2/87 OSWP1469.09.doc section 95-A of the Maharashtra Housing & Area Development Act, 1976 (MHADA Act) issued in the name of the Poojari of the Shree Venkatesh Balaji Temple. The petition was amended twice. By the first amendment the Official Trustee also sought an order setting aside all the building plans, permissions, NOCs granted by respondent No.1 to 3 and 5 for the re-development of the temple. The Official Trustee sought an order setting aside the orders / permissions granted by MHADA and MBR&RB, whether under DC Regulation No.33(7) or under any other DC regulation for the re-development or development of the temple. Lastly, the Official Trustee sought an order directing respondent No.5 not to grant any transferable development right certificate (TDR Certificate) to the developer, i.e., respondent No.4 unless and until the actual area measurement is done of the plots now bearing C.S. No.113 and 1/113 and the alleged illegalities and irregularities in the building plans and also the development scheme are removed.

3. On 4th October, 1927, this Court appointed the Official Trustee as the sole Trustee of the Shree Venkatesh Balaji Temple as well as the SRP 3/87 OSWP1469.09.doc properties of the temple, including its funds and immovable property.

The immovable property comprises, inter-alia, of a plot of land admeasuring 3240 square yards bearing C.S. No.113. The immovable property is located in Walkeshwar, a prime locality of Mumbai.

According to the Official Trustee, a Dharamsala was also constructed on the land.

4. By an order dated 12th April, 1950, this Court had authorized the then Official Trustee to lease out an area of 1600 square yards of the said property. By a further order dated 26th September, 1951,

79.11 square yards was permitted to be given on lease. Pursuant to the above orders, agreements were entered into on 12th April, 1950 and 18th January, 1952, by which the Official Trustee leased an area of 1679.11 square yards from the original C.S. No.113. These leases were in favour of one C.U. Padia which were then assigned to M/s.

Vijay Associates. This leased portion was then shown as C.S.

No.1/113 in the revenue records - P.R. Card. Upon the sub-division, thereof, C.S. No.113 comprises of land admeasured 1561 square yards and C.S. No.1/113 which was given out on lease as aforesaid, SRP 4/87 OSWP1469.09.doc admeasured 1679.11 square yards.

M/s. Vijay Associates utilized the entire FSI available on plot bearing C.S. No.1/113 by constructing thereon, a building named Ritu Apartments.

By an order dated 29th January, 1982, in Trust Petition No.18 of 1981, this Court sanctioned the use by M/s. Vijay Associates in the construction of Ritu Apartments of 4500 square feet FSI out of C.S.

No.113.

5. On 19th February, 1991, the Ministry of Environment, Central Government, issued a Coastal Regulation Zone Notification (CRZ Notification, 1991). We will refer to this Notification while dealing with the Official Trustee's submissions. Suffice it to note at this stage that the property falls within CRZ-II.

6. The Official Trustee and the developers - respondent No.4 entered into a Memorandum of Understanding dated 29th November, 1994. The Memorandum recites that the Official Trustee invited tenders and offers for the sale of the said premises on 'as is where is' SRP 5/87 OSWP1469.09.doc basis. The premises were described in the Fourth Schedule. The developers offer of Rs.1,36,00,000/- was the highest. Clauses 2, 3, 4, 13 and 14 read as under :

> "2.The Vendors hereby declare that on the said portion of the said property there is a temple thereon. The Purchasers at their entire costs have agreed to fullfill the object of the trust that is to maintain, repair and renovate the existing SHRE VENTAKESH BALAJI TEMPLE on the said property and as per the directions, if any, given by the Heritage Society.
>
> 3. The Vendors hereby declare that on the said portion of the said property there is a structure standing thereon which is occupied by several tenants. It shall be the responsibility and liability of the Purchasers to deal & or to settle with the tenants on such terms and conditions as they deem fit and proper and all costs, expenses for rehabilitating the tenants shall be borne by the Purchasers alone.
>
> .....

13. The Vendors have agreed to sell the said property more particularly described in the Fourth Schedule hereunder annexed to the Purchasers, and the Purchasers have agreed to purchase the same from the Vendors for agreed consideration amount of Rs.1,36,00,000/- (Rupees One Crore thirty six lakhs only).

14. The Purchasers on or before the execution of this agreement have paid to the Vendors the sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) as per the particulars given in the receipt as an earnest money token advance deposit amount, the receipt of which amount the Vendors hereby admit and acknowledge."

The Fourth Schedule states :

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"ALL THAT PIECE OR PARCEL of land of ground

having balance F.S.I. of about 2294 sq. ft. area situate, ... bearing .....cadestral survey No.113 ..... containing by adm.1,560.89 sq. yds. equivalent to 1305.10 sq. meters or thereabouts together with the Temple and Dharamshala and chawls standing thereon known as SHRI VENTAKESH BALAJI MANDIR....."

7. Three Public Interest Litigations were filed opposing the sale.

Further, the Government of Maharashtra by a letter dated 7th January, 1995, directed the Official Trustee not to pass any final orders without the permission of the Government. By a further letter dated 2nd March, 1995, the Government of Maharashtra informed the Official Trustee that the temple and the adjacent property was being included in the list of buildings and structures of historical / aesthetic and architectural importance in the surrounding precincts of the city to be protected and conserved. The Official Trustee was, therefore, directed to await final orders from the Urban Development Department.

8. The Developers filed Trust Petition No.5 of 1995 seeking the sanction of this Court for the sale of the property as per the MOU dated 29th March, 1994. The Indian Heritage Society (IHS) was impleaded as respondent No.2. The IHS had also filed Writ Petition SRP 7/87 OSWP1469.09.doc No.147 of 1995 opposing the sale of the property.

9. On 21st April, 1995, Regulation 67 was introduced in the Development Control Regulations (DC Regulations) which provided for the transfer of development rights in respect of heritage properties.

We will be considering Regulation 67 while dealing with the submissions.

By an order and judgment dated 8th August, 1997, the Division Bench of this Court disposed of the Trust Petition No.5 of 1995 and Writ Petition No.147 of 1995. The order reads as under :

> " This is a petition filed under the provisions of the Official Trustees Act, 1913, seeking sanction of the sale of the property pertaining to Shree Venkatesh Balaji Temple at Walkeshwar, in pursuance of the memorandum of understanding entered into between the Petitioner and Official Trustee on 29-11-1994. The 2nd Respondent-Indian Heritage Society was impleaded in the Petition opposing proposal of the sale of the property.

Writ Petition No.147 of 1995 is also been filed opposing sale of the Temple property in favour of the Petitioner. Both these Petitions came up for hearing before us. We heard the parties concerned and ascertained their views. Ultimately, the parties to this Petition have settled the issue and arrived at terms of settlement. The terms of settlement filed by the Petitioner and the Administrator General and Official SRP 8/87 OSWP1469.09.doc Trustee has taken on record Terms of the settlement according to us safeguard the interest of the Temple property. Therefore, the Petition is disposed of in terms of the above settlement.

Writ Petition is also disposed of in view of the Order passed in Trust Petition No.5 of 1995."

11. The order was corrected by an order dated 20th November, 1997, which reads as under:

> "By Consent wherever the word "Settlement" occurs in the Order dt. 8/8/97, same is deleted and substituted by words viz. "Minutes of Order".
>
> On Page 2, of the same order Sentence in 2nd para commencing from 6th line i.e. "Ultimately ..... Settlement", shall be substituted by the sentence "Parties submit to the Minutes of Order".
>
> .....

The clauses of the Minutes of Order are important and read as under :

> "1. There shall not be any sale of the temple, chawl or temple land to the Petitioners. The temple, land and its properties shall continue to vest in the Official Trustee. The Petitioners shall be entitled to avail of only the privilege of the F.S.I. available in respect of the property including in the form of T.D.R. in accordance with D.C. Regulation 67.
>
> 2. In consideration of the payment of a total sum of Rs.1,36,00,000/- the Official Trustee shall make available to the Petitioners the F.S.I. potential in respect of the said property by way of Transfer of T.D.R. Certificates.

3. The Petitioners shall pay to the Official Trustee forthwith, within a period of 30 days, a sum of Rs.35,00,000/- for the purpose of repairing and maintaining the temple. The Official Trustee will through its own Architect repair the said Shree Ventakesh Balaji Temple in accordance with the Heritage Guidelines.

4. The payment of the total balance consideration of Rs.1,26,00,000/- (exclusive of the amount of Rs.10,00,000/- which has already been deposited with the office of the Official Trustee) shall be effected against the transfer and endorsement of T.D.R. Certificates in favour of the Developers by the Official Trustee.

5. The Official Trustee will grant a Power of Attorney in favour of the Petitioners' Director Bhupesh Jain for the purpose of negotiating with and obtaining Consent Agreements from Tenants in respect of the existing chawl structure and for putting up a proposal for availing of developable F.S.I. in the form of Development Right Certificates (T.D.R.) in respect of the property. All costs, expenses and charges incurred for obtaining Development Right Certificates or T.D.R. including in respect of the tenanted chawl will be borne by the Petitioners. The Official Trustee will render necessary assistance to the Petitioners for the purpose of obtaining necessary sanctions from the Municipal and other Authorities.

6. After receipt of possessions the Petitioners shall comply with all reconstruction Municipal rules, regulations and guidelines applicable to the heritage properties.

7. The Petitioners undertake to the Court to comply with these terms and conditions and with Development Control Regulation 67 and strictly follow all the rules, regulations and guidelines of the Municipal Corporation SRP 10/87 OSWP1469.09.doc of Greater Bombay pertaining to heritage properties.

8. ..... [Clause 8 was deleted]

9. Liberty to apply."

Clause 8, which was deleted, provided that the MOU shall stand sanctioned, subject to the above terms.

12. Pursuant to the above order, the Official Trustee executed the Power of Attorney (POA) dated 8th September, 1997, in favour of the developer's Director one Bhupesh Jain. Clause 1, 3, 10, 13 and 15 thereof read as under :

> "1. To prepare plans in respect of the said property described in the Schedule hereunder written and to submit the same to the Bombay Housing & Area Development Board, Municipal Corporation of Greater Bombay and other Concerned Authorities for obtaining approval of the same and to submit proposals and obtain approval from time to time for the amendments of such plans to the Municipal Corporation of Greater Bombay and other Concerned Authorities and to take such steps as are necessary with a view to obtain Development Right Certificates in respect of the TDR FSI available in respect of the said property described in the Schedule hereunder written.
>
> .....

3. TO carry on correspondence with all the Concerned Authorities and Bodies including the government of Maharashtra in all its Departments, Municipal Corporation of Greater Bombay and/or Town Planning Department and other Concerned Authorities SRP 11/87 OSWP1469.09.doc in connection with the said property with a view to obtain TDR FSI in view of the said property falling within the Heritage precinct.

.....

10. TO give such letters and writings and/or Undertakings as may be required from time to time to the Municipal Corporation of Greater Bombay and or other Concerned Authorities for the purpose of carrying out the development in respect of the property as also in respect of the repair reconstruction work of the structure thereon and also for obtaining the Occupation and/or Completion Certificate in respect thereof and for obtaining Development Right Certificates in respect of the balance TDR FSI in respect of the said entire property.

