HIGH COURT OF JUDICATURE AT BOMBAY

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

WRIT PETITION NO. 1699 OF 2016

1. Samta Nagar Co-operative Housing Societies Union Limited, a society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 bearing registration no. BOM/W-R/HSG (OH)/3246/1987/88 having its registered address at Building No. 19D/304, Samta Nagar, Kandivali (East), Mumbai – 400 101

2. SD Corporation Private Limited a company incorporated under the provisions of the Companies Act, 1956 and having its office at 41/44 Minoo Desai Marg, Colaba, Mumbai – 400 005. … Petitioners

Versus

1. Municipal Corporation of Greater Mumbai, through the Municipal Commissioner having its office at Mahanagarpalika Building, Mumba – 400 001.

2. The Maharashtra Housing and Area Development Authority, Grihanirman Bhavan, Kalanagar, Bandra East, Mumbai, Maharashtra – 400 051.

3. State of Maharashtra through the Urban Development Department, having its office at Mantralya, Mumbai-400 032. … Respondents

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Dr. Milind Sathe, Senior Counsel a/w Mr. Bhushan Deshmukh, Mrs.Jasmine Kachalia, Mr. Aryan Srivastava i/by M/s. Wadia Ghandy and Co. for the Petitioners.

Mr. Anil Sakhare, Senior Advocate a/w Mr. Rohan Mirpury and Ms.Trupti Puranik for the Respondent No.1-M.C.G.M.

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Mr. P. G. Lad a/w Ms. Aparna Kalathil and Ms. Sayli Apte for the Respondent No.2-MHADA.

Mr. Sukanta Karmakar, Asst. Government Pleader Respondent No.3-State.

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CORAM: R. D. DHANUKA AND
MADHAV J. JAMDAR, JJ.
RESERVE DATE : 20th JANUARY, 2021.
PRONOUNCE DATE : 5th FEBRUARY, 2021.

JUDGMENT (*Per R.D. Dhanuka, J.*) :-

. By this petition filed under Article 226 of the Constitution of India, the petitioners have prayed for a declaration that Regulation 33(5) of the Development Control Regulations (hereinafter referred to as 'the said D.C. Regulations') permits utilization of area which is free of FSI area including staircase, fire escape staircase, car park area, staircase room, lift machine room, lift rooms, lobby, elevated water tanks in buildings for rehabilitation component on the land described in the petition without payment of premium. The petitioners have also impugned an order dated 6th January, 2018 and seeks refund of Rs.27 crores along with interest incurred thereon and for other reliefs. Some of the relevant facts for the purpose of deciding this writ petition are as under :-

2. The petitioner no.1 is an Apex Society incorporated under the provisions of the Maharashtra Co-operative Societies Act, 1960 and is the lessees of the respondent no.2 i.e. The Maharashtra Housing and Area Development Authority (MHADA) with respect to all that piece and parcel of the land situate and lying at Survey Nos. 55 and 56, CTS No. 837 to 840 of Village Poisar, Taluka Borivali, admeasuring 2,13,867.50 square meters or

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thereabouts situate at Samta Nagar, Kandivali (East), Mumbai – 400 101 (hereinafter referred to as 'the said land'). The petitioner no.1 comprises of 65 societies and are constructing buildings including rehab buildings for about 1955 individuals/members of the societies who belongs to Economical Weaker Sections and Low Income Group.

3. The petitioner no.2 has acquired the development rights with respect to the said land from the petitioner no.1 and other 65 individual societies. The respondent no. 2 is the owner of the said land. There were about 165 structures/buildings on the said land which are now being re-developed by the petitioner no.2.

4. Sometime in the year 1961-62, the respondent no.2 had developed 160 buildings having 2714 tenaments for different income groups such as (i) High Income Group – 12 buildings – 240 tenaments, (ii) Middle Income Group – 35 buildings – 700 tenaments, (iii) Low Income Group (LIG-Big) – 45 buildings – 672 tenaments, (iv) Low Income Group (LIG Small) – 31 buildings – 816 tenaments and (v) Economical Weaker Section – 37 buildings – 296 tenaments.

5. On 3rd October, 2007, 29th February, 2008, 20th June,2014, 1st July, 2014 and 31st March, 2016, the respondent no.2 issued Letter of Offer to the petitioner no.1 for certain buildings comprising of about 1784 tenaments out of 2714 tenaments for integrated development in the layout.

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6. On 25th October, 2010, the petitioners no.2 submitted a proposal for building no.1. On 26th November, 2010, the respondent no.1 issued IOD in respect of the said building no.1. On 25th July, 2011, the respondent no.1 issued commencement certificate. On 15th January, 2016, the respondent no.1 approved the plans for building comprising of 7 wings for various floors. On 16th April, 2016, the petitioner no.1 applied to the Deputy Chief Engineer, Building Proposal Department for relaxation/concession by not charging any premium in accordance with Regulation 33(10), Clause (6) of Regulation 33(5) read with Sub-Regulations 6.21 and 6.22 of Appendix IV of the D.C. Regulations. The petitioner no.1 submitted amended plans for building no.1 (rehab building).

7. By letter dated 22nd April, 2016, the Deputy Chief Engineer (building proposal) W.S.-II rejected the said request made by the petitioners for granting relaxation from paying of premium for staircase, staircase lobby, lift, lift lobby from FSI configuration on the ground that there was no provision in Regulation 35(ii)(iv) for the cases of reconstruction dealt with under Regulation 33(5) of the said D.C. Regulations or any other provisions of D.C. Regulations 1991 in force. Being aggrieved by the said order dated 22nd April, 2016, the petitioners filed this writ petition for various reliefs on 4th May, 2016.

8. On 7th December, 2016, this Court recorded a statement made by the petitioners that the comprehensive representation would be submitted to the Corporation in respect of getting regularization in payment of premium for

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staircase and lift lobby etc. This Court made it clear that if any such representation would be received by the respondent no.1 within one week, the respondent no.1 shall deal with the same in accordance with the law and to communicate the decision to the petitioners. This Court did not express any opinion on merits. The said order was clarified by order dated 22nd December, 2016. This Court directed the respondent no.1 to decide the said representation within four weeks from the date 26th December, 2016.

9. The petitioners thereafter filed their detailed representation before the Municipal Commissioner of the respondent no.1. On 4th February, 2017, the Municipal Commissioner of the respondent no.1 held that the provisions of D.C. Regulation 33(10), Clauses 6.21 and 6.22 i.e. allowing concession for area of staircase, lift etc without charging premium is applicable only in case if the applicant follows provisions 1.2 of Appendix IV to D.C. Regulation 33(10). It is held that in the present case, the rehabilitation areas proposed are more than 25 square meters and hence petitioners were not eligible for concession under Clauses 6.21 and 6.22. However, the area of staircase, lift etc proportionate in the existing built-up area of the existing occupants as received by MHADA could only be considered and the premium shall be charged on the balance area. The petitioners thereafter applied for amendment to the Writ Petition and also impugned the said order dated 4th February, 2017. The petitioners were allowed to amend the petition on 23rd March, 2017.

10. On 12th October, 2017, this Court admitted this writ petition and made

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the rule returnable on 6th November, 2017 for hearing. This Court directed that in the meanwhile the respondent no.1 to process the application filed by the petitioners for occupation certificate in respect of 4 wings of rehabilitation buildings, construction of which was stated to be already completed, without exemption for staircase premium. This Court however made it clear that the said interim order was made subject to the petitioner no.2 filing an undertaking before this Court that in case it fails in the Writ Petition, it would make staircase payment. Such undertaking was directed to be filed within two weeks from the date of the said order. The petitioners accordingly filed an undertaking before this Court.

11. Being aggrieved by the said interim order dated 12th October, 2017, the respondent no.1 preferred a Special Leave Petition (Special Leave to Appeal) (C) No(s). 32918 of 2017 before the Hon'ble Supreme Court. By an order dated 15th December, 2017, the Hon'ble Supreme Court issued notice in the said matter and clarified that in the meanwhile application for the occupation certificate may be processed but no final order to be passed. The Hon'ble Supreme Court thereafter recorded the statement made by the petitioners herein that the petitioners would deposit an amount of Rs.27 crores in the registry of the Hon'ble Supreme Court on or before 31st January, 2018. The Hon'ble Supreme Court directed that on receipt of the said amount, the registry will keep it in a fixed deposit initially for a period of 6 months and to issue a receipt to the respondents. The respondent no.1 would grant occupancy certificate within two weeks on production of a receipt of the deposit before the respondent no.1 by the petitioners. The

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petitioners accordingly deposited the said sum of Rs.27 crores with the registry of the Hon'ble Supreme Court on 24th January, 2018. The respondent no.1 thereafter granted part occupation certificate in favour of the petitioner no.1 in respect of various buildings.

12. By an order dated 31st August, 2018, the Hon'ble Supreme Court directed that the said amount of Rs.27 crores deposited by the petitioners with the registry of the Hon'ble Supreme Court, with accrued interest be handed over to the respondent no.1 herein subject to final orders passed in this Writ Petition pending in this Court. The Hon'ble Supreme Court directed that the respondent no.1 should ensure that all the bylaws and the rules etc. with regard to the fire safety and other legal requirements were complied with and disposed of the said Special Leave Petition.

13. In the meanwhile, this Court disposed of the Writ Petition bearing No. 187 of 2016 filed by ***Wadhwa Estate and Developers(I) Pvt. Ltd.*** against ***the Municipal Corporation of Greater Mumbai*** seeking a declaration that the respondent no.1-Corporation did not have the authority to charge premium @ 100% for the development under Regulation 33(5) of the said D.C. Regulations for Greater Mumbai 1991 for the open space deficiency. The petitioners in the said Writ Petition had also challenged the demand notice issued by the Municipal Corporation by which the petitioners therein were required to pay 100% premium for the open space deficiency. This Court allowed the said Writ Petition filed by the said ***Wadhwa Estate and Developers(I) Pvt. Ltd.*** and declared that the respondents therein would not

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be entitled to charge 100% premium under the regulation pertaining to open space deficiency under the sub Clause 6 in Annexure 'A' of Appendix IV of Regulation 33(10) of the Regulation and the impugned notice demanding the said amount was bad in law.

14. The Hon'ble Supreme Court has admitted Special Leave petition in Special Leave to Appeal (C) No. 8186 of 2018 against the said judgment delivered by this Court in case of ***Wadhwa Estate and Developers(I) Pvt. Ltd.*** and another. The Hon'ble Supreme Court has granted stay of the order passed by this Court in the Writ Petition No. 187 of 2016. The said Special Leave Petition is pending before the Hon'ble Supreme Court.

15. The Hon'ble Supreme Court expedited the hearing of this Writ Petition and directed that the Writ Petition be disposed of by 17th January, 2021. Both the parties were allowed to file their written arguments. The writ petition was thereafter heard by this Court at length finally and is being disposed off.

16. The respondent no.1 filed reply dated 24th June, 2016, additional affidavit in reply filed on 24th April, 2017 and affidavit in reply dated 9th January, 2019. The respondent no.2 filed affidavits dated 17th September, 2016 and 1st January, 2021. The petitioner no.2. filed an affidavit on 26th October, 2017 and additional affidavit on 5th January, 2021. Both the parties also filed compilation containing various provisions of the said D.C. Regulations for consideration of this Court.

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17. Dr. Sathe, learned senior counsel for the petitioners invited our attention to various documents forming part of the record and also various averments made by the parties in their respective affidavits by his client in the writ petition.

18. It is submitted that relaxations/exemptions/benefits enumerated under Regulation 33(10) of D.C. Regulations in respect of Slum Rehabilitation Projects are also available to the Redevelopment under Regulation 33(5) of the D.C. Regulations under which the petitioners' redevelopment project falls. The respondent no.1 has categorized certain areas in a building which are not to be included in computation of FSI ("Free of FSI Area") which are enumerated in Regulation 35(2) of the D.C. Regulations. Clause 35(2)(c) before 2012 and Clause 35(2)(iii) deal with areas covered by staircase rooms, lift rooms etc. He relied upon Sub-Regulation (6) of Regulation 33(5) of the D.C. Regulations and would submit that all relaxations/exemptions to the planning requirements under D.C. Regulations enumerated under Regulation 33(10) of the D.C. Regulations are also applicable to the present development being undertaken on the said land under Regulation 33(5) of the D.C. Regulations.

19. Learned senior counsel placed reliance on paragraphs 6.21 and 6.22 of Appendix IV of the D.C. Regulations and would submit that the provisions of Regulation 35(2) (iv) of the D.C. Regulations insofar as they relate to the payment of premium for such free of FSI areas in rehabilitation

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component had been exempted and/or relaxed by Clause 6 of Regulation 33(5) of the D.C. Regulations read with Regulation 33(10) and Appendix IV of the D.C. Regulations.

20. Learned senior counsel invited our attention to the Regulation 35(2) of the D.C. Regulations as amended on 6th January, 2012 and would submit that certain free of FSI area has been included under Regulation 35(2) (iii) which are allowed to be constructed without payment of premium to respondent no.1. The only free of FSI covered under Regulation 33(2) (iv) are staircases/lift wells including lobbies excluding those covered under D.C. Regulation no.35(2) (iii). He submits that though Regulation 35(2) of the D.C. Regulations has been amended, the intent of Sub-Regulation 6.21 and 6.22 of Appendix IV of D.C. Regulations remains that premium shall not be charged for such free of FSI area under Regulation 35(2) (iv) of the D.C. Regulations on rehabilitation component.

