

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2223 OF 2013
WITH
CHAMBER SUMMONS NO.107 OF 2015
IN
WRIT PETITION NO.2223 OF 2013

Shree Ram Urban Infrastructure Limited
and Another.

..

Petitioners

Vs.

State of Maharashtra and Ors.

..

Respondents

—
Mr. P.K. Dhakephalkar, Senior Counsel and Mr. M.S. Karnik and Mr. Lalit Kataria, Mr. Samsher Garud, Mr. Vishwabhusan Kamble and Ms. Juhi Valia i/by M/s. Jayakar & Partners for the Petitioners in Writ Petition No.2223 of 2013.

Mr. Ram Apte, Senior Counsel a/w Mr. J. Udaipuri and Mr. V.P. Bajpai i/by M/s. Udaipuri & Co. for Applicant in Chamber Summons No.107 of 2015.

Mr. A.Y. Sakhare, Senior Counsel a/w J. Xavier and Mrs. Shobha Ajitkumar for the Respondent – Mumbai Municipal Corporation.

Mr.S.G. Aney, Advocate General a/w Ms. Poornima H. Kantharia, Government Pleader, Ms. Geeta Shastri, Additional Government Pleader and Mr. Abhay Anturkar for the Respondent – State of Maharashtra.

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ALONG WITH
APPELLATE SIDE JURISDICTION
FIRST APPEAL NO.884 OF 2015

The Municipal Corporation for Gr. Mumbai ..

Appellant

Vs.

Shriram Mill Urban Infrastructure Ltd.

..

Respondent

—

**WITH
CIVIL APPLICATION NO.1458 OF 2015
IN
FIRST APPEAL NO.884 OF 2015**

Janhit Manch & Anr.

..

Applicants

In the matter between

The Municipal Corporation for Gr. Mumbai ..

Appellant

Vs.

Shriram Mill Urban Infrastructure Ltd.

..

Respondent

--

Mr. S.U. Kamdar, Senior Counsel a/w Mr.Ranbir Singh and Ms. Amanda Rebello i/by Bharucha & Partners for the Applicants in CAF No.1458 of 2015.

Mr. A.Y. Sakhare, Senior Counsel a/w Mr. J.J. Xavier and Mrs. Geeta Joglekar for the Appellant Mumbai Municipal Corporation in the First Appeal and the Civil Application.

Mr. P.K. Dhakephalkar, Senior Counsel, Mr. M.S.Karnik, Mr. Shamsheer Garud, Mr. Lalit Kataria, Mr. Vishwabhusan Kamble and Ms.Juhi Valia i/by M/s. Jayakar and Partners for the Respondent in the First Appeal and the Civil Application.

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CORAM : A.S. OKA & C.V. BHADANG, JJ

DATED : 22nd, 25th & 27th JANUARY 2016

ORAL JUDGMENT (PER A.S. OKA, J)

1. Before we deal with the merits of the controversy, at the outset, we must set out the reason why out of turn priority is being given to the final hearing of the Writ Petition of the year 2013 and First Appeal of the year 2015. This is in the context of the fact that the original side Writ Petitions from the year 1992 are pending in this Court

for final hearing and First Appeals of the year 1990 are pending for final hearing. This Court is also hearing the Family Court Appeals of the year 2007-2008.

2. In Writ Petition No.2223 of 2013 (Writ Petition), Rule was issued by the Division Bench of this Court on 19th October, 2013. A prayer was made before this Court on 20th July, 2015 for giving an out of turn priority to the hearing of the Writ Petition. By an order passed on the same date, the prayer was rejected by pointing out that the request cannot be acceded to in view of the fact that this Court is dealing with the very old Writ Petitions from the year 1992 onwards. Then came the order of the Apex Court dated 7th September, 2015 which directed that the Writ Petition should be disposed of preferably within a period of three months. The Apex Court while issuing the said direction specifically observed that the controversy involved may affect the investment of Rs.2,000 Crores. There is a subsequent order passed by the Apex Court on 4th December, 2015 in Special Leave Petition filed by the Petitioners in PIL (L) No.133 of 2015 (Applicants in Civil Application No.1458 of 2015 in First Appeal No.884 of 2015). Under the said order dated 4th December, 2015, the Apex Court extended time to decide the present Writ Petition only till the end of this month. The narration will not be complete unless we make a reference to the orders passed by this Court from time to time and in particular orders dated

23rd November, 2015 and 7th December, 2015. The said orders clearly record the conduct of the Petitioners in the Writ Petition as well as the Petitioners in PIL (L.) No.133 of 2015 which resulted in delay in taking up the matters for final hearing. In fact, the Petitioners in this Petition and the Petitioners in PIL (L) No.133 of 2015 were penalised by this Court by directing them to pay costs of Rs.1 lakh each. The said orders of this Court and in particular the detailed order passed on 7th December, 2015 imposing costs were not challenged by the said parties and in fact, compliance has been made with the said order.

3. We must also note one more fact. As per the order passed by the Hon'ble the Acting Chief Justice, PIL (L) No.133 of 2015 was tagged along with Writ Petition and First Appeal. Hearing of the Writ Petition and First Appeal was concluded on 19th January, 2016. The submissions of the Petitioners in the PIL were also heard. However, the State sought time in the PIL on the ground of unavailability of the learned Advocate General by informing that the learned Advocate General will be available at the earliest on 27th January, 2016. This Court has already recorded the statement of the learned Senior Counsel representing the Petitioners in the Writ Petition that the Petitioners will not be affected in any manner by the order of this Court which may be passed in the PIL. Even assuming that all the prayers made in the PIL could be granted, after hearing the PIL, we were of the view that PIL

(L.) No.133 of 2015 can be decided by a separate Judgment. Moreover, if we were to meet the deadline fixed by the Apex Court of deciding the Writ Petition by 31st January, 2016, we had to commence the dictation of Judgment today. That is how we are deciding the Writ Petition and the First Appeal by this Judgment.

FACTS OF THE CASE

4. Now, we turn to the facts of the case. The Writ Petition and the First Appeal relate to a land at Worli at Mumbai being Plot No.5B+6 admeasuring 28,409.50 square meters which is a part of larger plot which is more particularly described in paragraph 3(a) of the Writ Petition and in Exhibit A. The larger plot described in the said paragraph 3(a) has been sub-divided into 9 plots.

5. The Petitioners in the Writ Petition (for short “the Petitioners”) made an application for grant of permission to construct a building on the plot No.5B+6 (for short “the said Plot”). The Commencement Certificate was issued by the Planning Authority i.e. the Mumbai Municipal Corporation (for short “the said Corporation”) on 24th February, 2005 under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short “the MRTP Act”) read with the Development Control Regulations for Greater Mumbai, 1991 (for short “the said Regulations”). From time to time, modified building

plans were sanctioned by the Mumbai Municipal Corporation (for short “the said Corporation”). In these two matters, we are not concerned with the history as to how the sanctioned plans were amended from time to time. Suffice it to say that the last of the modifications was on 8th February, 2011 under which construction of a residential/main building consisting of two basements, ground, entrance level, 8 parking levels, amenity levels, area over deck + service floor and refuge area + 3rd to 56th upper floors having total height of 294.84 meters was approved by the said Corporation.

6. After the Commencement Certificate dated 24th February, 2005 was issued, there was an amendment made to the said Regulations. The amendment was made by incorporating clause 24 in Regulation 33 of the said Regulations. The said clause 24 was incorporated by an amendment with effect from 20th October, 2008. The amendment provided that with the previous approval of the Government, a development of multi-storied /parking lots on any plot abutting the roads will be permitted. It provided that additional FSI, as specified therein on built up parking area constructed and handed over to the said Corporation free of cost, shall be allowed on the land belonging to the private owners, which is not reserved for any public purposes. In short, it can be said that clause 24 of Regulation 33 provides for grant of incentive FSI on the condition of handing over the

possession of built up parking area to the Municipal Corporation free of cost. It appears that the Petitioners applied for grant of benefits under the said added clause No.24 of Regulation 33. The Committee appointed under clause 24 recommended the case of the Petitioners. The proposal was also approved by the State Government and accordingly on 20th August, 2010 building plan submitted by the Petitioners for construction of a Public Parking Lot (for short "PPL") was approved and a separate IOD in continuation of earlier IOD in respect of the residential/main building was issued. The plans were approved for construction of the PPL consisting of 3 basement floors, ground floor and 15 upper floors. Commencement Certificate dated 24th February, 2005 was accordingly endorsed only up to plinth level of the PPL including the basement.

7. Commencement Certificate dated 24th February, 2005 issued by the said Corporation to the Petitioners contains subsequent endorsements. There is an endorsement made on 8th February 2011 that the Commencement Certificate was extended upto 43rd floor (top slab) of the residential buildings as per the amended plans. There is also an endorsement made on the said Commencement Certificate on 1st October 2010 stating that it is endorsed up to plinth level of the PPL including the basement of the PPL as per the plans dated 20th August, 2010.

8. To complete the narration of facts, the Petitioners have completed the construction of the main/residential building of all 56 floors though admittedly the Commencement Certificate is issued by the said Corporation authorising the construction only up to the height of 238.65 meters i.e. upto 43rd floor. Thus, 13 upper floors of the building have been illegally constructed by the Petitioners. It is also an admitted position that the construction of the entire PPL consisting of basement, ground and 15 floors has been virtually completed though the Commencement Certificate granted by the said Corporation is only up to plinth level including the basement. As far as the Commencement certificate for upper floors of the PPL is concerned, the Petitioners are relying upon a deemed permission.

9. A reference to additional facts will be necessary to point out how the Writ Petition and Appeal arise.

10. The case of the Petitioners is that on 7th May, 2011 their Architects addressed a letter to the said Municipal Corporation for seeking Commencement Certificate for the construction above the plinth level of the PPL in accordance with Regulation 6(4) of the said Regulations. In clause 24 of the Regulation 33 as amended in the year 2008, there was no upper limit for seeking incentive FSI. It appears

that on 22nd June, 2011, a Circular was issued by the said Corporation which restricted PPL to 2 basements, ground and 4 upper floors. By the said Circular, the premium was enhanced. A stop work notice dated 16th July, 2011 in respect of the construction of the PPL was issued by the said Corporation under Section 354A of the Mumbai Municipal Corporation Act, 1888 (for short “MMC Act”). The said stop work notice was withdrawn on 11th November, 2011. According to the Petitioners, the said stop work notice was not in relation to the PPL. On 29th November, 2011 the said Municipal Corporation issued a notice under Section 51 of the MRTP Act calling upon the Petitioners to show cause as to why the Commencement Certificate in respect of the PPL should not be revoked. This was followed by a notice dated 14th December, 2011 under Section 354A of the MMC Act calling upon the Petitioners to stop the work of PPL beyond plinth level as there was no Commencement Certificate issued permitting the said construction above the plinth level. After submitting a reply to the notices under Section 51 of the MRTP Act and under Section 354A of the MMC Act, the Petitioners on 24th December, 2011 filed a civil suit (L.C. Suit No.2942 of 2011) in the City Civil Court at Mumbai wherein the challenge was confined to the said stop work notice dated 14th December, 2011. In the said suit, the learned Judge of the City Civil Court granted ad-interim injunction on the very day restraining the Municipal Corporation from taking any action on the basis of the

impugned notice. Admittedly, the said order was operative till the disposal of the said civil suit. On the basis of the contention that there is a deemed permission to construct the upper floors above the plinth level of PPL, perhaps during the pendency of the suit, the Petitioners proceeded with the construction and completed 15 upper floors of the PPL.

11. Then came PIL No.43 of 2012 filed by Janhit Manch, the Applicants in Civil Application No.1458 of 2015 in First Appeal No.884 of 2015, wherein the challenge was to the construction of the PPL above plinth level. There was also a challenge to the permission granted to construct the residential building. The said PIL was contested by the Petitioners. The PIL was decided on 13rd May, 2013 by this Court by issuing various directions which are referred in the subsequent part of the Judgment. We must note here that SLP filed by the Petitioners Janhit Manch in PIL No.43 of 2012 for challenging the Judgment and Order dated 13th May, 2013 is pending before the Apex Court. On 16th May, 2013, the City Civil Court decreed the Civil Suit No.2942 of 2011 by holding that the stop work notice dated 14th December, 2011 was illegal. The finding of the City Civil Court is that further Commencement Certificate to construct the fifteen floors above the plinth of the PPL shall be deemed to have been granted in terms of the Regulation 6(4) of the said Regulations. Therefore, the stop work notice

was declared to be illegal. This decree is the subject matter of the present First Appeal.

12. Various directions were issued by the First Court while deciding the PIL No.43 of 2012 including a direction to the Municipal Commissioner to pass an order on various aspects after hearing the parties. The Municipal Commissioner passed an order dated 12th September, 2013 which is impugned in the present Writ Petition. By the said order most of the claims of the Petitioners were rejected. The present First Appeal is preferred by the said Corporation for challenging the aforesaid Judgment and Decree dated 16th May, 2013 passed by the learned Judge of the City Civil Court in the said suit.

