

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

WRIT PETITION NO.366 OF 2014

1	D B Realty Limited	]	
	a company incorporated under the	]	
	provisions of Companies Act, 1956	]	
	having its registered office at DB	]	
	House, General K. Vaidya Marg,	]	
	Goregaon (East), Mumbai 400 063.	]	
2	Mr. Salim Balwa, of Mumbai	]	
	inhabitant, having office at 265-E,	]	
	Bellasis Road, Mumbai 400 008.	]	.. Petitioners.

V/s.

1	State of Maharashtra	]	
	through its Urban Development	]	
	Department, Mantralaya, Mumbai	]	
2	Secretary,	]	
	Urban Development Department	]	
	Govt. of Maharashtra, Mantralaya,	]	
	Mumbai 400 032.	]	
3	Municipal Corporation for Greater	]	
	Mumbai, having its office at	]	
	Mahapalika Bhavan, Mahapalika	]	
	Marg, Mumbai.	]	
4	Mumbai Building Repairs and	]	
	Reconstruction Board, having office	]	
	at Griha Nirman Bhavan, Bandra (E),	]	
	Mumbai 400 051.	]	.. Respondents.

CIVIL APPELLATE JURISDICTION
WITH
WRIT PETITION NO.4445 OF 2014

1	Savita Homemakers LLP	]	
	a registered limited liability	]	
	partnership firm registered under	]	

the Limited Liability Partnership Act,]
 2008, having its registered office at]
 Bhairav House, Muthaliya]
 Residency, Dattaram Lad Marg,]
 Off Lalbaug, Mumbai 400 033.]
 2 Akkshay Jain]
 Age: 29 years, Indian Citizen,]
 partner of Savita Homemakers LLP]
 having his office at Bhairav House,]
 Muthaliya Residency, Dattaram Lad]
 Marg, Off Lalbaug, Mumbai 400 033.] .. Petitioners.

V/s.

1 State of Maharashtra]
 through its Principal Secretary,]
 Urban Development Department,]
 having its office at Mantralaya,]
 Hutatma Rajguru Chowk, Madame]
 Cama Road, Mumbai 400 032.]
 2 Navi Mumbai Municipal Corporation]
 a statutory corporation, constituted]
 under the provisions of the Bombay]
 Provincial Municipal Corporation]
 Act, 1949 and having its office at]
 1st Floor, Belapur Bhavan, CBD]
 Belapur, Navi Mumbai 400 416.]
 3 The Additional Director of Town]
 Planning, Navi Mumbai Municipal]
 Corporation, having his office at]
 1st Floor, Belapur Bhavan, CBD,]
 Belapur, Navi Mumbai 400 46.]
 4 The Town Planning Officer]
 Navi Mumbai Municipal Corporation]
 having his office at 1st Floor,]
 Belapur Bhavan, CBD Belapur,]
 Navi Mumbai 400 416.]
 5 City and Industrial Development]
 Corporation of Maharashtra Limited]
 a State Government owned]
 Company, incorporated under the]
 provisions of the Companies Act,]

1956, having its registered office at]
 Nirmal, 2nd Floor, Nariman Point,]
 Mumbai 400 021 and administrative]
 office at CBD Belapur, Navi Mumbai]
 400 614.] .. Respondents

ORDINARY ORIGINAL CIVIL JURISDICTION

WITH

WRIT PETITION (L) NO.1040 OF 2014

- 1 Oberoi Constructions Limited]
 a company incorporated under the]
 provisions of the Companies Act,]
 1956 and having its registered office]
 at Commerz, 3rd Floor, International]
 Business Park, Oberoi Gardern City]
 Goregaon (East), Mumbai 400 063.]
- 2 Mr. Arunkumar Kotian]
 being the shareholder of Petitioner]
 No.1, Indian Inhabitant and having]
 office at Commerz, 3rd Floor,]
 International Business Park, Oberoi]
 Gardern City, Goregaon (East),]
 Mumbai 400 063.]

V/s.

- 1 The Government of Maharashtra]
 through the Urban Development]
 Department, having its office at]
 Mantralaya, Mumbai 400 032.]
- 2 The Municipal Corporation of]
 Greater Mumbai, having its office]
 at Mahanagarpalika Building,]
 Mumbai Mahanagarpalika Marg,]
 Mumbai 400 001.]
- 3 The Municipal Commissioner]
 Municipal Corporation of Greater]
 Mumbai, Mahapalika Building,]
 Mahapalika Marg, Mumbai 400 001.] .. Respondents.

**WITH
WRIT PETITION (L) NO.1035 OF 2014**

- | | | |
|---|---|-----------------|
| 1 | Central Bank of Colleagues]
Co-operative Housing Society Limited]]
a co-operative housing society]
registered under the provisions of]
Maharashtra Co-operative Societies]
Act, 1960 having its registered office]
at Dadabhai Cross Road No.3, Vile]
Parle (West), Mumbai 400 056.] | |
| 2 | Mayfair Housing Private Limited]
a company incorporated and]
registered under the Companies Act]
1956 and having its registered]
office at 1, Mayfair Meridian,]
Caesar Road, Off S. V. Road, Andheri]
(West), Mumbai 400 058.] | .. Petitioners. |

V/s.