21. It is submitted that Regulations 35(2) and 33(5) read with Regulation 33(10) and Appendix IV of the D.C. Regulations clearly indicate that areas covered by staircase room, lift rooms above topmost storey, staircase/lift wells and passages in stilt, basement and floors exclusively used for parking and other ancillary users, staircases/lift wells including lobbies, ought to be allowed to be constructed as free of FSI area and without charging any premium for a building of the rehabilitation component. The respondent no.1 however has illegally disallowed the said relaxation by its impugned letter dated 22nd April, 2016 and order dated 6th January, 2018.

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22. Learned senior counsel invited our attention to the various Letters of Offer issued by the respondent no.2 from time to time. He laid emphasis on various terms and conditions of the NOC dated 1st July, 2014 issued by the respondent no.2 for proposed redevelopment of the existing building of the LIG big size (1 to 45), LIG small size (1 to 31) EWS (37) MIG size (1 to 12 and 35 to 38 and 40 to 47) known as Samata Nagar Co-operative Housing Society Union Limited bearing CTS No. 837 (Part) to 840 (Part) Survey Nos. 55 and 56 at Samata Nagar, Kandivali (East), Mumbai – 400 101. He submits that the said NOC was in continuation of various Letters of Offer issued by the respondent no.2 from time to time. By the said NOC, the petitioners were granted no objection for redevelopment of their buildings on the terms and conditions on the plot admeasuring about 90666.48 sq.meters. The NOC is granted as per the policy laid down by the MHADA vide MHADA Resolution Nos. 6260 dated 4th June, 2007, A.R.No. 6397 dated 5th May, 2009 and A.R.No. 6422 dated 7th August, 2009 subject to various conditions setout in the said NOC.

23. Learned senior counsel strongly placed reliance on Clauses 4, 21, 31, 32, 35 and the last paragraph of the said NOC. It is submitted by the learned senior counsel that by the said NOC, the petitioners were granted permission for redevelopment of the existing buildings of LIG, big size, small size, economically weaker section, MIG size etc. as per policy laid down by MHADA. He submits that under the said NOC, it was made clear that 60% of the total built up area should be in the form of EWS/LIG/MIG. The

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petitioners were required to construct separate buildings for rehabilitation of existing tenants and for the purpose of free sale. The petitioners were to form the independent co-operative housing society for rehab building of tenants as well as for free sale component after giving possession to the existing tenants and prospective buyers, wherever possible.

24. Learned senior counsel placed reliance on the last paragraph of the said NOC which provided that the MHADA shall consider the proposal for amendment of the layout for 2.5 FSI. Further 2.5 FSI was granted to the petitioners on the notionally sub-divided area. The proposal of the petitioners should be considered for the 2.5 FSI and all the directives given in the Government Resolution of U.D.D. Vide No.TPB/4308/74/ C.NO.11/2008/UD-11 dated 6th December, 2008 shall be applicable to the petitioners.

25. Learned senior counsel invited our attention to the notification dated 26th August, 2009 describing the maximum area to be allotted for the EWS, LIG and MIG tenaments. He invited our attention to the Regulation 33(5)(1)(2)(d) and proviso (3)(c) and would submit that the said provision as on 6th December, 2008 also had made it clear that notwithstanding anything contained in the Regulation 33(10) of that Regulation shall apply for housing scheme under rehabilitation for tenament under EWS/LIG/MIG categories. Regulation 33(5) was substituted on 6th December, 2008 which was applicable to the redevelopment undertaken by the petitioners.

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26. Learned senior counsel invited our attention to the Regulation 33(5) thereby substituting the earlier Resolution 33(5) by notification dated 8th October, 2013. He invited our attention to the Regulation 33(5)(2), (6) and (9) and would submit that the said amendment substituting the earlier Regulation 33(5) w.e.f. 8th October, 2013 was clearly not applicable to the project undertaken by the petitioners. Even if the same would have been applied, Clause 6 of Regulation 33(5) made it clear that notwithstanding anything contained in the Regulations incorporated under Regulation 33(10), these Regulations shall apply to the housing schemes under this regulation for construction of the tenaments of EWS/LIG and MIG categories. He submits that the 3 FSI available for redevelopment of existing housing scheme of MHADA containing (i) EWS/LIG and/or (ii) MIG with carpet area less than the maximum carpet area described by the MIG was admittedly not given to the petitioners in view of the petitioners' project being clearly governed by the directives given in the Government Resolution dated 6th December, 2008 applying 2.5 FSI only.

27. It is submitted by the learned senior counsel that the irrespective of the area of the tenaments offered by the petitioners to the existing occupants under EWS or LIG in this case, the petitioners were entitled to the relaxation granted to the schemes under Regulation 33(10) of the D.C. Regulations. The respondent no.1 thus could not have demanded any premium from the petitioners irrespective of the tenament constructed by the petitioners i.e. under rehabilitation component. Regulation 33(5)(2)(c) of the D.C. Regulations does not provide for any specific area for grant of relaxation.

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Clause (6) of Regulation 33(5) provides for a non-obstante clause and thus prevail over the other conditions prescribed under the said Regulation. Thus irrespective of the petitioners having constructed more than 25 sq.mtrs tenaments, all relaxations available to the schemes under Regulation 33(10) of the D.C. Regulations would apply to the project undertaken by the petitioners under Regulation 33(5)(2)(c) of the D.C. Regulations.

28. It is submitted that in this case, the petitioners have not carried out any tenaments for MIG group. Regulation 33(10) has no qualification. Clauses 6.21 and 6.22 of Regulation 33(10) which clearly provide that no premium shall be charged for exclusion of the staircase and lift etc. as covered under the provisions of D.C. Regulations 35(2)(c) which would apply to the project undertaken by the petitioners. He submits that under Clause 6.22 of the said Regulation 33(10) all the relaxation provided under the said Regulation shall be given to the rehabilitation component free of any premium proposed under Regulation 33(5) (2) (c) of the D.C. Regulations. The tenament area mentioned in Regulation 33(10) cannot apply to the project undertaken under Regulation 33(5).

29. Learned senior counsel invited our attention to the first impugned order dated 22nd April, 2016 passed by the Deputy Chief Engineer (Building Proposal) annexed at Ex.I to the petition and would submit that the application for relaxation of premium made by the petitioners was rejected solely on the ground that there was no provision in Regulation 35(2)(iv) for the cases of reconstruction dealt under Regulation 33(5) of D.C. Regulations

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1991 or any other provisions of modified D.C. Regulations 1991 in force. He submits that the said order shows total perversity and is ex-facie contrary to Clause 6 of Regulation 33(5) of the D.C. Regulations.

30. Learned senior counsel strongly placed reliance on the judgment delivered on 14th November, 2017 by a Division Bench of this Court in case of ***Wadhwa Estate and Developer (I) Pvt. Ltd. and Anr. vs. Municipal Corporation of Greater Mumbai and Others in Writ Petition No.187 of 2016*** and in particular paragraphs 3, 4, 6 to 11 and would submit that this Court on interpretation of Regulations 33(5), 33(10), Clauses 6.21, 6.22 and 6.23 of Annexure A of Appendix IV has declared that the Municipal Corporation would not be entitled to charge 100% premium for the relaxation containing open space deficiency under the Sub-clause 6 in Annexure A of Appendix IV of Regulation 33(10). He submits that the said judgment would squarely apply to the facts of this case and is binding on this Court. Learned senior counsel submits that the said judgment though has been impugned by the Municipal Corporation before the Hon’ble Supreme Court, the said judgment is not stayed by the Hon’ble Supreme Court.

31. Learned senior counsel for the petitioners invited our attention to the averments made by the petitioners in paragraph (4) (dd) of the writ petition and would submit that the petitioners had specifically given various instances showing that the respondent no.1 had duly granted relaxation in payment of premium for loading of free FSI area in rehabilitation component in a project under Regulation 33(5) of the D.C. Regulations to many

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similarly situated developers/society. He invited our attention to the document annexed at pages 267 to 296 in support of this submission. The respondent no.1 has also granted various relaxation to the project under Regulation 33(7) read with Appendix III Clause (8) on similar basis in respect of all rehabilitation component. There cannot be a burden on the developer of additional liabilities of premium. He submits that there was thus blatant discrimination against the petitioners by the respondent no.1.

32. Learned senior counsel placed reliance on the circular dated 18th January, 2016 issued by the respondent no.1 i.e. the policy regarding condonation of open space deficiency created on account of loading of fungible FSI and would submit that the said circular would clearly indicate that all relaxations available under Regulation 33(10) of D.C. Regulations shall be made applicable to Regulation 33(5) of the D.C. Regulations. He submits that the said circular also refers to Clause 6 of Regulation 33(5) read with Clauses 6.21 and 6.22 of Appendix IV (Regulation 33(10) of D.C. Regulations) of the D.C. Regulations. The petitioners are also seeking to rely upon the said provision for seeking exemption in payment for loading of free of FSI area for rehabilitation component.

33. Learned senior counsel for the petitioners submits that the premium demanded by the respondent no.1 are without authority of law under Article 265 of the Constitution of India. There is neither any express nor any implied authority for the respondent no.1 to enforce such premium. The demand for premium raised by the respondent no.1 is in absence of any

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authority of law under Regulation 33(5) of the D.C. Regulations and thus such demands are in the nature of compulsory extractions. The respondent no.1 has no authority to demand such premium and the same would be in violation of Article 19(1)(g) and/or Article 300-A of the Constitution of India. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla an others, (1992) 3 SCC 285*** and in particular paragraph (7). He also relied upon the judgments of this court (i) in case of ***Bharati Tele Ventures vs. State of Maharashtra, 2007(4) Mah.L.J. 105*** and in particular paragraph (35) and (ii) ***Buildarch, Mumbai and another vs. Municipal Corporation of Greater Mumbai and others, 2010 SCC Online Bom. 778*** and in particular paragraph (15).

34. It is submitted by the learned senior counsel that whilst interpreting taxing statutes, the golden rule of strict interpretation of law is to be followed. The State cannot at its whim burden its citizens without any authority of law. The respondent no.1 cannot be allowed to expand/interpret to include those which were not intended by the legislature. He submits that since the Clause 6 of Regulation 33(5) is clear and explicit for relaxation from payment of premium read with Regulation 35(2) read with Regulation 33(10), condition no.6.21 and 6.22, the respondent no.1 cannot be allowed to interpret the said provision in a different way so as to deprive the petitioners from the relaxation provided under those provisions.

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35. In his alternate submission, he submits that even if there is any ambiguity under the provision of Regulation 33(5) read with 33(10) and it is open to two interpretations, the benefit of the interpretation has to be given to the petitioners and not to the respondent no.1. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Promoters & Builders Assn. Of Pune vs. Pune Municipal Corporation and others, 2007 (6) SCC 143*** and in particular paragraph (11) and judgment of this court in case of ***Achal Industries vs. State of Karnataka, 2019 SCC Online SC 428*** and in particular paragraph (11).

36. Learned senior counsel invited our attention to the contentions raised by the respondent no.1 in the affidavit in reply and made submissions thereon. Insofar as the issue raised by the respondent no.1 that the writ petition is not maintainable on the ground that the petitioners had not exhausted the remedy available in Regulation 64(1)(a) of the D.C. Regulations prior to filing of this writ petition by applying to the Municipal Commissioner for seeking special permission is concerned, it is submitted that the petitioners had already made representation to the respondent no.1 pursuant to the order passed by this Court which representation has been already decided vide order dated 4th February, 2017 thereby rejecting the said representation for relaxation. He submits that in any event, since the order passed by the Municipal Commissioner is ex-facie illegal and unconstitutional, the petitioners have right to challenge such illegal acts by filing a writ petition.

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37. Insofar as the contentions raised by the respondent no.1 that the petitioners could not be granted relaxation in view of the carpet area provided by the petitioners under Regulation 33(5) being more than the carpet area described in Regulation 33(10) which was originally fixed at minimum 180 sq.feet, increased to 225 sq.feet and thereafter to 269 sq.feet is concerned, it is submitted by the learned senior counsel that the intent of Sub-Regulation 6.22 and 6.23 of Appendix IV is clear that no premium shall be charged for such areas that are free of FSI under Regulation 35(2) pertaining to rehabilitation component. The D.C. Regulations does not restrict or fix any minimum or maximum areas in rehabilitation component for which exemptions as sought for by the petitioners can be restricted. The areas of rehab component is also fixed by the same D.C. Regulations which grant the relaxations.

38. Learned senior counsel for the petitioners relied upon various averments made in the said additional affidavit filed by the petitioners controverting the said allegations made by the MHADA in the additional affidavit in reply dated 1st January, 2021.

39. After closure of the arguments, the petitioners circulated 'tabular chart showing the breakup of the carpet area of the respective tenaments' provided by the petitioners. The MHADA circulated a compilation of three notifications. The matter was placed on board for directions on 20th January, 2021. This Court permitted the petitioners as well as the Municipal

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Corporation to file a supplementary submissions to deal with the said chart tendered by the petitioners as well as to address the issue regarding the Regulation 35(2)(c) of the Development Control Regulations, 1991. The petitioners as well as the Municipal Corporation filed supplementary submissions.

40. In the supplementary submissions submitted by the petitioners, it is contended that all schemes sanctioned under D.C.Regulation 33(5) for EWS/ LIG/MIG including redevelopment thereof are entitled for benefit of non-payment of premium for exclusion of area like staircase and lift well etc. from computation of FSI in view of Clause 6 of D.C.Regulation 33(5) as conferred upon slum schemes under D.C.Regulation 33(10). The benefit of exclusion of staircase from computation of FSI is applicable to all schemes under D.C.Regulation 33(5). It is pointed out in the additional written arguments that the contentions of the respondents that the schemes of the petitioners is not for the benefit of EWS/LIG/MIG and at the same time that the original character of the scheme for the benefit of EWS/LIG/MIG underwent a change and a redevelopment of MHADA colonies is not for the benefit of EWS/LIG/MIG are inconsistent with each other. The issue raised about the alleged change in character of scheme is as and by way of afterthought and cannot be permitted. No such issue was mentioned in the impugned orders, communications and affidavits filed by either of the respondent.