13. In the Writ Petition, the prayer is for quashing and setting aside the order dated 12th September, 2013 passed by the Commissioner of the said Corporation. There is also a prayer made for issuing a writ of mandamus enjoining the said Corporation to take over the possession of the PPL consisting of basement, ground + 15 upper floors and forthwith endorse the said Commencement Certificate for residential building up to the full height of 56 floors. The reason is that unless incentive FSI in respect of the PPL is made available, 13 upper floors of the main building will be illegal in the sense that the incentive FSI of PPL was proposed to be used for the upper 13 floors.

THE DIRECTIONS ISSUED IN PIL No. 43 OF 2015

14. To enable us to appreciate the rival submissions, it will be necessary to make a reference to the Judgment and Order dated 13th May, 2013 passed by the First Court in PIL No.43 of 2012 filed by Janhit Manch. The issues which were canvassed before the Division Bench by the PIL Petitioners (Janhit Manch) can be summarised as under :-

- (1) It was contended that permission granted to erect floors nos. 44 to 56 of the residential building was dependent upon availability of incentive FSI on account of PPL. All floors above 43rd floor were illegally erected by the Petitioners as admittedly Commencement Certificate was confined to only 43 floors;
- (2) The second contention was that construction of PPL consisting of basements + ground + 15 upper floors was illegal inasmuch as there was no Commencement Certificate issued to proceed with the construction above the plinth level;

- (3) It was contended that refuge area provided in the residential building which is free of FSI is excessive and such excessive refuge area could not have been permitted. The contention of the PIL Petitioners was that the refuge area/fire escape constitutes 72% of total habitable built up area of the residential building;
- (4) Another contention was that the present Writ Petitioners were not entitled to FSI on account of set back area of 705.45 square meters as they had already received compensation for the said area;
- (5) Another issue was raised regarding the height of the habitable floors in relation to consumption of FSI;
- (6) It was contended that the passages at manor level and entrance, swimming pool, area over deck and refuge area of the residential building ought to have been computed in the FSI of the residential building;
- (7) As the service floor of the building has height of 8.40 meters, the height above 4.5 meters cannot be granted free of FSI;

- (8) FSI relating to service floors, amenity floor and FSI of duplex floors ought to have been counted;
- (9) FSI in relation to service toilets, structural columns, toilets at duplex level and the floor bed ought to have been counted.

15. The operative part of the said Judgment and Order in PIL No.43 of 2012 reads thus :-

- “i. The Public Parking Lot cannot be held illegal as contended by the petitioner and the Respondent No. 5 cannot be deprived from claiming incentive FSI accrued therefrom for the Residential Building, if otherwise available in law. Other aspects will be considered by the Commissioner /Corporation at the time of issuance of occupation certificate.**
- ii. The FSI granted in respect of refuge area is excessive. We direct the Commissioner to re-examine the said issue and rework the FSI accordingly.**
- iii. The Commissioner will also determine, after ascertaining the factual position, as to whether the Respondent No. 5 is entitled to claim FSI in lieu of set back area.

- iv. As far as the issue of passages at manor level and entrance, swimming pool, area over deck and refuge area at entrance level is concerned, since the Corporation has accepted the position that the FSI under these heads was erroneously granted, the said aspect will be reconsidered by the Commissioner.
- v. As far as the issue of FSI in respect of structural columns is concerned, since this issue is linked with the issue of FSI regarding refuge area, this issue also needs to be reconsidered by the Commissioner along with the issue of FSI regarding refuge area.
- vi. The Commissioner while reconsidering the other aspects, will consider the issue regarding need to obtain NOC from the High Rise Committee.
- vii. The decision of the Commissioner as regards servant toilets, height of habitable floors, amenity floors, and toilets over kitchen ,cannot be termed as unreasonable or arbitrary.
- viii. Decision of the Commissioner to permit height of Service Floor at 8.40 meters is not interfered with.
- ix. The Respondent No. 5 will be entitled to be heard before the final decision in the above regard is taken by the Commissioner.

- x. The Commissioner will decide the above issues within a period of six weeks from today.”

(emphasis added)

16. The Respondent No.5 in the aforesaid PIL is the first Petitioner in the present Writ Petition. On the basis of the directions issued by the Division Bench, the parties were heard and a detailed judgment and order was passed on 12th September, 2013 by the Municipal Commissioner which is impugned in the present Writ Petition. The operative part of the said Judgment and Order reads thus :-

“(i) As regards the Public Parking Lot (PPL), it shall be as per the MCGM Circular dated 22.06.2011 and as per State Govt. directives dated 19.03.2012 issued under section 37(1) of MRTP Act, which is in accordance with the law. **Hence, MCGM will accept PPL comprising of 3 basements + Ground + 4 upper floors, which only will be eligible for grant of incentive FSI towards construction of PPL, on payment of requisite premium as per policy.**

(ii) Refuge areas shall be provided free of FSI only to the extent of 4% of the built up area it serves. Refuge areas in excess of the aforesaid requirements, shall be counted in FSI in accordance with clause 4.12.3 of National Building Code.

- (iii) There is no provision in the DCR for exclusion of the structural columns from FSI computations. Hence, the structural columns need to be counted in FSI.
- (iv) As regards the set back area admeasuring 705.45 sq.mt., FSI advantage in lieu of handing over of the same cannot be granted at this stage, in absence of conclusive documentary evidence.
- (v) The passages at manor level and entrances, swimming pool, area over deck and refuge area at the entrance level, which were earlier permitted free of FSI shall be counted in FSI in accordance with law.
- (vi) The request of SRUIL to pay the security deposit under DCR 5(3)(xi) and to levy the premium as per section 22(m) of MRTP Act, 1966 is rejected.
- (vii) Since there are many interlinked revised FSI computations as aforesaid, the Project Proponent (SRUIL) is directed to submit modified plans in accordance with the regulations.”

(emphasis added)

THE SUBMISSIONS OF THE PETITIONERS

17. Firstly, the submissions were canvassed by the learned Senior Counsel representing the Petitioners. He invited our attention to the aforesaid Judgment and Order of the First Court in PIL No.43 of 2012 and the impugned order in the Writ Petition. Inviting our

attention to the various paragraphs of the said Judgment of the Division Bench dated 13th May, 2013 in the PIL he urged that in fact, there is a specific finding recorded that the construction of the entire PPL of 3 basements + ground + 15 upper floors was legal and valid and, therefore, the Petitioners in the Writ Petition were entitled to receive the entire incentive FSI in respect of the same. Inviting our attention to the findings recorded by the Division Bench, he urged that the issue of legality and validity of the construction of the entire PPL was not at all kept open and that the said issue was concluded by the Division Bench in paragraph 28 of the impugned order. He pointed out that the said paragraph 28 specifically holds that once PPL is handed over free of cost to the said Corporation, the Petitioners will be entitled to avail of the entire incentive FSI in respect of all the fifteen floors. He also pointed out the finding recorded in clauses (l) and (o) of paragraph 28 and urged that the First Court accepted the case of the Petitioners of deemed permission under the Regulation 6(4) and, therefore, there was absolutely no reason for the Commissioner to while passing the impugned order to go into the issue of the legality of the PPL building. His submission is that in fact the Division Bench directed that the Petitioners should not be deprived of the use of the incentive FSI accrued from the PPL for the residential building. He invited our attention to the specific finding recorded by the Division Bench in paragraph 35 and submitted that a finding is already recorded about

the entitlement of the Petitioners to receive the entire incentive FSI. He pointed out the observation made in the operative part of the said Judgment that the Petitioners cannot be deprived of use of the incentive FSI accrued from the construction of PPL for the residential building, if otherwise available in law. His submission is that the words used “is otherwise available in law” would not mean that the issue of legality of the PPL building can be gone into as the same has been already decided in favour of the Petitioners. He urged that the Division Bench has already held that the Petitioners are entitled to incentive FSI. His submission is that only if there was any other legal impediment in the way of granting the incentive FSI, the same could be considered by the Municipal Commissioner. He submitted that the Municipal Commissioner has ventured to go into the issue of the legality of the PPL constructed by the Petitioners though it was not permissible in view of the finding already recorded by the Division Bench.

18. He urged that apart from the fact that the issue of deemed permission under Regulation 6(4) was concluded by the Division Bench in favour of the Petitioners it is virtually an admitted position that an application was made by the Architects of the Petitioners for grant of certificate of completion up to plinth level and grant of further Commencement Certificate in respect of the PPL. He submitted that there is a clear finding recorded by the Division Bench that the said

application was received by the said Corporation. He invited our attention to the contents of the said letter/application addressed by the Petitioners' Architect. Without disputing the fact that for invoking deeming fiction under Article 6(4), strict compliance is required, he submitted that as far as the compliance with the requirement of filing an application by the Architect is concerned, the said requirement is mandatory, but as far as the contents of the application are concerned, if the same are substantially in terms of the prescribed form, the deeming fiction can be very well invoked. He has relied upon some of the decisions on the aspect of substantial compliance in respect of the first contention. Thus, his submission that this was a case where there was a deemed permission granted to commence further construction above the plinth level of the PPL. The learned Senior Counsel appearing for the Petitioners, therefore, submitted that there was a deemed commencement certificate on the basis of which the construction of the PPL was carried out. His further submission on this aspect was that the issue which was concluded by the Division Bench cannot be reopened now inasmuch as the Judgment and Order of the Division Bench in the PIL No. 43 of 2012 has not been stayed by the Apex Court though an Appeal against the same is pending.

19. He submitted that when the Circular dated 22nd June, 2011 was issued, clause 24 of the Regulation 33 was not amended. He relied

upon several decisions in support of the contention that only by a Circular, the relevant clause in the said Regulations cannot be amended inasmuch as the said Regulations have been framed in exercise of legislative function and it is a piece of subordinate legislation. He would, therefore, urge that the said Circular could not have been relied upon as it being contrary to the clause 24 of Regulation 33. He pointed out several orders passed by this Court in Writ Petitions filed by similarly placed Petitioners in which a concession of the learned counsel appearing for the Municipal Corporation was recorded by this Court that that Circular dated 22nd June, 2011 will not be relied upon. He urged that in fact the Division Bench while deciding PIL No.43 of 2012 has referred to the several orders passed by this Court recording the said concession and has come to the conclusion that the Municipal Corporation could not have relied upon the Circular dated 22nd June, 2011 in the case of the Petitioners. He submitted that the Commissioner committed another error by relying upon the direction issued by the State Government to initiate a proposal for modification of clause 24. He urged that so long as the said clause 24 was on the statute book and was not amended, the Petitioners are entitled to take benefit of the said clause 24. He urged that merely because there was a subsequent direction issued by the State Government directing initiation of proceedings for the modification of clause 24, the proposed modification could not have been implemented without the same being

sanctioned by the State Government under sub-section (2) of Section 37 of the MRTTP Act.

20. As regards the refuge area, he submitted that though the Division Bench in PIL may have found the refuge area to be excessive, the Commissioner in the impugned order has not even recorded a finding as to what could have been a reasonable refuge area. He urged that the Commissioner relied upon the National Building Code for recording a conclusion that the maximum refuge area can be 4% of the built up area. He submitted that the Commissioner has taken the bare minimum area provided by the National Building Code. However, the Commissioner has not done the exercise of determining what should be the reasonable refuge area in the peculiar facts of the case of the Petitioners. He would, therefore, urge that to that extent, the order of the Commissioner is illegal.

21. As regards the set back area, the learned senior counsel appearing for the Petitioners submitted that in fact the finding of the Commissioner is that there was no evidence of the payment of monetary compensation to the Petitioners. He submitted that in the light of the said clear finding, there was no reason to reject the prayer for grant of FSI in relation to the set back area.

22. As regards the passages at manor level, entrances and structural columns as well as swimming pools, the learned senior counsel submitted that a direction has been given by the Municipal Commissioner to submit a modified plan. His submission is that this direction is illegal as the earlier sanctioned plans of the Petitioners have not been set aside by this Court. Relying upon Section 51 of the MRTP Act, he would urge that as the substantial part of the construction has been already carried out, an action under Section 51 of revocation of the sanctioned plans could not have been taken. He urged that therefore, in any event, the benefits which are already granted cannot be withdrawn as the same will be completely contrary to Section 51 of the MRTP Act. He submitted that in any event, what is tried to be done by the Municipal Commissioner is to review the order granting IOD and commencement certificate which cannot be done. Reliance was placed on various decisions of the Apex Court including the decisions in the case of *Kalabharti Advertising v. Hemal Vimalnath Narichania and Others*¹ and *Patel Narshi Thakershi v. Pradyuman Singhji*². As regards the passages at manor level and entrances, structural columns as well as swimming pools, he submitted that as provided in Sub-clauses (c), (m) and (n) of the Clause (2) of Regulation 35 of the said Regulations, the passages are required to be excluded from computation of the FSI. He submitted that firstly it is incorrect to hold that the

1 (2010) 9 SCC 437

2 (1971) 3 SCC 844

passages connecting to the flats are exclusive passages. Secondly, he would urge that while taking the view that the passage should be included in the FSI, is completely contrary to the Regulations. He urged that perhaps, the Municipal Commissioner was impressed by the fact that if such FSI exclusion is granted, the possibility of misuse cannot be ruled out. He submitted that this is no ground to deny FSI as held by the Apex Court in the case of *Indore Municipal Corporation and Another v. Dr. Hemalata and Others*³.

