Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 1179 OF 2019

GRACE ESTATE DEVELOPMENT VENTURE
006, 6th Floor, Everest CHS Ltd, Hill Road,
Bandra (West), Mumbai 400 050 **...Petitioner**

~ VERSUS ~

1. **MUNICIPAL CORPORATION OF GREATER MUMBAI**
having his office at 2nd Floor, Annex Building, Mahapalika Marg, CST, Mumbai 400 001

2. **MR AJOY MEHTA**
Learned Municipal Commissioner for Greater Mumbai, Mumbai

3. **ASHISH BUILDING NO. 21 CHS LTD,**
Four Bungalows, Manishnagar, J. P. Road, Andheri (W), Mumbai 400 053 **...Respondents**

APPEARANCES IN WP (L) NO 1179 OF 2019

FOR THE PETITIONER	**Mr Milind Sathe,** ***Senior Advocate****, with Ankita Singhania, i/b Mohd Rehan Sayeed Chhapra.*
FOR THE RESPONDENT-MCGM	**Mr Girish Godbole***, Advocate with Ms Nita Mandhyan & Ms Rupali Adhate.*

AND

WRIT PETITION (L) NO. 1270 OF 2019

1. **Surinder Kaur Sablok**
Age : 51 years, Occupation: Housewife, 41C-311, Ghanshyam Krupa, Manish Nagar, Four Bungalows, Andheri (W), Mumbai 400 053

2. **Poonam V Sippy**
Age : 67 years, Occupation: Retired, Flat No. 08, Ashish Building No. 21, J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 053

3. **Uday Basrur**
Age :58 years, Occupation: Retired, Flat No. 29, Ashish Building No. 21, J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 053

4. **Meenakshi Bal**
Age : 54 years, Occupation: Housewife, Flat No. 18, Ashish Building No. 21, J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 053

5. **Prakash Chaudhari**
Age : 51 years, Occupation: Service, Flat No. 17, Ashish Building No. 21, J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 053

6. **Surinder Singh**
Age : 47 years, Occupation: Service, Flat No. 28, Ashish Building No. 21, J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 053

7. **Mahesh Janjani**
Age : 54 years, Occupation: Service,
Flat No. 25, Ashish Building No. 21, J.
P. Road, Manish Nagar,
Andheri (W), Mumbai 400 053

8. **Asha Jagdish Panchal**
Flat No. 40, Ashish Building No. 21, J.
P. Road, Manish Nagar,
Andheri (W), Mumbai 400 053

9. **Madhu Bala Singh**
Age : 48 years, Occupation: Housewife,
Flat No. 09, Ashish Building No. 21, J.
P. Road, Manish Nagar,
Andheri (W), Mumbai 400 053

10. **Popat D Badave**
Adult, Indian inhabitant
14-604, Celebration KH4 Co.op Hsg
Society, Sector 17, Kharghar,
Navi Mumbai 410 210

11. **Krishna Verma**
Flat No. 06, Ashish Building No. 21, J.
P. Road, Manish Nagar, Andheri (W),
Mumbai 400 053 **...Petitioners**

~ versus ~

1. **The Municipal Commissioner,**
Municipal Corporation of Greater
Mumbai, having his office at Municipal
Head Office.

2. **Municipal Corporation of Greater Mumbai**
A statutory body incorporated under
the provisions of Mumbai Municipal
Corporation Act, 1888 having its office

at Municipal Head Office, Mahapalika Marg, Mumbai 400 001

3. **Grace Estate Development Venture**
A partnership firm, having its address at 006, 6th Floor, Everest CHS ltd, Hill Road, Bandra (W), Mumbai 400 050

4. **Ashish Building No. 21 Co-op, Hsg. Ltd,**
A Society registered under the provisions of Maharashtra Co-operative Societies Act, 1960, having its registered office at J. P. Road, Manish Nagar, Andheri (W), Mumbai 400 056 **...Respondents**

Appearances in WP(L) no 1270 of 2019

FOR THE PETITIONERS	**Mr Paritosh Jaiswal**, *with Mr Rubin Vakil, i/b Ashok Purohit & Co.*
FOR THE RESPONDENT, MCGM	**Mr Girish Godbole**, *with Ms Nita Mandhyan & Ms Rupali Adhate.*

CORAM : S.C. Dharmadhikari & G.S.Patel, JJ.

JUDGMENT RESERVED ON : 21st August 2019

JUDGMENT PRONOUNCED ON : 16th October 2019

JUDGMENT: ***(Per G. S. Patel, J)***

1. In the suburb of Andheri, about 35 kms north of the city's southernmost tip, and less than two kilometres to the east of the beachfront at Versova, there lies a large tract of land of 128,115 sq mts in area known as Manish Nagar. The site is on Survey Nos. 145 and 146 of Village Ambivali, along JP Road (which is to the site's northern boundary) in Andheri (West). The present corresponding CTS Nos are 826 and 827. Today, this is a bustling area with as many as 49 buildings, internal roads, and many different civic amenities; including, apparently, a gurudwara, a masjid, a small mandir, stores and shops, a maternity and surgical hospital and a roughly rectangular playground or open area. But it was not always like this. The site's layout was approved in 1965 with 18 buildings, but remained incomplete for the next six years. One Ashish Cooperative Housing Society Ltd ("**Ashish CHSL**") took over the project and had the earlier building permission or IOD (Intimation of Disapproval) revalidated. Yet, by 1971, only one building was completed with an occupation permission; six others were awaiting an occupation permission; three were only partly constructed; and for four buildings, only the piling foundations had been done.