41. It is contended that all the schemes sanctioned under D.C.Regulation

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33(5) are entitled to the benefit of Clause (6) whether it is the original development of MHADA colony or it is a redevelopment of MHADA colony. No distinction is made out under Clause (6) of D.C.Regulation 33(5) between the original development and redevelopment as is artificially sought to be created by the respondents at that stage contrary to Clause 6 of D.C. Regulation 33(5). The object of D.C.Regulation 33(5) under D.C. Regulations is to rehab EWS/LIG/MIG occupants whose buildings have become dilapidated and MHADA is not in a position to redevelop the same. The increased FSI and relaxations of dimensions as well as payments of premium as available for slum projects are also extended to the redevelopment under D.C. Regulation 33(5). It also contemplates giving additional area to these occupants EWS/LIG/MIG as mentioned in the housing policy which translated into D.C. Regulation 33(5). Every sanction of scheme under 33(5) is for the benefit of EWS/LIG/MIG including the redevelopment of MHADA colonies.

42. Insofar as area mentioned in the Chart submitted by the petitioners is concerned, it is contended that D.C. Regulation 33(5) introduced by a notification dated 6th December, 2008 provides that the carpet area to be provided through EWS/LIG/MIG tenements as determined by the Government from time to time. The Government Resolution dated 5th February, 2008 has redefined the EWS/LIG categories and now provides that the area for EWS and LIG categories as reflected shall not be more than 45 sq.mtrs. The petitioners have provided the areas that are being provided to EWS and LIG categories in paragraph 5.5 of their additional affidavit dated

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5th January, 2021. The areas to be provided to both LIG categories and EWS categories are not exceeding 45 sq.mtrs. of carpet area as per Government Resolution dated 26th August, 2009 and 5th February, 2008. The area provided by the petitioners to LIG and EWS categories are less than 45 sq.mtrs. of carpet area.

43. It is submitted that before amendment on 6th January, 2012, certain areas such as staircase, lift, lobby, basement, covered parking etc. were excluded from computation of FSI. After the amendment of D.C.Regulation 35(2) w.e.f. 6th January, 2012, areas such as staircase, lift, lobby continue to be excluded in computation in FSI. Certain areas such as basement, covered parking etc. are included in computation of FSI. However, a new Clause i.e. D.C.Regulation 35(4) is added, wherein in Commissioner can permit fungible FSI not exceeding 35% over and above the existing FSI, for residential development by charging premium. The case of the petitioners however falls under Clause 6 of D.C.Regulation 33(5) that no premium shall be charged for exclusion of staircases and lift well etc. from computation of FSI. The schemes under D.C.Regulation 33(5) are exempted from the payment of premium for exclusion of staircase and lift well under D.C.Regulation 35(2)(c) which is now D.C.Regulation 35(2) (iii). It is submitted that as per amendment of 6th December, 2012 to D.C.Regulations, 1991, as per D.C. Regulation 35(4), the fungible FSI not exceeding 35% for residential development, is permitted over and above the admissible FSI by charging of premium notwithstanding anything contained in D.C. Regulations 32, 33 and 34.

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44. It is contended that at the time, when the petitioners' scheme under D.C. Regulation 33(5) was sanctioned, the petitioners were providing an area of not exceeding 45 sq.mtrs. carpet area along with certain free of FSI areas such as balcony, flower bed etc. After the amendment of D.C. Regulations on 6th January, 2012, certain areas such as balcony, flower bed which were earlier excluded from computation of FSI are included in computation of FSI. Hence, the members of the petitioner no.1 society who were otherwise entitled to carpet area upto 45 sq.mtrs. along with certain free of FSI areas such as balcony, flower bed, these free of FSI areas were no longer available. Hence, to compensate this, the Government introduced "Compensatory Fungible FSI" of 35% over and above the permissible FSI.

45. It is submitted that explanations made in the additional written arguments are being provided without prejudice to the arguments that on the plain reading of D.C. Regulation 33(5), the arguments of 'change of character' on redevelopment of EWS/LIG/MIG and the argument about the areas that are being provided to EWS/LIG/MIG etc. are both misconceived.

46. Mr. Sakhare, learned Senior Counsel for respondent no.1 on the other hand invited our attention to various provisions of Development Control Regulation amended from time to time, various annexures to the Writ Petition, to the affidavits-in-reply filed by his client, averments made in the affidavit-in-reply filed by his client and various contentions raised in the written argument filed before this Court.

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47. It is submitted by the learned Senior Counsel that the petitioners had submitted application for amendment of the plan on 16th April, 2016 and thus all the provisions as on 16th April, 2016 in force including the provisions of D.C. Regulations would apply to the project undertaken by the petitioners and not earlier Government Resolution and the Notification as sought to be relied upon by the Petitioners. He invited our attention to the objections raised by respondent no.1 to the maintainability of this Petition and also on merits raised in the affidavit-in-reply which are summarised in the written argument filed by respondent no.1.

48. Learned Senior Counsel invited our attention to the order dated 22.04.2016 and also order dated 04.02.2017 passed by the Municipal Commissioner on the representation made by the petitioners pursuant to an order passed by this Court dated 7th December, 2016. He submits that the Municipal Commissioner though in the order dated 4th February, 2017 has rejected the claim made by the petitioners for relaxation in payment of premium on the area of staircase, lift etc., he has exercised his discretion under Regulation 64 vested in him and directed that the area of staircase, lift etc. proportionate to the existing built up area of existing occupants as certified by MHADA can only be considered and the premium shall be charged on the balance area. He submits that by exercising such discretion by the Municipal Commissioner, the original demand for payment of premium on the entire area of construction of rehabilitation component was substantially reduced to Rs.27 Crores.

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49. It is submitted that the Municipal Commissioner in the said order has already held that the petitioners are not entitled to pick and choose provisions under Appendix IV of D. C. Regulations under Regulation 33(10) only for the purpose of seeking relaxation. The relaxation under Section 33(10) only applies to the extent of tenament having size of 20.90 sq. mtrs. carpet area. There is no provision under Regulation 33(10) to grant relaxation in excess of the said area. Any proposal for relaxation thus would only be considered to the extent of area specified under Regulation 33(10) read with Appendix IV thereunder. The Municipal Commissioner, thus, rightly decided that the existing built up area of the occupant as certified by MHADA only would be considered and the premium shall be charged on the balance area. The petitioners are misreading the provisions of D. C. Regulations to suit itself and seeking concession more than what was provided under the Regulations. Regulation 33(10) read with Appendix IV does not contemplate exclusion of provisions of staircase, lift etc. more than 20.9 sq. mtrs. or tenaments.

50. It is submitted by the learned Senior Counsel that Regulation 33 (5) of D. C. Regulations, 1991 is not at all applicable to the present case. Regulation 33 (5) provides for construction of new scheme of low cost housing implemented by MHADA and also to the redevelopment of existing scheme. He strongly placed reliance on Regulation 33 (5) (5) (b) (i) and (ii) and also Clauses 1 and 2 of Regulation 33 (5) introduced by notification dated 8th October, 2013. He submits that in the present case the development being undertaken by the petitioners cannot be termed as housing scheme for

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construction of tenament under EWS/LIG/MIG.

51. It is submitted by the learned Senior Counsel that three categories of constructions are covered under Regulation 33(5)(5) i.e. “(1) Construction of EWS/LIG/MIG tenaments by MHADA on vacant plot, (2) Redevelopment Project of the construction EWS/LIG/MIG tenaments towards the share of MHADA and (3) Re-development Project on existing housing scheme having rehabilitation components.”

52. Learned Senior Counsel placed reliance on clause Regulation 33(5) and would submit that the relaxation incorporated in Regulation 33(10) shall apply to the housing scheme under the Regulation for construction of tenaments under EWS/LIG/MIG categories by MHADA on a vacant plot or only if the redevelopment project was for construction of EWS/LIG/MIG towards the share of MHADA. The Redevelopment Project on already existing scheme is not covered under Clause 6 as the same is not for construction of any new tenament for EWS/LIG/MIG. The petitioners are not entitled to seek any benefit for such clause as the present project is not a housing scheme for construction of tenament under EWS/LIG/MIG categories. It is a redevelopment project of existing housing scheme.

53. It is submitted by the learned Senior Counsel that the object of granting benefit of housing scheme for construction of tenament under EWS/LIG/MIG categories is on the basis that such projects are undertaken not with any commercial profit motive. The object of the project is to

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provide housing at affordable rates to particular communities. Present development does not involve the construction of tenament of EWS/LIG/MIG categories and only rehabilitation of existing occupants. The present project does not fall within the ambit and scope of Regulation 33(5). The project scheme undertaken by the petitioner no.2 is for utilization of full plot potential and commercial gain of the developers. The petitioners are thus entitled to any relaxation available to the project undertaken under Regulation 33(10).

54. Without prejudice to the aforesaid submission, it is submitted by the learned Senior Counsel for respondent no.1 that the Regulation 33(10) contemplates that the provisions of Appendix IV shall apply to the development thereunder. He placed reliance on Clause 1.1 of Appendix IV in support of his submission that the said clause contemplates that free of cost residential tenament having carpet of 20.90 sq. mtrs. i.e. 225 sq. ft. including balcony, bath and water closet but excluding common area shall be provided. He relied upon Clause 1.2 of Appendix IV and would submit that under that clause it is contemplated that the structures having residential area more than 20.90 sq. mtrs. will be eligible only for 20.90. sq. mtr. Area. The relaxation is to be given qua 20.90 sq. ft. area and the proposal contains more area, it shall not be taken up for consideration. Since in this case the tenament size itself is more than the area of 20.9 sq. mtrs, proposal seeking relaxation qua payment of premium for area of staircase in respect of area existing 20.90 sq. mtrs per tenament cannot be considered in view of express provisions of Regulation 33(10) read with Clauses 1.1 and 1.2 of

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Appendix IV.

55. It is submitted that minimum carpet area is not defined under the provisions of Regulation 33(5) of D. C. Regulations i.e. redevelopment of existing building on land owned by MHADA. On the other hand the same is variably fixed by Government for EWS/LIG/MIG on land belonging to MHADA. The limit of carpet area is extended upto 80 sq. mtrs. The tenament under rehabilitation of slum improvement are of unique size and category. The condition of the slums prior to redevelopment under Regulation 33(10) was totally different. The occupants stay in bad clusters with inadequate facility or natural light of ventilation. There is lack of sanitation facility.

56. It is submitted by the learned senior counsel that the redevelopment under existing housing scheme under Section 33(5) are on an entirely different footing and do not have any of the features as in case of slum redevelopment. They have adequate light and ventilation facility and adequate sanitary facility. The redevelopment of MHADA is mainly for utilization of full plot potential and commercial gain of the developers. The additional FSI benefit cannot be given by Regulation 33 (5) by involving a beneficiary development who sells free sale tenament in open market. In contrast Regulation 33 (10) seeks to provide incentive to the willingly participating partner who shoulders the responsibility of developing the slums by deploying his own funds and recovering the same from sale of sale components in open market. The basis for not charging the premium for

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area of staircase, staircase lobby, lift, lift lobby and passages thereto is on the rational of minimum carpet area defined and benefits received.

57. It is submitted by the learned Senior Counsel that the rational for exemption of staircase, staircase lobby, lift, lift lobby and passages thereto being on the basis of minimum based carpet area provided under Regulation 33 (10) of the D. C. Regulation, 1991 for Slum Rehabilitation Scheme such rational cannot be applied to the scheme of redevelopment of existing building situated on the land owned by MHADA dealt under Regulation 33 (5) of D.C. Regulation, 1991. The provisions of Regulation 33 (5) (iv) do not permit the exemption of the area of staircase, staircase lobby, lift, lift lobby and passages thereto without charging premium to the redevelopment of building on the land owned by MHADA dealt with under Regulation 33 (5) of D.C. Regulation, 1991.

58. Learned senior counsel tendered copy of the compilation of various provisions of D. C. Regulation, copy of the notifications dated 6th December, 2008, 8th October, 2013 for consideration of this Court. It is submitted by the learned Senior Counsel that the additional FSI was permitted under the said notifications only to the development/redevelopment of housing schemes of MHADA under specific categories. There were more than 12 such categories. He submits that by the said notification dated 6th December, 2008 the earlier provisions of Regulation 35 (5) in force then were substituted. He submits that the said Regulation 33(5)(2) i.e. “for redevelopment of existing housing scheme of MHADA undertaken by the

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MHADA departmentally or jointly with societies/occupiers or by housing societies/occupiers of building or lessee of MHADA or by developers is not applicable to the petitioners since the development is being carried out by the petitioners-developers and not by MHADA.

59. Learned Senior Counsel placed reliance on the Government Notification dated 8th October, 2013 and would submit that the Government Notification dated 6th December, 2008 was substituted by the said Government Notification dated 8th October, 2013. He submits that in view of the said amendment, Regulation 33 (5) of D. C. Regulations in existence prior to 8th October, 2013 does not apply to the developments other than the developments prescribed in Regulation 33 (5) (5) (b) (i) and (ii). It is submitted that since the project undertaken by the petitioners would not fall under Regulation 33 (5) (5) (b) (i) or (ii), there is no question of granting any relaxation prescribed under Clause (6) of Regulation 33 (5).