23. He has invited our attention to the contents of the three affidavits filed by the Municipal Corporation in the PIL No.43 of 2012. He also invited our attention to the written submissions filed in the PIL. He pointed out that the stand taken in the said affidavits filed in the PIL has completely undergone a change while passing the impugned order by the Municipal Commissioner. For example, he pointed out that in the written submissions of the Municipal Corporation filed in the PIL, the benefit of refuge area to which the Writ Petitioners would be entitled to has been specifically set out.

24. His another criticism of the order of the Municipal Commissioner is that he has travelled beyond the scope of the directions issued in the said PIL and he has reopened the issues which are concluded by the Division Bench in the said PIL. By way of illustration,

³ (2010) 4 SCC 435

he has referred to the findings of the Municipal Commissioner on the issue of legality of the PPL. He submitted that the Division Bench has specifically found that the construction of the PPL was legal and valid. Coming back to the issue of PPL, his another limb of argument was that the incentive FSI which was granted in terms of the Clause (24) of the Regulation 33 of the said Regulations cannot be reduced only on the basis of the subsequent Circular dated 22nd June 2011. He submitted that the Circular cannot modify the substantive provisions of the Regulations. He pointed out the decision of the Apex Court in the case of *Pune Municipal Corporation and Another v. Promoters and Builders Association and Another*⁴ and submitted that the said Regulation is in fact a delegated or subordinate legislation and the process of making the said Regulations partakes character of a legislative function. Relying upon the decision of the Apex Court in the case of *Godrej and Boyce Manufacturing Company Limited v. State of Maharashtra and Others*⁵, he would urge that by issuing a Circular, the said Regulations cannot be amended. In this behalf, he also relied upon a decision of the Apex Court in the case of *Laxminarayan R. Bhattad and Others v. State of Maharashtra and Another*⁶. On the very point, he relied upon a decision of the Division Bench of this Court in the case of *Kausarbag Co-operative Housing Society Limited v.*

4 (2004) 10 SCC 796

5 (2009) 5 SCC 24

6 (2003) 5 SCC 413

*State of Maharashtra and Others*⁷. He pointed out that the said decision has been affirmed by the Apex Court.

25. Learned senior counsel appearing for the Writ Petitioners further submitted that the Division Bench while deciding the PIL found that though construction of the residential building above the 43rd floor up to 56th floor was illegal in the sense that there was no commencement certificate for the said floors, it was held that it is not so patently illegal that it should be ordered to be pulled down. He accepted that the floors above 43rd floor have been approved only on the basis of the incentive FSI of PPL consisting of ground + 15 upper floors. He submitted that notwithstanding the fact that the Division Bench found that the PPL has been lawfully constructed and in fact it is in the public interest that the PPL should be protected, the Municipal Commissioner in the impugned order has held that the construction of the PPL above 4th floor cannot be available for grant of incentive FSI. He pointed out that as far as the Circular dated 22nd June 2011 is concerned, there are several orders passed by this Court which record that learned counsel for the Municipal Corporation solemnly accepted before this Court that the said Circular would not be relied upon. He submitted that the decision in the case of *Municipal Corporation of Greater Mumbai and Others v. Kohinoor CTNL Infrastructure*

⁷ 2010(1) Bom.C.R. 409

*Company Private Limited and Another*⁸ does not hold that the said Circular is legal. He submitted that after accepting in the several cases that the said Circular could not be relied upon, now the Municipal Corporation cannot use the same against the Writ Petitioners. He also invited our attention to the findings recorded by the Division Bench while deciding PIL in this behalf. He submitted that the Division Bench has accepted that in view of the several orders of this Court which record a solemn statement of the said Municipal Corporation that the said Circular will not be relied upon, now the Municipal Corporation cannot enforce the said Circular. He submitted that serious prejudice will be caused to the Petitioners in view of the impugned order dated 12th September 2013 passed by the Municipal Commissioner as both the residential and PPL buildings have been substantially completed. Without prejudice to the earlier contentions, he submitted that an offer was made by the Writ Petitioners to pay security deposit as provided in the Regulation 5(3)(xi) and to pay premium as may be levied by the Municipal Corporation. He submitted that even the said prayer has been turned down by the Municipal Corporation. His submission is that the impugned order passed by the Municipal Commissioner is completely illegal. He submitted that though the Petitioners repeatedly offered to hand over the possession of the PPL consisting of 900 parking places, the Municipal Corporation has consistently refused to accept the same.

⁸ Writ Petition No.143 of 2012 Decided on 9th July 2012

SUBMISSIONS OF THE MUNICIPAL CORPORATION

26. Learned senior counsel appearing for the Municipal Corporation has taken us through the pleadings and evidence recorded in the suit which is a part of the paper book of the First Appeal. He also invited our attention to the proviso to Sub-section (5) of Section 45 of the MRTTP Act and urged that the provision regarding deemed permission under the Clause (4) of Regulation 6 of the said Regulations will have to be construed strictly. He submitted that under Clause (4) of Regulation 6, the Architects of the Petitioners were required to submit a notice in the form prescribed by the Appendix–XVI to the Municipal Commissioner on completion of the work upto plinth level to enable the Municipal Commissioner to ensure that the work conforms to the sanctioned plan. He invited our attention to the Appendix VI which is a part of the said Regulations. He submitted that the so called Application dated 7th May 2011 submitted by the Architects of the Writ Petitioners is not in the format prescribed by the said Appendix XVI and, therefore, the Municipal Corporation was justified in ignoring it. He urged that the Architects of the Petitioners have not even stated that the work upto the plinth level was carried out under their supervision. He submitted that the provisions of the said Regulations which provide for the grant of permission to carry on further construction by a deeming

fiction has to be construed strictly. He submitted that the learned Trial Judge while holding that the case of deemed permission has been established by the Original Plaintiffs/Writ Petitioners has completely ignored that the provision of Clause (4) of the Regulation 6 is a mandatory in nature and that even the notice given by the Architects of the Writ Petitioners was not in the prescribed form. He submitted that the deeming provision will not apply. He, therefore, submitted that the entire work of the PPL above the plinth level is completely illegal as there is no commencement certificate for the said work. He pointed out that as the entire work is illegal, the Writ Petitioners are not entitled to any benefit of incentive FSI. He urged that the Division Bench while deciding the said PIL has not concluded the issue of deemed permission inasmuch as the Division Bench has merely observed that it was not possible to override the interim order passed by the City Civil Court in the pending suit. He urged that if the Division Bench intended to decide the said issue finally, it could have disposed of the suit as the Division Bench was aware that the suit in which the issue of deemed commencement certificate was already framed was pending. However, the final hearing of the suit proceeded thereafter in which the Writ Petitioners participated. He submitted that while dealing with the PIL, the issue of deemed permission has not been finally decided by the Division Bench. He submitted that if the construction of upper floors of PPL is held to be illegal, it is obvious that the construction of residential

building above 43rd floor will have to go inasmuch as the incentive FSI for the PPL was proposed to be used for 44th floors to 56th floor. As regards the refuge area, he submitted that the finding recorded by the Division Bench in the PIL that the refuge area shown by the Petitioners is excessive is not challenged by the Writ Petitioners. His submission is that in fact the Division Bench directed to reopen the whole issue and accordingly, based on the provisions of the National Building Code of India, the Commissioner has recorded a finding as to what should be the reasonable refuge area. He submitted that the facilities like passage, swimming pool etc. are not the facilities common to all the occupants and they are exclusively for the owners of certain premises in the building. He submitted that there are cases where facility of allowing refuge and passage area free of FSI has been misused. He submitted that the decision of this Court relied upon by the Writ Petitioners in the case of *Gulmohor Area Societies Welfare Group and Others v. State of Maharashtra and Others*⁹ is in the peculiar facts of the case before it. He urged that in the present case, the Petitioners are bound by the order of the Division Bench which holds that refuge area sanctioned to them is excessive and no interference is called for. Learned counsel appearing for the Interveners in the First Appeal has supported the Municipal Corporation .

9 PIL (L) No.46 of 2012 decided on 14th June 2012

**RESPONSE OF THE PETITIONERS TO THE
SUBMISSIONS OF THE MUNICIPAL CORPORATION**

27. Learned senior counsel appearing for the Writ Petitioners in his reply reiterated that the issue of deemed permission has been concluded by the Division Bench in the PIL. He submitted that assuming that the said issue was not concluded, he submitted that the form of notice is not mandatory and in fact, in the present case, though the notice may not be strictly in terms of the prescribed form, in substance, all contents of the prescribed form are there in the notice dated 7th May 2011. In this behalf, he relied upon a decision of the Apex Court in the case of *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Others*¹⁰. He urged that a part of the same statutory provision can be mandatory and a part of it can be directory. He also relied upon a decision of the Apex Court in the case of *Banarsi Das v. Cane Commissioner, Uttar Pradesh and Another*¹¹. He, therefore, submitted that what is mandatory is the requirement of submitting an application or notice, but the form thereof is not mandatory and, therefore, as far as the form is concerned, substantial compliance is permissible which in the facts of the case is already made by the Writ Petitioners. Lastly, he reiterated that the public at large will be adversely affected if the Municipal Corporation does not take the possession of the PPL which is already constructed consisting of 900

¹⁰ (2011) 1 SCC 236

¹¹ AIR 1963 SC 1417

parking places. He pointed out that the Petitioners have already shown readiness and willingness to hand over the possession thereof to the Municipal Corporation free of cost.

**CONSIDERATION OF SUBMISSIONS: ISSUE OF THE
LEGALITY OF THE CONSTRUCTION OF GROUND
AND 15 UPPER FLOORS OF THE PPL**

28. We have carefully considered the submissions. The issue of the legality and validity of the construction of the PPL goes to the root of the matter and therefore, firstly, we would like to deal with the question of deemed permission under Clause (4) of Regulation 6 of the said Regulations. The said question is the only question which arises for consideration in the First Appeal. Before we go into the merits of the said issue, firstly, we must deal with the contention that the said issue has been concluded by the judgment of the Division Bench in the said PIL. The said PIL was decided by the judgment and order dated 13th May 2013. It appears that the Writ Petitioners filed the suit being Suit No.2942 of 2011 in the City Civil Court on 23rd December 2011. We have perused the Roznama of the suit which shows that the issues were framed on 3rd November 2012. Thus, the issues were framed before the decision in the PIL. The second issue is specifically on the basis of the plea of deemed permission/commencement certificate under Clause (4) of the Regulation 6 of the said Regulations. The suit was decided three days after the PIL was decided.

29. The Writ Petitioners examined Shri Subhakaran Loharuka, a Director of the first Petitioner, by filing an affidavit-in-lieu of the examination-in-chief. The said affidavit-in-lieu of the examination-in-chief was filed on 6th March 2013. Thereafter, an affidavit-in-lieu of the examination-in-chief dated 18th April 2013 of Shri Ajay Chavan, a sub-engineer was filed by the said Municipal Corporation. The suit was decided on 16th May 2013 (three days after the Division Bench decided the said PIL). At no stage, the Petitioners moved the Trial Court for deletion of the second issue by raising a contention that the issue of deemed permission was the subject matter of the said PIL. On 14th May 2013, the suit was on board before the Trial Court and was adjourned to 16th May 2013 for pronouncement of judgment. Even on 14th May 2013, a contention was not raised that the issue of deemed permission did not arise as the same was the subject matter of the PIL which was decided on 13th May 2013.