2. These petitions invoke our writ jurisdiction under Article 226 of the Constitution of India to challenge a far more recent order, one dated 22nd November 2018, issued by the then Municipal Commissioner. A copy is at Exhibit "A" from page 33 of Writ Petition (L) 1179 of 2019. The challenge is restricted to one particular piece of land in this larger layout or site. This is known as Building No. 21 (or the structure on Plot No.21). It is named 'Ashish Building'.

3. First, as to the array of parties in the two writ petitions. The sole Petitioner in Writ Petition (L) No. 1179 of 2019 is one Grace Estate Development Venture ("**Grace Estate**"). This is said to be a partnership firm engaged in real estate development. It claims to have been appointed a developer by the 3rd Respondent, and this is the Ashish Building No.21 Co-operative Housing Society Ltd ("**the Ashish Building No. 21 Society**", quite distinct from the Ashish CHSL which took over the project). The 1st Respondent is the Municipal Corporation of Greater Mumbai ("**MCGM**"). The 2nd Respondent is the Municipal Commissioner.

4. The 11 Petitioners in Writ Petition (L) No. 1270 of 2019 say they are members of the Ashish Building No.21 Society, Respondent No.4. Respondent No.1 is the MCGM, Respondent No.2 is the Municipal Commissioner, and Respondent No.3 is Grace Estate. These 11 Petitioners (for convenience, "**the Members**"), support Grace Estate. They, too, impugn the Municipal Commissioner's 22nd November 2018 order, a copy of which is Exhibit "B" to their Petition.

5. We will take the facts from the Grace Estate petition. We have heard Mr Sathe for Grace Estate, learned Advocate for the Members, and Mr Godbole for the MCGM and the Municipal Commissioner at considerable length. With their assistance, we have carefully considered the material on record. Apart from the Petitions and their annexures, these materials include several compilations and notes of submissions. Rule. Respondents waive service. By consent, taken up forthwith for hearing and final disposal.

6. We first examine the impugned order and then analyze the Petitioners' attack on it.

7. The order itself has a litigation history. The Ashish Building No.21 Society filed Suit No. 41 of 2017 in this Court inter alia seeking further permissions from the MCGM to complete a building proposed on Plot No.21. The existing building was to be demolished, and a new, two-wing building of stilts and 18 floors (with podium parking up to the second floor) was to be constructed. The Ashish Building No.21 Society also filed a Notice of Motion No. 98 of 2017 for interim relief. On 19th September 2018, after fully hearing all concerned, SJ Kathawalla J passed an order by consent of all parties. He set out the entire factual matrix preceding the proposed re-development and directed the MCGM and the Municipal Commissioner to consider granting further permissions. This was predicated on (i) hardship caused to the Ashish Building No.21 Society members; and (ii) a 27th December 2007 in-principle approval to proceed with the development. Specifically, the order said the Municipal Commissioner would be justified in exercising his discretionary power under Regulation 64(b) of the Development Control Regulations, 1991 ("**DCR 91**"). This is what, therefore, came before the Municipal Commissioner.

8. Regulation 64 of DCR 91 reads:

> 64.Discretionary powers.—
>
> (a) In conformity with the intent and spirit of these Regulations, the Commissioner may:—

(i) decide on matters where it is alleged that there is an error in any order, requirement, decision, determination made by any municipal officer under delegation of powers in Regulations or interpretation in the application of these Regulations:

(ii) interpret the provisions of these Regulations where a street layout actually on the ground varies from the street layout shown on the development plan;

(iii) modify the limit of a zone where the boundary line of the zone divides a plot with the previous approval of Government; and

(iv) authorise the erection of a building or the use of premises for a public service undertaking for public utility purposes only, where he finds such an authorisation to be reasonably necessary for the public convenience and welfare, even if it is not permitted in any land use classification.

(b) **In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed by these Regulations to be modified**, **except those relating to floor space indices unless otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood**.

(*Emphasis added*)

9. This, then, is the discretionary power that was invoked: in view of the 'clearly demonstrable hardship', a *modification* of the dimensions prescribed by the Regulations, except the floor space indices or FSI (except where a FSI-relaxation was permitted).

10. The Municipal Commissioner called a meeting in his chamber on 12th November 2018. Grace Estate was represented, and its architect, Taranath Shetty, was also present. Officers of the MCGM were in attendance. The Chief Engineer (DP) of the MCGM said there was a layout of 9th April 1972. Plot No.21 was said to be, in this layout, 'one of the sub-divided plots' in the Manish Nagar layout. Its plot area was 1456.26 sq mts. The Ashish Building on this Plot No.21 had, however, consumed a built up area or BUA of 2428.87 sq mts. The Municipal Commissioner therefore found that Ashish Building had consumed almost 1000 sq mts more than was permissible, given the area of its plot. He noted the definition of FSI[1] — a ratio of the combined gross floor area of all floors, except those specifically exempted, to the total area of the plot.[2] The FSI varies by location.[3]

11. Paragraph 5 of the impugned order says this:

> "As such the earlier principal approval granted on 27/12/2007 **considering the consumed/existing built-up area of building as plot area instead of plot area as per the sanctioned sub-division/layout is an error and the**

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1 Under DCR 2(42).

2 To illustrate: if the plot is of 1000 sq mts and the FSI is 1.00, then the maximum BUA is 1000 sq mts. It is undisputed that the FSI in this area was 1.00.