- | | | |
|---|--|-----------------|
| 1 | State of Maharashtra]
through Urban Development]
Department, Mantralaya, Mumbai.] | |
| 2 | Maharashtra Housing and Area]
Development Authority, a statutory]
authority constituted under the]
Maharashtra Housing and Area]
Development Act, 1976 and having]
its office at Kalanagar, Bandra (E),]
Mumbai 400 051.] | |
| 3 | The Municipal Corporation of]
Greater Mumbai, a statutory]
Corporation constituted under the]
provisions of the Mumbai]
Municipal Corporation Act, 1888]
and having its office at Mahapalika]
Marg, Mumbai 400 001.] | .. Respondents. |

CIVIL APPELLATE JURISDICTION**WRIT PETITION NO.2532 OF 2014**

Mr. Sanjay Ramchandra Kulkarni]
 Age 60 years, Occupation- Business]
 (Promoter and Builder), having office at]
 60, Shichhaya, Erandawana, Pune 411 004] .. Petitioner.

V/s.

1 State of Maharashtra]
 through the office of Government]
 Pleader, High Court, Mumbai.]
 2 Secretary,]
 Urban Development Department]
 Govt. of Maharashtra, Mantralaya,]
 Mumbai 400 032.]
 3 Municipal Corporation for the City]
 of Pune, Shivajinagar, Pune,]
 4 Municipal Commissioner]
 for Municipal Corporation for Pune.]
 5 MHADA]
 Agarkar Nagar, Behind Alankar]
 Cinema, Pune 411 001.] .. Respondents.

WITH

WRIT PETITION NO.1419 OF 2014

1 Marathi Bandhkam Vyavasayik]
 Association, a Society incorporated]
 and registered under the provisions]
 of the Societies Registration Act,]
 1860 under No. Maharashtra/759/]
 2003/Pune and having its registered]
 office at Flat No.3, First Floor,]
 Vrindavan Apartments, Plot No.38A,]
 Lane No.11, Prabhat Road,]
 Pune 411 004.]
 2 Sandeep Mukund Kolatkar]
 of Pune, Indian Inhabitant, residing]
 at Shreyas Covert, 108/1,]
 Chaturshrungi, Pune 411 016.] .. Petitioners.

V/s.

- | | | | |
|---|--|------------------|-----------------|
| 1 | The State of Maharashtra
through the Secretary, Urban
Development Department,
Mantralaya, Mumbai 400 032. |]
]
]
] | |
| 2 | The Maharashtra Housing and Area
Development Authority, having
office at Connaught Road,
Agarkar Nagar, Pune 411 001. |]
]
]
] | .. Respondents. |

Dr. Virendra Tulzapurkar, Sr. Advocate with Mr. Sanjay V. Kadam, Ms. Apeksha Sharma, Mr. Sanjeel S. Kadam i/b. Kadam & Co., for the Petitioner in W. P. No.4445 of 2014.

Mr. Pravin Samdani, Sr. Advocate with Mr. Patni, Mr. Swapnil Khatri, Ms. Kalyani Shukla, Mr. Satyendra Kumar i/b. Wadia Ghandy & Co., for the Petitioner in W. P. (L) No.1040 of 2014.

Mr. Aspi Chinoy, Sr. Advocate with Ms. Jyoti Singh i/b. Negandhi Shah & Himayatullah, for the Petitioner in W. P. No.366 of 2014.

Mr. S. S. Pakale with Ms. Yamuna Parikh, for Respondent-BMC.

Mr. Anirudha Joshi i/b. Maniar Srivastav Associates, for the Petitioner in W. P. (L) No.1035 of 2014.

Mr. A. A. Kumbhakoni, Sr. Advocate with Mr. Amit Borkar, for Petitioner No.2532 of 2014.

Mr. P. G. Lad, for Respondent No.4 in W. P. No.366 of 2014, for Respondent Nos.1 and 2 in W. P. (L) No.1035 of 2014.

Mr. D. J. Khambatta, Advocate General with Mr. J. S. Saluja, AGP and Mr. Vikramaditya Deshmukh, for Respondent Nos.1 and 2 in W. P. No.366 of 2014.

Dr. Virendra Tulzapurkar, Sr. Advocate with Mr. Mandar Soman i/b. A. K. Vaidya & Co., for the Petitioner in W. P. No.1419 of 2014.

Mr. Sanjay Kshirsagar, for Respondent No.2 in W. P. No.1419 of 2014.

**CORAM: MOHIT S. SHAH. C.J. &
M.S.SANKLECHA,J.**

PRONOUNCED ON: 5 FEBRUARY 2015.

CAV JUDGMENT (Per M.S.SANKLECHA,J.):-

This petition under Article 226 of the Constitution of India assails the validity of the Notification dated 8 November 2013 issued by the State of Maharashtra (State) in exercise of its powers under Section 37(1AA) of the Maharashtra Regional Town Planning Act, 1966 (“MRTP Act”).

2 The impugned notification contains two schedules, one applicable to the City of Mumbai and other applicable to Municipalities within the State of Maharashtra. The impugned notification issued under the MRTP Act incorporates the Schedules thereto in the Development Control Regulation, 1991 (DCR 1991) as regulations for inclusive housing. The aforesaid amendment to DCR 1991 is applicable to the lands admeasuring 4000 sq.mts. or more to be utilized for residential purposes. In these group of petitions, we are concerned with both the Schedules to the Notification one- issued for the City of Mumbai and the other for the rest of the State. The schedules are identically worded and are being considered herein.

3 For the sake of convenience we would refer to facts in Writ Petition No. 366 of 2014 as a lead Petition. In the context of those facts we shall dispose of these group of petitions.