30. Now let us turn to the findings recorded by the Division Bench in the said PIL. Firstly, the Division Bench was dealing with the PIL which was under Article 226 of the Constitution of India. Secondly, the Division Bench has observed that there was an interim order passed in the said suit. Learned senior counsel appearing for the Petitioners relied upon what is held by the Division Bench in Cause (I) of Paragraph 28 of the said judgment which reads thus:

“(l) The Respondent No.5 has contended that it had submitted a letter on 7th May 2011 under DCR 6(4) for further commencement certificate and the application having not been refused, deemed to have been granted. The Petitioners have laid heavy emphasis on the fact that the said letter purported to be of 7 May 2011 is undated and therefore there is no question of deemed permission. It is true that the said letter is undated but there is a receipt by the Corporation of having received the application on 7 May 2011. During the course of the hearing the learned counsel for the Corporation produced the original inward register. We perused the said inward register and found nothing suspicious or out of ordinary. There is an entry of 7 May 2011 as regards receipt of the application of the Respondent No.5 which seems to be made in usual course. Admittedly this application is not decided by the Corporation. **In the circumstances, we do not find that the submission made by the Respondent no.5 that it had deemed permission is without any substance. The Respondent no.5 has filed a Civil suit taking this contention in which there is an interim order passed in favour of Respondent no.5.**”
(emphasis added)

31. He also relied upon what is recorded in Clause (o) of Paragraph 28 of the judgment of the Division Bench in the said PIL which reads thus:

“(o) The Respondent no.5 has placed on record that it carried on construction on the basis of deemed permission. The Respondent no.5 has placed on record that there was no stop work notice in respect of PPL till 14 December 2011, which notice was stayed by the City Civil Court. **We find force in the submission of the Respondent no.5 that it had deemed permission to continue with the construction and in fact the construction had come up substantially. The civil suit filed by the Respondent no.5 is pending in which the Civil Court has passed an interim order finding prima**

facie substance in the case of the Respondent no.5. We do not find any grave error in the order of interim relief passed so as to override the same and hold that the construction of PPL as illegal. The construction of PPL has been completed in accordance with sanctioned plan. As noted earlier, the said PPL will be handed over to the Corporation free of costs for the use of general public. Once that is done the Respondent no.5 will be entitled to avail of the incentive FSI.”

32. In Clause (l) of Paragraph 28 of the judgment of the Division Bench in the said PIL, the Division Bench has noted that the present first Writ Petitioner (the Respondent No.5 in the PIL) has filed a Civil Suit raising the contention of deemed permission in which there is an interim order. All that the Division Bench has observed is that the contention raised by the first Writ Petitioner (Respondent No.5 in the PIL) of grant of deemed permission cannot be said to be without any substance. There is no positive finding recorded by the Division Bench that the plea of deemed permission is established by the Writ Petitioners. In fact, in Clause (o) which we have quoted above, the Division Bench has again reiterated that the suit is pending in which the City Civil Court has passed an interim order observing that there is a prima facie substance in the case of the Writ Petitioners. What is observed by the Division Bench is that there was no grave error in the order of interim relief so as to override it and hold that the construction of PPL is illegal. Upon the conjoint reading both the paragraphs of the judgment of the Division Bench in the said PIL, it is crystal clear that the

Division Bench has not concluded the issue of deemed permission. On the contrary, after noticing that the suit filed by the first Writ Petitioner (Respondent No.5 in the PIL) was pending in which the said contention based on the deemed permission was raised, all that the Division Bench has observed is that there is nothing wrong in the interim order passed by the City Civil Court and it cannot be said that the plea of deemed permission is without any substance. If the Division Bench intended to conclude the issue of deemed permission, the Division Bench would have directed the disposal of the suit in terms of the Judgment. The Division Bench could have directed that the City Civil Court before which the suit was pending will be guided by the findings recorded in the PIL. On the contrary, the Division Bench has recorded a finding in clause (o) of paragraph 28 that, there was nothing wrong in the interim order passed in the suit and, therefore, the interim cannot be overridden in the PIL. In clause (l) of paragraph 28, the Division Bench observed that the submission based on the plea of deemed permission is not without substance and the first Petitioner herein has filed a civil suit taking the said contention in which there was an interim order. On conjoint reading of the relevant clauses in the Judgment we are of the view that the Division Bench prima facie found substance in the contention based on the deeming fiction under clause (4) of Regulation 6 and found that the interim order in the suit cannot be overridden. Thus, we do not agree with the submission that the

issue of deemed permission was concluded by the Division Bench while deciding the PIL. The issue was not decided finally as the same was arising in the suit which was pending for Judgment when the PIL was decided. Therefore, the issue could be finally decided only by the Civil Court in the pending suit.

33. Therefore, now we turn to the finding on issue of deemed permission which has been recorded by the City Civil Court against the Municipal Corporation. It will be necessary to make a reference to the relevant averments in the Plaint. In Paragraph 18 of the Plaint, there are material averments which read thus:-

“18. As per the LOI dated 6th August, 2010, the Plaintiffs were required to complete and handover to the MCGM the Public Parking Lots within 24 months of issue of the LOI i.e. by 6th August, 2012. The Plaintiffs state that construction of plinth was completed in May 2011 in accordance with the CC. The Plaintiffs thereafter gave notice as required under DCR 6(4) for inspection of the plinth and grant of further CC on 7th May, 2011. Since no reply nor any rejection to the same was received by the Plaintiffs within 15 days the project execution of the Public Parking Lot was continued by the Plaintiffs as per the sanctioned plans and in accordance with law. Hereto annexed and marked Exhibit “I” is a copy of the Plaintiff's Architect's letter dated 7th May, 2011. The Plaintiffs say and submit that as no reply/rejection was received within 15 days from the Defendants as required under law and hence as per DCR 6(4) it is a deemed provision permitting the Plaintiffs to carry out further work as requested in their letter dated 7th May, 2011.”

34. In the written statement, the reply of the said Municipal Corporation to the aforesaid averments is of denial. The gist of the contention raised in the Plaint is that as there was a deemed permission, the stop work notice under Section 354 of the MMC Act which was challenged in the suit could not have been issued.

35. Before we deal with the legal issues, it will be necessary to make a reference to the relevant Regulations and the scheme of the Regulations. The said Corporation has been established under the Mumbai Municipal Corporation Act, 1888. Under the MRTP Act, it is a Planning Authority being the Local Authority. There are elaborate provisions made under the MMC Act for regulating the construction of the buildings. Chapter XII of the MMC Act deals with the building regulations. Section 337 of the MMC Act requires a notice to be given to the Commissioner of an intention to erect a building. Section 338 requires the building plans to be submitted. Section 344A deals with the supervision of the buildings and works. Section 345 provides when building or work may be proceeded with. It reads thus:

“345. When building or work may be proceeded with.

If within thirty days after receipt of any notice under section 337 or 342, or of the plan, section, description or further information, if any, called for

under section 338, 340 or 343, as the case may be, the Commissioner fails to intimate in writing, to the person who has given the said notice, his disapproval of the building which the said person proposes to erect, or of the work which he proposes to execute; or if, within the said period, the Commissioner signifies in writing to the said person his approval of the said building or work;

the said person may, at any time within one year from the date of the delivery of the notice to the Commissioner, proceed with the said building or work in accordance with his intention as described in the notice or in any of the documents aforesaid, but not so as to contravene any of the provisions of this Act or any by-law under this Act at the time in force.”

36. Intimation of Disapproval (IOD) is issued by the Municipal Corporation under the Section 345 of the BMC Act. Under Section 45 of the MRTP Act, for carrying out any development which includes construction of a building, a permission of the Planning Authority i.e. the said Corporation is required. The said Regulations have been framed in exercise of the powers under the MRTP Act. Sub-section (1) of Section 44 of the MRTP Act mandates that a person who intends to carry out development shall make an application in writing to the Planning Authority for grant of permission in such form and containing such particulars and accompanied by such documents, as may be prescribed. Section 44 of the MRTP Act which deals with applications for Development Permissions reads thus:

“44. Application for permission for development:-
(1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out

any development on any land shall make in application writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed: Provided that, save as otherwise provided in any law, or any rules, regulations or bye-laws made under any law, for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under the Maharashtra Housing and Area Development Act, 1976.

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

Section 45 of the MRTP Act deals with grant or refusal of Development Permissions which reads thus:

“45. Grant or refusal of permission:- (1) On receipt of an application under section 44 the Planning Authority may, subject to the provisions of this Act, by order in writing-

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

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

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

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

(5) If the Planning Authority does not communicate its decision whether to grant or refuse permission to the applicant within sixty days from the receipt of his application, or within sixty days from the date of receipt of reply from the applicant in respect of any requisition made by the Planning Authority, whichever is later, such permission shall be deemed to have been granted to the application on the date immediately following the date of expiry of sixty days.

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

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

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

37. Now we turn to the said Regulations which have been framed in exercise of the powers under the MRTTP Act. Section 44 of the MRTTP Act will have to be read with the relevant provisions regarding Development permissions in the said Regulations. The Regulation 4 deals with the development permission and commencement certificate. Clause (1) of Regulation 4 is very relevant, which reads thus:

“4. Development Permission and Commencement Certificate.

(1) Necessity of obtaining permission.-- No person shall erect or re-erect a building or alter any building or carry out any development or redevelopment, on any plot or land or cause the same to be done without first obtaining separate development permission and a commencement certificate from the Commissioner.”

38. Therefore, no construction of a building can be made without first obtaining a separate development permission and a commencement certificate from the Commissioner. Therefore, the requirement of obtaining a development permission under the MRTTP Act and the said Regulations is over and above the requirements of the provisions of Section 345 of the MMC Act. Regulation 5 deals with the procedure for obtaining development permission and commencement certificate. Very detailed provisions have been set out in the Regulation 5. What is material for deciding the matter is provided in Clauses (1), (5) and (6) of Regulation 5 which read thus:

5. Procedure for obtaining Development Permission and Commencement Certificate:-

(1) Notice of intention:—Every person who intends to carry out a development or redevelopment, erect or re-erect a building or alter any building or part of a building shall give a notice in writing to the Commissioner of his said intention in the form in Appendix X and such notices shall be accompanied by plans and statements with sufficient number of copies, as required by sub-regulation (2) and (i) hereunder. The plans may be ordinary prints. One set of such plans shall be retained in the office of the Commissioner for record after the issue of permission or refusal.

(2) Copies of plans and statements.—

(i) Notice:— The notice referred to in sub-regulation (2) of Regulation 6 shall be accompanied by as many copies of plans as the Commissioner may prescribe after taking into consideration the clearances required from other agencies.

(ii) Size:— The size of drawing sheets shall be any of those specified in Table I hereunder.

Table 1
Drawing Sheet Sizes

Serial No. (1)	Designation (2)	Trimmed Size (mm) (3)
1.	AO	741 - 1189
2.	A1	594 - 841
3.	A2	420 – 594
4.	A3	297 – 420
5.	A4	210- - 297
6.	A5	148 - 210

- (iii) Colouring notations for plans:—The plans shall be coloured as specified in Table 2 hereunder. The prints of the plans shall be on one side of the paper only.

TABLE 2
Colouring of Plans

Sl.No. (1)	Item (2)	Site Plan (3)	Building Plan (4)
1.	Plot lines	_____	Thick black _____
2.	Existing street	Green	
3.	Future Street	Green dotted	
4.	Permissible building	Thick dotted black	
5.	Open spaces	_____	No colour _____
6.	Work proposed to be demolished	Yellow hatched	_____
7.	Proposed work	_____	Red filled in _____
8.	Drainage and sewerage work	_____	Red dotted _____
9.	Water supply work	_____	Blue dotted thin _____
10.	Deviations	_____	Red hatched _____
11.	Recreation ground	_____	Green wash _____
12.	Roads and set backs	_____	Burnt sienna _____
13.	Reservation	_____	Appropriate colour code _____

Note:—Existing work to be hatched black; for land development/subdivision/lay-out suitable colouring notations shall be used duly indexed.

(3) Information accompanying notice:—

- (i) Key plan, site plan, etc. to accompany notice.—The notice shall be accompanied by the key plan (location plan), a site plan, sub-division/ lay-out plan, building plan, specifications and certificate of

supervision, ownership, title, etc. as prescribed in clauses (ii) to (xiii) below.

(ii) Ownership title and area:—Every application for development permission and commencement certificate shall be accompanied by the following documents for verifying the ownership and area etc. of the land:—

- (a) attested copy or original sale/lease deed/power of attorney/enabling ownership document wherever applicable;
- (b) property register card of a date not earlier than twelve months of the date of submission of the development proposal;
- (c) statement of area of the holding by triangulation method from the qualified licensed technical personnel or architect with an affidavit from the owner in regard to the area in the form prescribed by the Commissioner;
- (d) any other document prescribed by the Commissioner;

In the case of land leased by the Government or local authorities, clearance of Government or such authorities regarding observance of the lease conditions shall be obtained and attached to the application for development permission in respect of such land.

(iii) Key plan or location plan:—A key plan drawn to a scale of not less than 1: 10000 shall be submitted alongwith the application in Appendix X for development permission and commencement certificate showing the boundary locations of the site with respect to neighborhood land-marks.