.....

13. TO do all other acts, deeds matters and things in respect of the said property described in the Schedule hereunder written including to represent before and correspond with the Municipal Corporation of Greater Bombay, Maharashtra Housing and Area Development Authority and the Bombay Housing and Area Development Board and other Concerned Authorities for any other matters relating to the sanctioning of the plans, obtaining the Floor Space Index (F.S.I.) for the repair reconstruction of the structure and/or for availing of the balance FSI by way of T.D.R. in respect of the said property. It is however made clear that the Development Right Certificates in respect of the T.D.R. FSI will be issued in the name of the Official Trustee, Maharashtra State, Mumbai.

.....

15. TO enter into such arrangements and Agreement as our Attorney may deem fit for the purpose of obtaining consent from the Tenants and occupants in occupation of the structure on the said property for the purpose of repair and reconstruction of the Tenants structures and for obtaining the Development Right Certificates in respect of the balance FSI available in respect of the said property, with the prior approval of the Official Trustee, Maharashtra State and at the entire SRP 12/87 OSWP1469.09.doc risk, cost and expense of the said Attorney."

13. Correspondence ensued between the Official Trustee and the developer in the course of which the Official Trustee contended that only FSI of 2294 square feet was sold to the developer. The developer contended that the Official Trustee was required to make available the FSI potential in respect of the property by way of transfer of TDR certificates and that the Official Trustee's contention was incorrect.

The developer contended that the Official Trustee's reliance upon Schedule D to the MOU referred to 2294 square feet FSI being available was misplaced as the MOU, which was for the sale of the property, was given a go-by to and instead, the rights of the parties stood concluded on the terms and conditions stipulated in the minutes of the order in terms of which the order dated 8th August, 1997, was passed. These rival contentions are contained in the letter dated 19th September, 1997, from the official trustee to the developer; 20th September, 1997, from the developer to the official trustee and a letter dated 22nd September, 1997, from the official trustee to the developer.

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14(A) The Official Trustee thereafter filed a praecipe da

September, 1997, for speaking to the minutes of the order dated 8th August, 1997. The praecipe stated that no settlement had been arrived at between the parties and, therefore, sought the substitution of the word "settlement" with the words "minutes of order". This, as we noted, was granted.

The Official Trustee also sought the deletion of the statement in the order that it was for the reasons separately recorded in the oral order as there were, in fact, no such reasons separately recorded.

Mr. Chinoy, the learned senior counsel appearing on behalf of the developer, stated that it is significant that in this praecipe, the Official Trustee did not contend that what was sold to the developer was only FSI of 2294 square feet.

(B) Even after this praecipe, correspondence ensued between the Official Trustee and the developer in the course of which they raised their respective contentions - the Official Trustee contending that

FSI of only 2294 square feet was transferred to the developer and the developer contending that it is entitled to avail of the potential FSI SRP 14/87 OSWP1469.09.doc available in respect of the property, including in the form of TDR.

This is reflected in the developer's letter dated 27th September, 1997, the Official Trustee's letter dated 4th October, 1997, the developer's letter dated 10th October, 1997 and the Official Trustee's letter dated 21st October, 1997. By the letter dated 4th October, 1997, the Official Trustee stated that the MOU mentioned 2294 square feet FSI being available and that he had proceeded on that basis and, accordingly, submitted to the orders of the Court dated 8th August, 1997. He further stated that he had come to know that the area available may be more than double than that mentioned in the petition and what was in his mind and that there was a clear misunderstanding and misrepresentation. He stated that as an Official Trustee, he could not cause any loss to the Trust by giving more than what was agreed or mentioned in the documents viz. the Trust Petition No.5 of 1995 and the MOU. By the letter dated 21st October, 1997, the Official Trustee requested the developer not to act on the POA and to deliver up the same to him to enable him to mention the area therein.

15. As we noted earlier, the praecipe dated 22nd September, 1997, SRP 15/87 OSWP1469.09.doc was disposed of by an order dated 20th November, 1997, by substituting the word "settlement" in the order dated 8th August, 1997, with the words "minutes of order" and by substituting the words "Ultimately ..... settlement" with the words "parties submitted to the minutes of order".

16. The MBR&RB - respondent No.2, by a letter dated 26th November, 1997, responded to the developer's application dated 15th September, 1997, for the redevelopment of the property. The developer was informed that it would eventually have to form a co-

operative housing society along with the minimum 70% of the old occupants of the existing building; that all the occupiers of the old cessed building should be rehoused in the newly reconstructed building and that a suitable agreement should be made in this respect on ownership basis and submitted to the MBR&RB duly executed with at least 70% of the occupiers of the old building. In Clause 5(a), the developer was informed of some of the facilities to be extended to the occupants such as the allotment of the tenements in the newly constructed building to persons as per the list certified by MBR&RB, SRP 16/87 OSWP1469.09.doc the quantum of tenements / area to be handed over to the MBR&RB and the minimum area of each tenement.

17. Correspondence again ensued between the parties in the course of which the Official Trustee contended that there were certain discrepancies in the original area of the property and the area shown in the sanctioned plans for Ritu Apartments which was on the sub-

divided plot bearing C.S. No.1/113. The Official Trustee, therefore, requested the developer not to submit any proposals for sanction and to furnish the Official Trustee copies of all applications, plans etc. submitted pursuant to the POA. The Official Trustee raised a grievance even then, by a letter dated 19th March, 1988, that he had not been furnished with the necessary particulars and documents.

18(A) By a communication dated 21st March, 1988, the Heritage Committee of the Municipal Corporation conveyed its no objection to the redevelopment plan on the terms and conditions contained therein. The NOC considers in considerable detail, the developer's application and the result of the site visit. Clause 7 notes that the proposed new single storeyed structure was to be on the SRP 17/87 OSWP1469.09.doc similar foot-print as that of the existing structure and also within the same section profiles, height and elevation, landscape etc. On an earlier occasion, the developer's Architect was requested by the Heritage Committee to submit revised drawings as during the site visit, the Architect had expressed his inability to maintain exactly the same foot-print in the proposed structure as that of the existing structure owing to restrictions such as the non availability of open spaces in certain locations, area / planning and other requirements of the existing tenements and the minimum carpet area requirement as per MHADA norms. The NOC records that the Architect was permitted to modify the foot-print marginally in the North-West corner of the proposed structure, subject to certain conditions and that the Architect had submitted the modified plans in accordance with the directions of the Heritage Committee. The NOC records that the modified plans were found to be in order from the heritage conservation point of view and approved the same, subject to several conditions, including the following :

> "1. that the existing foot-print will be maintained in the proposed structure except at the north-west corner of the plot (for convenience in open spaces, area requirement of the existing tenants, MHADA SRP 18/87 OSWP1469.09.doc requirements etc. as stated by the Architect. .....
>
> 5. that as the plans approved by the Committee do not fully utilise the available FSI as permissible on the plot under reference, the unutilised balance FSI will be consumed by the developer by way of TDR in the same Ward as perthe provisions of the Heritage Regulation (DCR No.57).
>
> 6. that in case of any increase in permissible FSI in future, no additional structures or extensions to the existing structures will be proposed in the layout. The surplus FSI may be consumed as per Condition No.5 above."

(B) A copy of this NOC was forwarded by the developer to the Official Trustee under cover of a letter dated 25th March, 1998.

(C) Thereafter, correspondence ensued between the Official Trustee, the developer and the authorities in the course of which the Official Trustee and the developer raised their rival contentions between each other as well as before the authorities concerned. The Official Trustee called upon the developer to furnish, inter-alia, papers, plans and documents submitted to the authorities failing which he threatened to cancel the POA. The developer, in turn, contended that the POA was irrevocable till the development right certificates were issued in its favour and the question, therefore, of cancelling the POA did not arise.

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The Official Trustee, however, informed the developer that in view of its failure to provide the necessary information, the POA stood cancelled and called upon the developer to surrender the same. The Official Trustee also informed the Municipal Corporation about the revocation of the POA. In paragraph 13-A, at serial number 9, the Official Trustee stated that the Executive Engineer of the Municipal Corporation, however, took the view that the POA could not be unilaterally revoked without obtaining orders from the Court.

19. By an order dated 27th July, 1998, the Supreme Court dismissed in limine, the Official Trustee's petition for special leave to appeal against the order dated 8th August, 1997.

20. The developer by it's letter dated 1st August, 1998, addressed to the Official Trustee stated that the matter had now also been adjudicated upon by the Supreme Court and called upon him to co-

operate in the matter of arriving at arrangements with the tenants in the property and in obtaining the necessary permissions in respect of the TDR/FSI from the authorities as stipulated in the order dated 8th SRP 20/87 OSWP1469.09.doc August, 1997, failing which, the developer stated that it would adopt contempt proceedings.

21(A). The Government of Maharashtra, by a letter dated 13th August, 1999, informed the Municipal Corporation that the developer's proposal had been examined in consultation with the Housing & Special Assistance Department and conveyed the Government's approval to utilize the balance built up area in the form of DRC (Heritage) in accordance with the provisions contained in Development Control Regulations for Greater Mumbai, 1991 and Heritage Regulations for Greater Mumbai, 1995 and other relevant regulations / guidelines. The Government also stated that it had no objection to waive the condition of handing over of requisite percentage of floor space to the Bombay Housing and Area Development Board as provided in the 1991 DCR, subject to the condition that each tenant would be accommodated with minimum built up area of 225 square feet.

(B) The Municipal Corporation, however, by a letter dated 18th

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February, 2000, informed the developer that the Official Trustee had revoked the POA and that, therefore, the Municipal Commissioner had directed that it's application for grant of DCR for heritage TDR could not be processed further till the clearance was received from the Official Trustee.

22. On 10th January, 2002, the developer submitted a fresh proposal for re-development of the property before the MBR&RB under DCR 33(7) in view of the amendment to DCR 67 which introduced (iii)(a) in clause 2. The amendment dated 25th January, 1999, reads as under :-

> "(iii) (a) Provisions of Regulation 67 would be applicable only in Grade I and Grade II category of Heritage Building for reconstruction and redevelopment of old buildings undertaken under Regulation 33(7), 33(8) and 33(9) of these Regulations."

23. The MBR&RB, by a letter dated 21st February, 2002, informed the developer that the Official Trustee had informed them that the POA had been revoked and had also requested them not to grant the permission sought by the proposal dated 30th January, 2002.

MBR&RB informed the developer that it's request, therefore, could SRP 22/87 OSWP1469.09.doc not be considered.

24. This led to the developer filing Contempt Petition No.48 of 2002 against the Official Trustee alleging non compliance with the order dated 8th August, 1997.

On 20th May, 2002, the learned Vacation Judge passed an order directing the Official Trustee to inform MHADA and the Municipal Corporation that the POA was valid and directed the Official Trustee not to obstruct the developer from obtaining the FSI potential in the form of TDR certificates.

This order was, however, vacated by an order of the Division Bench dated 30th July, 2002, on the ground that the matter could have waited a proper hearing after the vacation.