3 Table 14 of DCR 32.

> **said error cannot be continued forever.** There is a difference of about 1000 sq mts in the plot area as per layout and the plot area while granting earlier approval which results in additional built up area to the extent of about 30,000 sq ft."
>
> (*Emphasis added*)

12. Then the Municipal Commissioner went on to hold that DCR 64(b) did not authorise him to relax FSI norms except where otherwise permitted by the DCRs.

13. The Municipal Commissioner therefore made the following order:

> 7) After hearing both the parties, I pass the following order:
>
> The sub-division of layout is already approved u/no. CE/153/BSII/AK dtd-9/04/1972 and the area of the subdivided plot on which the building under reference is located is 1456.26 sq mts. As per Regulation 32 of DCR 1991, Regulation 30 of DCPR 2034, the FSI is permissible on the least plot area out of the PRC, Architect's Triangulation calculations (physical survey), Development Agreement, Layout Sub-Division as per policy. **The request of the Architect/Developer to consider the existing built-up area as plot area of the purpose of calculation of FSI potential while allowing re-development can't be considered.** Moreover, I cannot modify the floor space indices as per Regulation 64(b) of DR 1991 or 6(b) of DCPR 2034. Hence there is error in granting earlier approval and said approval cannot be continued.

> Ch.Eng (D.P.) is hereby directed to scrutinize plans considering the plot area as per approved sub-division or physical plot area as certified by Architect whichever is lesser as and when the plans are submitted by the Architect.
>
> The Sr.Counsel/Law Officer to apprise the Hon'ble High Court regarding this order on the date of hearing.
>
> (*Emphasis added*)

14. There are two distinct issues that emerge from this: (i) whether the built up area could be 'considered' as the plot area for FSI calculations; and (ii) whether the grant of additional FSI relaxations was within the discretionary power of the Municipal Commissioner. On the second question, it is immediately and readily conceded that the Municipal Commissioner had no such power, and we need not, therefore, trouble further with that aspect of the matter. Indeed, Mr Sathe's case is precisely that he does not seek any relaxation of FSI norms at all. It is also not in dispute that under current norms, the FSI is 1.00 and that it is permissible to load an additional FSI of 1.00 by way of Transferable Development Rights or TDR. That would make an FSI of 2.00.

15. But on what plot is this FSI to be computed? That is the only issue, and it is the first of the two questions the Municipal Commissioner addressed. The entire case turns only on this.

16. What was it that Grace Estates argued? It agreed that *if the area of Plot No.21 was taken 1456.26, and the FSI was 1.00*, *then the built up area of Ashish Building could not have been 2428.87*. Therefore, Grace Estates argued before the Municipal

Commissioner as it does before us, there was (i) no sub-division in law at all, as a matter of fact; (ii) there was a mutual 'understanding' between the various buildings/societies that every building's built up area would be 'considered' as its plot area. Consequently, the Municipal Commissioner was entirely in error in equating the actual plot area on a layout that was nothing more than a 'notional' sub-division at the highest with the permissible built up area. He was in error in applying the FSI to actual plot area rather than proceeding on this understanding of 'considering the built up area to be the plot area'.

17. When placed like this, in our view, the petitions can only be dismissed. Every one of these assertions is a disputed question of fact that demands proof. That lies beyond our remit under Article 226 of the Constitution of India. Second, the structure of this argument overlooks a fundamental principle when invoking a high prerogative writ remedy. First, we look not to the decision, but to the decision-making process. That, in our view, is unexceptionable, and indeed no exception is taken to the process itself. What is being canvassed is a manifest error, arbitrariness or perversity in the impugned order. This again is unpersuasive. Surely, from any perspective, the view the Municipal Commissioner took is, at a minimum, plausible; if that be so, then there is no scope for interference in writ jurisdiction.

18. Ordinarily, that should have been sufficient to warrant a dismissal of the petitions. But it is our judgment that the Municipal Commissioner's view is not merely plausible, but that it is the *only* correct view. It is to more fully set out our reasons for this view that

we now proceed to examine the facts and the applicable legal provisions in somewhat greater detail than might otherwise have been necessary. We will first set out a historical narrative and then turn to a few crucial documents.

19. The factual backgrounds runs like this:

(a) In the petition, the property under Survey Nos. 145 and 146 of Village Ambivali, corresponding to CTS Nos 826 and 827 is called 'the larger plot'. It admeasures about 1,41,812 sq yds or 1,18,573 sq mts. The original owner was one Jim Rusdin Pvt Ltd ("**JRPL**"). In its hands, the larger plot was not subdivided. Some time in 1960, the Ashish Cooperative Housing Society Ltd came to be registered. This is not to be confused with the 3rd Respondent society, which is concerned only with Building No.21, although we find that in the petition and in the list of dates there is some mixing up of these identities. The reason the two cannot be the same is that the 3rd Respondent society was formed decades later, in 2005.

(b) On 3rd August 1965, the first layout was sanctioned. On 16th May 1970, JRPL demised the whole of the larger plot to the Ashish CHSL. There is a note of 6th October 1971 from the MCGM approving the layout for the larger plot. As regards the Recreational

Grounds and internal roads, Ashish CHSL obtained some FSI benefits.

(c) According to the MCGM, a layout sub-division of the larger plot was approved on 9th April 1972. This resulted in Plot No.21 having an area of 1,456.26 sq mts.