(iv) Site plan:—The site plan sent with an application for permission drawn to a scale of 1 : 500 shall be duly authenticated by the appropriate officer of the Department of Land Records showing in addition to the details in Form II of Appendix X the following :—

- (a) the boundaries of the s i t e and of any contiguous land belonging to the owner of the site;
- (b) the position of the site in relation to neighboring streets;
- (c) the names of the streets on which the building is proposed to be situated, if any;
- (d) all existing buildings contained in the site with their names (where the buildings are given names) and their numbers;
- (e) the position of the building and of other buildings, if any, which the applicant intends to erect upon his contiguous land referred to in (a) above in relation to--
 - (i) the boundaries of the site and, in a case where the site has been partitioned, the boundaries of the portions owned by others;
 - (ii) all adjacent streets, buildings (with number of storeys and height) and premises within a distance of 12 m. of the work site and of the contiguous land (if any) referred to in (a) ; and
 - (iii) if there is no street within a distance of 12 m. of the site, the nearest existing street with its name;
- (f) the means of access from the street to the building, and to all other buildings (i f any) which the applicant intends to erect upon his contiguous land referred to in (a) above;
- (g) the space to be left around the building to secure free circulation of air, admission of light and access for scavenging purposes;

- (h) the width of the street (if any) in front and of the street (if any) at the side or near the building;
 - (i) the direction of the north line relative to the plan of the building;
 - (j) any existing physical features, such as wells, tanks, drains or trees;
 - (k) the ground area of the whole property and the breakup of the covered area on each floor with the calculations for percentage covered in each floor in terms of the total area of the plot as required by the Regulations governing the coverage of the area;
 - (l) overhead electric supply lines including space for electrical transforming sub-station according to the requirements of the electric distribution licences, water supply and drainage line;
 - (m) such other particulars as may be prescribed by the Commissioner.
- (v) Sub-division/Loy-out plan:—Where development is proposed in a sub-division or involves a layout plan, the notice shall be accompanied by a key-plan showing the location of the plot in the ward at a scale of not less than 1: 4000, and a sub-division layout plan to a scale of not less than 1: 500, which shall be duly authenticated by the appropriate officer of District Inspector of Land Records/Superintendent of Land Records containing the following:—
- (a) scale used and the north line;
 - (b) the location of all proposed and existing roads with their names, existing/proposed/prescribed width within the land;
 - (c) dimensions of the plot along with the building lines showing the set-backs with dimensions within each plot;

- (d) the location of drains, sewers, public facilities and services, electric lines, etc.;
- (e) a table indicating the size, area and use of all the plots in the sub-division/lay-out plan;
- (f) a statement indicating the total area of the site area utilised under roads, open spaces for parks, playgrounds, recreation spaces and development plan designations, reservations and allocations, schools, shopping, and other public places along with their percentage with reference to the total area of the site;
- (g) in the case of plots which are sub-divided, in built-up areas. in addition to the above the means of access to the sub-division from existing streets, and in addition, in the case of plots which are subdivided in built-up areas, the means of access to each sub-plot from existing streets.

(vi) Building plan:—The plans of the building with elevations and sections accompanying the notice shall be drawn to a scale of I MOO and shall—

- (a) include floor plans of all floors together with the covered area clearly indicating the size of the rooms, the position and width of staircases, ramps and other exitways, liftwells. lift machine rooms and lift pit details, meter room and electric sub-station. It shall also include the ground floor plan as well as the basement plan and shall indicate the details of parking spaces, loading and unloading spaces, if required to be provided around and within the building, as also the access ways and appurtenant open spaces with projections in dotted lines, the distance from any building existing on the plot in figured dimensions along with the accessory building. These plans will also contain the details listed in Form 1 of Appendix X.

- (b) show the use or occupancy of all parts of the buildings;
- (c) show the exact location of essential services, e.g. water closet (WC), sink, bath;
- (d) include sectional drawings showing clearly the sizes of the footings, thickness of basement wall, wall construction, size and spacing of framing members, floor slabs and roof slabs with their materials. The section shall indicate the heights of the building and rooms and also the height of the parapet and the drainage and the slope of the roof. At least one section should be taken through the staircase. The structural plan giving details of all structural elements and materials used along with structural calculations can be submitted separately, but in any circumstances before the issue of the development permission/commencement certificate;
- (e) show relative levels of streets;
- (f) indicate details of basket privy/served privy, if any;
- (g) give dimensions of the portions projecting beyond the permissible building line;
- (h) include a terrace plan indicating the drainage and the slope of the roof;
- (i) indicate the north line relative to the plans;
- (j) give a schedule of doors, windows and ventilators;
- (k) provide such other particulars as may be prescribed by the Commissioner:

Provided that with the building plans for multi-storeyed/high rise or special buildings, the following additional information shall be furnished or indicated on the building plans:—

- (a) access to fire appliances/vehicles with details of vehicular turning circle and clear motorable accessway around the building;
- (b) size (width) of main and alternate staircases along with the balcony approach, corridor, ventilated lobby approach;
- (c) location and details of lift enclosures;
- (d) location and size of fire lift;
- (e) smoke stop lobby door, where provided;
- (f) refuse chutes, refuses chamber, service duct, etc.;
- (g) vehicular, loading and unloading parking spaces;
- (h) refuse area, if any;
- (i) details of air-conditioning system with position of fire dampers, mechanical ventilation system, electrical services (with dimensions of electrical transforming sub-stations, etc.), boilers, gas pipes, meter rooms, etc.;
- (j) details of exits, including ramps, etc. for hospitals and special risks; (k) location of generator, transformer and switch gear room;
- (l) smoke exhaust system, if any;
- (m) details of fire alarm system;
- (n) location of centralised control, connecting all fire alarms, built-in fire protection arrangements and public address system, etc.;
- (o) location and dimensions of static water storage tank and pump room along with fire service inlets for mobile pump and water storage tank:

(p) location and details of fixed fire protection installation such as sprinklers, wet hose reels, drenchers, carbon-dioxide (CO₂) installations, etc.; and

(q) location and details of first aid and fire fighting equipment/installations.

(vii) Service plan:—Plan and sectional elevations of private water supply, sewage disposal system and details of building services, where required by the Commissioner, shall be made available on a scale of not less than 1: 100 before undertaking such work.

(viii) Specifications:—General specifications of the proposed construction, giving the type and grade of materials to be used in the form in Appendix X, signed by a licensed surveyor/engineer/structural engineer supervisor, or architect as the case may be, shall accompany the notice.

(ix) Supervision Certificate:—The notice shall be further accompanied by a certificate of supervision in the form in Appendix XI by the licensed surveyor/engineer/structural engineer/supervisor or architect as the case may be. If the said licensed technical person or architect ceases to be employed for the development work, further development shall be suspended till a new licensed technical person or architect is appointed and his certificate of supervision along with a certificate of supervision along with a certificate for the previous work erected, if any, is accepted by the Commissioner.

(x) Development permission fee receipt:—The notice shall be accompanied by an attested copy of the receipt of payment of the development permission application fee.

(xi) Security deposit:—To ensure compliance with these Regulations and the directions given in the sanctioned plan and other conditions, a security deposit which may be in the form of an irrevocable bank guarantee, shall be charged at rates specified by the Commissioner. It shall be returned to the owner one year after the issue of the full occupancy certificate

after the Commissioner is satisfied with the compliance with various conditions stipulated in the said full occupancy certificate.

(xii) Clearance certificate for tax arrears:—The notice shall also be accompanied by an attested copy of a clearance certificate from the Assessment Department of the Corporation for payment of tax up-to date.

(xiii) No objection certificate:—For occupancies requiring clearance from authorities like the Civil Aviation Department, Directorate of Industries, Maharashtra Pollution Control Board, Inspectorate of Boilers and Smoke Nuisances, electrical distribution licensers regarding requirements of electrical transforming stations, the no objection certificate from these authorities, applicable to the occupancy, shall also accompany the application.

(xiv) Other facilities to be provided during construction.—The notice also be accompanied by an undertaking from the owner/developer/contractor to the effect that during the period of construction, facilities will be made available for day-care centre, creche, adult-literacy and non-formal education programmes for the construction workers, directly by him or through a voluntary agency.

(4) Signing of plans by owners and licensed personnel/architect:—

(i) Signing of plans.— All the plans shall be signed by the owner and the licensed surveyor/engineer/structural engineer/supervisor, or architect, as the case may be, and shall indicate their names in block capital letters, addresses and licence numbers when so licensed, allotted by the Commissioner.

(ii) Qualification and competence of the Licensed Surveyor/Engineer/Structural Engineer/Supervisor.— The Commissioner shall licence surveyors, engineers, structural engineers and supervisors with the qualifications listed in Appendix XII to perform the tasks mentioned in that Appendix.

- (5) Processing of the development permission application. -
- (i) Grant of permission or refusal - The Commissioner may either sanction or refuse to sanction the plans and specifications or may sanction them with such modifications or directions as he may deem necessary, and thereupon, he shall communicate his decision to the person giving the notice accordingly in the form in Appendix `XIII or XIV'.
- (ii) Fire brigade scrutiny.-The plans for all multi-storeyed, high rise and special buildings shall also be subject to the scrutiny of the Chief Fire Officer, and development permission shall be given by the Commissioner only after the clearance by the Chief Fire Officer.
- (iii) Deemed permission.-If within sixty days of the receipt of the notice under sub Regulation (i) of Regulation 5, the Commissioner fails to intimate in writing to the person who has given the notice his refusal or sanction, or sanction with modifications or directions, the notice with its plans and statements shall be deemed to have been sanctioned, provided that this shall not be construed to authorise any person to do anything on the site of the work in contravention of or against the terms of lease or titles of the land, development plan, these Regulations or any law in force.
- (iv) Revised plans. - Once the plans have been scrutinised and objections have been pointed out, the owner giving notice shall modify the plans to comply with the objections raised and resubmit them. The plans submitted for final approval shall not contain superimposed corrections. The Commissioner shall scrutinise the revised plans and shall grant or refuse commencement certificate/development permission within sixty days from the date of resubmission.

(6) Commencement of work. - A commencement certificate/development permission shall remain valid for four years in the aggregate, but shall have to be renewed before the expiry of one year from the date of its issue. The application for renewal shall be made before expiry of one year, if the work has not already commenced. Such renewal can be done for three consecutive terms of one year each, after which proposals shall have to be submitted to obtain development permission afresh.”

The Regulation 6 reads thus:

“6. Procedure during construction.-

- (1) Construction to be in conformity with Regulations.- Owner`s liability.-Neither the grant of permission nor approval of the drawing and specifications nor inspections by the Commissioner during erection of the building, shall in any way relieve the owner of such building from full responsibility for carrying out carrying out the work in accordance with these Regulations.
- (2) Notice to start of work :- The owner shall give notice to the Commissioner of his intention to start work on the building site in the form of given in Appendix XV. The owner may start the work after 7 days have elapsed from the date of the service such notice to the Commissioner or earlier, if so permitted.
- (3) Documents at site :- (i) Results of tests:- Where tests of any material are made to ensure conformity with the requirements of these Regulations, record of the test data shall be kept available for inspection during the construction of the building and for such period thereafter as required by the Commissioner. (ii) Development permission :- The person to whom a development permission is issued shall during construction, keep- (a) posted in a conspicuous place, on the site for which permission has been

issued, a copy of the development permission; and (b) a copy of the approved drawings and specifications referred to in Regulations 5 on the site for which the permit was issued.

- (4) **Checking of plinth columns upto plinth level :-** The owner through his licensed surveyor, engineer, structural engineer or supervisor or his architect shall give notice in the form of Appendix XVI to the Commissioner on completion of work upto plinth level to enable the Commissioner to ensure that the work conforms to the sanctioned plans. The Commissioner may inspect the work jointly with the licensed technical personal or architect within fifteen days from the receipt of such notice and either give or refuse permission for further construction as per the sanctioned plans in the form in Appendix XVII. If within this period, the permission is not refused, it shall be deemed to have been given provided the work is carried out according to the sanctioned plans.
- (5) **Deviation during constructions :-** If during the construction of a building, any departure of a substantial nature from the sanctioned plans is intended by way of internal or external additions, sanction of the Commissioner shall be necessary. A revised plan showing the deviations shall be submitted and the procedure laid down for the original plans heretofore shall apply to all such amended plans. Any work done in contravention of the sanctioned plans, without prior approval of the Commissioner, shall be deemed as unauthorised.
- (6) **Completion certificate :-** The owner, through his licensed plumber, shall furnish a drainage completion certificate to the Commissioner in the form in Appendix 'XIX'. The owner through his licensed surveyor/engineer/structural engineer/supervisor or his architect, who has supervised the construction, shall furnish a building completion certificate to the

Commissioner in the form in Appendix XX. These certificates shall be accompanied by three sets of plans of the completed development. The Commissioner shall inspect the work and, after satisfying himself that there is no deviation from the approved plans, issue a certificate of acceptance of the completion of the work in the form in Appendix XXI.”