25. In the meantime, however, the developer applied for an NOC to MHADA. MHADA, by its letter dated 6th June, 2002, granted the developer an NOC for redevelopment of the property subject to certain terms and conditions. One of the conditions was that only the built up area of 1400.13 square meters could be utilized in the form of SRP 23/87 OSWP1469.09.doc DRCs. The occupants of the old building were to be re-

accommodated in the re-developed building in tenements admeasuring a minimum carpet area of 225 square feet and/or maximum 753 square feet as provided in the MHADA Act, 1976. A copy of this NOC was forwarded to the Official Trustee.

It must be noted at this stage that MHADA in its affidavit stated that in the special circumstances of this case, there was no stipulation made for the formation of a co-operative society of the tenants/occupants.

The NOC itself did not have this requirement either.

26. The Official Trustee's grievance is that despite requests contained in his letters dated 11th July, 2002 and 29th July, 2002, MBR&RB did not furnish a copy of the NOC or the developer's proposal for the same. MBR&RB on 29th August, 2002, merely sent the proposal without a plan.

27. On 7th February, 2003, the Municipal Corporation sanctioned the plans and granted an IOD in favour of the developer.

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28. By a judgment and order dated 17th April, 2003, Contempt Petition No.48 of 2002, filed by the developer was disposed of. The learned single Judge observed that although it could have been contended by the developer that it was not open to the Official Trustee to revoke the POA, the developer had not done so. The learned Judge also observed that the developer was obliged to assail the Official Trustee's revocation of the POA and it was not sufficient merely to assert that the POA was still binding on the Official Trustee. The learned Judge observed that the developer's contention would entail a piquant situation that this court, meaning obviously thereby the court hearing the Contempt Petition, would be required to examine the correctness or otherwise of the Official Trustee's revocation of the POA which cannot be the scope of contempt jurisdiction. The learned Judge also observed "Perhaps, remedy for such a declaration has become time barred." The petition was essentially dismissed on the ground that it was barred by limitation. The merits of the matter, including as to the validity or otherwise of the revocation of the POA by the Official Trustee was not decided.

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29. The Official Trustee forwarded a copy of the order dated 17th April, 2003, to MBR&RB on 9th June, 2003 and 26th June, 2003. By a letter dated 18th October, 2003, the Official Trustee also informed the Municipal Corporation that the POA stood cancelled and, therefore, requested the Municipal Corporation not to process the developer's proposal without the Official Trustee's consent. In view of the Official Trustee's letter dated 18th October, 2003, the Municipal Corporation by it's letter dated 4th December, 2003, sought the following clarification from MBR&RB.

> "..... However, MHADA has issued N.O.C. for the redevelopment of property vide letter No.R.N.OC./F-938/M.B.R.&.R.B. of 02 dated 6.6.02 (Xerox copy enclosed herewith). Thereafter, this office has processed the proposal for the redevelopment of the said property. This office has already approved the plans on 7.2.2003 and I.O.D. is issued. However, C.C. is not released so far.
>
> In view of above, Chief Officer, M.B.R.&.R Board is requested to clarify whether this office can still process the proposal for redevelopment of property bearing C.S. No.113 of Malabar Hill Division or otherwise."

30. MHADA, by its letter dated 2nd April, 2004, informed the developer that in view of the order dated 17th April, 2003, in SRP 26/87 OSWP1469.09.doc Contempt Petition No.48 of 2002, it's NOC of 6th June, 2002, was withheld till further orders and that MHADA would not proceed with the developers proposal till it received a clearance from the Official Trustee.

31. This brings us to an extremely important development in the matter - one which we find prevents the Official Trustee from raising most of the issues raised in the present petition. On 27th April, 2004, the Official Trustee filed Trust Petition No.5 of 2004 under section 25 of the Official Trustees Act. The Official Trustee sought an order that the developer was entitled to use only 2294 square feet FSI by way of TDR failing which the Official Trustee be allowed to retain the amounts deposited by the developer except the earnest money; for an order directing the developer not to carry out any construction by way of demolition or otherwise and an order that the Official Trustee be allowed to dispose of the balance FSI by way of TDR in respect of the property, i.e., FSI other than the 2294 square feet after calling fresh bids from third parties.

The entire petition is important for it indicates that substantially SRP 27/87 OSWP1469.09.doc all the points raised before us were raised therein. We will indicate only a few of the main points raised in the Trust Petition. The Official Trustee alleged that the power of attorney did not reflect the true position and that he, therefore, informed the developer that it had purchased only 2294 square feet of the FSI. The disputes and the correspondence in this regard were referred to. The Official Trustee also contended that the developer was not entitled to make use of the POA as it was wider than what was contemplated in the MOU and the order dated 8th August, 1997.

ig The Official Trustee, therefore, requested the developer to return the POA so that a proper POA containing the provisions regarding the actual area of FSI of 2294 square feet could be affected. The Official Trustee stated that he was aware that the developer intended submitting plans for obtaining FSI of more than 2294 square feet and, therefore, requested the developer to return the POA. The

Official Trustee referred to the entire correspondence with the authorities concerned before whom the developer had made applications for having the plans sanctioned for obtaining NOC and the additional FSI. The Official Trustee also referred to the correspondence in this regard where he had raised the SRP 28/87 OSWP1469.09.doc contentions regarding the alleged irregularities in respect thereof. The Official Trustee also referred to Contempt Petition No.48 of 2002, the ad-interim order dated 20th May, 2002 and the order of the Division Bench in Appeal No.503 of 2002 vacating the same as well as the fact that in the meantime, on the basis of the ad-interim order, MBR&RB had granted the NOC regarding the proposal for redevelopment of the property as well as the FSI of 1400.13 square meters. The same was specifically challenged in the Trust Petition. The Official Trustee also referred to the fact that Contempt Petition No.48 of 2002 was ultimately dismissed by an order of this Court dated 17th April, 2003.

Based, inter-alia, on the above facts, the Official Trustee sought several reliefs which we have referred to earlier.

32(A). Trust Petition No.5 of 2004 was disposed of by an order and judgment dated 9th March, 2005, of a learned single Judge. The learned Judge held that it was clear that the Official Trustee was fully aware that what was being conveyed to the developer was not just 2294 square feet FSI, but the entire FSI potential of the said property which included the temple and the chawl; that it was too late in the SRP 29/87 OSWP1469.09.doc day for the Official Trustee to seek a clarification of that order; that the clarifications and directions sought were earlier rejected by this Court as well as the Supreme Court and that in view thereof, the question of granting any relief does not arise. The petition was, therefore, dismissed.

(B) Appeal No.713 of 2005, filed by the Official Trustee was dismissed by an order and judgment of a Division Bench of this Court dated 10th October, 2005. The Division Bench held :-

> "..... There is no dispute about the contents of the minutes of order. The minutes of the order in paragraphs 2 and 5 abundantly make it clear that what was conveyed was F.S.I. potential and available and developable F.S.I. in the form of Development Rights Certificate (TDR). Even in clause 2 it is clearly mentioned that what was made available to the respondents was FSI potential. Under these circumstances, we find absolutely no error or illegality with the order passed by the learned Single Judge. The appeal is devoid of any merits and the same is dismissed."

33. The developer by its letter dated 1st December, 2005, forwarded copies of the order in Trust Petition No.5 of 2004 to MHADA and requested MHADA in the light thereof to further process its applications and to vacate the stay on the NOC granted earlier by SRP 30/87 OSWP1469.09.doc MBR&RB.

34. MBR&RB, by a letter dated 24th March, 2006, called upon the developer to submit a bond indemnifying it against any adverse claim if the stay on its NOC was vacated. On 10th April, 2006, the developer submitted the indemnity bond and requested MBR&RB to vacate the stay on the NOC. MBR&RB, by a letter dated 14th June, 2006, informed the developer that the stay on the NOC

earlier granted by it on 2nd April, 2004, was vacated in view of the order dated 10th October, 2005 of the Division Bench. The developer was, therefore, permitted to go ahead with the redevelopment work in accordance with the NOC granted on 6th June, 2002.

35. On 16th November, 2006, the Municipal Corporation issued a commencement certificate in favour of the developer for re-

commencement of the work upto the plinth level.

36. By a letter dated 7th March, 2008, addressed to the Municipal Corporation, the Official Trustee contended that the plan ought not to be approved as there was no order restoring the POA.

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37. The Official Trustee claims to have been informed that some unknown persons had trespassed on the trust property, entered the chawl adjacent to the temple and had started demolishing the rooms at the instigation of the developer. The Official Trustee applied to the Government of Maharashtra for appointing a High Power Committee to look into the legality of the above plans. The Official Trustee was, however, directed to approach this Court.

38. The Official Trustee thereafter filed Trust Petition No.5 of 2008 praying that he be divested of the responsibility of being a trustee of the temple. The developer was respondent No.1 to this petition. On 23rd June, 2008, the Official Trustee addressed a letter dated 23rd June, 2008, to the Mumbai Heritage Conservation Committee of the Municipal Corporation alleging that there were certain discrepancies in the plan and stating that the developer had demolished certain premises which came under the heritage 'A' category and which also came within the CRZ. The Official Trustee, therefore, requested the Heritage Committee to reconsider the NOC granted to the developer.

The Deputy Municipal Architect of the Heritage Committee requested SRP 32/87 OSWP1469.09.doc the Executive Engineer, Building Proposals, to make a detailed report.

The Official Trustee also addressed a letter dated 6th August, 2008, to MHADA in which he also alleged that the requirements of DCR 33(7) had not been met and requested MHADA to revoke the NOC.

Reminders were sent to the Heritage Committee.

39. On 20th April, 2009, the priest of the temple was served with a notice under section 95-A of the MHADA Act calling upon him to vacate the premises and to shift to the temporary transit accommodation offered by the developer.

40. On 5th May, 2009, the present Writ Petition was filed. By an order dated 25th January, 2010, the Writ Petition was admitted and pending the hearing and final disposal of the petition, the respondents were restrained from transferring any ownership right, title or interest in the newly constructed building either to the tenants/occupants in lieu of their earlier respective tenements either in their individual names or to the proposed society. The structure which was not demolished was also protected pending the hearing of this petition.

The Writ Petition was amended twice. We will refer to the SRP 33/87 OSWP1469.09.doc nature of the amendments while dealing with Mr. Chinoy's submissions. He relied upon the nature of the amendments to oppose the petition.

41. A learned single Judge disposed of Trust Petition No.5 of 2008.

The Official Trustee's application for being divested of his office was rejected. We will refer to this order also later while considering Mr. Hakani's reliance upon the same in support of the Official Trustee.

On 20th October, 2010, the developer filed Appeal No.1141 of 2010 against this order. On 9th March, 2011, the developer withdrew the appeal.

42. Mr. Chinoy raised a preliminary objection as to the maintainability of the writ petition on the ground that the Official Trustee had filed this writ petition without seeking the permission of the court to do so. The submission is not well founded.

43. Mr. Chinoy has not invited our attention to any provision of the Official Trustees Act, 1913, which requires an Official Trustee to seek permission of the court before filing proceedings, including a writ SRP 34/87 OSWP1469.09.doc petition.