60. Learned Senior Counsel for respondent no.1 placed reliance on paragraph 6 of the additional affidavit-in-reply filed by respondent no.2 (MHADA) on 5th January, 2021 and would submit that even according to MHADA the redevelopment project by the petitioners is not for EWS/LIG/ MIG. It is submitted by the learned Senior Counsel that respondent no.2 is admittedly the owner of the said land. Petitioner no.1-Society is a lessee of respondent no.2 in respect of the said land and are the owners of the structures thereon. When the petitioner no.1-Society applied for development of the said plot for rehabilitation, it would develop the said land

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on its own terms. The petitioner no.2, who is developer, carrying out construction is also of the choice of petitioner no.1. He submits that in Regulation 33 (5) (5) (b) (iii) i.e. "for rehabilitation component of redevelopment project" the words "construction of tenaments EWS/MIG/LIG" are absent. The legislative intent is thus clear that the relaxation from payment of premium for the fungible FSI admissible under Regulation 35(4) is not available in case of rehabilitation component of a redevelopment project.

61. The next submission of the learned senior counsel for respondent no.1 is that in case of redevelopment of the land in question, then original character of the members belonging to EWS/LIG/MIG group is lost. Thus, the redevelopment having being carried out on commercial basis, there is no question of any relaxation of premium which could be availed of only when construction of EWS/LIG/MIG tenament would have been carried out by the MHADA on a vacant plot or if the redevelopment project was for construction of EWS/LIG/MIG tenaments towards the share of MHADA. The allotment of tenaments to the members of petitioner no.1 is not on the basis of EWS/LIG/MIG but is on the basis of existing tenants/ occupants/holders of the tenaments. No new tenaments for EWS/LIG/MIG are generated in the project.

62. Learned Senior Counsel made an attempt to distinguish the Judgment of this Court in case of ***Wadhwa Estate and Developers (I) Pvt. Ltd.*** (supra) on the ground that the issue before this Court in the said Judgment was

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regarding premium for open space deficiency. The issues raised in this Petition were not raised by respondent no.1 in the said matter before the Division Bench of this Court. He submits that in any event the Special Leave Petition filed by respondent no.1 against the said Judgment is admitted and is still pending before Hon'ble Supreme Court. The learned Senior Counsel however agreed that the Judgment of this Court in the case of ***Wadhwa Estate and Developers (I) Pvt. Ltd***. (supra) is not stayed by the Hon'ble Supreme Court but only an order passed by this Court is stayed.

63. In so far as the submission of the petitioners in respect of alleged discrimination against the petitioners by respondent no.1 is concerned, it is submitted by the learned Senior Counsel that even if any wrong advantage is granted to any other developer by respondent no.1, that would not confer any right on the petitioners to seek similar advantage. He submits that in any event pursuant to internal discussion held on this issue on 20th April, 2017, respondent no.1 has taken a decision to review Worli case and also to levy premium, if necessary.

64. In the supplementary written arguments submitted by the Municipal Corporation, it is contended that since the redevelopment scheme which is the subject matter of the present petition, is not a housing scheme for construction of tenaments of EWS/LIG and MIG, the petitioners are not entitled to the benefits contemplated under Clause 6 of Regulation 33(5) of D.C. Regulations, 1991 which benefits are specifically meant for housing schemes for construction of tenaments under EWS/LIG and MIG. The

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reliance is placed on Clause 4 of Regulation 33(5) in support of the submission that under the said clause, the carpet area of EWS/LIG/MIG tenaments shall be as determined by the Government from time to time. The carpet area provided by the petitioners for EWS/LIG/MIG being more than carpet area determined by the Government, such schemes cannot be considered or treated as scheme for EWS/LIG and MIG as contemplated under Regulation 33(5).

65. It is contended that the Circular dated 5th January, 2008 relied upon by the petitioners to contend that the permissible carpet area for EWS/LIG tenaments were 45.00 sq.mtrs., was issued prior to the amendment of the Regulation 33(5) and also prior to the Government circular dated 26th August, 2009. The said Circular dated 5th February, 2008 thus would have no application in the present case. In the alternate submissions, it is contended that even the said Circular dated 5th February, 2008 contemplates that the carpet area of 45 sq.mtrs. permissible for EWS/LIG tenaments would be including the balcony. The submission of the petitioners that the balcony is excluded from such carpet area is contrary to the said Circular dated 5th February, 2008.

66. The carpet area mentioned in paragraph 5.5 of the additional affidavit filed by the petitioners are stated to be the total carpet area including fungible FSI component. The petitioners however in the chart submitted now purportedly seeks to set out the carpet area of the tenaments excluding the fungible FSI component. The chart submitted by the petitioners is

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misleading in as much as the area of fungible FSI can never be separated while determining the carpet area of the tenaments as sought to be canvassed by the petitioners.

67. It is contended that prior to the amendment in D.C. Regulations in 2012, balconies, flower beds and niches were not included in the FSI computation and many developers/builders were taking undue advantage of such provision. By way of amendment to Regulation 35 and insertion of Regulation 35(3) many such areas that were earlier free of FSI came to be included in FSI computation. It was accordingly decided that the compensatory FSI on payment of premium would be available as specifically provided under Regulation 35(4). In the present case, the benefit of fungible FSI is granted free of premium to the petitioners.

68. It is contended that the petitioners have taken benefit of Clause 5(b) (iii) of Regulation 33(5) as amended on 8th October, 2013 which itself shows that the provisions which are applicable to the project of the petitioners would be under Regulation 33(5) as amended vide notification dated 8th October, 2013. The petitioners cannot be allowed to pick and choose part of the said provisions and contend that other part would not be applicable. The reliance placed by the petitioners on the unamended provision is entirely misconceived and untenable.

69. Reliance is also placed on the definition of the carpet area under Clause 2(15) of D.C. Regulations, 1991 in support of the contention that the

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area of fungible FSI is not specifically excluded from floor space index computation and is included in the carpet area as defined under D.C. Regulations, 1991. It is contended that under Regulation 35(4) Clause (iii) the fungible FSI is usable as regular FSI and thus the same is required to be included while determining the carpet area. After amendment to Regulation 33(5) vide notification dated 6th December, 2008, the Government has fixed the carpet area for tenaments of EWS/LIG and MIG vide notification dated 26th August, 2009. The contention of the petitioners that the carpet area for EWS/LIG and MIG is exclusive of fungible FSI is entirely baseless and misconceived. There is no provision either in the D.C. Regulations or any notification of the Government that such fungible FSI is to be excluded while calculating the carpet area.

70. The authority is not made known as to which tenaments are being allotted to which category of persons and such verification has not been carried out by any authority viz. MHADA or MCGM. The allotment of rehab tenaments is entirely based on the private negotiations between the developer and the society/members/occupiers and thus it is not possible to ascertain as to which size of tenaments are being allotted to which category of persons and whether such persons truly belong to such a category at all. The allotment of tenaments is solely by virtue of persons being existing occupants of buildings and is not based on the economic status of the occupiers. The petitioners thus cannot be allowed to urge that the present redevelopment project is a housing scheme for construction of tenaments under EWS/LIG/MIG as required to avail benefits of Clause 6 of Regulation

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33(5).

71. It is contended that the area for EWS under the Government notification dated 26th August, 2009 is restricted to 27.88 sq.mtrs. However, minimum size of the tenaments in the buildings of the petitioners is 45.00 sq.mtrs. and thus on this ground also the project undertaken by the petitioners cannot fall under Clause 4 of the Regulation 33(5) and cannot be said to be a housing scheme for construction of tenaments under EWS/LIG/ MIG categories for obtaining benefit under Clause (6) of the Regulation 33(5) of Regulation 1991. The project of the petitioners comprises of rehabilitation of existing occupants and also free sale component as contemplated under Regulation 33(5) of D.C. Regulations, 1991 and is not a housing scheme for construction of tenaments under EWS/LIG and MIG.

72. Insofar as the applicability of Regulation 35(2)(c) of the D.C. Regulations is concerned, it is contended that Regulation 35(2)(c) has been deleted vide notification dated 6th January, 2012 and replaced by Regulation 35(2)(iii) and Regulation 35(2)(iv). The concept of fungible FSI has been introduced by the same notification. Since the petitioners have taken benefit of fungible FSI in pursuance of the notification dated 6th January, 2012, the petitioners are estopped from contending that for the purpose of premium, Regulation 35(2)(c) would be applicable which has been deleted vide the said notification dated 6th January,2012. The premium is levied under Regulation 35(2)(iv) which empowers the Municipal Corporation to levy the premium for exclusion of areas covered by staircase, lift wells including

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lobbies from FSI and the case of the petitioners is squarely covered under Regulation 35(2)(iv).

73. Without prejudice to the aforesaid submissions, it is submitted that even under the earlier Regulation 35(2)(c), the Corporation was charging premium for exclusion of the areas covered by staircase, lift wells including lobbies with special permission of the Commissioner. The source of power for levy of such premium is traceable to section 22(m) of the MRTP Act.

74. Learned senior counsel placed reliance on the judgment of this court delivered on 10th June, 2010 in case of ***Buildarch, Mumbai and another vs. Municipal Corporation of Greater Mumbai and others, 2010(5) Mh.L.J. 327*** holding that in absence of any express provision in the Act or Regulations, the Municipal Corporation did not have the power to levy or collect premium under Regulation 35(2)(c) of the D.C. Regulations, 1991. With a view to remove the basis of the said judgment, the State Government enacted the Maharashtra Regional and Town Planning Act (Amendment and Validation) Act, 2010 on 21st September, 2010. Section 22(m) of the MRTP Act was amended partly with retrospective effect from 11th January, 1967 thereby not only giving power to charge premium for grant of special permission but also validating the levy and collection of such charges prior to the date of the commencement of the amending Act. Clause 6.21 of Appendix IV under Regulation 33(10) has been modified by notification dated 15th October, 2003.

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75. It is contended that the said provision has been introduced for the first time in 1996 and retained in 2003 which shows that the Corporation has been charging premium since prior to 1996 for exemption under Regulation 35(2)(c). The submission of the petitioners that the Corporation has no authority to charge premium is contrary to section 22(m) of the MRTP Act read with Regulation 35(2)(c) of the D.C. Regulations. It is contended that in any event, the petitioners are taking the benefit of Regulation 35(4) introduced vide notification dated 6th January, 2012 and thus cannot be allowed to contend that the amendment to Regulation 35(2) would not apply to the petitioners.

76. Mr. Prakash Lad, learned counsel for the respondent no.2 (MHADA) states that he adopts the submissions made by Mr.Sakhare, learned senior counsel for the respondent no.1 and made additional submissions. He submits that MHADA is the owner of the said land. He submits that on 23rd May, 2018, his client has been authorized to execute the powers of Planning Authority in respect of the land owned by the respondent no.2. In respect of the said land which is the subject matter of this petition, the respondent no.2 is thus notified as Planning Authority.

77. It is submitted by the learned counsel that the development/ redevelopment is permissible under Regulation 33(5) of the D.C. Regulations in two cases. D. C. Regulations 33(5)(1) is applicable for the new housing scheme implemented by MHADA on MHADA's own land for EWS, LIG and MIG category. The second instance of development

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under DCR 33(5) is that the redevelopment of the existing scheme of MHADA undertaken by the MHADA department and jointly with society and Applicant. As the development is undertaken by the petitioners on the land owned by MHADA, the request of the petitioners cannot be considered for exemption from payment of premium. The development undertaken by the petitioners falls under DCR 33(5)(2) i.e. the redevelopment on the existing housing scheme framed and executed by the MHADA. The petitioners can claim benefit of incentive FSI and fungible compensatory area. The respondent no.2 had granted lease of land in favour of the petitioner no.1 society and after completion of the development, conveyed the buildings to the petitioner no.1 society. The development of the petitioners is in the capacity of lessee of the land and owner of the building. Reconstruction is undertaken by the petitioners which is not for EWS, LIG and MIG category. It is combined redevelopment for rehousing the members of the society who were entitled for the schemes framed by the respondent no.2 for EWS, LIG and MIG.

78. It is submitted by the learned counsel that the area of EWS, LIG and MIG tenament has been described as per Government Resolution dated 11th August 2009 as EWS-27.80 sq.meter, LIG-45 sq.meter and MIG-80 sq.meter. In the present development, the entitlement of the petitioner no.1 society is for EWS-45 sq.meters and for LIG-52 sq.meters. The petitioner had not submitted any plan for development for MIG buildings. The development undertaken by the developer is for EWS, LIG category and it is not as per the Government Resolution dated 11th August 2009.

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79. Learned counsel for the respondent no.2 submits that the petitioners had applied for amendment for plan on 16th April 2016 and thus the D.C. regulations prevailing on the said date would apply. He submits that the notification dated 8th October 2013 will be applicable to the application for relaxation of premium made by the petitioners which has already substituted the Government Resolution dated 6th December 2008.

80. Learned counsel for the respondent no.2 invited our attention to the averments made by the petitioners in paragraphs 5.3 and 5.5 of the additional affidavit dated 5th January 2020 filed by the petitioner no.2 and would submit that admittedly the area of tenaments offered by the petitioners in case of EWS and LIG tenaments is more than the maximum carpet area prescribed under the Government Resolution dated 26th August 2009. He submits that even if the area of fungible FSI is considered while computing the area mentioned in paragraph 5.5 i.e. 53.39 sq.mtrs. in case of LIG big tenaments, 45 sq.mtrs. for LIG small tenaments, in case of 296 EWS tenaments admeasuring 45 sq.mtrs. each which would be much more than maximum carpet area of the tenaments prescribed under Government Resolution dated 26th August 2009.