(emphasis added)

Clause (6) of Regulation 5 provides that a commencement certificate/development permission issued under Regulation 5 shall remain valid for four years in aggregate. On conjoint reading of Regulations 5 and 6, on the basis of commencement certificate granted under Regulation 5, construction can be carried out only till plinth level. Only after permission is obtained under Clause (4) of Regulation 6 that further construction on the basis of the sanctioned plan can be carried out. That is the reason why initially when the commencement certificate dated 24th February 2005 was issued to the Petitioners, as per the Regulation 5, the same permitted construction only up to the plinth level. Clause (4) of the Regulation 6 comes into picture after the construction is made up to the plinth level. On completion of the work upto plinth level, a notice in the format prescribed by the Appendix XVI is required to be given to the Commissioner by the owner through his Licensed Surveyor, Structural Engineer or Supervisor or Architect. The notice is required to be issued to enable the Commissioner to ensure that the work conforms to the sanctioned plans. After inspecting the

work, the Commissioner may grant or refuse to grant permission for construction as per the sanctioned plans in the form prescribed by the Appendix XVII. If such permission is not refused within a period of 15 days from the date of receipt of such notice in the format prescribed by the Appendix XVI, it shall be deemed to have been given provided the work carried out is in accordance with the sanctioned plans. It is this deeming fiction which is invoked by the Writ Petitioners.

39. At this stage, we must go back to Clause (4) of Regulation 5 which makes it mandatory that the plans submitted along with an Application for grant of commencement certificate and development permission must be signed by the owner as well as the Licensed Surveyor/Structural Engineer/ Supervisor or Architect. Sub-clause (ii) of Clause (4) of Regulation 5 provides that the qualifications and competence of the Licensed Surveyor/Structural Engineer/Supervisor or Architect are provided in the Appendix XII. What is material is the Appendix XII. Apart from laying down the qualifications of the Licensed Surveyor/Structural Engineer/Supervisor or Architect, Appendix XII lays down the responsibilities of the Licensed Technical Personnel or the Architect specified under Clause C-6.3, which reads thus:

“(1) It will be incumbent on every licensed technical person or architect in all matters in which he may be professionally consulted or engaged to assist and co-operate with the Commissioner and other

Municipal Officers in carrying out and enforcing the provisions of the Bombay Municipal Corporation Act and Maharashtra Regional and Town Planning Act and of any Regulations or rules for the time being in force under the Acts.

- (2) **Even licensed technical person or architect shall in every case in which he may be professionally consulted or engaged be responsible so far as his professional connection with such case extends, for due compliance with the provisions of Chapters IX, X, XI and XII of the Bombay Municipal Corporation Act, the Maharashtra Regional and Town Planning Act and of any rules or regulations for the time being in force under the said Acts, or such of them as may respectively be applicable to the circumstances of the particular case and in particular it will be obligatory on him to satisfy himself that a qualified and competent site supervisor with qualifications prescribed by the Commissioner is constantly employed and present on the work to supervise the execution of all work and to prevent the use of any defective material therein and the improper execution of any such work.”**

(emphasis added)

40. Clause 2 of C-6.3 is very relevant which imposes a duty on the Architect that he will be responsible for due compliance with the provisions of Chapters IX, X, XI and XII of the MMC Act as well as the provisions of the MRTP Act as well as the said Regulations. Thus, the responsibility of the Architect is to ensure that the construction for which he is engaged is carried out in terms of the commencement certificate and it is carried out in accordance with law. Further obligation of an Architect is to satisfy himself that a qualified and

competent site supervisor with the qualifications prescribed by the Commissioner is constantly employed and is present at the site of the work to supervise the execution of all work as well as to prevent the use of any defective material and the improper execution of any such work. The Architect who signs the plans submitted along with an application made for seeking development permission is bound to perform the duties and responsibilities as specified in Clause C-6.3 in Appendix XII to the said Regulations. It is the duty of the Architect to ensure that the construction is carried out in accordance with law and as stated earlier, a site supervisor is engaged who is always present at the site to supervise the work to ensure that any defective material is not used and the improper execution of any such work is not made. It is in this context that the contention regarding deemed permission will have to be examined. It is, therefore, necessary to note the form in which the notice as contemplated by Clause (4) of Regulation 6 of the said Regulations is required to be given. The said form is in Appendix XVI of the said Regulations. The said form reads thus:

“APPENDIX XVI
[Regulation No.6(4)]

Form for intimation of Completion of Work up to Plinth Level

To,

The Executive Engineer (Building Proposal)Ward,
Municipal Corporation of Greater Bombay.

Sir,

The construction upto plinth/column upto plinth level has been completed in Building No...on/in the Plot No./C.T.S.No..... Division/Village/Town Planning Scheme No.Road/Street.....Word.. in accordance with your permission No..... dated under my supervision and in accordance with the sanctioned plan.

Please check the completed work and permit me to proceed with the rest of the work.

Yours faithfully,

Signature of Licensed Surveyor/
Engineer/Structural Engineer/
Supervisor or Architect.

Name.

(In block letters)

Address

Date :”

41. Apart from the statement that the work upto the plinth level has been carried out in accordance with the sanctioned plan, it is necessary for the Architect to state that it was done under his supervision. This requirement has a great deal of significance as a duty is imposed by the said Regulations on the Architect to ensure that the construction is carried out in accordance with law and under the supervision of a supervisor having prescribed qualifications. The Supervisor has to ensure that the material of inferior quality is not used and the work is not improperly carried out. At this stage, we must refer to the letter dated 7th May 2011 addressed by the Architects of the Writ

Petitioners to the Executive Engineer (B.P) City-I, E-Ward, Byculla, Mumbai, on the basis of which the plea of deemed permission is based.

The letter reads thus:

“With reference to the above subject. The amended plan submitted by us has been approved by your office. Further we have complied all the condition of I.O.D. As well as amended plan and we have complied work up to plinth as per approved plans. You are therefore requested to kindly check the plinth and grant us further C.C. At the earlier.”

42. All that the Architects say is that “we have complied the work upto the plinth as per approved plans”. The most the material part of the form prescribed by the Appendix XVI is that the work has been carried out under the supervision of the Architect. The said statement does not find place in the said letter. As stated earlier, it is the obligation of the Architect to supervise the construction and to ensure that a qualified supervisor is at the site to ensure that material of inferior quality is not used and that the work is not carried out improperly. Therefore, the statement in the prescribed form that the work is carried out under his supervision is not an empty formality. It is an essential part of the form on basis of which the Commissioner is required to inspect the construction.

43. At this stage, we must note here that though the Intervenor who are claiming to support the Municipal Corporation have filed bulky

compilations and though one of them has filed written submissions in the First Appeal, a binding decision of this Court which directly deals with the issue of prescribed format has not been shown to this Court. The entire argument of the learned senior counsel appearing for the Petitioners was that the requirement of giving a notice under Clause (4) of the Regulation 6 is mandatory, but the requirement of giving the notice in a particular form is directory. Similar issue arose before a Division Bench of this Court in the case of *GTL Infrastructure Ltd., Pune v. Dhule Municipal Corporation and Others*¹². This was a case where the argument was whether making of an application in the prescribed format for taking benefit of Sub-section (5) of Section 45 of the MRTP Act was mandatory. The Division Bench dealt with the said issue in Paragraph 7, which reads thus:

“7. From bare perusal of the provisions contained in section [44](#) and [45](#) of MRTP Act it is clear that for any person, intending to carry out any development on any land, it is mandatory to make an application in writing to the Planning Authority for permission in the "prescribed form" and unless the application made is in "the prescribed form", as contemplated by section [44](#) of the said Act, in our opinion, one cannot take benefit of the deeming provision contained in subsection (5) of section [45](#) of the said Act and carry out any development, claiming that there was no communication/reply from the Planning Authority within sixty days. In other words, one can take benefit/advantage of deeming provision only if the application for permission for development was made in the "prescribed form" and if there was no communication from the Planning Authority

12. 2011(6) Mh.L.J. 215

either granting or refusing permission to the applicant within 60 days from the date of receipt of his application. When the statute mandates that one has to apply for building/development permission in the prescribed form, the mandate of the statute has to be duly observed.”

(underline supplied)

44. The Division Bench held that the said requirement is mandatory. The Division Bench held that one can take benefit/advantage of the deeming provision only if the Application for development permission was made in the prescribed form. The Division Bench held that when the statute mandates that one has to apply for building and/or development permission in the prescribed form, the mandate of the statute has to be duly observed. Thus, this issue has been concluded by the Division Bench of this Court. The decision will squarely apply to the present case. We must, therefore, hold that for taking the benefit of the deeming fiction under clause (4) of Regulation 6, it is mandatory to serve a notice in terms of the form in Appendix XVI.

45. There is one more reason why we are taking this view. We are referring to a decision of a Division Bench of this Court in the case of *Perfect Machine Tools Co. Ltd. v. State of Maharashtra & Others*¹³. The Court was interpreting the deeming fiction incorporated in Section 127 of the MRTP Act. It provides that in case of a land reserved in the Development Plan, if a notice is given by the owner or person interested

13. 2008(2) Mh.L.J. 404

as provided in Section 127 of the MRTP Act, on the failure to take steps for acquisition within the time stipulated therein, the reservation shown in the Development Plan shall be deemed to have lapsed. While dealing with the said provision, the Division Bench has generally dealt with the laws which provide for deeming fiction. In Paragraphs 6 and 7 of the said decision, the Division Bench has held thus:

- “6. It is a settled canon of law that the legislature is quite competent to create the legal fiction, in other words, to enact a deeming provision for the purposes of assuming existence of a fact which does not really exist provided the declaration of non-existing fact as existing does not offend the constitution. The legal fiction, thus, could be enacted without using express words. The Court while interpreting such a provision has to ascertain for what purpose the fiction is created and then Court may even assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. The Courts, however, have to take definite precaution that while construing the fiction it is not to be extended beyond the purpose for which it is created or beyond the language in the section by which it is created. The concept of legal fiction was stated by James, LJ.

When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what person the statutory fiction is to be resorted to.

7. The scope of Section 127 takes in its ambit the consequences of default by concerned authorities that is where they failed to acquire

the land and utilize the same for the purpose for which it was reserved or notified and despite service of the notice as contemplated under Section 127 still failed within the period of six months to take appropriate steps. **After the deeming fiction comes into effect the land shall automatically be released from such acquisition/reservation without passing of any order to that effect or without any specific act on the part of the authorities. Such situation beneficial to the owner or a person interested comes into existence on its own and as a result of default or inaction in compliance by the appropriate authority of the statutory provisions of the Act. To acquire the benefit of the provisions resulting from a legal fiction, it would be obligatory upon the part of the beneficiary to comply with the requirements of the statutory provisions strictly. Conditions postulated under this provision would be mandatory and not merely directory since the default has the effect of taking the land outside the ambit of acquisition/reservation. Thus, the compliance of the requirements of the provisions would be a condition precedent to the invocation of the right granting such benefit.** The interested person should serve a notice on the Planning Authority, Development Authority or the appropriate authority as the case may be. The notice should state that despite its reservation, notification and after coming into force of the final development plan for 10 years, the land has not been acquired. The person should assert his right and still if within six months from the date of service of such notice the land is not acquired or no steps as stated in the section are commenced, then alone, the land shall be deemed to be released from such reservation and would be available to the owner.”

(emphasis added)

46. Thus, what is held by the Division Bench is that to acquire the benefit of a provision which incorporates a deeming fiction, it

would be obligatory upon the part of the beneficiaries to strictly comply with the requirements of the statutory provisions. The Division Bench held that the conditions postulated under the provisions of Section 127 of the MRTP Act are mandatory and not merely directory since the default has the drastic consequence of the lapse of reservation. About the defects in the notice, the argument canvassed was that there is no format prescribed of the notice provided in Section 127. The Division Bench held that if the beneficiary of a deeming provision wants to take the benefit thereof, he must strictly comply with the provisions which lay down the deeming fiction as the said provision is mandatory in nature.

47. On this issue, it will be also necessary to advert to the decision of the Apex Court in the case of *State of Jharkhand and Others v. Ambay Cements and Another*¹⁴. What is material for our consideration is the law laid down in Paragraphs 25 and 26 of the said decision which read thus:

“25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. **Whenever the statute prescribes that a particular act is to be done in a particular**

14. (2005) 1 SCC 368

manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance of the same must result in canceling the concession made in favour of the grantee-the respondent herein.”