44. Section 7(2) of the Official Trustees Act provides that the Official Trustee shall have the same powers, duties and liabilities and be entitled to the same rights and privileges and be subject to the same control and orders of the Court as any other trustee acting in the same capacity. What then are the powers of any other trustee acting in the same capacity ? The Official Trustees Act itself does not require the Official Trustee to seek the permission of the Court before filing proceedings in the interest of the trust.

Nor is there any provision in the Official Trustees (Maharashtra) Rules, 1971, requiring the Official Trustee to obtain the permission of the High Court to initiate legal proceedings.

45. Nor do we find any provision under the Indian Trusts Act, 1882, requiring him to do so. Section 13 of the Indian Trusts Act, 1882, provides that a trustee is bound to maintain and defend all suits

and (subject to the provisions of the instrument of trust) to take such other steps as maybe reasonably required for the preservation of the trust SRP 35/87 OSWP1469.09.doc property and the assertion of the protection of title thereto. Our attention has not been invited to any provisions of the Indian Trusts Act or to any authority under that Act that requires the Official Trustee to seek the permission of the court before filing proceedings. Nor do we see any reason to read such a requirement in section 13 or in any other provisions of the Indian Trusts Act, 1882.

46. Mr. Chinoy's reliance upon the judgment of the Supreme Court in Official Trustee of Tamil Nadu vs. Udavumkarankal & Ors. [1993 Supp. (3) SCC 509 = AIR 1993 SC 1472] is misplaced. Firstly, the preliminary objection raised by Mr. Chinoy was neither raised before nor decided by the Supreme Court. That was a case where on the application of the Official Trustee, the High Court had granted him permission to incur an expenditure of Rs.6 lakhs for converting the tiled-roof of a marriage hall into an R.C.C. roof and for providing certain other facilities. Thereafter, the Official Trustee undertook entirely different work involving the demolition of the building and the construction of a new marriage hall on the plot involving additional expenses of Rs.4 lakhs. Mr. Chinoy relied upon paragraph SRP 36/87 OSWP1469.09.doc 15 of the judgment which reads as under :-

> "15. There is no doubt that the appellant knew that the earlier sanction obtained was only for replacement of the tiled-roof by the R.C.C. slab. The sanction was also for incurring only an expenditure of Rs.6 lakhs and some other sundry expenses for providing minor facilities. Since the new proposal which he sanctioned consisted of the demolition of the entire building and of constructing a new one in its place which also involved a further expenditure of Rs.4 lakhs or so, the proposal was completely different and it could not be acted upon on the basis of the old sanction. It was, therefore, absolutely necessary for the appellant to approach the Court before he embarked upon the new proposal, even though in doing so he was acting in the interest of the trust and no mala fides could be attributed to him. We find that this is the only error committed by the appellant in the present case. However, in the facts and circumstances of the case, the error could not be said to have been actuated by any mala fide intentions on his part. The expenses that he had undertaken to incur were also within reasonable bounds looking at the proposal. His intention in promoting the proposal could not be said to be other than honorable, and in any case it could not be said that it was not in the interests of the trust. In view of this, it was wrong on the part of the courts below to make the appellant himself pay for the excess expenditure involved in the proposal."

(C) The Supreme Court did not consider the question whether an Official Trustee is bound to seek the permission of the Court before filing legal proceedings. The Supreme Court obviously considered a case under section 28(b) of the Official Trustees Act which provides that an Official Trustee may, incur expenditure with the sanction of the SRP 37/87 OSWP1469.09.doc High Court on such religious, charitable and other objects and on such improvements as may be reasonable and proper in the case of such property. Thus, section 28(b) of the Official Trustees Act expressly requires the Official Trustee to seek the sanction of the High Court while incurring such expenditure. Indeed, section 28(b) militates against Mr. Chinoy's submission for it indicates that where the Legislature

required the Official Trustee to seek the sanction of the High Court, it provided for the same expressly in the Act.

47. Even the orders of this Court appointing the Official Trustee did not mandate his obtaining the permissions of the Court for filing legal proceedings.

48. The Official Trustee was appointed by an order of this Court dated 4th October, 1927 read with an order dated 10th October, 1927.

By the said orders, the Official Trustee was appointed as the sole trustee of the temple and of the said properties. The order vested the temple and the property in the Official Trustee with power to manage the same and recover the rents and profits thereof and to apply the SRP 38/87 OSWP1469.09.doc same and the temple funds for the purpose of the temple and of the worship to be carried on therein. The orders directed the Official Trustee to incur certain expenses and make certain payments. The orders, however, did not require him to seek the permission of the Court before instituting legal proceedings.

49. In any event, even assuming that an Official Trustee is bound to seek the permission of the Court before filing legal proceedings, there is nothing that indicates that he must do so before filing the proceedings. Obtaining the permission of the Court to file proceedings is not a condition precedent to doing so. There is nothing that prevents an Official Trustee from seeking permission later, i.e., after filing the proceedings. It would always be open to the Official Trustee to seek permission of the Court subsequently. In other words, even if the proceedings are filed without the permission of the Court, they would not be void for that reason. The Court would not lack inherent jurisdiction to entertain proceedings filed by an Official Trustee without the permission of the Court even assuming that such permission was required.

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Had we accepted Mr. Chinoy's submission we would, in any event, have permitted the Official Trustee to seek the sanction of the Court before proceeding to hear the writ petition. However, as we have not accepted Mr. Chinoy's submission, it is not necessary to adjourn the hearing of this writ petition in order to enable the Official Trustee to seek permission.

50. The preliminary objection is, therefore, rejected. The Writ Petition is maintainable.

51. Mr. Hakani submitted that the authorities considered the developer's application and granted the permission, NOC and approval illegally as the Official Trustee had revoked and cancelled the POA.

The POA was admittedly filed by the developer before MHADA and the Municipal Corporation. Relying upon clause 15 of the POA, Mr. Hakani submitted that the developer was entitled to obtain the consent of the tenants and occupants only with the prior approval of the Official Trustee. The developer had not obtained the approval of the Official Trustee. Therefore, the approval of the plans based on the SRP 40/87 OSWP1469.09.doc POA and based on the consents obtained by the developer from the tenants and occupants is illegal, null and void. He further submitted that the plans are not binding on the Official Trustee as the same were approved without the authority of the Official Trustee on account of the POA having been withdrawn / cancelled by the said notice dated 19th March, 1998. The developer had not taken any steps to challenge the revocation of the POA. Nor had the developer obtained a fresh POA. The authorities, including MHADA, the Municipal Corporation and MBR&RB were bound to follow the directions of the owner of the trust property. They were not entitled to act on the basis of the proposals submitted by the Constituted Attorney as the POA in favour of the Constituted Attorney had been revoked. He also relied upon the observations of the learned single Judge in paragraph 5 of the order dated 17th April, 2003, in Contempt Petition No.48 of 2002 to the effect that the developer was obliged to assail the revocation of the POA and that it was not enough for it to merely assert that the POA was still operating and binding on the Official Trustee inspite of the revocation thereof.

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52. Mr. Hakani's reliance upon the observations of the learned single Judge in the order dated 17th April, 2003, is not well founded.

These observations were made in the context of a Contempt Petition.

This is clear from the observation that the developer's argument that if the Official Trustee could not have revoked or cancelled the POA was to be accepted it would entail a piquant situation requiring this Court to examine the correctness or otherwise of that action which cannot be the scope of contempt jurisdiction. The present writ petition is filed by the Official Trustee. If it is found that the revocation of the POA was illegal and contrary to the orders of this Court, the developer cannot be prejudiced merely on account of the revocation. If the authorities act on to POA, as they have, it would be for the Official Trustee to adopt proceedings to restrain them from doing so which he has by this petition. It is then for this Court to see if the revocation is legal or not. We now proceed to do so.

53. We set out clause 5 of the minutes of the order in terms whereof the order dated 8th August, 1997, was passed disposing Trust Petition No.5 of 1995. Clause 5 provided that the Official Trustee would grant SRP 42/87 OSWP1469.09.doc a POA in favour of the developer's Director Bhupesh Jain for the purpose of negotiating with and obtaining consent agreements from tenants and for

putting up a proposal for availing the developable FSI in the form of development right certificates in respect of the property.

This was, therefore, not a POA granted by the Official Trustee voluntarily. It was granted pursuant to the order of the Court. It must be remembered that the word "settlement" in the order dated 8th August, 1997, was corrected to read "minutes of order" by the order dated 20th November, 1997. Further, in the recital to the POA, the Official Trustee stated : "I am required to grant a POA....." and "I am, accordingly, executing these presents .....". Thus, the POA was issued pursuant to the orders of this Court dated 8th August, 1997.

54. Clause 3 of the POA permitted the developer, inter-alia, to negotiate arrangements and agreements with the tenants for the purpose of repair/reconstruction of the structure with a view to enable the obtaining of the balance FSI by way of TDR FSI and development right certificates. The first part of clause 15 of the POA relied upon by Mr. Hakani is identical to clause 3. It is important to note that clause SRP 43/87 OSWP1469.09.doc 3 does not require the developer to obtain the prior approval of the Official Trustee in respect of the power conferred upon it therein. In fact, clause 5 of the Minutes of Order dated 8th August, 1997, which required the Constituted Attorney to grant a POA in favour of the developer for the said purposes did not require the developers to obtain the prior approval of the Official Trustee for the activities mentioned in clause 3 of the POA. Further, by clause 16 of the POA, the Official Trustee not only agreed to do and perform all acts, deeds, matters and things necessary for the aforesaid purposes, but also agreed to ratify and confirm whatever the developer lawfully does. If, therefore, the applications for redevelopment were made in compliance with the orders of this Court, the Official Trustee would be bound to ratify the same.

55. It is necessary to read clause 3 alongwith clause 15 which was relied upon by Mr. Hakani. The requirement of prior approval of the Official Trustee in clause 15 obviously relates only to the developer obtaining the development right certificates for the property stands in the name of the Official Trustee and not in the name of the developer.

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This approval obviously cannot be illegal or even unreasonably withheld for the order dated 8th August, 1997, and in particular clause 2 thereof required the Official Trustee to make available to the Official Trustee the FSI potential in respect of the said property by way of transfer of TDR certificates.

However, in view of clause 15 the "prior approval of the Official Trustee" is mandatory "for obtaining Development Registration Certificates in respect of the balance FSI available in respect of the said property". Thus, the authorities would be entitled to process the developer's application for the

DRCs subject to the prior approval of the Official Trustee. The authorities cannot decide whether the Official Trustee has rightly withheld the approval or not.

That would depend upon the result of the proceedings to be adopted in a Court or Tribunal of competent jurisdiction. The rights and contentions of the parties in this regard are kept open.

56. The POA would stand revoked only upon the issuance of the development right certificates in respect of the TDR FSI and the transfer of the said certificates in favour of the developer and/or its SRP 45/87 OSWP1469.09.doc nominee. That stage admittedly had not been reached when the POA was purportedly revoked. The developer was, therefore, entitled to act upon the POA and the authorities were entitled to process the applications and proposals of the developer for carrying on the development on the basis that the developer held a valid and subsisting POA.