81. Learned counsel for the respondent no.2 invited our attention to the averments made by the petitioners in paragraph 3(c) of the Writ Petition and would submit that the petitioners had also proposed to construct built up area for commercial exploitation. He invited our attention to the averments

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made by the petitioner in the additional affidavit dated 6th January 2021 and would submit that there is no prohibition for sale of tenaments under Regulation 33(5) prescribed in Government Resolution dated 26th August 2009.

82. It is submitted by the learned counsel for the respondent no.2 that in view of the petitioners offering larger area than the actual area of various tenaments in possession of the tenants/occupants/holders in the building constructed by MHADA, the status of those tenants/ occupants/holders as EWS/LIG/MIG has changed. The original status as EWS/LIG MIG is lost. The relaxation from payment of premium which could be available only if the tenaments would have been constructed by MHADA itself from open plot for EWS/LIG/MIG could not be claimed by the petitioners exploiting the said land for commercial purposes.

83. Dr. Milind Sathe, learned senior counsel for the petitioners in rejoinder strongly placed reliance on NOC dated 1st July 2014 issued by MHADA and more particularly the subject, paragraph 1 which refers to the NOC as per the Housing Policy laid down by MHADA vide MHADA Resolution Nos.6260 dated 4th June, 2007, A.R. No.6397 dated 5th June 2009 and A.R. No.6422 dated 7th August 2009. He submits that under the said NOC and more particularly in Clause 35 it was clarified that 60% of total build up areas should be in the form of EWS/LIG/MIG. He relied upon the last paragraph at the end of Clause 40 of the said NOC and would submit that project undertaken by the petitioners was specifically governed

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by the Government Resolution dated 6th July 2008 and was eligible to get 2.5 FSI.

84. Learned senior counsel invited our attention to the notification dated 6th December 2008 and more particularly the recitals in Clauses 1, 2, 4, 6 & 7. He submits that under Regulation 33(5) of the said notification dated 6th December 2008, the redevelopment of existing housing schemes of MHADA was permissible by the MHADA (i) departmentally or (ii) jointly with societies/occupiers of buildings or (iii) by housing societies/occupiers of building or (iv) by lessees of MHADA or (v) by the developer. Total permissible FSI prescribed was 2.5 in the manner set out in Clause (a) and (b) of Regulation 33(5)(2). He submits that under Clause (c) of Regulation 33(5)(2), the petitioners have paid premium to the respondent no.2 in respect of difference between 2.5 FSI and the FSI required for rehab + incentive in the ratio prescribed therein. The tenaments constructed under Regulation 33(5) is for redevelopment of the existing housing scheme of MHADA for EWS, LIG and MIG of the MHADA having at least 60% built up area in the form of tenaments under EWS, LIG and MIG categories. The carpet area for EWS, LIG & MIG tenaments has been determined by the Government from time to time.

85. Learned Senior Counsel strongly placed reliance on Clause 6 of Regulation 33 (5) in support of the submission that the petitioners were clearly eligible for relaxation from payment of premium as was available to redevelopment under Regulation 33 (10). Till 2008, the only MHADA

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could construct their project. By virtue of the said notification dated 6th December 2008, redevelopment of existing housing schemes of MHADA was permissible by the MHADA (i) departmentally or (ii) jointly with societies/occupiers of buildings or (iii) by housing societies/occupiers of building or (iv) by lessees of MHADA or (v) by the developer. Whether such development is permissible by MHADA by departmentally or by others as set out in Regulation 33(5)(2), FSI of 2.5 remains the same.

86. Learned senior counsel strongly placed reliance on the Maharashtra State Housing Policy framed by the Government of Maharashtra, Housing Department dated 23rd July 2007. He relied upon the Foreword, Preamble, Clauses 2, 3.2, 20 and 21 of the said policy. He submits that it is clear from the said policy that there is acute shortage of accommodation. The first ever Draft State Housing Policy was published on 1st November, 2006 which made an effort to address the issue of providing affordable housing for the EWS, LIG and MIG. The said policy recommended various schemes, redevelopment of old MHADA buildings etc. The preamble prescribes that Housing implies not only construction of bricks and mortar; it would include the supporting infrastructure, access to transport and employment opportunities. Housing in urban areas assumes much greater significance as it relates not only to basic shelter needs but also provides a facility to the citizens, to access services and be part of the development process.

87. It is submitted that objectives of the housing policy are to facilitate

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affordable housing in urban and rural areas, create adequate housing stock for LIG, EWS and shelters for the poorest of the poor on ownership or rental basis. The said policy also recommends availability of land, property value index based Transfer of Development Rights for LIG/MIG in identified zones in Metropolitan Region. He strongly placed reliance on Clause 7.4 of the said policy. He submits that in the said policy, Government of Maharashtra also noticed the problem of old and dilapidated buildings particularly in the island city of Mumbai as a major concern. It was provided that unless reconstruction of old and dilapidated building is undertaken on a warfooting, disaster is inevitable in every monsoon. Redevelopment of these buildings will provide better houses to the tenants, provide them ownership rights and also create additional housing stock.

88. Learned senior counsel placed reliance on Clause 20 of the said Housing Policy and would submit that it was proposed to allow redevelopment of such MHADA colonies all over Maharashtra State by providing higher FSI and to revise the ceiling of 30 sq.mtrs. for LIG tenaments which would enable the present occupants to have better accommodation as well as additional housing stock. Under the present D.C. Regulations of 33(5), if the MHADA colony has more than 60% LIG tenaments then 20% extra FSI and permission to load TDR is available. He submits that this Housing Policy framed by the Maharashtra State is translated into the said Government Notification dated 6th December 2008. He submits that even in the said notification dated 6th December 2008,

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there was reference made to the said Housing Policy in the recitals.

89. It is submitted by the learned senior counsel that the petitioners are obliged to provide the existing tenants/occupants/holders various tenaments earlier constructed by MHADA of larger size but as described in the NOC and also in the Government Resolution passed by the State of Maharashtra free of cost. The petitioners have not been paid any consideration for providing accommodation to the existing tenants/occupants/holders by MHADA. On the the other hand the Petitioners are required to spend the entire construction cost out of its own pocket and also required to pay premium to MHADA as per Government Notifications. The scheme under Regulation 33(5) of the D. C. Regulations is self financing scheme by which the petitioners were allowed to construct additional tenaments by way of sale component and to sell those additional tenaments to the customers in open market.

90. It is submitted that the cost of construction on tenaments to be constructed for EWS/LIG/MIG by the petitioners was to be recovered out of the proceeds of sale of sale component tenaments. He submits that under the relevant Government Resolutions as well as the notifications issued by the Government, no relaxation from payment of premium is available in respect of sale components nor the petitioners have made any such claim in this case. The carpet area to be allotted to these tenants/occupants/holders has been decided by the State of Maharashtra from time to time. The existing EWS/LIG/MIG stands continued under the

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scheme availed off by the petitioners. There is no question of change of status of the then EWS/LIG/MIG as sought to be contended by the learned counsel for the respondents across the bar.

91. In so far as the Government Notification dated 8th October 2013 strongly relied upon by the learned counsel for the respondents is concerned, learned senior counsel for the petitioners invited our attention to Clause 9 of the said Government Notification and would submit that the respondents have deliberately not invited attention of this Court to the said clause. He submits that the said clause makes it clear that redevelopment proposals where NOC has been issued by Mumbai Board or Offer Letter has already been issued prior to the date of coming into force of that modification and which is valid as on the appointed date, shall continue to be governed by the Regulation applicable prior to this modification. He submits that admittedly the Letters of Offer have been issued by MHADA from time to time during the period between 26th September 2007 and 1st December 2010. The project undertaken by the petitioners under Regulation 33(5) would be thus governed not by the said notification dated 8th October 2013 but the notification dated 6th December 2008.

92. It is submitted by the learned senior counsel that admittedly FSI of 3.0 available under the said Government Resolution dated 8th October 2013 is not made available to the petitioners by MHADA. The FSI of 2.5 continues to apply to the petitioners under the said Government Notification dated 6th December 2008. The petitioners have however, availed of the

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fungible FSI made permissible under the Notification dated 6th January 2012.

93. It is submitted by the learned senior counsel that even if the terms and conditions under the said Government Resolution dated 8th October 2013 are made applicable, Clause 6 of Regulation 33 (5) of the Government Notification clearly provides that notwithstanding anything contained in these Regulations, the relaxation incorporated in Regulation 33 (1) of these Regulations shall apply to the Housing Schemes under this Regulation for construction of tenaments under EWS/LIG and MIG categories. He also referred to Regulation 33(5)(5)(b)(iii) and would submit that the said clause will have to be read with Regulation 33(5)(2) which provides that no premium shall be charged for the fungible FSI admissible as per DCR 35(4) for rehabilitation of component of redevelopment project. He submits that in no circumstances, the respondents could refuse the said relaxation from payment of premium to the petitioners.

94. Learned senior counsel invited our attention to the Government Notification dated 6th January 2012 and in particular amendment to D.C. Regulation 33(5) and would submit that Municipal Commissioner is empowered to permit fungible compensatory FSI, notwithstanding anything contained in the D.C. Regulations 32, 33 & 34 at a particular percentage by charging premium subject to the proviso that redevelopment under D. C. Regulations 33(5) and redevelopment proposal of existing buildings in suburbs and extended suburbs by availing TDR, the fungible

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compensatory FSI admissible on FSI consumed in existing structure shall be granted without charging premium.

95. It is submitted by the learned senior counsel that Sub-Regulation (5) was required to be added to Regulation 33(5) while issuing Government Notification dated 8th October 2013 in view of the fungible FSI which was made available by virtue of Government Notification dated 6th January 2012. The scheme for redevelopment which was available under the Government Notification dated 6th December 2008 continues to be made available till today in view of the Letters of Offer already having been issued by MHADA much prior to issuance of Government Resolution dated 8th October 2013 and the terms and conditions set out in the said Government Resolution dated 6th December 2008.

96. Learned senior counsel for the petitioners lastly invited our attention to the impugned orders by the Municipal Commissioner and would submit that in none of the impugned orders, the application for relaxation of premium under Clause 6 of Regulation 33(5) read with Regulation 33(10) has been rejected on the ground that proposal for redevelopment submitted by the petitioners was not under Regulation 33(5) of the D.C. Regulations nor on the ground that proposal for development submitted by the petitioners was not under EWS/LIG/MIG in so far as the rehabilitation component is concerned. The MHADA, in its affidavit and also across the bar, has admitted that the proposal submitted by the petitioners was under Regulation 33(5) of the D.C. Regulation.

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REASONS AND CONCLUSION :-

97. We have perused the records and have heard the learned senior counsel for the petitioners, for the respondent no.1 and the learned counsel for the respondent no.2 at length and have given our anxious consideration to the rival submissions made by the learned counsel. The questions that arise for consideration of this Court in this Writ Petition are (i) whether application for relaxation filed by the petitioners fell under Regulation 33(5) of the D.C. Regulations 1991 or fell under any other provision, (ii) Whether notification dated 8th October, 2013 substituting notification dated 6th December, 2008 and all other notifications regarding Regulation 33(5) prior to 8th October, 2013 would apply to the NOC granted by the respondent no.2 in favour of the petitioners in respect of the project in question or the notification dated 6th December, 2008 would continue to apply to the petitioners' project? (iii) whether the petitioners will be entitled to relaxation incorporated in Regulations 33(10) of the D.C. Regulations irrespective of the size of the tenaments under EWS/MIG constructed by the petitioners and were more than 25 square meters and (iv) Even if notification dated 8th October, 2013 substituting then existing Regulation 33(5) of the D.C. Regulations is applicable, whether petitioners are not entitled to relaxation in payment of premium for the consumable FSI admissible as per Regulation 35(4) of the D.C. Regulations under Regulation 33(5)(5)(b)(iii) read with Clause 6 of Regulation 33(5).

98. We shall first decide the issue whether application filed by the

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petitioners for seeking relaxation for payment of premium does not fall under Regulation 33(5) as sought to be contended by the respondent no.1 across the bar.

99. A perusal of the order dated 22nd April, 2016 as well as order dated 4th February, 2017 passed by the Municipal Commissioner does not indicate that the application for relaxation for payment of premium made by the petitioners has been rejected on the ground that the application was not under Regulation 33(5) of the D.C. Regulations. Though this Court repeatedly called upon the learned senior counsel for the respondent no.1 to state the provision under which the application for relaxation was made by the petitioners, if according to the respondent no.1 the said application was not under Regulation 33(5) of the D.C. Regulations, the learned senior counsel could not point out any other provision under which the said application seeking exemption/relaxation from payment of premium on area of staircase, lift, life lobby and passages free of FSI without charging premium would fall.

100. Insofar as the respondent no.2 is concerned, the respondent no.2 in its additional affidavit in reply dated 1st January, 2021 and in particular paragraphs 4 and 5 had admitted that the development is undertaken by the petitioner no.1-society under Regulation 33(5)(2) of the D.C. Regulations i.e. the redevelopment on the existing housing scheme framed and executed by the MHADA. Mr. Lad, learned counsel for the respondent no.2 during the course of his argument also stated that the application for

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exemption/relaxation made by the petitioners was in respect of the redevelopment undertaken under the Regulation 33(5)(2) of the D.C. Regulations. A perusal of the documents annexed to the petition and reply clearly indicates that the project undertaken by the petitioners is under Regulation 33(5) of D.C. Regulations. There is, thus, no substance in the submission made by Mr. Sakhare, learned senior counsel for the respondent no.1 that the application made by the petitioners for relaxation would not fall under Clause 6 of the Regulation 33(5) or that the project undertaken by the petitioners did not fall under Regulation 33(5) of the D.C. Regulations.