(emphasis added)

48. What is held by the Apex Court is that whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that the failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. In the present case, the consequence of applicability of deeming fiction in clause (4) of Regulation 6 is that the owner gets permission to construct upper floors above the plinth of a building only as a result of the failure of the Municipal Corporation to respond to the notice and that is why the requirement of giving notice in the prescribed form will have to be held as mandatory. In fact, the decisions relied upon by the learned senior counsel appearing for the Writ Petitioners do not fully support the case of the Writ Petitioners. The first decision is in the case of *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Others*. What is material in the said decision are Paragraphs 29 to 34. The Apex Court was dealing with the provisions of exemption

notification. Paragraph 34 of the said decision lays down the test to decide whether the requirements relate to the substance or essence of the statute. In the present case, we have already adverted to the duties of the licensed Architect and Surveyor. Considering the duties, the prescribed form in Appendix XVI provides that the Architect while giving a notice/intimation of the completion of work upto plinth level must make a statement that the work has been carried out under his supervision. On the face of it, the construction may have been carried out in terms of the sanctioned plan. However, the Architect has to ensure that there is a supervisor at the site who, in turn, ensures that the defective construction material is not used and the work is not improperly carried out. Therefore, the requirement of making a statement in the intimation that the work has been carried out under the supervision of the Architect cannot be said to be directory in nature. It is not an empty formality. In fact, the said requirement is of substance and essence. In the case of **Banarsi Das**, the Apex Court was dealing with the question whether the want of signature of the complaining party and the existence of the blanks render the contract void and non existing. In fact, in Paragraph 18, the Apex Court quoted Maxwell on the Interpretation of Statutes in which it was observed that the general Rule was that an absolute enactment must be obeyed or fulfilled substantially.

49. Therefore, there is no option but to hold that the notice given by the Architects of the Petitioners on 7th May 2011 was not in the form prescribed by the Appendix XVI of the said Regulations as a material statement that the work was carried out under their supervision is missing and, therefore, the Architects of the Petitioners have not complied with the mandatory requirements of Clause (4) of Regulation 6. Therefore, it follows that the Writ Petitioners cannot take benefit of the deeming fiction.

50. There is one more aspect of the matter. In a City like Mumbai there are hundreds of building proposals. If the requirement of form prescribed by the Appendix XVI is held to be directory, it will create a chaotic situation. The Municipal Corporation will have to act upon several defective intimations and inspect the plinths though the Architects of the projects do not state that the work is carried out under their supervision. The Corporation is not expected to act on the basis of an intimation which does not incorporate the material part of the form prescribed in Appendix XVI. If the intimation given by the Architects of the Petitioners is not in the prescribed format as provided in the Appendix XVI, there is no reason for the Municipal Corporation to take cognizance of the said notice/intimation. We must, therefore, hold that for taking the benefit of the deeming fiction under clause (4) of

Regulation 6, it is mandatory to serve a notice in terms of the form in Appendix XVI.

51. We have perused the findings recorded by the learned Trial Judge. We find that the learned Judge was impressed with one sentence in the cross-examination of the witness examined by the Municipal Corporation that the construction carried out was in terms of the sanctioned plan. The real issue was whether there was a compliance made by the Plaintiffs in terms of Clause (4) of Regulation 6 to enable the Plaintiffs to take benefit of the deeming fiction provided therein. Therefore, the finding of the Civil Court on the second issue of deeming fiction will have to be set aside and it will have to be held that in fact, there was no such deemed permission/commencement certificate enabling the Petitioners to carry on construction of the PPL above the plinth level . Thus, the construction of PPL was made upto 15th floors though there was no commencement certificate. Hence, the Petitioners were not entitled to proceed with the construction of the upper floors of the PPL. Hence, the stop work notice issued by the Municipal Corporation was legal and valid. Therefore, the decree of declaration passed holding that the stop work notice was illegal and the consequential decree of injunction cannot be sustained. The impugned stop work notice will remain valid. Hence, the First Appeal by the Municipal Corporation must succeed.

52. There is a challenge to the order dated 12th September 2013 passed by the Municipal Corporation on this aspect. We have already noted the decision of the Division Bench of this Court in the said PIL dealing with incentive FSI of the PPL. We have quoted Clause (i) of Paragraph 36 of the judgment in the said PIL. As stated earlier, the Division Bench was dealing with the PIL where there was a challenge to the construction of the PPL. The construction of the PPL is held to be legal on the basis of an order of interim injunction in the suit by recording a prima facie finding that the submission of deemed permission made was not without substance. After the decision in the PIL, the suit was decided and now we are deciding the First Appeal against the decree passed in the suit. The finding of this Court is that as there was no deemed permission under Clause (4) of Regulation 6, the construction of PPL above the plinth level is illegal.

53. Perusal of the order of the Municipal Commissioner shows that he has not dealt with the aspect of deemed permission as there was already a decree of the Civil Court in the Civil suit. The Commissioner has taken into consideration the Circular dated 22nd June 2011 as well as the directives dated 19th March 2012 issued by the State Government under Sub-section (1) of Section 37 of the MRTP Act by holding that

the possession of 5th to 15th floors of the PPL cannot be taken over by the Municipal Corporation and, therefore, no incentive FSI is admissible in respect of the said floors.

54. It is true that there is no specific challenge to the Circular dated 22nd June 2011 in the present Writ Petition. However, it is not in dispute that when the said Circular was issued, clause (24) of the Regulation 33 provided that the FSI of PPL consisting of more than four floors was available by way of an incentive. The Regulation as it existed on that day did not restrict the incentive FSI to only four floors. The said Regulation, as observed earlier, is a sub-ordinate legislation. Therefore, no Circular can amend the said Regulations. To that extent, the learned senior counsel appearing for the Writ Petitioners is right in placing reliance on the decision of the Apex Court in the case of ***Laxminarayan R. Bhattad and Others***. Similarly, reliance placed by the Municipal Commissioner on the directions issued by the State Government under Sub-section (1) of Section 37 of the MRTP Act was misplaced. By the said directions, the State Government directed the Municipal Corporation which is the Planning Authority to follow the procedure under Sub-section (1) of Section 37 and to amend the relevant Regulation. The proposed amendment cannot be taken into consideration unless it is sanctioned. Therefore, the Planning Authority was bound by the Regulations which were in force. Therefore, the view

taken by the Municipal Commissioner while dealing with this aspect of incentive FSI of the PPL cannot be sustained. But in view of the finding which we have recorded in this Judgment, the Petitioners will not be entitled to incentive FSI as the construction of the PPL above the plinth level is illegal as it is made without obtaining commencement certificate.

55. Hence, even if we set aside the said finding by the Municipal Commissioner, the Writ Petitioners cannot take advantage of that as the construction of the PPL consisting of 15 upper floors above the plinth level is completely illegal as there was no commencement certificate issued to carry on the said construction. It is not in dispute that the construction has been completed of the floors up to the 15 floor. The said Corporation cannot be compelled to take possession of the PPL as the floors above the plinth have been illegally constructed. Now the only option left for the Writ Petitioners is to apply for regularization of the construction of 15 floors above the plinth. However, we have already noted that Clause (6) of the Regulation 5 which provides that a commencement certificate and the development permission shall remain valid for four years in aggregate. In the present case, the commencement certificate and the development permission was issued on 24th February 2005 which was lastly endorsed on 8th February 2011 by granting commencement certificate for construction

of residential building upto and inclusive of 43rd floor. Therefore, as provided in Clause (6) of Regulation 5, in fact, for regularization of all the upper floors of the PPL, a proposal will have to be submitted to obtain a development permission afresh. Therefore, we propose to grant reasonable time to enable the Writ Petitioners to do so. As stated earlier, the FSI used for the floors above the 43rd floor of the main building is the incentive FSI in relation to the 15 floors of the PPL. Now that FSI will not be available. When the Division Bench of this Court decided the PIL, in the suit which was pending, the issue of deemed permission was at large. If the ultimate finding of the Civil Court was that there was a deemed permission under Clause (4) of the Regulation 6, the floors constructed above the 43rd floor could have become legal. That is the reason why considering the situation on the date on which the said PIL was decided, the Division Bench held that though construction of the floors above the 43rd floor was illegal as there was no commencement certificate issued for the said floors, it is not so patently illegal that the same deserves to be demolished. Now the floors above 43rd floor can be saved only to the extent to which the incentive FSI of the PPL is made available to the Writ Petitioners. Hence, the fate of the floors constructed above the 43rd floors will depend on the outcome of the Application, if any, made by the Writ Petitioners for grant of a fresh Development Permission in respect of the PPL above the plinth level. Needless to state that such floors

constructed above the 43rd floor for which there is no incentive FSI available will have to be pulled down by the Municipal Corporation.

***CONSIDERATION OF THE FINDING OF THE
MUNICIPAL COMMISSIONER AS REGARDS THE
REFUGE AREA***

56. As far as the Writ Petition is concerned, another main issue which is canvassed is that the finding recorded by the Municipal Corporation as regards the refuge area is erroneous. The Clause (7) of Regulation 44 provides that in a multi-storeyed and high rise building having height above 24 meters there shall be provided a refuge area which shall not be counted in FSI. It will be, therefore, necessary to advert to the findings recorded by the Division Bench of this Court on this aspect. The first finding which is recorded by the Division Bench of this Court in the said PIL is in Clause (h) of Paragraph 30 which reads thus:

“30(h) However even though there is no maximum cap on refuge and fire escape provided under the DCR, it cannot be an arbitrary exercise and refuge area cannot be provided at an absurd percentages of built up area. **A situation where a developer is free to provide any extent of refuge area and claim an excessive exemption, cannot be countenanced.**”

(emphasis added)

57. Clause (i) of Paragraph 30 of the said order in the PIL takes a note of the Circular dated 21st September 1993 which provides that the refuge area shall be not less than 4% of total built up area for floors above 24 meters and not more than 50% of the built up area of the floor where it is provided. The Division Bench notes that the said Circular cannot amend or modify the said Regulations. The Division Bench also considered a decision of this Court in the case of **Gulmohor Area Societies Welfare Group and Others v. State of Maharashtra and Others**. Reliance was placed on various paragraphs of the said decision and in particular Paragraph 13 which reads thus:

“13. As regards the refuge areas, we find considerable substance in the submission made by the learned counsel for the respondent-trust running the college that since each floor is having ten class rooms, (it is necessary to have two refuge areas of 237.50 sq. meters each on each floor). For the large number of students, teachers and staff members, an area of 15 sq. meters referred to in Regulation 44(7)(c) as minimum area will not be adequate and the DCRs do not prohibit the party from providing larger refuge area (portion is to be excluded from FSI), provided such refuge area is used only as refuge area and not for any other purpose.”

It was contended by the Writ Petitioners that there is no prohibition on a party providing for larger refuge area. This contention is based on the Clause (7) of the Regulation 44 of the said Regulations which does not put any upper limit on the area provided as a refuge area. The Division Bench while deciding the said PIL No.43 of 2012

dealt with the said argument in the same judgment. Clause (j) of Paragraph 30 of the decision of the Division Bench in the said PIL reads thus:

“30(j) The reliance placed by the Respondent no.5 on the decision in the case of Gulmohor Area Societies Welfare Group (supra) to contend that an unlimited refuge area can left and claimed free of FSI, is misconceived. In the said case it was a question of a college with 10 class rooms in each floor where at any given time hundreds of students would gather. It was in the facts of that case, that the Court did not consider the refuge area amounting to 474 sq. mts. as excessive. The Court went on to hold that the DCR do not prohibit a party from providing larger refuge area. This may be so but it does not mean that there is no limit whatsoever. It would depend on facts of each case and that case court found it to be not excessive.”
(emphasis added)

Thus, the Division Bench held that though there was no upper limit for the refuge area, excessive refuge area cannot be provided. The Division Bench in Clauses (k) and (l) of the same Paragraph 30 holds thus:

“(k) The Corporation itself now has realized that the area sanctioned to respondent no.5 for refuge area is excessive. The Corporation has filed an additional affidavit on 18 September 2012 wherein it is stated that the recommendations for refuge area were excessive. It is stated in the affidavit that the Commissioner has directed an enquiry to be instituted as to how the Chief Fire Officer granted refuge area in excess of fire fighting requirements.

(l) It is thus clear from the stand of the Corporation itself that the refuge area granted is an excess of the norms. To our

mind once the planning authority comes to the conclusion that the recommendation of the Chief Fire Officer and the concessions granted by the Commissioner based on such recommendation, are faulty, it is not enough to merely institute an enquiry. If the percentage of refuge area is of such a magnitude i.e. of 70% as alleged by the Petitioners and the general indication as per the Corporation is only 4% then, it is necessary that the Corporation reconsiders the concession granted by the Commissioner as well as the Planning permission granted on this basis. The planning authority cannot, having once come to the conclusion that concessions and permissions grant were excessive, choose to remain silent. **Instead of doing the exercise of finding out what will be the appropriate admissible refuge area for the first time in this petition, it will be appropriate if the Commissioner is directed to reconsider the issue regarding the refuge area free from FSI. Though we leave the adjudication to the Commissioner, we cannot help at observing that the refuge area free of FSI as being claimed and granted to the Respondent No. 5, appears to be excessive."**

58. Thus, there is a direction of the Division Bench to the Municipal Commissioner to reconsider the concession granted by the Corporation to the Petitioners by sanctioning refuge area as sought by the Petitioners. According to the contention raised by the Petitioners before the Municipal Commissioner, the refuge area in the building is 22617.64 sq. meters which according to them is 15% of the total built up area of 13th to 54th floors. This Court held that the refuge area permitted to the Petitioners was excessive. It is in the light of this

finding that the Division Bench directed the Municipal Commissioner to re-examine the said issue and rework the FSI accordingly. One of the submissions made by the Petitioners was that as a substantial part of the construction is completed, the act of reducing FSI granted in respect of the refuge area will amount to the modification or revocation of the Development Permission which is in breach of Section 51 of the MRTP Act. This submission is not available to the Petitioners as they have not challenged the decision of the Division Bench in the said PIL. In fact, the specific direction of the Division Bench was that the Commissioner of the Municipal Corporation should not restrict himself only to holding of an enquiry against the Officers who permitted excessive refuge area, but he should re-examine or rework FSI accordingly. Thus, on plain reading of the judgment in the said PIL, the Municipal Commissioner was directed to examine what should be the reasonable refuge area to be made free of FSI considering the facts of the case. The Division Bench has already recorded a finding that refuge area permitted to the Petitioners was excessive. These Directions have not been challenged by the Petitioners. Therefore, the Municipal Commissioner would have been justified in deciding the question what should be the reasonable refuge area to be provided in the facts of the case.