57. Mr. Hakani submitted that the approval of the plans and the grant of NOC / permissions under Regulation 33(7) of the Development Control Regulations, 1991, are in contravention of CRZ Notification dated 19th February, 1991. He submitted that the property is in the Bhan Ganga precinct (temples and tank) and is located within the Coastal Regulation Zone-II as per the CRZ Notification issued by the Ministry of Environment on 19th February, 1991. On 19th February, 1991, Development Control Rules of 1967 were in existence and, therefore, the development activity in respect of the property is governed by the 1967 DCR. Thus, according to him, the DC Regulations for Greater Mumbai of 1991 do not apply to the property. Hence, the processing of the plans under Regulation 33(7) SRP 46/87 OSWP1469.09.doc of the 1991 DCR is illegal. In this regard, he relied upon the judgment of the Supreme Court in Suresh Estates Pvt. Ltd. & Ors. v. Municipal Corporation of Greater Mumbai & Ors. (2007) 14 SCC 439. The Supreme Court held :

> "16. The contention advanced by the learned counsel for the respondents that the DC Rules, 1967 would not apply to the development permission sought for by the appellants, but the Development Control Regulations of 1991 would apply, cannot be accepted. It is not in dispute that on 19-2-1991 MoEF issued a notification under the provisions of the Environment (Protection) Act, 1986 regulating building activities in coastal zones which is known as coastal regulation zone notification. The said notification classifies the areas within 500 metres of high tide land into CRZ I, CRZ II, CRZ III and CRZ IV categories. It is also not in dispute that the plot belonging to the appellants falls within CRZ II category. The notification inter alia provides that buildings shall be permitted only on the landward side of the existing road and buildings permitted at landward side of the existing and proposed roads shall be subject to the existing local town and country planning regulations including the existing norms of floor space index/floor area ration.
>
> 17. It is true that the DC Regulations for Greater Bombay, 1991 were notified on 20-2-1991 and came into force with effect from 25-3-1991. However, a doubt was raised whether the existing DC Regulations for Coastal Regulation Zone II (CRZ II) would mean the DC Rules, 1967 or Draft Development Control Regulations, 1989 which ultimately culminated into the DC Regulations, 1991 and, therefore, MoEF was

consulted. MoEF issued a clarification on 8-9-1998 stating that the DC Regulations as existing on 19-2-

1991 would apply for all developmental activities in SRP 47/87 OSWP1469.09.doc Coastal Regulation Zone including CRZ II. MoEF also issued clarification on 18-8-2006 reiterating that the existing DC Regulations applicable to CRZ II areas in Mumbai would mean the DC Rules, 1967. Even the Municipal Corporation in its letter dated 31-12-2005 addressed to the Principal Secretary, Urban Development Department, Government of Maharashtra, had expressed the view that the application made by the appellants for construction of a luxury hotel with additional FSI under the DC Rules, 1967 be granted under Rule 10(2) of the Rules.

.....

19. The word "existing" as employed in the CRZ notifi- cation means the town and country planning regulations in force as on 19-2-1991. If it had been the intention that the town and country planning regulations as in force on the date of the grant of permission for building would apply to the building activity, it would have been so specified. It is well to remember that CRZ notification refers also to structures which were in existence on the date of the notification. What is stressed by the notification is that irrespective of what local town and country planning regulations may provide in future the building activity permitted under the notification shall be frozen to the laws and norms existing on the date of the notifi- cation.

20. On 2-2-1991 when the CRZ notification was issued, the only building regulations that were existing in city of Mumbai, were the DC Rules, 1967. In view of the con-

tents of CRZ II notification issued under the provisions of the Environment (Protection) Act which has the effect of prevailing over the provisions of other Acts, the appli- cation submitted by the appellants to develop the plot belonging to them would be governed by the provisions of the DC Rules, 1967 and not by the draft development regulations of 1989 which came into force on 20-2-1991 in the form of the Development Control Regulations for Greater Bombay, 1991."

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58. While this matter was still being heard, another Division Bench of this Court considered an issue similar to the one raised before us and decided the same by a judgment dated 21st October, 2013, in the case of M/s. TCI Industries Limited & Anr. v. State of Maharashtra & Ors., Writ Petition No.1244 of 2012. The Division Bench considered the judgment of the Supreme Court in Suresh Estates. The Division Bench held :

> "28. In Suresh Estates, the Supreme Court rejected the submission that the 1967 DC Rules would not apply to development projects in CRZ-II areas. It held that the word "existing" in the CRZ Notification was a reference to the town and country planning regulations in force as on 19th February 1991, not on the date of grant of the permission. The CRZ Notification explicitly refers to "existing" structures and roads and, therefore, all building activity permitted under the notification is, in the words of the Supreme Court, "frozen to the laws and norms existing on the date of the notification".
>
> Since, on that date, 19th February 1991, the only building regulations in existence were the 1967 DC Rules, and since the CRZ Notification has a wide non- obstante clause, development applications for CRZ-II plots would be governed by the 1967 DC Regulations, not the 1989 draft regulations. We may note here that the Supreme Court upheld the decision of this Court in Overseas Chinese Cuisine (India) (P) Ltd v Municipal Corporation of Greater Mumbai to the same effect as regards the applicability of the 1967 DC Rules to CRZ-

II lands. But the Supreme Court was also unambiguous in saying, in para 32, that the CRZ Notification has only frozen the FSI/FAR (Floor Area Ratio) norms. In Suresh Estates, the plot in question was under a reservation for a public purpose, viz., a playground for SRP 49/87 OSWP1469.09.doc a secondary school. Would the CRZ Notification have the effect of ousting the operation of Section 127 of the MRTP Act, which deals with lapsing of reservations?

The Supreme Court said that it could not, and Section 127 would continue to operate since all that the CRZ Notification does is to freeze FSI/FAR norms and pin these to the standards of the 1967 DC Rules. Thus, in Suresh Estates, the Supreme Court explicitly recognized the protective and preservative objectives of the CRZ Notification. We must note here that the decision of this Court in Overseas Chinese Cuisine is of 2000. It pre- dates TCI's first application of 27th July 2004 to the State Government to be exempted from the operation of DCR 58. It also pre-dates TCI's development application of 5th September 2006 under the 1991 DC Regulations. It seems to us entirely unlikely that TCI was, as it claims, "unaware" of the legal situation as regards the CRZ Notification and the 1967 DC Rules till the decision in Suresh Estates. There is no manner of doubt that TCI's first application of 27th July 2004 was on legal advice. Yet it made no claim invoking the applicability of the 1967 DC Rules although, four years earlier, this Court in Overseas Chinese Cuisine had already pronounced on the matter; and the decision in Suresh Estates was still three years in the future.

29. Mr. Chinoy's argument today is not restricted to the grant or refusal of additional FSI, though the Petitioners' application under the 1967 DC Rules is for an FSI as high as 7 for the hotel and 2.45 for the residential complex. What he suggests is that even those aspects of the 1991 DC Regulations that are unrelated to the quantum of FSI that may be granted must be completely excised from consideration. This creates something more than an anomaly; it creates a legislative singularity, a statutory black hole as it were, from whose gravity nothing escapes. Were this to be accepted there then would be within the Island City isolated islands or stretches where not a single aspect of

current town planning regulations would apply. Present-day needs and considerations would have to be entirely ignored.

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CRZ-II plots would have to be treated as standing outside the city, stripped of all context, physical, geographic and architectural and social. In a city surrounded on three sides by the sea, the consequences could well be catastrophic. It is difficult to accept the argument, even by necessary implication, that this is the result the Supreme Court intended in Suresh Estates. We understand that decision to mean that the intent of the CRZ Notification was to freeze and restrict development, not to foster it at the cost of sound and balanced town and country planning. It is for this reason that, while saying that it is the 1967 DC Rules that would apply, the Supreme Court later in the same decision in terms said that the CRZ Notification has "only frozen the FSI/FAR norms." This is plainly evident from the phrasing of the 1991 CRZ Notification itself, the relevant portions of which read:

> (i) Buildings shall be permitted only on the landward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) or on the landward side of existing authorised structures. Buildings permitted on the landward side of the existing and proposed roads/existing authorised structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor Space Index/Floor Area Ratio.
>
> (ii) Reconstruction of the authorised buildings to be permitted subject to the existing FSI/FAR norms and without change in the existing use.

30. The word "including" in the first clause must, we believe, necessarily receive a restricted meaning if the purposes and objectives of the CRZ Notification are to be served, and if the legislative anomaly we have noticed above is to be avoided. This is the only interpretation that serves both these objectives while retaining consistency with the decision in Suresh SRP 51/87 OSWP1469.09.doc Estates. The alternative is a complete ouster of DCR 58 from its application to the Mukesh Mills lands. It is, in our view, not possible to accept such an interpretation;

and to do so would be to attribute to the Suresh Estates decision things it does not say and could not have intended. We have earlier noted the wider social objectives of DCR 58, and, too, the very wide gamut of factors that any development plan must attempt to address. Every one of these objectives would be completely lost if we were to wholly exclude the operation of DCR 58. At the cost of repetition, we must note that DCR 58 does not itself fix any particular FSI. It provides for the apportionment or utilization of that FSI. Whether that FSI is fixed under the 1967 DC Rules or the

1991 DC Regulations is immaterial to the operation of DCR 58 generally and to DCR 58(8) and 58(9) in particular. In this context, two aspects must be emphasized. First, that the demands of the Monitoring Committee are not directed to FSI or the nature or type of the proposed development at all. They are directed to the achievement of social welfare objectives, including the rehabilitation of workers, the settlement of their dues, the issuance of service certificates and so on. TCI itself accepted this when it made its application on 27th July 2004 for exemption from DCR 58, for the only basis of that application was its fulfilment of its statutory obligations under industrial and labour law, not the ouster of the entirety of the 1991 DC Regulations. All these objectives would be set at naught were we to hold that DCR 58 is wholly inapplicable to the Mukesh Mills lands. Second, there is a conceptual and qualitative difference between saying that FSI shall remain fixed at the then prevalent norms of 1967, and saying that current exigencies and needs must therefore be overlooked. This argument assumes that there is a complete stasis in the city's growth and development since 1967 or, at any rate, that the CRZ Notification blindly so presumes. The CRZ Notification does nothing of the sort. It seeks only to restrict development, and that, too, in certain areas, in order to attain its goal of coastal environmental protection.

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. . . . . .