The petitioner carries on business of real estate development. The Petitioner inter alia owns immovable properties of more than 4000 sq.mts. The said land is in the city of Mumbai. The Petitioner is developing and/or proposing to develop the said lands for building of residential tenements. For the purpose of developing the said land, the petitioner would require permission from the Municipal Corporation of Greater

Mumbai for the development of its land which would only be granted upon the petitioners complying with the impugned notification dated 8 November 2013.

The same position would apply to lands situated outside Mumbai while obtaining permission from the concerned Municipality.

4 The Schedule to the impugned notification dated 8 November 2013 by which the DCR 1991 is amended reads as under:

“Regulation for Inclusive Housing

- (1) (a) *For the sub-division or layout of the land admeasuring 4000 sq.mt. or more for residential purpose, minimum 20% of the net plot area shall have to be provided-*
 - (i) *either in the form of developed plots of 30 to 50 sq.mt. Size for Economically Weaker Sections/Low Income Groups (EWS/LIG), (hereinafter referred to as “affordable plots”) in which plots of 30 sq.mtr. Size shall be kept for EWS.*

Or

 - (ii) *in the form of equivalent 20% net plot area for constructing EWS/LIG tenements, which area shall be handed over to MHADA at the land rate prescribed in the Annual Statement of Rates prepared by the Inspector General of Registration, Maharashtra State, Pune (hereinafter referred to as ASR) of the year in which final approval is accorded to such sub-division or layout.*
- (b) *The Landowner/Developer shall sell the affordable plots to MHADA at one place in lieu of equivalent FSI to be utilised in the remaining plots. If MHADA declines to purchase the same within a reasonable time of six months, he can sell the affordable plots in the open market, in such case additional FSI of affordable plots shall not be admissible.*
- (2) *For a plot of land, admeasuring 4000 sq.mt. Or more to be developed for a Housing Scheme consisting of one or more buildings (hereinafter referred to as 'the said Scheme'), EWS/LIG Housing in the form of tenements of size ranging between 30 to 50 sq.mt. (hereinafter referred to as 'affordable housing tenements') shall be constructed at least to the extent of 20% of the basic zonal F.S.I., subject to the following conditions:-*

- (a) The built up area of the EWS/LIG tenements constructed under the Scheme shall not be counted towards F.S.I.
 - (b) The Landowner/Developer shall construct the stock of the affordable housing tenements in the same plot and the Planning Authority shall ensure that the Occupation Certificate for the rest of the development under the said Scheme is not issued till the Occupation Certificate is issued for the Affordable Housing tenements under the said Scheme.
 - (c) The completion of the Affordable Housing tenements under the said Scheme, alongwith necessary particulars, including a copy of the Occupation Certificate granted by the Planning Authority in respect thereof, shall be immediately intimated by the Landowner/Developer to MHADA. Upon such intimation, MHADA, within a period of six months from the date of receipt of such intimation, shall either purchase such affordable housing tenements or allot such tenements to the allottees selected by MHADA through a system of lottery, drawn after such Affordable Housing tenements have been granted Occupation Certificate and thereafter, the Land Owner/Developer shall dispose of such tenements to MHADA or such allottees, as the case may be, at the construction rates in the ASR applicable to the land under the Scheme, on the date of grant of Occupation Certificate to such Affordable Housing tenements.
 - (d) The Landowner/Developer may also be permitted to utilize 1/4th of the total 20% F.S.I. Earmarked for Affordable Housing towards construction of Affordable Housing Tenements in the form of service quarters on the same plot in a separate block which shall have to be sold as service quarters only to the purchasers of free sale flats under the said Scheme.
 - (e) There shall be no obligation to construct affordable housing tenements in accordance with these provisions in any Housing Scheme or residential development project wherein owing to the relevant provisions of the Development Control Regulations, more than 20% of the basic zonal FSI is required to be utilized towards construction of residential tenements for EWS, LIG or MIG.
- (3) Amalgamation of affordable plots/affordable tenements shall not be allowed.
 - (4) these provisions shall be applicable prospectively and shall not be applicable to any Housing Scheme or residential development

project wherein Commencement Certificate had been issued prior to the date of coming into force of these provisions and was valid on such date.”

5 A plain analysis of the schedules to impugned notification would reveal that it mandatorily requires the owner of the land admeasuring 4000 sq.mts. or more in terms of clause 1(a) seeking sub division or lay out of the land for residential purpose, then on minimum 20% of the plot area the land owner has either to develop plots of 30 to 50 sq. mts. for Economically Weaker Sections/Low Income Group (EWS/LIG) or an area of 20% of the said land is required to be handed over to Maharashtra Housing and Area Development Authority (MHADA) for constructing EWS/LIG tenements at the rate prescribed in the Annual Statement of Rates (ASR) in the year in which sanction is granted to the Sub division or Lay out. The next sub-clause (b) provides that the affordable plots required to be sold to MHADA at one place in consideration of equal quantum of FSI to be utilized on the remaining plots. In the event of MHADA declining to purchase the plots within six months the developer can sell the affordable plot in the open market. However, in such cases the additional FSI of affordable plots shall not be available to the developer.