101. We shall now decide the issue whether notification dated 8th October, 2013 substituting notification dated 6th December, 2008 and all other notifications regarding Regulation 33(5) prior to 8th October, 2013 would apply to the NOC granted by the respondent no.2 in favour of the petitioners in respect of the project in question or the petitioners would be governed by the notification dated 6th December, 2008.

102. A perusal of the NOC dated 1st July, 2014 read with various Letters of Offer issued by the respondent no.2 clearly indicates that it was made clear that the proposal made by the petitioners should be considered for 2.5 FSI and all the directives given in the Government Resolution of U.D.D. vide No.TPB/4308/74/C.No.11/2008/UD-11 dated 6th December, 2008 shall be applicable to the petitioners.

103. A perusal of the notification dated 8th October, 2013 on which reliance

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is placed by the respondent nos. 1 and 2 by which the then existing Regulation 33(5) of the D.C. Regulations has been substituted and more particularly Clause 9 clearly indicates that the redevelopment proposal where NOC has been issued by the Mumbai Board or Letters of Offer has already been issued prior to the date of the modification, the said modification carried out by notification dated 8th October, 2013, offer letters and NOC valid on the appointed date, shall be continued to be governed by the Regulation applicable prior to the said modification. It is not in dispute that the Letters of Offer issued by the respondent no.2 in favour of the petitioners were issued prior to the appointed date i.e. 8th October, 2013.

104. In our view, in view of the clarification issued in paragraph 9 of the said notification dated 8th October, 2013 and in view of the fact that all the Letters of Offer were already issued prior to the date of coming into force of the said notification, the rights and obligation of the petitioners would be governed by the Regulations applicable prior to 8th October, 2013 then in force. Reliance thus placed by the learned senior counsel for the respondent no.1 and by Mr. Lad, learned counsel for the respondent no.2 on various Sub-Regulations 33(5) under the said notification dated 8th October, 2013 for the purpose of denying the relaxation to the petitioners for payment of premium is totally misplaced.

105. There is also no substance in the submission made by the learned counsel for the respondents that since the application for amendment of the sanction plan was made by the petitioners on 16th April, 2016, the

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notification dated 6th December, 2008 would not apply to the project undertaken by the petitioners but notification dated 8th October, 2013 would be applicable to such project. It is not the case of the respondents that the petitioners have been given 3 FSI permissible under the said notification dated 8th October, 2013. This submission of the learned counsel for the respondents is *ex-facie* contrary to Regulation 33(5)(a) introduced by notification dated 8th October, 2013.

106. **Regulation 33(5) (2), (a), (b) and (c), (4), (6) and (7) of the Government notification dated 6th December, 2008 are extracted as under** :-

> *2) For redevelopment of existing housing schemes of MHADA, undertaken by the MHADA departmentally or jointly with societies/occupiers of buildings or by housing societies/occupiers of building or by lessees of MHADA or by the developer, the FSI shall be as under :-*
>
> *a) Total permissible FSI shall be 2.5 on gross plot area.*
> *b) The incentive FSI admissible against the FSI required for rehab shall be as under:-*
> *(i) In Island City, for the area upto 4000 sq.mt. the incentive FSI admissible will be 50%.*
> *(ii) In Island City, for the area above 4000 sq.mt. the incentive FSI admissible will be 60%.*
> *(iii) In suburban area, for the area upto 4000 sq.mt. the incentive FSI admissible will be 60%.*
> *(iv) In suburban area, for the area above 4000 sq.mt. the incentive FSI will be 75%.*
> *c) In the redevelopment scheme either (i) difference between 2.5 FSI and the FSI required for rehab + incentive shall be shared between MHADA and Society/Developer in the ratio of 2:1 or (ii) for additional built up area over and above the permissible FSI as per DCR 32, MHADA shall charge premium at the rate decided by Govt. in Housing Department from time to time.*
>
> *4) For the purpose of this Regulation the carpet area for EWS, LIG or MIG tenament shall be as determined by the Government from time to time.*
>
> *6) Notwithstanding anything contained in these regulations, the*

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relaxation incorporated in Regulations No.33(1) of these regulations shall apply for Housing Schemes under the regulation for tenaments under EWS/LIG and MIG categories. However, the front open space shall not be less than 3.6 mt.

7) In any Redevelopment scheme where the Co-operative Housing Society/Developer appointed by the Co-operative Housing Society has obtained No Objection Certificate from the MHADA/ Mumbai Board thereby sanctioning additional balance FSI with a consent of 70% of its members and where such NOC holder has made provision for alternative accommodation in the proposed building (including transit accommodation) then it shall be obligatory for all the occupiers/members of participate in the Redevelopment Scheme and vacate the existing tenament for the purpose of redevelopment, in case of failure to vacate the existing tenaments, the provisions of Section 95A of the MHAD Act mutatis mutandis shall apply for the purpose of getting the tenaments vacated from the non co-operative members.

107. **Regulation 33(5)(2)(2.1)(A)(5)(6) and (9) read with Regulation 33(5) substituting the then existing Regulation introduced by notification dated 8th October, 2013 are extracted as under** :-

2) For redevelopment of existing housing schemes of MHADA, containing (I) EWS/LIG and/or (ii) MIG and/or (iii) HIG houses with carpet area less than the maximum carpet area prescribed for MIG, the total permissible FSI shall be 3.0 on the gross plot area (exclusive of the Fungible FSI).

2.1) Where redevelopment of buildings in existing housing schemes of MHADA is undertaken by the housing co-operative societies or the occupiers of such buildings or by the lessees of MHADA, the Rehabilitation Area Entitlement, Incentive FSI and sharing of balance FSI shall be as follows:-

A) Rehabilitation Area Entitlement:

i) Under redevelopment of buildings in existing Housing Schemes of MHADA, the entitlement of rehabilitation area for an existing residential tenament shall be equal to sum total of-

(a) a basic entitlement equivalent to the carpet area of the existing tenament plus 35% thereof, subject to a minimum carpet area of 300 sq. ft, and

(b) an additional entitlement, governed by the size of the plot under redevelopment, in accordance with the

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Table-A below:-

TABLE A

Area of the Plot under Redevelopment	*Additional Entitlement (As % of the Carpet Area of the Existing tenament)*
Upto 4000 sq. m.	*Nil*
Above 4000 sq.m to 2 hect.	*15%*
Above 2 hect. To 5 hect.	*25%*
Above 5 hect. To 10 hect.	*35%*

Explanation : The plot under redevelopment, means the land demarcated by MHADA for redevelopment.

Provided that the maximum entitlement of rehabilitation area shall in no case exceed the maximum limit of carpet area prescribed for MIG category by the Govt. as applicable on the date of approval of the redevelopment project.

Provided further that the entitlement of rehabilitation area as admissible under this regulation shall be exclusive of the area of balcony.

ii) Under redevelopment of buildings in existing Housing Schemes of MHADA, the entitlement of rehabilitation area of any existing commercial/amenity unit in the Residential Housing Scheme shall be equal to the carpet area of the existing unit plus 20% thereof.

4) For the purpose of this Regulation, the carpet areas for EWS, LIG or MIG tenaments shall be as determined by the Government from time to time.

5) a) For providing the requisite infrastructure' for the increased population, an infrastructure charge at the rate of 7% of the Land Rate as per the ASR of the year of approval of the redevelopment project shall be chargeable for the extra FSI (excluding the fungible FSI) granted over and above the normal FSI for the redevelopment schemes. 6/7th part of the Infrastructure Charge levied and collected by MHADA shall be transferred to the Municipal Corporation of Greater Mumbai for developing necessary off site infrastructure.

b) No premium shall be charged for the fungible FSI admissible as per DCR 35(4) for

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> *(i) construction of EWS/LIG and MIG tenaments by MHADA on a vacant plot or*
> *(ii) in a redevelopment project for the construction of EWS/LIG and MIG tenaments towards the share of MHADA, or*
> *(iii) for rehabilitation component of a redevelopment project.*
>
> *6) Notwithstanding anything contained in these Regulations, the relaxation incorporated in Regulation No. 33(10 of these Regulations shall apply to the Housing Schemes under this Regulation for construction of tenaments under EWS/LIG and MIG categories. However, the front open space shall not be less than 3.6 mt.*
>
> *9) The Redevelopment proposals where NOC has been issued by Mumbai Board or Offer Letter has already been issued prior to the date of coming into force of this modification (hereinafter referred to as the "appointed date") and which is valid as on the appointed date, shall continue to be governed by the Regulation applicable prior to this modification.*

108. **Regulation 35 (4) introduced by notification dated 6th January, 2012 with provisos and explanatory note are extracted as under** :-

> ***Compensatory Floor Space Index (FSI) :-***
>
> *Notwithstanding anything contained in the D.C. Regulations 32, 33 & 34, the Commissioner may, by special permission, permit fungible compensatory Floor Space Index, not exceeding 35% for residential development and 20% for Industrial/Commercial development, over and above admissible Floor Space Index, by charging a premium at the rate of 60%, 80% and 100% of the Stamp Duty Ready Recknor Rate, for Residential, Industrial and Commercial development respectively.*
>
> *Provided in case of redevelopment under regulation 33(7), 33(9) & 33(10) excluding clause no. 3.11 of Appendix-IV of Development Control Regulation 1991, the fungible compensatory F.S.I. admissible on rehabilitation component shall be granted without charging premium.*
>
> *Provided further that redevelopment under D.C. regulations no. 33(5) and redevelopment proposal of existing buildings in suburbs and extended suburbs by availing TDR, the fungible compensatory F.S.I. admissible on F.S.I. consumed in existing structure shall be granted without charging premium.*
>
> *Provided further that such fungible compensatory FSI for*

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rehabilitation component shall not be used for free sale component and shall be used to give additional area over and above eligible area to the existing tenants/occupants.

Provided, that this regulation shall be applicable in respect of the buildings to be constructed or reconstructed only.

Explanatory Note :-

i) Where IOD/IOA has been granted but building is not completed, this regulation shall apply only at the option of owner/developer.

ii) For plots/layouts, where IOD is granted for partial development, this Regulation will apply for the balance potential of the plot,

iii) The fungible FSI is useable as regular FSI.

Provided, further, the development in Coastal Regulation Zone (CRZ) areas shall be governed by the Ministry of Environment and Forests Notification issued from time to time.

Note : The premium amount collected shall be kept in a separate Account to be utilized for infrastructure development.

109. **Relevant portion of Regulation 33(10) and Clauses 6.21 and 6.22 of Appendix IV of Development Control Regulation are extracted as under** :-

33(10) (I) ***Eligibility for redevelopment Scheme***.-

[(a) For this purpose, a person eligible for redevelopment scheme shall mean a protected occupier as defined in Chapter I-B of Maharashtra Slum Areas (Improvement, Clearance and Redevelopment Act, 1971 and orders issued thereunder.]

(b) Subject to the foregoing provisions, only the actual occupants of the hutments shall be held eligible, and the so called structure-owner other than the actual occupant if any, even if his name is shown in the electoral roll for the structure, shall have no right whatsoever to the reconstructed tenament against that structure.

6.21 Premium shall not be charged for exclusion of staircase and lift-well etc. as covered under the provisions of DCR 35(2)(c).

6.22 All relaxation outlined hereinabove shall be given to the rehabilitation component, and also to the composite buildings

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in the project Premium shall not be charged for all or any of the relaxation given hereinabove, or for any other mentioned in DCR 35(2)(c).

110. Be that as it may, even if the Regulation 33(5) of the D.C. Regulations introduced by the notification dated 8th October, 2013 thereby substituting existing Regulation 33 (5) is considered, Regulation 33(5) (2) indicates that the said Regulation will apply to the redevelopment of the existing housing scheme of MHADA containing (i) EWS/LIG and/or (ii) MIG and/or (iii) HIG houses with carpet area less than the maximum carpet area prescribed for MIG. In this case, we are concerned with the redevelopment of the existing housing scheme of MHADA containing EWS/LIG. The respondent no.2 in its affidavit in reply and during the course of the arguments admitted that the project of the petitioners for redevelopment was under Regulation 33(5)(2).

111. A perusal of the said Regulation 33(5) (5) (b) introduced by notification dated 8th October, 2013 indicates that no premium shall be charged for the fungible FSI admissible as per D.C. Regulation 35(4) in three situations i.e. (i) when MHADA itself raises construction of EWS/LIG and MIG tenaments on a vacant plot, (ii) when the construction of EWS/LIG and MIG tenaments are redevelopment project is carried out towards the share of MHADA, (iii) for rehabilitation component of a redevelopment project. Admittedly in this case MHADA has not carried out any construction for EWS/LIG and/or MIG tenaments on vacant plot. The said clause thus would not apply to the facts of this case.

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112. Similarly since the MHADA has taken premium from the petitioners in respect of the shares of MHADA prescribed in Regulation 33(5) (2.1) and no construction is being carried out by the petitioners of EWS/LIG and MIG tenaments towards the share of MHADA, the said clause thus also would not apply to the facts of this case. Be that as it may, even if notification dated 8th October, 2013 is considered, since the petitioners are allowed to carry out redevelopment for rehabilitation on the basis of the existing housing scheme of MHADA containing EWS/LIG and/or MIG, the case of the petitioners would fall under Regulation 33(5) (5) (b) (iii). The respondents cannot be allowed to contend that no premium would be charged only if the construction of EWS/LIG and MIG tenaments is carried out by the MHADA on a vacant plot or only if the construction of EWS/LIG and MIG tenaments in redevelopment project is carried out towards the share of the MHADA only.