(d) On 18th April 1972, the MCGM's Executive Engineer replied to a letter dated 7th March 1972 from M/s Shah, Desai and Jambhekar, architects, approving the proposed sub-division.

(e) Two years later, on 25th April 1974, Ashish CHSL entered into a deed of assignment with JRPL and some others. Ashish CHSL assigned building plots nos. 1 to 16, 18 to 20, 22, 25 to 36, 38 to 48, 49 and a 43/48ths undivided (and indivisible) share in the common areas, roads, RGs, etc. to one Mala Enterprises. The total area so assigned to Mala Enterprises was 1,06,432 sq mts from the larger plot area of 1,18,573 sq mts. Ashish CHSL continued to be the lessee of five Building Plots No. 17, 21, 23, 24 and 37, of the aggregate area of 12,141 sq mts. Then, a few months later on 30th August 1974, Ashish CHSL mortgaged these five plots to Mala Enterprises along with a 5/48th undivided and indivisible share in the common areas.

(f) On 30th March 1978, JRPL conveyed Plot No.49 to Mala Enterprises. Thus, by this time, Mala Enterprises owned Plot No. 49; had a lease of 42 other plots from Ashish CHSL; and was the mortgagee of the remaining five plots with Ashish CHSL as the mortgagor.

(g) In early 2005 the Deputy Registrar of Cooperative Societies approved a proposal for re-development of the existing building on Plot No. 21, the building with which we are concerned.

(h) The 3rd Respondent, Ashish Building No.21 Society, was formed on 24th February 2005. By an order of that very date under Section 17 of the Maharashtra Co-operative Societies Act, 1960, the Ashish Building No.21 Society was split into five societies, one for each of the five buildings. Ashish Building No.21 Society held the building on Plot No. 21.

(i) In 2005, the Ashish Building No.21 Society's members consented to re-development. A General Body resolution approving the development proposal followed.

(j) On 22nd November 2005, Ashish Building No.21 Society entered into a development agreement with Grace Estate. One of the conditions in this Agreement was that the Ashish Building No.21 Society would get a

conveyance of 2428.87 sq mts in its favour (evidently from JRPL).

(k) It seems that by this time there was an apex or federation or association of constituent societies set up. It is called the Manish Nagar Societies Association. It is claimed — and Mr Sathe relies heavily on this — that on 11th January 2007, this Association of societies gave its consent to the Ashish Building No.21 Society consuming 2428.87 sq mts FSI and an additional 2428.87 sq mts TDR.

(l) Grace Estate submitted a proposal using these figures to the MCGM on 17th July 2007. The MCGM's fire department gave its NOC on 27th September 2007. It is claimed that the MCGM approved the project on 1st November 2007 subject to some conditions. There is a MCGM report dated 27th December 2007 approving this re-development by considering Plot No.21's development 'potential' as 2428.87 sq mts for the purposes of FSI and TDR.

(m) On 17th March 2008, the MCGM issued its Intimation of Disapproval or IOD — a building permission that is, peculiarly, always worded in the negative — again using this area of 2,428.87 sq mts as the basis.

(n) By 6th March 2008, there was in place a specimen of what is called a MOFA Agreement, i.e. an agreement under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. Grace Estate would enter into such agreements with individual members or purchasers.

(o) In June 2010, Grace Estate purchased TDR of 540 sq mts and 60 sq mts to load on this Plot No. 21. On 4th January 2011, the MCGM issued an amended IOD and a commencement certificate followed on 10th March 2011. On 26th August 2011, Grace Estate received MCGM approval for amended plans up to the 10th floor. On 28th May 2012, the MCGM issued a commencement certificate up to the 10th floor.

(p) On 13th September 2012, Grace Estate bought a further 600 sq mts of TDR to load on Plot No.21.

(q) In 2013, Grace Estate's architects wrote repeatedly to the MCGM asking it not to insist on the 'amended layout for the present project'.

(r) On 18th July 2013, the Executive Engineer recommended Grace Estate's architect's proposal for approval. Another report by the Deputy Chief Engineer followed on 22nd July 2013, and, on 24th July

2013, the Executive Engineer's proposal was submitted for approval. In December 2013, Grace Estate's Architect Mr Taranath Shetty requested the Commissioner, the 2nd Respondent, to approve the plans since work had come to a halt for the last nine months. While a parking layout was separately approved, discussions continued. Ultimately, on 6th September 2014, the Chief Engineer referred the matter to the Technical Advisory Committee.

(s) By 2015, Grace Estate had sought further approvals and submitted a layout amendment proposal. The Executive Engineer of the MCGM prepared a note on 22nd July 2015 on this layout amendment proposal. The Executive Engineer prepared a further report on 22nd August 2015 in response to a clarification sought by the Municipal Commissioner. The Executive Engineer sought some information from Grace Estate on 13th October 2016, and from the Ashish Building No.21 Society on 4th November 2016.

(t) Meanwhile, in 2016, some of the Members of the Ashish Building No.21 Society filed Suit (L) No. 976 of 2016 (later numbered as Suit No. 41 of 2017) against Grace Estate, evidently for specific performance. They filed a Notice of Motion (L) No. 3010 of 2016 (later finally numbered as Notice of Motion No. 98 of 2017). In that, the MCGM filed a reply on 10th November 2016 contending that JRPL had to be given notice of

any development since it was the owner; raising issues about internal roads, layout etc; and taking the plea that the plot was in the Coastal Regulation Zone II.