6 Clause 2 of schedules to impugned notification is an independent provision dealing with land owner developing a housing scheme consisting of one or more buildings on the said land then in developing housing scheme (consisting of one or more building), the land owner shall provide tenements ranging from 30 to 50 sq.mts. (affordable housing tenements) by constructing it to the extent of 20% of the FSI available, subject to the following conditions:-

- (a) the built up area of EWS/LIG tenements constructed shall not be counted towards the FSI;
- (b) the affordable housing tenements will be constructed on the same plot and only after issue of occupation certificate to the affordable housing tenements will the occupation certificate be issued for the rest of the development;
- (c) on completion of affordable housing tenements, MHADA shall either purchase or allot such affordable housing tenements and pay consideration at construction rates in the ASR;
- (d) 1/4th of total of 20% of FSI earmarked for Affordable Housing tenements will be available in the form of service quarters in the same plot; and
- (e) there shall be no obligation to construct Affordable housing in any housing scheme or residential development project wherein 20% or more of FSI is required to be utilized for construction of residential tenements for EWS, LIG or MIG.

The notification is to apply prospectively and only where commencement certificate is issued after coming into force of the Notification. Admittedly this Notification came into force on 28 November, 2013.

7 Before considering the challenge to the impugned notification it may be pointed out that during the course of the hearing on 25 July 2014 Mr. Khambatta, the then learned Advocate General for the State of Maharashtra under instructions stated that DCR, 1991 would be amended to provide that developer to provide affordable housing tenements not necessarily on the same plot but even on different plots in the same

administrative ward of the Corporation. On instructions he further states that there shall be no obligation for the developer to construct affordable housing tenements in redevelopment projects under Regulations 33(5), 33(7), 33(9), 33(10) and 33(14) of the DCR, 1991 and suitable amendments would be carried out thereto.

8 Accordingly, the State Government has issued notification dated 11 September 2014 inviting suggestions for the proposed amendments. Keeping in view the above parameters of the impugned notification we shall consider the challenge made to the impugned notification dated 8 November 2013.

9 We have heard Mr. Aspi Chinoy, Dr. V.V. Taulzapurkar, Mr. Khumbhakoni, Mr. Pravin Samdani, all Senior Counsel along with Mr. Anirudha Joshi, Counsel appearing for petitioners in support of the petitions and Mr. Khambatta, learned Advocate General for the State. On the basis of the submission we find that the following issues arise for consideration:-

1. *Whether the provisions of the impugned amendment to the Development Control Regulations of Greater Mumbai, 1991 ("DCR"), in pith and substance amount to compulsory acquisition?*
2. *Whether the provisions of the impugned amendment to the DCR are ultra vires the Maharashtra Regional Town Planning Act, 1966 ("MRTP Act")?*
3. *Whether the provisions of the impugned amendment to the DCR are violative of Articles 14, 19(1)(g) and 300A of the Constitution of India?*

10 We are not listing out the submissions made by the learned Counsel separately, but would deal with their submissions while considering the above issues which arise for our consideration. The Counsel have dealt with various facets to the above challenge and the

learned Advocate General has responded to each of them for our consideration.

11 We shall first deal with the challenge to the issue of the impugned notification on the ground that the same is beyond the legislative competence to the extent it seeks to acquire land. The submission of the Petitioners is that there is no power under the MRTTP Act to acquire land in the face of Right to Fair Compensation and Transparency in Land Acquisition and Resettlement Act (Land Acquisition Act, 2013). It was pointed out on behalf of the Petitioner that the MRTTP Act has been passed under Entry 20- list III of the VIIth Schedule to the Constitution of India i.e. "Economic and Social Plan" by the State legislature. While the Land Acquisition Act, 2013 has been made in exercise of its powers under Entry 42 List III of Schedule VII of the Constitution of India which deals with acquisition and requisition of property. On the above premise, it is submitted that as both the statutes deal with Land Acquisition, the law made by the Parliament would prevail over the law made by the State in terms of Articles 246 and 254 of the Constitution of India.

12 The aforesaid contention is contested by the learned Advocate General. It is submitted that the source of legislative power to make the MRTTP Act is not Entry 20 of the Concurrent list i.e. List III of the VII Schedule of the Constitution of India but is found specifically in Entry 5 r/w Entry 19 of State list i.e. List II of the VIIth Schedule to the Constitution of India.

13 We find that Article 246 of the Constitution would not have

any application in the present facts as the impugned legislation viz. MRTP Act has been passed by the State Legislature in exercise of its exclusive powers under Article 246(3) of the Constitution of India. Reliance placed upon Article 246(4) of the Constitution of India is misplaced as it relates to the power of the Parliament to legislate in regard to Union Territory even in respect of matters enumerated in the State List. So far as the challenge based on Article 254 of the Constitution is concerned, we find that the issue stands concluded by virtue of the Apex Court's decision in ***Girnar Traders (3) v/s. State of Maharashtra and Others 2011 (3) SCC 1***. The Apex Court traced the legislative power of MRTP Act to Entry 5 of List II of Schedule VII of the Constitution and negated the contention that the source of legislation is Concurrent list viz. List III of Schedule VII of Constitution. The Court further held that in view of the above, the doctrine of repugnancy under Article 254 of the Constitution of India between the Land Acquisition Act, 1894 and the MRTP Act cannot arise. This is so as the doctrine of repugnancy would only arise when both the Central Act and State Act are made in exercise of powers in List III of the Constitution of India. The Court observed that the object of the Land Acquisition Act is to acquire land for a public purpose while the object of the MRTP Act is to deal with the development of a particular area. The Court further observed that the Constitutional Lists in the VII Schedule do not confer power but merely demarcate the legislative heads of fields of legislation and the area over which the appropriate legislature may operate. They have to be construed liberally. The possibility of overlapping has led to a formation of, amongst others, two doctrines that is the doctrine of pith and substance and the doctrine of incidental encroachment. The objective is to construe both the laws harmoniously to

achieve the legislative intent of both the Acts. The Court further observed that once it is found that in pith and substance the MRTTP Act is in the permitted field then incidental encroachment even on a forbidden field will not affect the competence of State legislature to make the MRTTP Act. It may be pointed out that the Land Acquisition Act 2013 which came into force w.e.f. 1 January 2014 came in to replace the erstwhile Land Acquisition Act 1894 which was repealed by the 2013 Act. Thus, the source of its legislative power and that of the MRTTP Act continue to be the same. Thus in view of the decision of the Apex Court in *Girnar Traders* (3) (supra), the challenge raised on the ground of legislative competence and repugnancy cannot be accepted.