113. In our view, the words no premium shall be charged for the fungible FSI admissible as per D.C. Regulation 34 at the beginning of three clauses setting out three situations in Regulation 33(5) (5) (b) (i) (ii) (iii) would clearly indicate that the relaxation in payment of premium would apply to all the three eventualities including on rehabilitation component of a redevelopment project. Admittedly in this case, the petitioners have not made claim for relaxation of payment of premium for the fungible FSI admittedly as per D.C. Regulation 35(4) for carrying out the construction of the tenament of free sale area component. In our view no provision

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prescribed in the Act can be rendered otiose and more particularly in this case Regulation 33(5)(5)(b)(iii). Court has to read the provision as it is.

114. Be that as it may, Clause 6 of Regulation 33(5) begins with a non-obstante clause which makes it clear beyond reasonable doubt that notwithstanding anything contained in D.C. Regulations, the relaxation incorporated in Regulation 33(10) of D.C. Regulations shall apply to the housing schemes under Regulation 33(5) for construction of tenaments under EWS/LIG and MIG categories. The respondents thus cannot be allowed to read Regulation 33(5) (5)(b) (i) and (ii) only for the purpose of relaxation of premium for the fungible FSI and to ignore Clause (3) thereof which is also one of the eventualities prescribed under Regulation 33(5)(5)(b) for the purpose of relaxation of premium.

115. A perusal of the impugned orders passed by the respondent no.1 would clearly indicate that in none of the orders, the application for relaxation from payment of premium for the fungible FSI is rejected on the ground that such relaxation cannot be permitted in view of the Regulation 33(5)(5)(b) (i) and (ii) prescribed by notification dated 8th October, 2013. A perusal of the order dated 22nd April, 2016 passed by the Deputy Chief Engineer of the respondent no.1 clearly indicate that the claim for relaxation for payment of premium is rejected on the ground that there is no provision in Regulation 35(2)(2)(iv) for the case of the reconstruction dealt with under Regulation 33(5) of the D.C. Regulations, 1991 or any other provision of the modified D.C. Regulations 1991 in force. In our view, even otherwise in

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view of Clause 6 Regulation 33(5), reliance placed by the Deputy Chief Engineer on Regulation 35(2)(4) in the order dated 22nd April, 2016 is misplaced.

116. We shall now deal with the other issues formulated in paragraphs 97(iii) and (iv). Insofar as the impugned order passed by the Municipal Commissioner on 4th February, 2017 is concerned, a perusal of the said order also would clearly indicate that the claim of the relaxation from the payment of premium made by the petitioners is rejected only on the ground that the provision of Regulation 33(10), Clauses 6.21 and 6.22 thereby allowing the concessions for area of staircase, lift etc. without charging premium is applicable only in case if it follows provisions 1.2 of Appendix IV to D.C. Regulation 33(10) and not on any other ground. In our view the said finding of the Municipal Commissioner is *ex-facie* contrary to Clause (6) of Regulation 33(5)(6) and more particularly in view of the non-obstante clause under Clause (6) of Regulation 33(5).

117. In our view, even if the area of the tenament constructed by the petitioners under EWS/LIG and MIG schemes for rehabilitation thereof is more than 25 sq.mtrs, that would not disentitle the petitioners from claiming relaxation in payment of premium of fungible FSI. The Municipal Commissioner has not rejected the claims made by the petitioners on the ground that the claim for relaxation made by the petitioners was not under Regulation 33(5) or that Clause 6 of the Regulation 33(5) was not applicable to the project undertaken by the petitioners. The entire argument advanced

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by the learned senior counsel for the respondent no.1 is totally contrary to the reasons recorded by the Municipal Commissioner in the order dated 4th February, 2017 and by the Deputy Chief Engineer (Building Proposal) W.S.-II dated 22nd April, 2016. The respondents cannot be allowed to supplant the reasons for the first time in the affidavit in reply or during the course of the arguments across the bar.

118. Be that as it may, even otherwise there is no substance in the submission of the learned senior counsel for the respondent no.1 and by the learned counsel for the respondent no.2 that in view of Regulation 33(5)(b)(i), (ii) and (iii) introduced by the notification dated 8th October, 2013, the claim of the relaxation from the payment of premium on fungible FSI was not maintainable in the eyes of law.

119. We have perused the relevant paragraphs of the Maharashtra State Housing Policy framed by the Government of Maharashtra in the month of July 2007. The foreword of the said policy itself indicates that in the first draft, State Housing Policy published on 1st November, 2006, an effort was made to address the issue of providing affordable housing for the economically weaker section, low income group, middle income group. It also emphasized the need for reforms and liberalization in the housing sector as a major challenge. Instead of the role of provider, the State Government will increasingly play the role as Facilitator and Enabler. It sets out an ambitious objective of moving from acute shortage of accommodation towards a surplus situation. That would be possible only if competition is

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allowed and encouraged. The objectives of the Housing Policy described therein clearly indicate that the objectives was to facilitate affordable housing in urban and rural areas, to create adequate housing stock for Lower Income Group (LIG), Economically Weaker Section (EWS) and shelters for the poorest of the poor on ownership or rental basis. The objectives of the housing policy also is to deregulate housing sector and encourage competition and public private partnerships in financing, construction and maintenance of houses for LIG and weaker sections of the society. The land was to be made available for efficient use of land through higher floor space index (FSI) for low income group housing.

120. Paragraph (20) of the said policy clearly indicates that the redevelopment of old MHADA colonies all over Maharashtra State has become an important issue because in several colonies, optimal utilization of land has not been done. More than 70% of these colonies were built for the EWS and LIG categories. Over the decades, there has been growth in these families both in terms of members and income. It provides that under the present D.C. Regulation 33(5), if the MHADA colony has more than 60% LIG tenaments, then 20% extra FSI and permission to load TDR is available. However, the size of the tenament is restricted to 30 sq.mtrs. It is further provided that there is no justification to expect the EWS/LIG families to stay in tenaments smaller in size than 30 sq.mtrs. in perpetuity. It was thus proposed to allow redevelopment of such colonies by providing higher FSI and to revise the ceiling of 30 sq.mtrs. for LIG tenaments which would enable the present occupants to have better accommodation as well as create

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additional housing stock.

121. Clause 21 of the said policy clearly provides that in every layout, whether private or public, it would be mandatory to provide atleast 10% of the layout for EWS/LIG tenaments and another 10% of the layout for MIG tenaments. The size of the EWS/LIG tenaments shall not exceed 30 sq.mtrs. and it should not exceed 50 sq.mtrs for MIG tenaments in such a composite layout.

122. A perusal of the notification dated 6th December, 2008 clearly indicates that the said housing policy was translated into the said notification dated 6th December, 2008 providing for redevelopment of the existing housing scheme of MHADA department with societies/occupiers of the buildings or by lessee of MHADA or by the developer. It is not in dispute that even in the NOC issued by the MHADA it was clearly provided that 60% of the total built up area should be in the form of EWS/LIG/MIG. There is thus no substance in the submission made by the learned senior counsel for the respondent no.1 and by the learned counsel for the respondent no.2 that the project undertaken by the petitioners was not for redevelopment of the scheme under EWS/LIG or MIG. The submission made by the learned counsel for the respondents are *ex-facie* contrary to the conditions of NOC and Letters of Offer issued by the respondent no.2 and various sanctioned also granted by the respondent no.1. Though no such contentions have been raised by the respondents in their affidavit in reply nor the applications for relaxation made by the petitioners was rejected on this

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ground by the Municipal Commissioner and also by the Deputy Chief Engineer, this Court has considered these submissions made across the bar by the respondents and responded by the petitioners.

123. In our view, merely because the respondent no.2 has permitted the petitioners to carry out the construction of the free sale components also, that would not disentitle the petitioners from claiming relaxation in payment of premium on the fungible FSI utilized on rehabilitation of EWS/LIG and MIG tenaments. The entitlement of relaxation from payment of premium on fungible FSI is not taken away in view of Clause 6 of the Regulation 33(5)(6) of D.C. Regulations even in these circumstances.

124. The Division Bench of this Court in case of ***Wadhwa Estate and Developer (I) Pvt. Ltd. and Anr.*** (supra) has considered the case of demand of premium for open space deficiency which was raised by the Municipal Corporation of Greater Mumbai. This court has considered the provisions of Regulations 33(5), 33(10) and Appendix IV appended and specifically Clause 6.23 of Annexure 'A' thereof and also considered a clause similar to Regulation 33(6) of the D.C. Regulations which provided that notwithstanding anything contained in these Regulations incorporated under Regulation 33(10), these Regulations shall apply to the housing schemes under this Regulation for construction of the tenaments of EWS/LIG and MIG categories. This Court held that by Regulation 33 of the D.C. Regulations, the planning authority had decided to grant certain relaxations to slum redevelopment schemes and schemes of MHADA that were meant

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for EWS / LIG and MIG tenaments at concessional premium and the very object of regulation 33(5) and 33(10) stood frustrated by the issuance of the so called circular dated 26th December 2013. The Municipal Corporation had thereafter issued second circular on 16th January, 2016 in pursuance of the remarks of the Deputy Law Officer and on the advice of TAC on the issue by referring to regulations 33(5), 33(10), Clauses 6.21, 6.22 and 6.23 in Annexure A of Appendix IV.

125. This Court accordingly held that the action of the Corporation and its authorities of directing the petitioners therein to pay 100 percent premium was not only illegal and arbitrary but was also discriminatory. This Court declared that the respondents therein would not be entitled to charge 100 percent premium for relaxation pertaining to open space deficiency under the sub-clauses of Clause 6 in Annexure A of Appendix IV of regulation 33(10) of the regulations and declared the notice of demand as illegal and bad in law. This Court directed the respondent to compute the amount payable by the petitioner therein towards 10 percent of the premium for availing the relaxation pertaining to open space deficiency and after retaining the said amount, refund the remaining/balance amount to the petitioner within eight weeks from the date of the said judgment. Though the Hon'ble Supreme Court has admitted the Special Leave Petition filed by the respondent no.1 against the said judgment of this Court in case of ***Wadhwa Estate and Developer (I) Pvt. Ltd. and Anr.*** (supra), the said judgment has not been stayed by the Hon'ble Supreme Court. In our view, the said judgment of this Court interpreting the identical provisions applies to the facts of this case.

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Learned senior counsel for the respondent no.1 could not distinguish the said judgment. We are respectfully bound by the said judgment.

126. In our view, the interpretation of the respondent no.1 while rejecting the scheme for relaxation of premium made by the petitioner is ex-facie untenable and contrary to the plain reading of Clause 6 of Regulation 33(5) read with Regulation 33(10) and Clauses 6.21 and 6.22 of Appendix IV appended thereto. Unless a specific provision for levy of premium under any of the provisions of the Development Regulations is made, the respondent no.1 could not have demanded any such premium from the petitioners without authority of law and in violation of Article 265 of the Constitution of India. On the other hand, since there was a specific provision for relaxation in payment of premium as demanded by the petitioners, the respondent no.1 could not have refused the said relaxation by interpreting the said provision differently.

127. Supreme Court in case of ***Promoters & Builders Assn. Of Pune*** (supra) has held that if the language of the Statute is plain and unambiguous, it is a cardinal principle of construction of a Statute that the Court must give effect to the words used in the statute and it would not be open to the Court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and the policy of the Act. The Court has to always presume that the legislature inserted every part of a statute for a purpose and the legislative intention is that every part of the statute should have effect. In our view on a plain reading of the Housing Policy which was

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translated into the said notification dated 6th December, 2008 issued by the State of Maharashtra, it is clear that the MHADA having failed to carry out their obligation to rehabilitate EWS/LIG or MIG categories as per Housing Policy, such obligations of the MHADA are got fulfilled by public private partnerships in financing, construction and maintenance of the houses for lower income group and weaker section of the society by providing certain incentives to the developers. MHADA has already collected premium from the petitioners towards its share in additional tenaments.

128. The purpose and object under the Housing Policy was to eliminate acute shortage of accommodation and to have a surplus stock by permitting redevelopment of such tenaments. In our view, after collecting premium on its share on additional tenaments, MHADA cannot be allowed to urge that the status of those occupants as EWS/LIG and MIG stood changed and thus the petitioners would not be eligible to any relaxation from payment of premium. The entire object of providing such schemes by MHADA by encouraging competition and public private partnerships in financing, construction and maintenance of housing for LIG and weaker section of society is attempted to be frustrated by the respondents by refusing to grant relaxation as prayed. The developers are obliged to rehabilitate occupiers of EWS/LIG/MIG on ownership basis by self financing by selling the sale component tenaments.

129. None of the respondents disputed the fact that if those tenaments would have been constructed by MHADA itself, no such premium could

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have been demanded by the respondent no.1 from MHADA. Even in the said notification dated 8th October, 2013 strongly relied upon by the learned counsel for the respondents, relaxation from payment of premium is allowed also in case of rehabilitation component of a redevelopment project. The legislative intent is clear that to the extent of the rehabilitation component in a redevelopment project also, such premium is relaxed as prayed even under the said Government Resolution dated 8th October, 2013.

130. A perusal of various schemes prescribed under the Development Control Regulations thereby granting relaxation in payment of premium clearly demonstrates a common object that the existing occupants or tenants have to be rehabilitated under those schemes so as to implement and achieve the object under the housing policy framed by the State of Maharashtra. The object of rehabilitating such occupants under different schemes including for rehabilitation of EWS/LIG and MIG is common. The respondents thus cannot be allowed to reject the claim for relaxation from the payment of premium overlooking the purpose, object and intent of declaring such Housing Policy which was translated into the Government notification dated 6th December, 2008.