(u) On 15th January 2018, a writ petition (L) No. 2487 of 2017 filed by Grace Estate was withdrawn keeping all contentions open.

(v) Finally, on 1st March 2018, this court passed an order in the Members' Notice of Motion No. 98 of 2017 directing that a representation be made to the Chief Engineer. On 19th September 2018, this court directed the MCGM to take an appropriate decision in view of the approval granted on 27th December 2007.

(w) The impugned order of 22nd November 2018 came to be passed in these circumstances.

20. Central to this dispute are the documents of 1972. Mr Sathe's argument is that even at that time, notwithstanding the terminology in correspondence, there was no 'sub-division' as required by law, that is to say, a sub-division within the meaning of the Maharashtra Land Revenue Code, 1966. That, in his submission, is the only sub-division recognized by law. If that be so, and there is no such MLRC-mandated sub-division, the Municipal Commissioner could not have held that the area of Plot No.21 was only 1456.26 sq mts. His argument is that the larger plot remained without a sub-division as contemplated by law, and it was always the understanding

between various societies and members that the FSI for any plot or structure was unrelated to the size or area of any layout markings. The FSI potential was to be reckoned on the basis of the as-built or actually constructed structures. Thus, illustratively, if a building was of 3000 sq mts, then its FSI potential was to be reckoned as 3000 sq mts (FSI being 1.00), irrespective of the fact that its layout plot size was shown as, say, only 1500 sq mts. This, he submits, is the only explanation as to how Ashish Building No.21 Society could have got a built-up area of 2428.87 sq mts on a plot of 1456.26 sq mts.

21. In our view, Mr Sathe's formulation actually raises more questions than it answers. It seems to suggest there was some pooling of the FSI on the larger plot, and then a distribution or allocation of the FSI between the various societies and plots on some understanding to which the MCGM was not party, and of which it had no knowledge. This suggestion, albeit implicit, is predicated on such a pooling-and-distribution being permissible in law in the first place. We do not think this was ever correct. Even in a large, multi-building layout of the kind we so often see today where there are some residential towers, a commercial complex and also additional common facilities such as a clubhouse, though the FSI on the layout may be one, there is no layout sub-division as such, and the built-up area of each building is known to, and approved by, the MCGM keeping in mind the 'global' FSI. Of this we have no evidence in this particular matter. Therefore, we find it difficult to agree with Mr Sathe's submission that 'all buildings will have the same problem, and, therefore, the correct order is to have regard to the FSI for the larger plot and leave it to the societies or association to work out a distribution within that global FSI'.

22. The controversy has two distinct components. First, Grace Estate must establish an undisputed factual foundation to its claim. It must show there was no sub-division in fact. It must establish the FSI pooling-and-sharing understanding of which Mr Sathe speaks. It must show that there is no controversy at all about title. And it must finally show that, should it be taking a disproportionate share of the 'global' FSI — i.e. more FSI than the area of Plot No.21 would permit — that it has the informed consent of other claimants to that FSI. In law, it must be shown that even if there was a factual layout sub-division, this is no sub-division for municipal planning purposes. Grace Estate must also establish that such a FSI pooling-and-sharing is permissible in law.

23. On the factual aspect, we believe the entire matter turns on a set of documents of the early 1970s. As regards the sub-division, there is no dispute that on 6th October 1971, there was a note or proposal from the Deputy Chief Engineer of the MCGM to the Municipal Commissioner. It says that the layout for the site was approved on 3rd August 1965. Until October 1971, only one building had been completed, for which an occupation certificate had been issued. Six others were ready for occupation. Three buildings were partly constructed, and for another four buildings, only the piling foundations had been done until then. The project had been taken over by Ashish CHSL. The previous IODs were revalidated. Then comes the following observation:

> "**The proposal is now received to sub-divide the plots as shown in plan at Pg.77, so that the society can handle the project in a better manner and it will cause less difficulty at the time of completing each building. By the present**

> **proposal of sub-division, the F.S.I. of individual plots will exceed the permissible limit of 1.00 as the advantage of proportionate area of the road and garden area has been continued to be given** because of previous commitment of the society, as otherwise any reduction in the area will make it necessary for the society to reduce the number of tenements etc which will … … [unclear] to members who have invested in the many years, and have … … [unclear] accommodation in till today. **In similar cases, such advantages of garden and road have been allowed to be continued for similar reasons and therefore there is no objection to permit the work of individual buildings to be carried out as per plans previously sanctioned** subject to minor modifications if necessary.
>
> M.C.'s sanction is therefore requested to permit M/s. Ashish Coop. H. Soc. Ltd. **to continue with the works as per previous approval already granted and to <u>permit sub-division of the plots</u> with excess F.S.I to the extent of area of individual plots for reasons stated above**. Considering the entire holding as a whole the F.S.I will remain as 1.00. This will be subject to the terms and conditions of the approved layout. No. of tenements and floors area of each building shall not be vary."
>
> (*Emphasis added*)

24. In itself, this provides a complete answer to Mr Sathe's case today. There was no question of any agreement or understanding for any FSI pooling or sharing. The global FSI was fixed or capped at 1.00. It was only because the sub-division came later, after some construction was done (and one building even fully occupied) that, having regard to precedent and possible hardship, a special dispensation was allowed. This does not mean that there was no

sub-division, or that it is established that FSI could be shared at will between the individual plots.