14 It was next contended by the Petitioner that the impugned notification violates Part IX-A of the Constitution of India dealing with the Municipality being inserted by the Constitution (74th Amendments) Act, 1992. Attention is invited to Article 243ZE of the Constitution of India. It provides that for every Metropolitan Area, there shall be constituted a Metropolitan Planning Committee to prepare a draft development plan for the Metropolitan area as a whole. In view of the above, it is submitted that the power to issue a Development Plan and/ or DCR, 1991 is no longer available under the MRTTP Act. Therefore, it is submitted that the MRTTP Act and the DCR, 1991 issued thereunder being inconsistent with the Constitutional provisions needs to be quashed and set aside.

15 This was contested by the learned Advocate General. It was submitted that Article 243ZE of the Constitution of India did not in any manner affect the existing development plan. According to him, the plain language of Article 243ZE of the Constitution of India clearly points to it

being only prospective.

16 We find that the MRTTP Act is in the nature of State Planning or Development Statute and does not deal with regard to Municipality. Thus, it shall not be hit by Part IX-A of the Constitution of India. Moreover, Part-IX-A of Constitution of India is prospective in operation and does not nullify an existing Development Plan. In any case, Article 243ZF of the Constitution of India by a non-obstate clause provides that any law relating to Municipality prior to 1992 shall continue to be in force in case it is inconsistent with the provisions of Part IX -A of the Constitution of India for the maximum period of one year from the commencement of the 74th Constitutional Amendment Act, 1994. The aforesaid provision only deals with the laws which are inconsistent with the provisions of Chapter IX-A of the Constitution. Nothing has been shown to us that exercise of power under the MRTTP Act is inconsistent with the provisions of Chapter IX-A of the Constitution. In fact, the Supreme Court in ***Sundargarh Zilla Adivasi Advocates Association v/s. State of Odisha 2013 (14)SCC 217*** has held that in view of Article 243ZF of the Constitution of India, laws relating to Municipality will continue to remain in force so long as they are not inconsistent with Part IXA of the Constitution of India. Thus, in the absence of the MRTTP Act being shown to be inconsistent to Part IX-A of the Constitution, the present challenge cannot be upheld.

17 It was next contended that the impugned notification amounts to compulsory acquisition of property without the authority of law. This is so as there is no element of volition/ option with the Petitioner. This acquisition by the impugned notification deprives the Petitioner of its freedom to use its property as it wants.

As against the above, the learned Advocate General after analyzing the impugned notification, contended that in the present facts, the notification applies only to make available affordable plots or tenements to EWS. In any case, the land owner is compensated by virtue of Floor Space Index (FSI) available on his original holding to be utilized on his truncated holding and where the land owner give plots and/or constructs tenements on his original holding is compensated at the ready reckoner rates. Thus, it is submitted that this is not a case of compulsory acquisition.

18 In the present case, it is not a case of acquisition of property as the Petitioner can by virtue of the compensation in terms of FSI can utilize/ exploit the land to the extent it could be exploited before his land holding was truncated. Moreover, where tenements are built by the landowner for the EWS, the cost of construction is paid to land owner at ready reckoner rates. As held by the Supreme Court in **Godrej & Boyce Manufacturing Co. Ltd. v/s. State of Maharashtra (2009) 2 SCC 242**, the grant of FSI is a valid form of compensation for surrendering land. The land is acquired to fulfill a public purpose. The reliance by the Petitioner upon the decision of the MP High Court in **State of M.P. & Others v/s. Gautam Nagar Housing Society (2004) 1 MPHT 493** and of the Apex Court in **Pt. Chet Ram Vashist v/s. Municipal Corporation of Delhi (1995) 1 SCC 47** are inappropriate as in both the cases the reservation/ acquisition was done without any compensation. Thus, we do not find the above objection on behalf of the Petitioners is sustainable. In any event, as discussed herein after, while dealing with the objections of the Petitioners that the impugned notifications are ultra vires the MRTTP

Act, we find that the State has incidental powers while executing a town planning scheme to acquire land for a public purpose and the same is valid.