34. In our view, Mr. Bharucha, Learned Senior Counsel appearing for the MCGM, and Mr. Saiyed, Learned Counsel for the 5th Respondent workers' organisation, the GKKNKS, are therefore justified in contending that there can be no such complete ouster of DCR 58. The issue in Suresh Estates, as they point out, was as to the applicable law for development. The Supreme Court was not called upon to decide questions of land surrender or housing; and it is, therefore, not permissible to attribute to Suresh Estates matters that it did not decide. Both Mr. Bharucha and Mr. Saiyed were at pains to point out that the Petitioners' argument, if accepted, would result in a manifest social and welfare injustice and imbalance, in that the Petitioners would then claim, and possibly get, a huge FSI but, at the same time, would evade the responsibility to surrender land for public purposes such as housing and open spaces; and would also not be subjected to the discipline of DCR 58(8) and 58(9), both of which seek to achieve, through the mechanism of town planning, objectives of social and spatial justice. In its fourth impugned order dated 11th July 2013, which we have read with the assistance of both Mr. Bharucha and Mr. Saiyed, the Monitoring Committee sets out briefly the historical background of the mill lands and DCR 58 and notes, in our view correctly, that DCR 58 as amended in 2001 has two aspects: the first dealing with what the Monitoring Committee calls the "nitty gritty of development/re- development of the mills and their lands" and the other with the protection of workers' rights to housing, dues to workers, etc. The Monitoring Committee is a statutory "watchdog" to ensure that the proceeds from development and re-development are utilized for the benefit of workers. It also notes that the operation of the CRZ Notification is unrelated to ownership of the textile mill lands, questions of surrender of land, protection of workers and other

matters that lie within the ambit of DCR 58. Therefore, the Monitoring Committee notes, the development of the Mukesh Mills property will be in accordance with the 1967 DC Rules and the 1991/2011 SRP 53/87 OSWP1469.09.doc CRZ Notification, but this is not inconsistent with the amended DCR 58 under which the Monitoring Committee must oversee questions, among others, of surrender of land for public purposes to government agencies and authorities, the utilization and disbursement of funds accruing from such re-

development, and the protection of workers' rights as to their housing and dues. The view taken by the Monitoring Committee is, we find, entirely consistent with our own in this matter, and cannot be faulted. It correctly balances the demands of the CRZ Notification with the objectives of DCR 58."

59. The result of the judgment of the Division Bench is that Regulation 33(7) of the 1991 DCR would operate. However, the cap of FSI would not increase as per Regulation 33(7). Mr. Hakani submitted that the judgment of the Division Bench is not good law and has wrongly construed the judgment of the Supreme Court in Suresh Estates. We do not agree. The judgment is binding on us. It is not open to us to take a different view. The construction and interpretation of the Division Bench of the judgment of the Supreme Court in Suresh Estates is also binding on us even if we assume the same to be incorrect, as suggested by Mr. Hakani.

60. Mr. Hakani did suggest that the price of Rs.1,36,00,000/- for FSI in excess of 2294 square feet was extremely low and detrimental SRP 54/87 OSWP1469.09.doc to the interest of the trust. During the course of arguments, he appeared to agree that this issue may not be open in view of the previous orders of this Court. We are, however, not clear as to whether he conceded this point. Moreover, the petitioner in Writ Petition (Lodg.) No.2572 of 2012 contended that the price of Rs.1,36,00,000/- was extremely low and that the Official Trustee ought not to be bound by the same. In view thereof, it is necessary that we decide this issue.

61. Unfortunately it is not open to us to go into this aspect in view of the orders passed by this Court in the previous proceedings. We hasten to add that we do not for a moment suggest that the price of Rs.1,36,00,000/- for 14000 square feet of FSI was remotely near the market price even in August, 1997. It would be, to say the least, highly possible and arguable that absent any special circumstances, Rs.1,36,00,000/- was a grossly inadequate consideration for 14000 square feet FSI even in the year 1997. It works out to a little more than Rs.1,000/- per square foot of FSI.

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62. It is not open to us to consider this aspect in view of the previous orders of this Court which have attained finality. Apart from the fact that these orders passed in other proceedings have attained finality, some of them have been passed by Division Benches of this Court and would, in any event,

therefore, be binding on us. For instance, the transaction was approved by the order dated 8th August, 1997 of the Division Bench in Trust Petition No.5 of 1995 with the observation that the terms safeguard the interest of the temple property. Further, the Official Trustee's SLP against this order was dismissed by an order of the Supreme Court dated 27th July, 1998.

Absent liberty from the Supreme Court, it is not open to this Court to go into this issue at least in this Writ Petition. It is not necessary to decide whether the Official Trustee can raise this issue in any other proceedings.

63. It is, however, expressly clarified that we have not gone into this question as, in our opinion, it has attained finality by virtue of the orders of this Court and not because we have come to the conclusion that Mr. Hakani's contention on merits in this regard is unfounded.

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64. The issue whether the developer's right is restricted to 2294 square feet FSI as contended by Mr. Hakani, has also attained finality as far as this Court is concerned.

65(A). As per clause 2 of the order dated 8th August, 1997, in Trust Petition No.5 of 1995, in consideration of the sum of Rs.1,36,00,000/-, the Official Trustee was to make available to the petitioner therein, i.e., respondent No.4 herein - the developer, the FSI potential in respect of the said property by way of transfer of TDR certificates. The Official Trustee executed the POA on 8th September, 1997. The Special Leave Petition filed by the Official Trustee against the order dated 8th August, 1997, was dismissed by the Supreme Court on 27th July, 1998.

(B) On 27th April, 2004, the Official Trustee filed Trust Petition No.5 of 2004, in which he, inter-alia, sought an order that the developer was entitled to use only FSI of 2294 square feet by way of TDR and an order directing the developer not to use FSI more than SRP 57/87 OSWP1469.09.doc 2294 square feet by way of TDR in respect of the property. The issue as to the extent of the FSI that the developer was entitled to was raised in the affidavits.

(C) Trust Petition No.5 of 2004 was disposed of by an order dated 9th May, 2005. The learned Judge, inter-alia, held that the Official Trustee was aware that what was being conveyed to the developer was not just 2294 square feet FSI but the entire potential FSI of the said property which included the temple and the chawl. The learned Judge held that it was too late in the day for the Official Trustee to seek a clarification of the order dated 8th August, 1997.

By an order and judgment dated 10th October, 2005, a Division Bench dismissed the Official Trustee's appeal against the order dated 9th May, 2005. The Division Bench held that clauses 2 and 5 of the minutes of order dated 8th August, 1997, made it abundantly clear that what was conveyed was the FSI potential in the form of development right certificates (DRC). What was made available under the minutes of order was the FSI potential.

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66. In view of the order of the learned single Judge and of the Division Bench in Trust Petition No.5 of 2004, the issue as to the extent of FSI stands concluded. There is no pending application to challenge or to revoke, recall or cancel the order dated 8th August, 1997. We are not entitled in these proceedings to consider whether the developer was entitled only to 2294 square feet FSI. We are bound by the orders of this Court.

It is clarified, however, that we have not quantified the FSI potential. That is for the appropriate authorities to do. While doing so, they must also take into consideration the observation in the various orders passed by this Court, including this order.

68. Mr. Chinoy submitted that the challenge to the plans and the NOC issued by the authorities suffers from gross delay and laches. He further submitted that in view of the previous proceedings and the orders passed therein, it is not open to the Official Trustee to raise these contentions. The contentions raised in this Writ Petition were, according to him, raised in the previous proceedings and in any event, SRP 59/87 OSWP1469.09.doc could have been raised therein. Those proceedings stand concluded by the orders passed therein and which orders have attained finality.

The Official Trustee ought not to be permitted to keep raising the same or even fresh grounds, especially after such delay.

69. It would be convenient first to note Mr. Hakani's submissions including regarding the applicability of Regulation 33(7) of the 1991 DC Regulations as the facts in respect of both the submissions are common to a large extent.

70. Mr. Hakani's submissions are as follows. Even assuming that the 1991 DCR applies, the approval of the plans under regulation 33(7) of 1991 DC Regulation is beyond the scope of the order dated 8th August, 1997, and the POA. Regulation 67 of the 1991 DCR is not applicable in the manner in which the same is sought to be applied and is contrary to the order dated 8th August, 1997. When the order dated 8th August, 1997, was passed TDR on heritage property could be granted only on the basis of Regulation 67(6). The regulation does not necessarily require redevelopment as envisaged under Regulation SRP 60/87 OSWP1469.09.doc 33(7). The scheme of granting and utilization of TDR is

different under Regulation 67(6) and Regulation 33(7). Whereas under Regulation 67(6) unconsumed FSI can be consumed in the scheme from which it originated, under Appendix III, Regulation 6 TDR can be utilized only in the suburbs. The Maharashtra Heritage Conservative Committee had permitted utilization of the TDR in the same ward. The TDR, however, was to be granted only as per Regulation 67(6). The development as sought was never intended as per the order dated 8th August, 1997. What was contemplated by the order dated 8th August, 1997, was only the sale of the benefit of potential FSI / TDR in accordance with DCR 67. For making available the benefit of TDR, the actual reconstruction or redevelopment is not required.

DC Regulation 67 reads :

> "67. Grant of Transferrable Development Rights in cases of loss of Development Rights - if any application for development is refused under this Regulation or conditions are imposed while permitting such development which deprive the owner / lessee of any unconsumed FSI the said owner / lessee shall be compensated by grant of Development Rights Certificate (hereinafter referred to as 'TDR" of the nature set out in Development Control Regulation No.34 and Appendix VIIA and as may be prescribed by Government from time to time. The TDR from heritage buildings in the SRP 61/87 OSWP1469.09.doc island city may also be consumed in the same ward from which it originated. The extent of TDR Certificates to be granted may be determined by the Commissioner, if required in consultation with the Heritage Conservation Committee and will not not be awarded unless sanctioned by Government."

The availability of the FSI / TDR can also be on the basis of disapproval of the plans / proposals and, therefore, the approval of the plan under Regulation 33(7) is in violation of Regulation 67 of the DCR 1991 and also of the order dated 8th August, 1997 and the POA.

The plans under Regulation 67 cannot be approved except for repairs and reconstruction and not for redevelopment. Whereas "reconstruction" implies re-erecting the structure exactly as it was, without any change, the term "redevelopment" involves an erection of a new structure with a completely new plan, dimensions etc.

71. Mr. Hakani's submission could have been and some of them were, in fact, raised by the Official Trustee in previous proceedings, especially in Trust Petition No.5 of 2004 which was filed on 27th April, 2004. We have referred to the reliefs sought in Trust Petition No.5 of 2004. The Official Trustee had sought an order that the developer was entitled to use only FSI of 2294 square feet by way of SRP 62/87 OSWP1469.09.doc TDR; that the developer was not entitled to demolish any chawl or any structure on the said property; an order that the respondent is not entitled to any TDR in respect of the property except FSI of 2294 square feet; an order directing the developer not to use any FSI more than 2294 square feet by way of TDR; an order not to demolish any chawl or any structure on the property; an order that the developer is not to be allotted any additional TDR in respect of the property except FSI of 2294 square feet; an order directing the developer not to use or utilize or put up any construction on the property and an order that the Official Trustee be allowed

to dispose of the balance FSI by way of TDR in respect of the property, i.e., TDR in excess of 2294 square feet.

72. It is important to note the facts that transpired prior to 27th April, 2004, i.e., prior to the filing of the Trust Petition No.5 of 2004 and also the facts that transpired prior to the orders dated 9th March, 2005 of the learned single Judge of this Court disposing of Trust Petition No.5 of 2004 and the order of the Division Bench dated 10th October, 2005. The importance of the facts that preceded the filing of SRP 63/87 OSWP1469.09.doc the Trust petition and the orders thereon is that the developer had by then made the applications; submitted the proposals to the various authorities, including the Municipal Corporation, MHADA, Heritage Committee and the MBR&RB and the authorities had processed the same. Even if the authorities had not processed the same it would make no difference for neither the learned single Judge nor the Division Bench interfered with the same in any manner. It is sufficient to collate briefly the relevant facts that preceded the filing of the Trust Petition on 27th April, 2004.