131. There is no substance in the submission of Mr.Sakhare, learned senior counsel for the respondent no.1 that the petitioners are not entitled to seek any benefit of Clause 6 of Regulation 33(5) on the ground that the present project was not the housing scheme of construction of tenements under EWS/LIG and MIG categories. In our view, this submission of the learned

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senior counsel is *ex-facie* contrary to the Letters of Offer issued from time to time and also the NOC by MHADA. The submission of the learned senior counsel that the present development does not involve the construction of tenements of EWS/LIG and MIG categories and was only for the rehabilitation of existing occupants is also devoid of merits.

132. The rehabilitation of the existing occupants could not have been done without carrying out redevelopment on the land on which the existing structure constructed by the MHADA for EWS/LIG and MIG were constructed. The present project in our view thus clearly fell within the scope of Regulation 33(5) and thus the petitioners had rightly claimed relaxation in payment of premium under Clause 6 of Regulation 33(5) read with Regulation 33(10) and Clauses 6.21 and 6.22 Appendix IV appended thereto. In our view, Dr.Sathe, learned senior counsel for the petitioners is right in his submission that even if the Municipal Commissioner has exercised his discretionary powers under Regulation 64 of D.C. Regulations, the Municipal Commissioner ought to have granted the entire relief in payment of relaxation of premium. The Municipal Commissioner could not have restricted the relaxation of payment of premium only upto 20.90 sq.mtrs. area in respect of each flat.

133. The submission of the respondents that the relaxation of premium in case of rehabilitation of slums cannot be extended to scheme under Resolution 33(5) on the ground that the problems such as inadequate light , ventilation facility and sanitary facility suffered by the occupants in slums

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were not suffered by the occupants/tenants under EWS/LIG/MIG group is totally untenable and contrary to the object of the Housing Policy. The rational behind providing such relaxation in both these categories was same.

134. Dr.Sathe, learned senior counsel for the petitioners invited our attention to few incidences where the respondent no.1 had granted relaxation in payment of premium on fungible FSI in similar situation. Since this Court is of the view that the petitioners were also eligible for such relaxation in payment of premium, in this case, the petitioners have rightly contended that the action on the part of the respondent no.1 is discriminatory against the petitioners by allowing relaxation in favour of few other developers similarly situated and by refusing such relaxation in favour of the petitioners.

135. Insofar as the submission made by Mr.Sakhare, learned senior counsel for the respondent no.1 and adopted by Mr.Lad, learned counsel for the respondent no.2 are concerned, those submissions are already dealt with in the earlier paragraphs of the judgment. There is no substance in the submissions of Mr.Lad that the petitioners have carried out construction of the larger tenaments than the size permitted by the State Government in the Government Resolution dated 26th August, 2009. This aspect is clarified by the petitioners in the additional affidavit on 5th January, 2021 and by filing a statement showing the break up of the original area permitted under Government Resolution, fungible FSI utilized and the total carpet area of those tenaments. We are satisfied with the explanation given by the petitioners in paragraph 5.5 of the said additional affidavit dated 5th January,

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2021. The size of the tenaments constructed by the petitioners for the LIG big tenaments, LIG small tenaments and EWS tenaments would clearly indicate that the size 53.39 sq.mtrs., 45 sq.mtrs. and 45 sq.mtrs. respectively are inclusive of the percentage of the fungible FSI permitted by the State of Maharashtra under Regulation 35(4) vide notification dated 6th January, 2012 availed of by the petitioners. There is thus no substance in the submission of the learned counsel for the MHADA that the petitioners had committed any violation of the Government Resolution prescribing the maximum carpet area under these schemes.

136. A perusal of the notification dated 6th December, 2008 thereby modifying Regulation 33(5) of the D.C. Regulations indicates that all the scheme that are sanctioned under Section 33(5) for EWS/LIG/MIG including redevelopment thereof are entitled for benefit of non payment of premium for exclusion of area like staircase and lift etc from computation of FSI and more particularly in view of Clause 6 of Regulation 33(5) inserted by notification dated 6th December, 2008. In our view, the contention of respondents that the schemes of the petitioners is not for the benefit of EWS/ LIG/MIG is totally untenable and contrary to their stand taken in the affidavit in reply and various sanctions granted by the respondents.

137. Dr. Sathe, learned Senior Counsel for the petitioners is right in his submission that the submission of the respondents made belatedly across the bar that the original character of the scheme for the benefit of EWS/LIG/MIG is after thought and is even otherwise untenable. A perusal

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of the NOC dated 1st July, 2014 read with Letter of Offers issued from time to time by the MHADA clearly indicates that the petitioners were required to carry out construction of large number of tenaments of all the structures originally constructed by MHADA. The scheme of redevelopment/rehabilitation under notification dated 6th December, 2008 has to be read with the Housing Policy which was translated into the said notification dated 6th December, 2008. In our view, there is no distinction made out under Clause 6 of the Regulation 33(5) between the original development and the redevelopment/ rehabilitation of the existing EWS/LIG/MIG.

138. A conjoint reading of the object of D.C. Regulation 33(5) read with Housing Policy makes it clear that the MHADA on its own was required to rehab EWS/LIG/MIG occupants whose buildings have become dilapidated or in joint collaboration with the developers or by permitting the society or the developers to carry out redevelopment/ rehab the existing EWS/LIC/MIG occupants by self-financing the project by granting additional FSI to enable to developers to carry out construction of an additional tenaments for outright sale.

139. In our view, the present income of the occupants who were then classified under any of the EWS/LIG/MIG category cannot be considered now for considering their eligibility under the category of EWS/LIG/MIG under the project undertaken by the petitioners under Section 33(5) of the D.C. Regulations to rehabilitate the existing occupants under

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EWS/LIG/MIG. The respondents could not point out any provision in the terms of the original allotment of the tenaments to those occupants under EWS/LIG/MIG allotted by MHADA in the original buildings constructed by MHADA to the effect that in future at any stage, if the income of any of those occupants/tenants would exceed the income that was considered for their eligibility for allotment of those tenaments under EWS/LIG/MIG, they would cease to be tenants/occupants and would have to vacate their respective tenaments on such ground. The submission of the learned Senior Counsel for the Municipal Corporation and learned Counsel for the MHADA that as of today those occupants/tenants no longer continues to be of the status of EWS/LIG/MIG and thus the project under taken by the petitioners could not be considered as a project for rehabilitation of EWS/LIG/MIG under Regulation 33(5) is totally untenable and *ex-facie* contrary to the Housing Policy framed by the State of Maharashtra and the provisions of Regulation 33(5) of the D.C. Regulations.

140. Be that as it may, it is not the case of the respondents in any of the pleadings or was the ground for rejection of claim for relaxation of premium that because of the present status of income of those occupants/tenants of various documents in the original buildings constructed by the MHADA, they cease to be the tenants/occupants of the tenaments allotted to them long back under EWS/LIG/MIG. The Municipal Corporation also had sanctioned the plan submitted by the petitioners from time to time under those provisions under Regulation 33(5) of the D.C. Regulations.

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141. Insofar as the submission of the respondents that the carpet area offered by the petitioners to the tenants/occupants under EWS/LIG/MIG being more than the carpet area prescribed under the Government Resolution dated 26th August, 2009 and thus no exemption from payment of premium could be granted to the petitioners on that ground is concerned, this aspect has been clarified by the petitioners in the additional affidavit dated 5th January, 2021 filed by the petitioner in this Writ Petition. On the perusal of the chart submitted by the petitioners after closure of the arguments giving the breakup of the carpet area allotted to each of the tenants/occupants under EWS/LIG/MIG, it is clear that the petitioners had taken the benefit of fungible FSI permitted under Regulation 35(4) of the D.C. Regulations. The petitioners have rightly explained that the petitioners are providing the carpet area of not more than 45 sq. meters to LIG and EWS categories as per the chart as provided in Government Resolutions dated 26th August, 2009, 5th February, 2008 and the NOC issued by MHADA.

142. There is merit in the submission of the Dr. Sathe, learned Senior Counsel for the petitioners that when the petitioners scheme under Regulation 33(5) was sanctioned, the petitioners were providing an area of not exceeding 45 sq. meters carpet area along with certain free of FSI areas such as balcony, flower bed etc. After the amendment of DCR on 6th January, 2012 certain areas such as balcony, flower bed which were earlier excluded from computation of FSI were not included in computation of FSI. The members of the petitioners no.1-society who were otherwise entitled to carpet area upto 45 sq. meters along with certain free of FSI areas such as

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balcony, flower bed, those free of FSI areas were no longer available. The State of Maharashtra accordingly introduced "Compensatory Fungible FSI" of 35% over and above the permissible FSI. The petitioner no.2 has accordingly provided the other areas which it was earlier providing by way of balcony, flower bed to the extent of 35% as it had committed to the members of the petitioner no.2-society.

143. NOC dated 1st July, 2014 issued by MHADA and more particularly Clause 21 thereof also clearly indicates that the tenaments of EWS and LIG are permitted maximum carpet area upto 45 sq. meters. There is no merit in the submission of Mr. Sakhare, learned Senior Counsel for respondent no.1 and Mr. Lad, learned counsel for the respondent no.2 that the carpet area provided by the petitioners for EWS/LIG/ MIG were more than the carpet area determined by the Government or that such schemes cannot be considered or treated as tenaments for the schemes EWS/LIG/MIG as contemplated under Regulation 33(5) on the basis of alleged larger area by the petitioners. The said Clause 21 reads thus "further T/s of EWS/LIG are permitted maximum carpet area upto 45 meters."

144. There is no substance in the submission of Mr. Sakhare, learned Senior Counsel for the respondent no.1 that the Circular dated 5th February, 2008 would have no application in the present case. Be that as it may, the carpet area of 45 sq. meters is provided in the NOC issued by MHADA itself in case of EWS and LIG and more particularly Clause 21 of the NOC dated 1st July, 2014. The said Clause 21 of the NOC dated 1st July, 2014 does not

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provide that the carpet area upto 45 sq. meters to EWS and LIG was including of balcony area. The respondent no.1 itself has admitted that in the present case the benefit of consumable FSI is granted free of premium to the petitioners.

145. There is no merit in the submission of Mr. Sakhare, learned Senior Counsel for the respondent no.1 that the petitioners have picked and chosen any of the provisions from the notification dated 8th October, 2013. In the earlier paragraphs of these judgments, we have already taken a view that the said notification dated 8th October, 2013 does not apply to the projects undertaken by the petitioners. It is also held by this Court that even if the said notification applies, the petitioners are entitled to exemption from payment of premium which are exempted in case of all the schemes under Regulation 33(10) read with Clauses 6.21 and 6.22 of Appendix IV of the D.C. Regulations. Reliance placed by the respondent no.1 on the definition of carpet area under Clause 2(15) of the D.C. Regulations is misplaced. The NOC issued by MHADA on 1st July, 2014 prescribing the carpet area in respect of EWS and LIG is after issuance of the notification dated 6th December, 2008, Circular dated 5th February, 2008, Government Circular dated 26th August, 2009 and notification dated 8th October, 2013.

146. It is not the case of the respondents that the petitioners were granted 3 FSI under the said Government Notification 8th October, 2013. The petitioners have also rightly not demanded 3 FSI under the said notification dated 8th October, 2013. Neither respondent no.1 nor respondent no.2

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disputed before this Court that under Clause 21 of the NOC issued by MHADA carpet area of the tenaments under EWS and LIG was upto 45 sq. meters. There is no merit in the submission of Mr. Sakhare, learned Senior Counsel for the respondent no.1 that the allotment of rehab tenaments is entirely based on the private negotiations between the developer and the society/members/occupiers thus it is not possible to ascertain as to which size of tenaments are being allotted to which category of persons.

147. Under the amended plan submitted for sanction by the petitioners and also in the NOC granted by the MHADA number of buildings required to be constructed by the petitioners for rehabilitating the EWS/LIG/MIG has been clearly provided. The Municipal Corporation being the Planning Authority at the relevant time cannot be allowed to raise this plea for the first time in the supplementary written arguments. Though this Court had directed the parties to file supplementary written arguments on limited issue, the Municipal Corporation has expanded the scope of the supplementary written arguments by making additional submissions which were not raised across the bar at the time of arguments nor raised in the detailed written arguments already filed earlier. Reliance placed on Section 22(m) of the MRTP Act by the respondents is also misplaced. The provision for charging premium under Section 33(2)(iv) of the D.C. Regulations, 1991 has to be read with Clause 6 of Regulation 33(5) as amended by notification dated 6th December, 2008. In our view, there is no substance in any of the additional issues raised by the respondent no.1 in the supplementary written arguments.

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148. In our view, the impugned order passed on 6th January, 2018 and 4th February, 2017 are perverse and contrary to the provisions of D.C. Regulations and more particularly Clause 6 of Regulation 33(5) read with Regulation 33(10) read with Clauses 6.21 and 6.22 of Appendix IV. There is no merit in any of the submissions made by the learned counsel for the respondents. The petitioners have made out a case for refund of amount of Rs.27 crores deposited pursuant to the order passed by the Hon'ble Supreme Court with interest which was allowed to be withdrawn by the respondent no.1.

149. We, therefore, pass the following order :-

(a) Rule is made absolute in terms of prayer Clauses (a), (b), (c), (d), (d-1), (d-2) and (g-a).

(b) Respondent no.1 is directed to refund the amount of Rs.27 crores with interest at the rate of 6% per annum from the date of withdrawal of the said amount by the respondent no.1 pursuant to the liberty granted by the Hon'ble Supreme Court within eight weeks from today.

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

(d) The parties to act on the copy of this order duly authenticated by the Associate of this Court.

[MADHAV J. JAMDAR, J.] **[R. D. DHANUKA, J.]**

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