19 It was next contended by the Petitioner that the impugned notifications are clearly beyond the ambit of the MRTP Act and thus ultra vires. It is submitted that the object of MRTP Act is for planning and systematic development of any area. In terms of Section 21 of the MRTP Act, a Development Plan is to be prepared by carrying out the survey of the existing land and prepare the Draft Development Plan in accordance with the Regional Plan. Section 22 of the MRTP Act provides what the contents of a Development Plan should provide for. The Reservation / Designation/ Allocation for public purpose is to be made under Section 22(a) to (c), of the MRTP Act. The manner of acquisition is provided in Section 126 of the MRTP Act. The power to frame the impugned notification can be traced to Section 22(m) of the MRTP Act. However, it does not contain any reference to reservation/acquisition of property. Reservation have been provided for in clauses (a)(b) and(c) of the MRTP Act. There is, thus, no power under 22(m) of the Act to compulsorily acquire the land as has been done by the impugned notification. Particularly, bearing in mind that the land which is sought to be acquired has not been reserved for any public purposes under the plan framed under the MRTP Act. Thus, it is submitted that in the absence of reservation for any public purposes under the Development Plan, the notification is bad in law being ultra vires the MRTP Act. The only manner in which the reserved land can be acquired is in terms of Section 126 of the MRTP Act. It is thus submitted that the impugned notification is ultra vires the MRTP Act.

20 As against the above, the learned Advocate General pointed out that the objective of the MRTP Act is ordinarily of a Planned Development of the region, making provisions for future development. The impugned notification lays down that in case permission is sought for development of land in excess of 4000 sq. mtrs, the same would be granted subject to the condition specified therein. It is in terms of Section 45 (1) of the MRTP Act.

21 We find that the Apex Court in *Girnar Traders (3)* (supra) after examining and analyzing the provisions of the MRTP Act came to the conclusion that the paramount purpose of the Act is for planning. The acquisition of land is merely incidental. The Court held that acquisition of land takes places only when it is required for development, in the view of the Planning Authorities. The Supreme Court in ***Babulal Badriprasad Varma v/s. Surat Municipal Corporation & Others (2008) 12 SCC 401*** held that the MRTP Act is a statute for town planning. Thus, when an owner of a plot is asked to part with it so as to enable the Authorities to provide facilities of which he also would be a beneficiary. The Court held that there is a distinction between the property vesting in the planning authority and one which is only to enable re-allotment for the purpose of achieving the objectives of town planning. Thus, we are of the view that the impugned notification is not one of acquisition but involves laying down conditions on the basis of which permission is to be granted for construction of residential houses on plot of land in excess of 4000 sq. mtrs. This is in terms of Section 45(1)(ii) of the MRTP Act.

The contention of the Petitioner is that in the decision of the Apex Court in ***Bombay Dyeing v/s. Bombay Environmental Action***

Group 2006 (3) SCC 434, it is clearly held that no acquisition can take place under Regulation 58 of DCR 1991. This cannot be disputed. However in this case, it is not acquisition of land under the DCR 1991 but regulation for purposes granting permission under Section 45(1)(ii) of MRTP Act.

22 As regards the contention of the Petitioner that the impugned notification is ultra vires the MRTP Act and in particular Section 22(m) thereof, as pointed out above, it is submitted that Section 22(m) of the MRTP Act does not enable going beyond the Development Plan. In response, the learned Advocate General pointed out that the opening words of Section 22 of the Act clearly indicate that the manner in which the land is to be used and developed, shall be regulated as indicated in the Development Plan. Similarly, attention was invited to the opening and last words of Section 22(m) of the Act. Thus, no person has an unconditional right to use and/or develop his land as he deems fit. This is because, the same is subject to the restriction provided for in the MRTP Act.

23 The impugned notification finds its source/ parentage in Section 22 of the MRTP Act. The opening words of Section 22 being very wide and, therefore, lay down various matters from clauses (a) to (m) which could be provided for in Development Plan. It provides for the manner in which the use of the land shall be regulated. Thus, the powers are very wide. In particular, Section 22(m) of the Act opens with the words *“provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of the local authorities”*. This itself would suggest that the Development Plan can

provide for controlling and regulating the use of land; secondly, the concluding words of Section 22 (m) inter alia provide for “*other matters as may be considered necessary for carrying out the objections of this Act*”. This would certainly include within its ambit regulation for Inclusive Housing. We find that the power under Section 22(m) of the MRTP Act is very wide and not restricted only to the plans originally made and gives powers to the Planning Authorities to regulate the use of the land under the over all plan made for the region.

24 The contention of the Petitioner is that the impugned notification is inconsistent with the MRTP Act for the reason that unless a particular plot has been reserved/ designated/ allocated for the particular purpose under the Development Plan, it cannot qualify for the acquisition of land as it has not been reserved under the plan. We find that it is undisputed position that the DCR 1991 framed under the MRTP Act are also a part of the Development Plan as held by this Court in ***Nariman Point Association & Another v/s. State of Maharashtra 2003(5) BCR 273***. In the above case, this Court has held that the Development Plan under Section 22 of the Act makes provisions inter alia for permission to be granted for controlling and regulating the use of land under the Development Plan. DCR 1991 have been sanctioned by the State Government in exercise of its power under Section 31 of the Act. These regulations form part of Development Plan under Section 22(m) of the Act. Therefore, the DCR, 1991 would be a part of the sanctioned final Development Plan, as is abundantly clear from Section 22(m) of the MRTP Act. Moreover, once it is accepted that the DCR 1991 are part of the Development Plan, there is no reason to restrict the words '*for permission to be granted*' in respect of use of land appearing in Section 22(m) of the

Act. It is correctly contended that there is no requirement in language of Section 22(m) of the Act that there must be first reservation/ allocation/ designation of a land for a particular use in the Development Plan before the land can be subjected to a control/ regulation by way of permission under the DCR. According to us, there is no justification to restrict the operation of Section 22 (m) of the MRTP Act so as to hold that the impugned notification is ultra vires the MRTP Act.