25. The second document is a communication of 18th April 1972 from the Executive Engineer to M/s Shah Desai and Jambhekar. It refers to a proposed sub-division of the larger plot, and says that the proposal is approved. Further, the architects were required to demarcate the boundaries of various plots and reservations as also the outer boundary of the larger plot, and the road alignment on site as per the approved plan. This was to be shown to the Assistant Engineer Building Proposals for approval. Then the letter says

> "Please note that permission **for construction of buildings on the sub-divided plots** or amalgamated plots will not be entertained until the access roads are constructed in water bound mode of construction with necessary sewers, storm water drains and water mains."
>
> (*Emphasis added*)

26. There can be no question therefore of saying today that there was never any sub-division.

27. Mr Sathe's submission that the only 'sub-division' contemplated by law is one of land under the Maharashtra Land Revenue Code, 1966 is also not correct. Mr Godbole correctly points out that the Mumbai Municipal Corporation Act, 1888 ("**the MMC Act**") and the Maharashtra Regional & Town Planning Act, 1966 ("**the MRTP Act**") both contain provisions that specifically speak of 'sub-divisions'.

28. The relevant provisions of the MMC Act are:

> **302. Notice to be given to Commissioner of intention to lay out lands for building and for private streets.**
>
> (1) Every person who intends—
>
> (a) to sell or let on lease any land subject to a covenant or agreement on the part of a purchaser or lessee to erect buildings thereon, or
>
> **(b) to divide land into building plots**, or
>
> (c) to use any land or permit the same to be used for building purpose, or
>
> (d) to make or lay out a private street, whether it is intended to allow the public a right of passage or access over such street or not,
>
> shall give written notice of his intention to the Commissioner, and shall, along with such notice submit plans and sections, showing the situation and boundaries of such building, land and the site of the private street (if any) and also the situation and boundaries of all other land of such person of which such building land or site forms, a part, and the intended development, laying out and plotting of such building, land, and also the intended level, direction, and width and means of drainage of such private street and the height and means of drainage and ventilation of the building or buildings proposed to be erected on the land and, if any building when erected will not abut on a street then already existing or then intended to be made as aforesaid, the means of access from and to such building.

(2) Nothing in this section or in sections 302A, 302B, 303 or 304 shall be deemed to affect or to dispense with any of the requirements of Chapter XII.

302A. Commissioner may call for further particulars.— If any notice given under section 302 does not supply all the information which the Commissioner deems necessary to enable to him to deal satisfactorily with the case, he may, at any time within thirty days after receipt of the said notice, by written notice require the person, who gave the said notice to furnish the required information together with all or any of the following documents, namely:—

(a) correct plans and sections in duplicate of the proposed private street, which shall be drawn to a horizontal scale of not less than one inch to every twenty feet and a vertical scale of not less than one and a half inches to ten feet and shall show thereon the level of the present surface of the ground above some known fixed datum near the same, the level and rate of inclination of the intended new street, the level and inclinations of the street with which it is intended to be connected and the proportions of the width which are proposed to be laid out as carriage-way and foot-way respectively.

(b) a specification with detailed description of the materials to be employed in the construction of the said street and its footpaths ;

(c) a plan showing the intended lines of drainage of such street and, of the buildings proposed to be erected and the intended size, depth and inclination of each drain, and the details of the arrangement proposed for the ventilation of the drains;

(d) a scheme accompanied by plans and section for the laying out into streets, plots and open spaces of the other land of such person or of so much of such other land as the Commissioner shall consider necessary before applying to the 1Standing Committee for their approval of the determination of the Commissioner

302B. Commissioner may require plan to be prepared by licensed surveyor.—The Commissioner may decline to accept any plan, section or description as sufficient for the purposes of section 302 and section 302A, which does not bear the signature of a licensed surveyor in token of its having been prepared by such surveyor or under his supervision.

303. Laying out of land, private streets and buildings to be determined by Commissioner.—

(1) The laying out of land for building, the level, direction, width and means of drainage of every private street, and the height and means of drainage and ventilation of and access to all buildings to be erected on such land or in either side of such street shall be fixed and determined by the Commissioner with the approval of the 3Standing Committee with the general object of securing sanitary conditions, amenity, and convenience in connection with the laying out and use of the land and of any neighbouring lands.

(2) But if, within thirty days after the receipt by the Commissioner of any notice under section 302 or of the plans, sections, description, scheme or further information, if any, called for under section 302A, the disapproval by the Commissioner with regard to any of the matters aforesaid specified in such notice shall not be communicated to the person, who gave the same, the proposals of the said person

shall be deemed to have been approved by the Commissioner.

304. Land not to be appropriated for building and private streets not to be laid out until expiration of notice nor otherwise than in accordance with Commissioner's directions.—

(1) **No person shall sell, let or use or permit the use of, any land for building or divide any land into building plots, or make or lay out or commence to make or lay out any private street, unless such person has given previous written notice of his intention as provided in section 302**, nor until the expiration of sixty days from delivery of such notice, nor otherwise than in accordance with such directions (if any), as may have been fixed and determined under sub-section (1) of section 303.

(2) If any act be done or permitted in contravention of this section, the Commissioner may by written notice require any person doing or permitting such act on or before such day as shall be specified in such notice by a statement in writing subscribed by him in that behalf and addressed to the Commissioner, to show-cause why the laying out, plotting, street or building contravening this section should not be altered to the satisfaction of the Commissioner, or if that be in his opinion impracticable, why such street or building should not be demolished or removed or why the land should not be restored to the condition in which it was prior to the execution of the unauthorised work, or shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised by him in that behalf, and show-cause as aforesaid.