73. The applications to the MBR&RB are as follows.

On 15th September, 1997, the developer's architect applied for permission to redevelop the Trust property. On 26th November, 1997, MBR&RB requested the developer to furnish certain information. It is important to note that the information sought, included whether the developer would form a co-operative society alongwith minimum 70% old occupants of the existing building before occupation of the reconstructed building. The letter also required all the occupants of the old cessed building to be re-housed in the newly constructed SRP 64/87 OSWP1469.09.doc building and a suitable agreement is made on ownership basis and submitted to the Board with at least 70% of the occupiers of the building. On 30th January, 2002, the developer submitted a fresh proposal for redevelopment. In view of the Official Trustee's communication of the revocation of the POA, MBR&RB by a letter dated 21st February, 2002, informed the developer that it's request for NOC for redevelopment could not be considered. Thus, by the time Trust Petition No.5 of 2004 was filed by the Official Trustee on 27th April, 2004, the applications before the MBR&RB were already in place and were being processed. MBR&RB stayed the process in view of the Official Trustee's contentions.

However, after the Trust Petition was dismissed by the learned single Judge and the appeal against the order was dismissed by the Division Bench on 10th October, 2005, MBR&RB proceeded further.

The developer, by its letter dated 1st December, 2005, forwarded the orders to MBR&RB. On 24th March, 2006, MBR&RB called upon the developer to furnish a bond indemnifying it against any adverse claim if the stay on its NOC was vacated. On 10th April, 2006, the developer submitted an indemnity bond. Ultimately, on 14th June, SRP 65/87 OSWP1469.09.doc 2006, MBR&RB informed the developer that the stay on the NOC was vacated in the light of the order dated 10th October, 2005, and permitted the developer to go ahead with the re-development work.

74. Thus, these permissions were granted by MBR&RB in respect of the proposals by applications which had been made prior to the filing of the Trust Petition. In view of the orders of this Court in Trust Petition No.5 of 2004, it is not open us to reconsider the issues which had been raised and/or

which ought to have been raised by the Official Trustee in Trust Petition No.5 of 2004.

75. On 21st March, 1998, the Heritage Committee of the Municipal Corporation conveyed its no objection to the proposed development / reconstruction as per the plans submitted by the developer subject to further scrutiny and approval by the Building Proposal Department.

Thus, the NOC from the Heritage Committee was also obtained prior to the filing of the Trust Petition. For the reasons mentioned with respect to the MBR&RB's permission, it is not open to us to reconsider the validity of the NOC.

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76. On 13th August, 1999, the Urban Development Department, Government of Maharashtra informed the Municipal Commissioner that it had no objection to the waiver of the condition requiring handing over of a percentage of the floor space to Bombay Housing Area Development Board under Regulation 4 of DCR Appendix III provided each tenant was accommodated with a minimum built up area of 225 square feet. The developer had submitted an application for grant of heritage TDR to the Municipal Corporation. On 18th February, 2000, the Municipal Corporation informed the Official Trustee that the same could not be processed in view of the Power of Attorney being revoked. The plans were sanctioned by the Municipal Corporation on 7th February, 2003. On 7th February, 2003, the Municipal Corporation issued an IOD in favour of the developer and sanctioned the developer's plans for re-development. Trust Petition No.5 of 2004 was filed on 27th April, 2004 and was disposed of by the order of the learned single Judge dated 9th March, 2005 which order was confirmed by the order of the Division Bench dated 10th October, 2005. Thus, the facts regarding the issuance of IOD and the SRP 67/87 OSWP1469.09.doc sanctioning of the plans by the Municipal Corporation were before this Court in Trust Petition No.5 of 2004.

77. Similarly, MHADA issued the NOC on 6th February, 2002.

78. We have summarized the proposals and applications submitted by the developer to MBR&RB, the Heritage Committee of the Municipal Corporation, the Urban Development Department of the Government of Maharashtra and the response of these authorities.

The authorities had granted the applications, albeit subject to certain terms and conditions. The importance of this is that all these facts were before the Court which decided Trust Petition No.5 of 2004.

Further, most of them and especially the NOC dated 6th February, 2002, issued by MHADA were referred to in the Trust Petition itself.

It is now important to note that most of the contentions raised by Mr. Hakani in respect of the same were raised in the Trust Petition. We will refer to only some of the averments in the Trust Petition.

79. The relevant averments in Trust Petition No.5 of 2004 are as follows :

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The developer was entitled to FSI of only 2294 square feet "and nothing more". The POA did not reflect the true position and the Official Trustee, therefore, informed the developer that it had purchased only 2294 square feet of FSI. The developer was not entitled to make use of the POA as it was wider than what was contemplated in the order dated 8th August, 1997, and had been revoked. The Official Trustee had learnt that the developer was intending to submit plans for obtaining FSI of more than 2294 square feet. On the basis of the ad-interim order in Contempt Petition No.48 of 2002, MBR&RB had issued the said NOC dated 6th June, 2002 and granted FSI of 14000.13 square meters. However, the ad-interim order had been set aside by the Division Bench subsequently. The developer had submitted a proposal for the redevelopment of the property by demolishing the existing chawl structure and building a new structure which was contrary to the order under which the temple and the chawl would remain the property of the Official Trustee and that the developer would be entitled to only FSI of 2294 square feet by way of TDR and that the developer was not entitled to demolish the said chawl without the prior permission of the Official Trustee or at SRP 69/87 OSWP1469.09.doc all. The developer had shown bogus tenancies. The proposals and the grant thereof were contrary, inter-alia, to the order dated 8th August, 1997.

Accordingly, the Official Trustee sought various orders and directions, including that the developer was entitled only to FSI of 2294 square feet by way of TDR in respect of the property and nothing more and an order that the developer is not entitled to demolish any chawl or any structure on the property. The Official Trustee sought an order directing the developer not to use FSI of more than 2294 square feet TDR; not to demolish the chawl or any structure not to use or utilize or put up any construction on the property and for an order permitting the Official Trustee to dispose of the balance FSI by way of TDR.

80. As we mentioned earlier, the Trust Petition was disposed of by the learned single judge by the order dated 9th March, 2005 and the order of the Division Bench dated 10th October, 2005, rejecting the contentions of the Official Trustee. The orders are binding on us. It is not possible for this Court to, in effect, disregard the decision of the SRP 70/87 OSWP1469.09.doc learned single Judge and of the Division Bench in Trust Petition No.5 of 2004.

81. These facts are also relevant while considering Mr. Chinoy's submission that this petition suffers from gross delay and laches. The writ petition was filed on 6th May, 2009, i.e., four years after the decision in the Trust Petition. The delay is aggravated by the fact that the contentions now sought to be raised were not even raised in the petition as it was originally filed. They were introduced by two amendments which were allowed on 29th November, 2010 and 30th October, 2012. In the petition, as originally filed, the Official Trustee only challenged the notice issued by MHADA under section 95-A. It is by the amendments that the Official Trustee also challenged the building plans, permissions/NOCs issued by respondent Nos.1, 2, 3 and 5 for the redevelopment of the property and sought orders restraining respondent No.5 from granting the developer any TDR certificates unless and until the actual area measurement was done of the plots.

In the petition, as it was originally filed, the Official Trustee SRP 71/87 OSWP1469.09.doc contended that the POA had been cancelled and that, therefore, the proposal submitted by the developer could not have been considered or sanctioned by the authorities concerned. Consequently, it was contended that the impugned notice under section 95A was illegal.

The only relief sought was for the cancellation of the notice under section 95A. By the first amendment, the Official Trustee introduced averments challenging the NOC issued by MHADA and the plans, permissions / NOCs granted by respondent Nos.1, 2, 3 and 5 for the redevelopment of the property and an order quashing and setting aside the orders and permissions granted by MHADA and MBR&RB under DCR 33(7) or any other DC Regulation for redevelopment or development of the property. The Official Trustee also sought an order directing respondent No.5 not to grant any TDR certificate to the developer unless and until the actual area measurement was done of C.S. No.113 and 1/113 and the illegalities and irregularities in the building plans and also the alleged development scheme under DCR 33(7)are removed. By the second amendment, the Official Trustee sought an order directing respondent No.5 not to issue any TDR certificate in favour of and in the name of the developer with a further SRP 72/87 OSWP1469.09.doc direction to respondent No.5 to issue such TDR certificates only in the name of the Official Trustee.

Thus, even as far as the pleadings are concerned, the only relief claimed in the petition as originally filed on 4th May, 2009, was in respect of the impugned notice under section 95-A. The main reliefs were claimed by the amendments which were granted only on 29th November, 2010 and 30th October, 2012. As stated herein above, by then, substantial part of the redevelopment had already commenced and it would have, in all probabilities, been completed but for the eighth occupant viz. the priest holding on to his tenement on behalf of the Official Trustee.

82. It is difficult to hold that DC Regulation 67 of the 1991 Regulations are inapplicable in view of the order dated 8th August, 1997, having attained finality. Clause 1 of the Minutes of Order specifically provides that the developer shall be entitled to avail of only the privilege of the FSI available in respect of the property, including in the form of TDR in accordance with the DC Regulation

67. Even the Special Leave Petition No.2883 of 1998, filed by the SRP 73/87 OSWP1469.09.doc Official Trustee against the order dated 8th August, 1997, was dismissed by the Supreme Court on

27th July, 1998. To uphold this contention would be contrary to the order dated 8th August, 1997 of the Division Bench of this Court and of the Supreme Court dated 27th July, 1998.

83. Mr. Hakani then submitted that the agreement to transfer the title to the property as contemplated by the MOU was given up and instead the Official Trustee and the developer agreed to the terms and conditions contained in the minutes of the order dated 8th August, 1997. In other words, the title to the property cannot vest in the developer. He submitted that the proposals and plans having been considered and processed under Regulation 33(7) diluted the rights of the Official Trustee by granting ownership rights to the tenants. He submitted that it would be compulsory under Regulation 33(7) to form a co-operative society and to transfer the ownership of the property to such society.

84. The apprehension is not well founded. Firstly, none of the SRP 74/87 OSWP1469.09.doc respondents contended that there is any transfer of ownership of the property in favour of the developer or the tenants. The occupants do not contend that the property vests or is liable to vest in them. The NOC granted also does not transfer or vest the title in the occupants.

Nor does it provide for the formation of a co-operative society.

MHADA has confirmed that there is no such vesting of title in the tenants. The title continues to vest in the Official Trustee. The developer also does not contend that the title vests in him or that he is either bound or entitled to transfer the title to any other person or persons, including the co-operative society.

85. Mr. Hakani relied upon the following note in Appendix III ""All the regulations / modifications mentioned above shall not be applicable to the areas which are affected by coastal regulations zone notification issued by Ministry of Environment dated 19th February, 1991 and orders issued from time to time."