25 It was next contended by the Petitioner that the impugned notification which has been issued under Section 37(1AA) of the MRTP Act providing for reservation for affordable housing for every single plot measuring more than 4000 sq. meters, changes/ alters the character of the Development Plan. It is submitted that this creates a new category of reservation taking away the reserved area in consideration of equivalent FSI to the land owner and to be utilized on a balance land available to the land owner. Consequently, the FSI actually consumed on all plots of land affected by the impugned notification, would increase to 20% of built up area on the reduced portion of land. This admittedly, in excess of 10% of the FSI. Thus, in terms of Section 22A(d) of MRTP Act, it amounts to modification of a substantial nature in the draft development plan rendering the impugned notification beyond the scope of Section 37(1AA) of the MRTP Act. This is for the reason that Section 22A of the MRTP Act specifically allows a notification to be issued thereunder, only if it does not change the character of the Development Plan. The learned Advocate General contested the same pointing out that Section 22A of the MRTP Act is specifically restricted only for the application of Section 31 of the MRTP Act as stated therein. It is further submitted that Section 37(1AA) of the MRTP Act will be inapplicable only if there is a substitution of the

Development Plan and not otherwise.

26 We find that Section 22A of the MRTP Act defines modification of a substantial nature for the purposes of Section 31 of the MRTP Act. This special definition for the purposes of Section 31 of the MRTP Act cannot be extended to Section 37(1AA) of the Act. Moreover, the words defined in Section 22A of MRTP Act are '*modification of a substantial nature*' while Section 37(1AA) of MRTP Act uses the words '*change the character of such Development Plan*'. The words '*change the character of the Development Plan*' in Section 37(1AA) of the MRTP Act would mean much more than mere modification. It would be a new and/or substituted Development Plan. In fact, the Apex Court in *Bombay Dyeing* (supra) has at paragraph 249 thereof, observed that the words '*change in the character of plan*' would necessarily mean alternation of the entire plan in its totality. In fact, in paragraph 249 of the *Bombay Dyeing* (supra), the Apex Court observed as under:-

“249:- *A development plan is an organic document in the sense that periodic changes are contemplated thereby. A development plan is required to be changed every 20 years. Such changes are to be brought about keeping in view the past experience of the planning authority and the intended further development of the town. While, therefore, interpreting the words 'change in the character of plan' the question would be as to whether the change in the character is referable to alternation of the entire plan. The change in the character would, therefore, necessarily mean the change in the basic feature thereof and the entire plan as a whole wherefore the same must be read in totality. In this case, the changes made do not bring about any significant changes so as to come to a conclusion that its basic features are altered.”*

Further, this Court in ***Shri Mihir Yadunath Thatte v/s. State of Maharashtra & Others 2007(1) ALL MR 537*** following the decision of

the Apex Court in Bombay Dyeing (supra) observed as under:-

“ Town planning changes with times. The development plan is not something which once sanctioned, cannot be touched. Periodic changes in the development plan are even contemplated by law. That the modification in the development plan is permissible is clear from section 137 of the Town Planning Act. However, such modification must not change the character of the development plan. If every modification in the development plan is to be constructed as a change in the character of the development plan then section 37 of the Town Planning Act may be rendered otiose and of no avail. That is not the scheme of section 37. The validity of the modification in the development plan has to be tested on the touch-stone of the alternation in the character of the development plan. Once there is no alternation in the character of the development plan by the modification, it is not material whether such modification is minor or major. It is for this reason that the word 'minor' was deleted in section 37 by Act 39 of 1994. Even the fundamental or significant changes in the development plan which do not change the character of the development plan is permissible under section 37.”

(emphasis supplied)

Thus, the test for the purposes of Section 37 of the MRTP Act is whether the change resulted in the original Development Plan losing its identity. In the present case, the land which is being used for housing the EWS under the Development Plan would continue to be used for the same purpose for which it was originally approved in the Development Plan. Thus there is no replacing/substitution of the uses of the land as dedicated in the Development Plan. The only condition put on the user of the land is that instead of the land owner building residential premises only affordable by the rich, he is required to dedicate only 20% of his land for the housing of EWS. Consequently, the above objection by the Petitioner is without merit and cannot be sustained.

27 It was next contended by the Petitioner that Section 37(1AA) of the MRTP Act empowers the State Government to issue a notification only for the purpose of carrying out urgent modification to any part of a final Development Plan. This power is of an exceptional nature and can only be exercised in extra ordinary circumstances. It is submitted on behalf of the Petitioner that from the preamble to the impugned notification, it is seen that the same has been issued on the basis of the Housing Policy of the year 2007. This itself establishes that there was no urgency in issuing the notification. Consequently, the impugned notification should be set aside and the State should follow the regular procedure prescribed under the MRTP Act. In support, reliance was placed upon the decision of the Supreme Court in ***Laxman Lal v/s. State of Rajasthan 2013 (3) SCC 764***. The learned Advocate General opposed the same on the ground that no prejudice is caused to the Petitioner.

28 We find as pointed out by the learned Advocate General, that the decision in Laxman Lal (supra) relied upon by the Petitioner was under the Land Acquisition Act. In that case, the State had dispensed with a hearing under Section 5A of the Land Acquisition Act, 1894. The Court on facts held that there is no real urgency and quashed the notification, taking away property rights. In this case, even if Section 37(1AA) of the MRTP Act is not followed, but Section 37(1) of the MRTP Act is followed, requiring the proposal to be initiated by the Planning Authority, yet the requirement of inviting objections and suggestions in both the modes are mandatory. In view of the above, no prejudice has been shown to be caused to the Petitioner by virtue of not following the procedure prescribed under Section 37 of the MRTP Act but adopting Section 37(1AA) of the MRTP Act to issue the notification. Moreover, the issue of

urgency depends upon facts now existing and merely because the impugned notification makes reference to Housing Policy 2007 does not establish that there is no urgency. The requirement for the impugned notification would be to ensure that available land is reserved for the benefits of EWS on urgent basis. Therefore, in the absence of any prejudice being shown to us, we see no reason to interfere with the impugned notification issued under Section 37(1AA) of the Act.