(3) If such person shall fail to show-cause to the satisfaction of the Commissioner why such street or

building should not be so altered, demolished or removed or why such land should not be so restored, the Commissioner may cause the work of alteration, demolition, removal or restoration to be carried out and the expenses thereof shall be paid by the said person.

(*Emphasis added*)

29. Then there are provisions in the MRTP Act:

2(7) "***development***" with its grammatical variation means the carrying out of buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage building or its precinct **and includes** demolition of any existing building structure or erection or part of such building, structure of erection; and reclamation, **redevelopment and lay-out and sub-division of any land**; and "to develop" shall be construed accordingly;

22. Contents of Development Plan.—A Development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say,—

(m) provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of fees, charges and premium, at such rate as may be fixed, by the State Government or the Planning Authority, from time to time, for grant of an additional Floor Space Index or for the special permissions or for the

use of discretionary powers under the relevant Development Control Regulations, and also for imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, **the sub-division of plots** the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and hoardings and other matters as may be considered necessary for carrying out the objects of this Act.

44. Application for permission for development.—

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

Provided that, save as otherwise provided in any law, or any rules, regulations or by-laws made under any law for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under the Maharashtra Housing and Area Development Act, 1976.

(2) Without prejudice to the provisions of sub-section (1) or any other provisions of this Act, any person intending to execute a Special Township Project on any land, may make an application to the State Government, and on receipt of such application the State Government may, after making such inquiry as it may deem fit in that behalf, grant such permission and declare such project to be a Special Township Project by notification in the Official Gazette or, reject the application.

45. Grant or refusal of permission.—

(1) On receipt of an application under section 44 the Planning Authority may, subject to the provisions of this Act, by order in writing—

(i) grant the permission, unconditionally;

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

(iii) refuse the permission.

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

(3) Every order granting permission subject to conditions, or refusing permission shall state the grounds for imposing such conditions or for such refusal.

(4) Every order under sub-section (1) shall be communicated to the applicant in the manner prescribed by regulations.

(5) If the Planning Authority does not communicate its decision whether to grant or refuse permission to the

applicant within sixty days from the date of receipt of his application, or within sixty days from the date of receipt of reply from the applicant in respect of any requisition made by the Planning Authority, whichever is later, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of sixty days:

Provided that, the development proposal, for which the permission was applied for, is strictly in conformity with the requirements of all the relevant Development Control Regulations framed under this Act or bye-laws or regulations framed in this behalf under any law for the time being in force and the same in no way violates either the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under this Act:

Provided further that, any development carried out in pursuance of such deemed permission which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorised development for the purposes of sections 52 to 57.

(6) The Planning Authority shall, within one month from the date of issue of commencement certificate, forward duly authenticated copies of such certificate and the sanctioned building or development plans to the Collector concerned.

(*Emphasis added*)

30. Finally, there are salient provisions of the Maharashtra Development Plans Rules, 1970:

6. Application for permission for development.—

(1) Subject to the provisions of this rule, every application under section 44 for permission to carry Out any development on any land shall be made in Form I.

(2) The following particulars and document shall be submitted along with the application, namely:

(a) A site plan (in quadruplicate) of the area proposed to be developed to a scale of not less than 1/600;

(b) A detailed plan (in quadruplicate) showing the plan, sections and elevation of the proposed development work to a scale of not less than 1/100 as may be available.

(c) In the case of a layout of land or plot:—

(i) a plan (in quadruplicate) drawn to a scale of not smaller than 1/15000 showing the surrounding land and existing access to the land included in the layout;

(ii) a plan (in quadruplicate) drawn to a scale of not less than 1/600, showing—

(x) **sub-divisions of the land or plot with dimensions and area of each of the proposed sub-divisions** and its use according to prescribed regulations;

(y) width of the proposed streets; and

(z) dimensions and area of open spaces provided in the layout for the

purposes of garden or recreation or like purpose.

(d) an extract of the record of rights or property register card or any other, document showing the ownership of land proposed to be developed.

(3) Plans referred to in sub-rule (2) above shall be prepared by a licensed surveyor.

(4) The Planning Authority may also call from the applicant in writing any further information that may be required for the purpose of considering any application.

7. Form of commencement certificate.—The commencement certificate to be granted under sub-section (2) of section 45 shall be in Form 2; and it shall remain valid for a period of one year from the date of its issue.

(*Emphasis added*)

31. Thus, we are unable to accept either of the two propositions canvassed by Mr Sathe, viz., (1) that there was factually no sub-division of the larger plot; and (2) that since there was no sub-division as contemplated by the Maharashtra Land Revenue Code, 1966, there is no sub-division in law.