Mr. Hakani submitted that in view of this note, the processing and approval of the impugned plans under Regulation 37 are contrary to law.

86. As we noted earlier, the issue regarding the validity of the plans SRP 75/87 OSWP1469.09.doc and the permissions granted were raised in Trust Petition No.5 of 2004. It is not open to the Official Trustee to keep raising different contentions in successive proceedings. In view of the previous orders of this Court, we find it difficult to entertain these contentions. It is, however, clarified that it is open to the authorities to take any steps in this regard. We do not, by this order, intend preventing them from doing so. Needless to say that if they do so, it would be subject to the rights and contentions of all the parties.

87. There is, however, one aspect of the matter which is of considerable importance directly relating to the rights of the Official Trustee. DCR 67 came into force from 21st April, 1995. Thus, when the order dated 8th August, 1997 was passed, DCR 67 was in force.

As on that date, under Regulation 67(6), an owner was entitled to unconsumed FSI. Regulation 33(7) was introduced in DCR 67 only with effect from 25th January, 1991 i.e. after the order dated 8th August, 1997. The property, admittedly, did not vest in the developer.

It continues to remain and vest in the Official Trustee. The important issue is whether the developer was entitled to the benefit of any SRP 76/87 OSWP1469.09.doc change in law after the date of the order dated 8th August, 1997, in respect of the quantum of FSI. We think not. The title to the property continues to remain and vests in the Official Trustee. There is nothing to indicate that the developer is entitled to the benefit of any change in law by virtue of which additional FSI is granted. The developer's right as to the quantum of FSI must stand frozen as on the date of the consent terms viz. 8th August, 1997. A view to the contrary would mean that the developer has a right in perpetuity to the benefit in the change of law regarding the quantum of FSI which cannot be the case.

88. Mr. Hakani submitted that the permissions were granted ignoring the building bye-laws read with DC Regulations of 1991. He submitted that the plan had been approved by the Municipal Corporation ignoring the terms and conditions of the Maharashtra Heritage Conservation Committee (MHCC) dated 21st March, 1998.

For instance, he submitted that the original foot-prints are to be maintained. He also submitted that the existing structure has been changed inasmuch as there are no common WCs meant for the devotees. He subsequently stated that common WCs were there, but SRP 77/87 OSWP1469.09.doc were shown at the wrong location in the plans. The original structure was a Dharamshala. Further, two small temples had not been shown in the plan.

89. Mr. Govilkar, the learned counsel appearing on behalf of the petitioner in Writ Petition No.2572 of 2012 adopted Mr. Hakani's submission and also submitted that parking facility is shown for 11 cars, which is not possible. He also submitted that the indications regarding the access to the car park are also in violation of the heritage provisions.

90. Firstly, these issues were and, in any event, could have been raised earlier, including in Trust Petition No.5 of 2004. Secondly, so long as the rights of the trust are not affected, we see no reason to exercise our jurisdiction under Article 226 in view of the gross delay and laches. By the time the writ petition was filed and the amendments in this regard were proposed, a substantial part of the work pursuant to the plans had already been completed. Thirdly, it is difficult for this court in a writ petition to determine these issues.

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Indeed, from the above facts it appears that some relaxation in this regard was granted by the authorities in view of the peculiar position of the structures and the plot. We had earlier referred to the NOC of the Heritage Committee which permitted a marginal modification regarding the maintenance of the original foot-prints. We are not inclined, in these circumstances, to order a demolition of the work that has already been carried out. The authorities are always at liberty to inspect the site, determine whether the construction is in accordance with the plans and permissions and to take suitable action, if necessary.

91. In any event, before issuing the DRC certificates, the authorities must satisfy themselves that the developer has not done anything which would jeopardize the financial interests of the trust in any manner whatsoever. If it is found that the developer has done anything which affects the rights of the trust after, of course, taking into consideration the benefits that the developer was entitled to under the order of this court, the authorities must withhold the certificates and/or recall or cancel the same. For instance, if as a result of any SRP 79/87 OSWP1469.09.doc construction, the trust is deprived the benefit of any FSI after 8th August, 1997, the authorities must take the said action. This must also be the case if the developer has utilized FSI in excess of what it was entitled to by virtue of the order dated 8th August, 1997. As we noted earlier, the developer is not entitled to the benefit of any increase in the FSI after 8th August, 1997.

92. Mr. Hakani then submitted that even assuming that Regulation 33(7) applied, the permissions were obtained on false representations and contrary to the provisions of Regulation 33(7). He submitted that Regulation 33(7) required the consent of 70% of the tenants. There are 8 tenants. The Poojari is in charge of one of them. He submitted that it could be demonstrated that the alleged consent of two other tenants was patently fraudulent. There were no such consents and the persons who had consented had no authority to issue such consent. If that be so, the permission under Regulation 33(7) could never have been granted as there was no consent of 70% of the tenants.

93. During the period 2000 to 2002, the developer entered into SRP 80/87 OSWP1469.09.doc agreements with seven tenants for the redevelopment of the chawl.

The MBR&RB certified the list of eight occupants, the eighth being the Poojari on behalf of the Trust who has not consented and, therefore, has been issued the impugned notice under section 95-A of the MHADA Act. There is no dispute in this respect as regards five occupants. However, five ought of eight would constitute only 60% of the occupants. The developers agreement with two occupants only has been challenged. The Official Trustee must succeed with respect to both for even if he fails with respect to one, it would amount to 75% of the occupants having jointed the redevelopment scheme which meets the requirement of 70%.

94. This ground of challenge was specifically taken by the Official Trustee in Trust Petition No.5 of 2004. In paragraph 35 of that petition, it was averred that the developer had shown bogus tenants in the premises. The correspondence in this regard was expressly referred to. For instance, by his letters, both dated 11th September, 2006, the Official Trustee informed MBR&RB that one Bhawarlal Shivratan Vyas and one Vilas Narayan Mahajan were neither tenants SRP 81/87 OSWP1469.09.doc nor occupants of room Nos.2 and 3 respectively as per his records.

This was one of the grounds on the basis of which the Official Trustee sought the reliefs in the Trust Petition which we referred to earlier, including an order that the developer is not entitled to demolish any chawl or any structure on the property and that the developer ought not to be permitted to utilize the property or put up any construction thereon. The Official Trustee seeks to raise the same contention in this writ petition as well. As we noted earlier, Trust Petition No.5 of 2004 was disposed of. The reliefs claimed in this regard were not granted by the learned single Judge. The order was confirmed by the Division Bench. In any event, the facts in this regard are disputed and complex. It would be difficult in a writ petition to adjudicate the same. The dispute in this regard was raised in the year 2002. It was agitated in the earlier proceedings. No reliefs on the basis thereof were granted. On the basis of the alleged consents, the permissions were granted and most of the construction was completed by the time the present writ petition was filed and by the time it was amended to introduce the new grounds of challenge. It would be unfair, not merely to the developer, but also to the other occupants to now restore SRP 82/87 OSWP1469.09.doc status quo, ante.

95. For instance, in the case of Parvatibai Vyas, it is contended that the consent is invalid for it was signed by her nephew. The said Bhawarlal Vyas was the nephew of Parvatibai Vyas. That he gave his irrevocable consent in respect of room No.2 is not denied. The Official Trustee denies that he, in fact, occupied room No.2. It is difficult in this petition and at this point of time to say that his assertion in the consent letter that he was in possession of the said premises is false.

96. There is a dispute, therefore, between the parties as to who is in possession. The letters addressed to the authorities are silent about the Official Trustee being in possession. It merely stated that as per the records, the said persons were not in occupation. It is for MHADA, while determining the list of eligible occupants, to determine these disputed questions of facts. We do not preclude MHADA from doing so even today.

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97. As regards room No.3, Mr. Hakani submitted that one Smt. Sushila Athawale was the tenant and not Mahajan who gave the consent. However, the said Sushila Athawale died before Mahajan gave his consent. Mahajan claimed to be a tenant. The suit filed in the Small Causes Court was dismissed in January, 2013. This, again, is a seriously disputed question which is for MHADA to decide in the first instance.

Indeed clause 11 of the NOC dated 6th June, 2002, issued by MHADA states that if it is subsequently found that the documents / information submitted with the application for NOC is incorrect or forged, the NOC would be cancelled and that the applicant would be responsible for the consequences. MHADA is, therefore, always at liberty to investigate the complaints, including by the

Official Trustee in this regards.

98. The contention that the NOC of the MHCC was required even after the approval under Regulation 33(7) and that the NOC of MHCC was obtained prior thereto suffers from gross delay and laches. The permission under Regulation 33(7) was obtained on 30th January, SRP 84/87 OSWP1469.09.doc 2002. The authorities permitted the construction thereafter. This objection was also raised and/or could have been raised in Trust Petition No.5 of 2004. Major part of the construction was completed thereafter. Any order would adversely affect the other occupants as well after this long lapse of time.

99. In this view of the matter, it is not necessary for us to consider Mr. Chinoy's submission in the alternative that in any event by the CRZ Notification of 2011, the previous position regarding the applicability of DC Regulation in force on 19th February, 1991, had been altered. He submitted that the CRZ Notification of 2011 stipulates that for development of old cessed / tenanted building under DCR No.33(7) the Town and Country Regulations in force on 6th January, 2011, i.e., DC Regulations of 1991 will be applicable. He contended that as a portion of the old cessed building / chawl admittedly even today remains and requires to be demolished for reconstruction, the developer would in any event be entitled to the benefit of the CRZ Notification of 2011. The only consequence being that the developer would require to formally submit revised / altered SRP 85/87 OSWP1469.09.doc plans.

We do not intend expressing any view on this aspect of the matter. We, however, wish to enter a caveat in this regard. Even assuming that the submission is well founded, the same would not entitle the developer to any FSI in excess of what the developer was entitled to as on 8th August, 1997. In other words, even assuming that the developer would be entitled to the benefit as alleged by Mr. Chinoy, in the alternative, the same would be restricted to the extent of the FSI that the developer was entitled to as on 8th August, 1997.

100. Nor is it necessary, therefore, for us to consider Mr. Chinoy's alternate submission that the sanctions and approvals were validly granted in view of section 154.

101. In the circumstances, the Writ Petition is dismissed subject what is stated above, including the following clarifications :

The dismissal of this Writ Petition does not affect the rights of the Official Trustee to make any representations before the authorities SRP 86/87 OSWP1469.09.doc including MHADA, BMC, MBR&RB and the MHCC. The authorities are not precluded from deciding the same and taking any action that they desire. The developer is entitled to the FSI potential as on the date of the order dated 8th August, 1997, and not to any benefits in the quantum of FSI by virtue of any subsequent change in the law. If the action of the developer has resulted in the Trust being deprived of FSI beyond what was available after 8th August, 1991, the same shall be adjusted from the developers entitlement to FSI under the said order dated 8th August, 1997. The prior approval of the Official Trustee would be required before granting the transfer of the DRC certificates in the developer's name. In the event of the Official Trustee refusing to give his consent, the parties are at liberty to

adopt appropriate proceedings. All interlocutory orders to stand vacated after eight weeks from today.

There shall be no order as to costs.

K.R. SHRIRAM, J.

SRP