29 It was also contended by the Petitioner that the impugned notification is violative of Article 19(1)(g) and 300-A of the Constitution of India. It is submitted that restriction on the land owner's, right to develop and construct on his land is ex facie arbitrary and constitutes an unreasonable restriction on the Petitioner's right under Article 19(1)(g) of the Constitution of India. In support, reliance is placed upon the decision of the Supreme Court in *Chairman Indore Vikas Pradhikaran v/s. Pure Industrial Coke & Chemicals Ltd. 2007(8) SCC 705*- wherein it has been observed that the right to property is not only a constitutional right but a human right. The Court held that even though a right to property had ceased to be a fundamental rights, yet it exists as a legal right and no person can be deprived of the same, except in accordance with law as provided in Article 300-A of the Constitution of India. The learned Advocate General opposed the contention and stated that the MRTP Act and the DCR 1991 constitute law. Thus, there is no violation of Article 300A of the Constitution of India.

30 It is undisputed that the denial of the right to property through an exproprietary legislation must be given strict construction. The Supreme Court in *Jilibhai N. Khachar v/s. State of Gujarat 1995 Suppl.*

(1) **SCC 596** has considered the scope of Article 300A of the Constitution and observed that the deprivation of property rights in view of Article 300-A of the Constitution of India can only be with the sanction/ in accordance with the law. In other words, Article 300A only limits the power of the State by providing that no person shall be deprived of its property save by authority of law. There has to be deprivation without sanction of the law for successfully invoking the safeguard provided in Article 300A of the Constitution of India. Further, the Court observed that the law may provide an amount or fix the manner in which the amount of compensation is to be determined. It is a settled law that such a law cannot be questioned on the ground that the amount fixed is not adequate unless of course it is illusory. In this case, the land is being taken under the provisions of the MRTP Act and the DCR 1991. Thus, the State is acting with the sanction of law. Therefore, no issue on the above ground of challenge can arise. Besides, the Petitioners are being given compensation in the form of FSI or in the form of construction cost as per the ready reckoner. The compensation in both the above forms is not illusory. The land owner can exploit the land to the fullest extent by virtue of receiving FSI attributable to the 20% of the land which is taken over for the Economically Weaker Section of the Society. The cost of the construction is also paid at the ready reckoner rates where the land owner builds tenements and gives it to the MHADA. In fact, the Supreme Court in *Godrej Boyce Manufacturing Company Ltd (supra)* has accepted that grant of FSI is a valid form of compensation for a person who surrenders a plot of land free of cost to the Municipal Authorities. In view of the above, we do not find that the Petitioner is being deprived of its properties without authority of law under Article 300-A of the Constitution of India.

Thus, the challenge on the above ground is unsustainable.

31 It was next contended that in any case, the deprivation of property under Article 300-A of the Constitution of India can only be done by the legislature itself and not by delegated legislation. This issue is no longer res integra as Supreme Court in ***Bishambhar Dayal Chandra Mohan v/s. State of Uttar Pradesh 1982 (1) SCC 30*** has observed that the word '*the law in the context of Article 300-A must mean Act of Parliament*' or a State Legislature or a rule or a statutory order having the force of law. In any event, the DCR 1991 is a part of the MRTP Act and has the same force. Thus, the above challenge by the Petitioner is also not sustainable.

32 It was also contended by the Petitioner that property under the MRTP Act can only be acquired under the Land Acquisition Act. However, so far as MRTP Act is concerned, the only method of acquiring the property is under Section 126 of the Act thereof. The Supreme Court in the case of Girnar Traders (3) (supra) has held that property need not be acquired only under the Land Acquisition Act but can also be acquired under the MRTP Act. It is contended by the Petitioner that under Section 126 of the act, the acquisition can be done only by one of the three modes – (a) by agreement, (b) land owner agrees to accept transferable development rights or FSI against the area of land surrendered free of costs or (c) by following the procedure under the Land Acquisition Act, 1894. In this case, it is submission of the Petitioner that none of the three methods of the acquisition has been followed and the State by the impugned notification directed the Petitioner to surrender 20% of its land or construct 20% of its tenement for Economically Weaker Section as

pre-condition for permission to develop the land.

33 The learned Advocate General opposed the same by pointing out that Section 126 of the MRTP Act is only facilitation and does not exhaust modes by which the land can be acquired. We find that although Section 126 of the MRTP Act is the only provision dealing with acquisition of land under the MRTP Act, there is nothing in the Act which would prohibit the State from making rules for acquisition in its DCR, different from one provided under Section 126 of the MRTP Act. In any case as held earlier, this is not acquisition of land per se but a form of regulation for grant of building permission under Section 45(1) (ii) of the MRTP Act.

34 In view of the above reasons, we find that the challenge to the impugned notifications dated 8 November 2013 must fail. Accordingly, **Petitions are dismissed.** No order as to costs.

CHIEF JUSTICE

(M.S.SANKLECHA,J.)