32. Then there is the question of title — again, purely a question of fact demanding proof in a civil action — and this only further muddies already turbid waters. For, as we have seen, the original owner was JRPL. It held the larger plot. It assigned this to the Ashish CHSL. Cutting a long story short, an area of 43/48ths of this larger plot was then assigned to Mala Enterprises. The 3rd Respondent, Ashish Building No.21 Society, initially held the

remaining five plots, but this holding was further balkanized so that the Ashish Building No.21 Society held a lease of only Plot No.21. Meanwhile, Mala Enterprises took a mortgage of the remaining five plots. It also obtained a full-fledged conveyance of Plot No.49. Therefore, the original larger plot then had two owners: JRPL for everything except Plot No.49, and Mala Enterprises as the owner of that Plot No.49. Mala Enterprises also had a lease or a mortgage of all the rest. Now these facts are not in dispute, and, indeed, the development agreement with Grace Estate specifically requires the 3rd Respondent, Ashish Building No.21 Society, to get a conveyance from JRPL (but demands that this be of 2428.87 sq mts.) This is material because, as we have seen, neither Grace Estate nor Ashish Building No.21 Society have any consent to this FSI pooling or sharing mechanism propounded in the petition from JRPL, Mala Enterprises or, indeed, from a single one of the other building societies. What it does have — and this is all that we were shown across the Bar — is a peculiarly worded letter from the association of societies. First, we have no means of knowing whether this letter or consent was properly authorised, or has the approval of the constituent societies. Second, there is nothing to show that the letter itself accepts that there was, historically, any such FSI pooling or sharing understanding. In short, when the two sets of petitioners claim a higher FSI than their plot area permits, and given that the global FSI on the entire larger plot is fixed, this necessarily means that they would be 'eating into' the FSI share of other buildings or plots. Even assuming that FSI can be shared or carved up like this, at a minimum, this would require the informed and specific consent of the other parties. In this case, that would be JRPL, Mala Enterprises, the other societies or some or all of these.

33. The recitals in the development agreement bind both sets of petitioners. So do the recitals in the Indenture of Lease of 25th April 1974 between Ashish CHSL and Mala Enterprises. Both documents speak specifically of a sub-division. The 1974 lease speaks of the five plots mentioned above as being sub-divided plots. A recital in that Lease Deed says:

> "'a sub-divided building plot' shall be construed to mean such actual plot as is shown numbered on the sanctioned sub-division building plot … joint use of all the lessees and assignees of the respective sub-divided building plots …"

Thus, even on the principal title documents there can be no doubt about the existence of a sub-division and the existence of individual plots.

34. Mr Sathe's reliance on the Division Bench decision in *The BEST Workers' Union v State of Maharashtra*[4] is entirely misplaced. It is true that there was a question before the court whether there was factually a sub-division, and an argument was indeed raised that any such sub-division would have to be entered on the revenue records. However, as the judgment itself shows in paragraph 75, the propounded sub-division was conditional and it only became 'approvable', i.e. it was not actually approved. Further, the layout sub-division was not proposed by the petitioners. In the present case, it is the lessee, Ashish CHSL, which proposed the sub-division; and this did not remain at the level of a proposal or a conditional approval. It was fully approved and implemented, as the title documents and other documents show.

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4 2008 (110) Bom LR 2692 : 2008 (5) All MR 848.

35. Mr Sathe then submits that since the larger plot area is 1,18,569.29 sq mts or thereabouts, and the total actually built up area is about 84,066.03 sq mts, there is an 'unutilized balance' of roughly 20,000 sq mts. Hence, if the petitioners help themselves to some part of this, to the extent of 4856 sq mts, nobody is harmed. This argument altogether fails to impress us. This is not some free orchard with low-hanging fruit ripe for the picking where anyone may help themselves to anything. There has to be an entitlement, and it must be an entitlement in law, i.e. a juridical entitlement such as the law recognizes, and one capable of being enforced. To say that 'getting the FSI is harmless' does not elevate the submission to the necessary status of espousing a legal entitlement.

36. Perhaps the most fundamental flaw in the petitioners' case is the attempt to de-link FSI from the plot area. As we have explained, FSI is directly a ratio of the plot area to the built-up area. What the petitioners suggest is that instead of considering the area of their plot no.21, we should consider the area of the larger plot; take it to be not sub-divided though it demonstrably was; assume that Ashish Building No.21 Society is entitled to the whole of it, or has full entitlement to take such of the FSI of the larger plot as it decides for itself; or factor the FSI to be reckoned on the existing built-up area of the 3rd Respondent's building; or accept some sort of unproved oral arrangement or understanding of FSI pooling and sharing; or, by some process of arithmetical reverse engineering, arrive at a figure of what the FSI for Plot No.21 *might* or *ought* to have been; or, in a worst-case scenario, allow it to take up additional FSI because there is plenty of unutilized FSI available or going a-begging.

37. We know of no way that this can be done. As we noted, DCR 2(42) defines FSI, and this is the definition:

> 2(42) "Floor Space Index means the **quotient of the ratio of the combined floor area of all floors** excepting areas specifically exempted under these Regulations **to the total area of the plot**, viz.,
>
> Floor Space Index (FSI) = $\frac{\text{Total covered area on all floors}}{\textbf{Plot area}}$
>
> (*Emphasis added*)

Respondent No.3 has title to only one plot, and that is Plot No.21 with an area of 1,456.26 sq mts. That is the only 'plot area' that can be taken into account for any construction on Plot No. 21. We cannot add to or subtract from this definition. Any exemptions are limited to those mentioned in the definition itself, i.e. those exemptions provided by the Regulations themselves. We cannot accept the petitioners' invitation to invent some entirely new method of computing FSI for plot No.21.

38. We have noted these aspects at some length because it is our considered view that the impugned order dated 22nd November 2018 passed by the then Municipal Commissioner suffers from no infirmity at all. It is not merely a plausible or possible order. We believe it to be the only order that could have been made in the facts of the case, and, further, that it is also the only order that even a writ court could have made.

39. In the result, we find no merit in the petitions. They are dismissed, and Rule is discharged. There will be no order as to costs.

(S. C. DHARMAKHIKARI, J.)

(G.S. PATEL, J.)