59. As far as the impugned order of the Municipal commissioner is concerned, he has relied upon the provisions of the National Building Code and the Circular dated 21st September 1993 issued by the Chief Fire Officer. He has come to the conclusion that the refuge area to the extent of 4% will be allowed free of FSI and the rest of the refuge area shall be counted in the FSI.

60. The Regulation 43 deals with the Fire Protection Requirements. What is material is Regulation 44 which deals with the requirement of making a provision for refuge area. Clause 7 is material for consideration which reads thus:

“7. Refuge Area-

(a) In multi-storeyed and high rise buildings, at least one refuge area shall be provided on the floor immediately above 24 m.

(b) It shall be on the external walls as a cantilevered projection or in any other manner.

(c) It shall have a minimum area of 15 sq.m. And a minimum width of 3.0 m.

(d) It shall not be counted in F.S.I.”

61. As held by the Division Bench, Sub-Clause (c) prescribes what should be the minimum area of the refuge area. Sub-Clause (d) provides that the refuge area will not be counted in FSI and that is how the Division Bench has held that though there is no upper limit on the

floor area to be provided as the refuge area, the same has to be reasonable inasmuch as by providing excessive refuge area, undue advantage can be taken of Clause (d) which provides that the area will not be counted as FSI. Therefore, the finding of the Division Bench in the said PIL which binds the Petitioners is that the excessive refuge area cannot be provided in the sense that if the excessive area is provided, the Petitioners will not be entitled to the benefit of treating the entire refuge area as free of FSI.

62. As far as the applicability of the National Building Code of India is concerned, Clause 1 of Regulation 43 of the said Regulations is material which reads thus:

“43(1) Fire Protection Requirements

(1) General.-- The planning design and construction of any building shall be such as to ensure safety from fire. For this purpose, unless otherwise specified in these Regulations, the provisions of Part-IV: Fire Protection Chapter, National Building Code shall apply.

For multi-storeyed, high rise and special buildings, additional provisions relating to fire protection contained in Appendix VIII shall also apply. The approach to the building and open spaces on all sides upto 6 m. width and their layout shall conform to the requirements of the Chief Fire Officer. They shall be capable of taking the weight of a fire engine weighing upto 18 tonnes. These open spaces shall be free of any obstruction and shall be motorable.”

(emphasis added)

63. Thus, it is very clear that unless otherwise specified in the Regulations, the provision of Part IV of Fire Protection Chapter, in the National Building Code will apply. In the present case, Clause 7 of Regulation 44 makes a specific provision regarding the minimum area of refuge area and that the refuge area will be free of FSI. Apart from relying upon the National Building Code on the footing that there is no substantive provision for the refuge area in the Regulations, the Municipal Commissioner has relied upon a Circular issued by the Chief Fire Project Officer. Detailed reasons are not required to be recorded for holding that a Circular/Guideline issued by the Chief Fire Officer cannot supersede the provisions of the said Regulations. Apart from the contention of the Petitioners that the Circular dated 21st September 1993 has been withdrawn, on close scrutiny of the findings recorded by the Municipal Commissioner on the aspect of refuge area, we find that he has not considered as to what should be the reasonable refuge area in the facts of the case. Reliance is placed by the Petitioners on the decision of this Court in the case of ***Gulmohor Area Societies Welfare Group and Others***. The Division Bench in the facts of the said case did not find anything wrong with the claim made for exclusion of a larger refuge area from the computation of FSI. The Division Bench while recording the said finding considered the fact that on one floor of the building, there will be 10 class rooms and therefore, two large refuge

areas will be necessary considering that the large number of students will be occupying 10 class rooms in each floors. That is very clear from the Paragraph 13 of the judgment of the Division Bench which we have quoted above. The said decision is in the facts of the case before it.

64. In case of a residential building, for finding out what should be the reasonable refuge area, various factors are required to be considered such as number of flats and the area of flat/flats provided on each floor which gives an indication of the number of persons occupying a particular floor. It was necessary for the Municipal Commissioner to consider this aspect of total constructed area available on each floor, the nature and the design of the building, the location of staircase and lift and other relevant factors. In our view, the Municipal Commissioner has committed an error by not considering the facts of the case and not recording a finding as to what should be the reasonable refuge area. He has only considered what should be the minimum refuge area and to that extent, the Municipal Commissioner will have to reconsider the said issue.

***CONSIDERATION OF THE ISSUE OF THE FSI IN
RESPECT OF THE STRUCTURAL COLUMNS***

65. The structural columns are beyond the building line. The same are supporting the Cantilever portion of the refuge area. Hence,

considering the location of the said columns, as observed by the Division Bench, the issue of FSI in respect of structural columns has a direct correlation with the issue of FSI regarding the refuge area, no finding is required to be recorded on that aspect as the said aspect will have to be considered along with the issue as to what should be a reasonable refuge area.

***CONSIDERATION OF THE ISSUES RELATING TO
PASSAGES AT MANOR LEVEL AND ENTRANCE,
SWIMMING POOL, AREA OVER DECK AND REFUGE
AREA AT THE ENTRANCE***

66. Now comes to the issue of passages at manor level and entrances, swimming pool, area over deck and refuge area at the entrance level. The Division Bench while deciding the said PIL accepted the stand of the Corporation that the FSI under these heads was erroneously granted. Therefore, a direction was issued to the Commissioner to reconsider the said issue. As the decision of the Division Bench in the said PIL has not been challenged by the Writ Petitioners, the argument that after completing the substantial construction, the FSI under these heads cannot be reworked or revoked cannot be accepted for the reasons which we have already recorded earlier. We have carefully perused the findings recorded by the Municipal Commissioner in the impugned order. We must note here that the Division Bench while deciding the said PIL did not find favour with the argument canvassed by the Writ Petitioners on this aspect.

The Commissioner has taken a view that under Clause 2 of Regulation 35, benefit free FSI cannot be availed inasmuch as the said facilities cannot be said to be common facilities. Clauses (i), (ii), (iii) and (iv) of the findings recorded by the Municipal Commissioner on this aspect read thus:

- “(i) Under regulation 35(2)(c), the common passages are allowed free of FSI, however they should be common passages accessible to all. In the present case, the refuge area at the entrance of the flat, passages connecting to the flats, passages at Manor Levels, swimming pool at duplex level and covered area over the deck are not common areas accessible to all and therefore will have to be counted in FSI.
- (ii) As per MCGM Circular dated 27.02.2007, swimming pool for individual purposes will not be allowed. If the amenity has a common access and if it is covered at the height of atleast 2 floors, the same will be allowed free of FSI. The space for filtration plant and chlorination plant etc. are functional requirements of the main activity of the swimming pool. Therefore, these installations will be free of FSI.
- (iii) In the present case, the Swimming pools were allowed in duplex flats free of FSI under the discretionary powers by the then Municipal Commissioner. As per the MCGM policy detailed in Circular dated 27.2.2007, Swimming pool having height less than 9.00 meters will also be counted in FSI. The deck area will also be counted in FSI.”
- (iv) In view of the above facts, the passages at manor level and entrances, swimming Pool area, deck area and refuge area at the entrance level which were earlier granted free of FSI need to be counted in FSI.”

67. As the facilities in respect of which the free FSI was claimed, as a matter of fact, are not common facilities accessible to all, free FSI in respect thereof has been denied. We find no reason to upset the said finding recorded by the Municipal Commissioner on examination of the user of the aforesaid areas as provided in the sanctioned building plans and to that extent, no interference is required with the order of the Municipal Commissioner.

***CONSIDERATION OF THE ENTITLEMENT OF THE
PETITIONERS TO THE FSI RELATING TO SET BACK
AREA***

68. Next question is regarding the entitlement of the Petitioners to FSI in relation to the set back area of 705.45 sq. meters. While sanctioning the plans, FSI of 705.45 sq. meters in lieu of the set back area was sanctioned in the year 2005. If it is established that the owner has been otherwise compensated while taking over the setback area of 705.45 sq. meters, it will follow that the FSI of the equivalent area could not have been used by the Writ Petitioners. Clause (B) of Paragraph 9 of the order of the Municipal Commissioner refers to the record of the Municipal Corporation as well as the record produced by the Authorities under the Urban Land (Ceiling and Regulations) Act, 1976. The ultimate finding is in Clause (v) Paragraph 9B, which reads thus:

“9B.(v) From the aforesaid facts, it is not clear whether the monetary compensation has been received by SRUIL till date in respect of the set back area surrendered in the year 1976. In the absence of conclusive documentary evidence, the FSI advantage in lieu of handing over of the set back area cannot be considered at this state.”

69. Thus, after perusal of the record, it could not be established that the monetary compensation in respect of set back area of 705.45 sq. meters was received by the Petitioners (described in the order as SRUIL). In view of the aforesaid finding, the Municipal Commissioner ought to have held that there was no error in granting FSI in respect of the set back area. The Municipal Commissioner after recording the aforesaid finding has merely observed that the issue cannot be considered at this stage. According to us, the said finding is completely erroneous. If after holding an inquiry, there was no material found on record to show that the compensation in respect of the set back area was received by the owner, the Municipal Commissioner ought to have recorded a finding that the FSI has been rightly granted.

***THE REQUIREMENT OF NO OBJECTION
CERTIFICATE OF HIGH RISE COMMITTEE***

70. As far as the issue of No Objection Certificate for High Rise Committee is concerned, in view of the findings recorded above, firstly it will have to be determined as to how many floors above 43rd floors can be regularised. As noted above, the said floors were proposed by

utilization of the incentive FSI of the fifteen floors of PPL. We have held that the construction of PPL above plinth level to be illegal. In this context, it is not necessary to interfere with what is observed in Paragraph 11 of the impugned order passed by the Municipal Commissioner, which reads thus:

“11. Issue No.(vi): N.O.C. From High Rise Committee (Para 36(vi) of Hon'ble High Court Order)

In this case, the NOC from High Rise Committee was submitted by SRUIL as per the approved plans dated 08.02.2011. The revised NOC from High Rise Committee will be insisted on submission of amended plans in accordance with this order.”

THE OFFER TO PAY SECURITY DEPOSIT AND PREMIUM

71. A submission was made by the Writ Petitioners that to counter the argument regarding possible misuse by the Petitioners of the refuge area and other portion which is free of FSI, they were willing to pay security deposit and premium. It is not in dispute that the power to accept the security deposit is always discretionary. The Commissioner by relying upon a decision of the Apex Court in the case of *Royal Paradise Hotel (P) Ltd. v. State of Haryana and Others*¹⁵, rightly came to the conclusion that in the facts of the case, the said request for paying security deposit as well as premium cannot be accepted. Considering the conduct of the Petitioners of admittedly constructing 44th to 56th floors without obtaining the commencement

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certificate, the discretion exercised by the Commissioner cannot be faulted with.

CONDUCT OF THE PETITIONERS

72. At this stage, it will be also material to note the general observations made by the Municipal Commissioner in Paragraph 13 of the impugned order, which read thus:

“13. Some General Observations:

- (a) **I have to note with concern that the Project Proponents – SRUIL in this case have tried to install their project, at times in defiance of the building regulation process. The PPL had CC only upto plinth. However, SRUIL went ahead and constructed PPL upto 15 floors, on the basis of deemed CC. As a result, there is a construction of PPL, which is at variance with the policy of State Govt. in respect of PPL. Deemed CC is the rarest of the rare occurrence in the course of building approval process in MCGM. Hence, show cause notice was issued to the then Executive Engineer (Building Proposal) City Shri V.N. Barabde calling for his explanation for his act of omission in respect of the undated letter of SRUIL demanding further CC for PPL. The outcome of the enquiry is awaited.**
- (b) **Further, SRUIL's act of defiance was evident in the construction of 44th to 56th floors of Palais Royale building. SRUIL had CC only up to 43 floors. This is a very serious matter. Constructions in Mumbai are predominantly multistoried, with a growing trend towards high rise construction (greater than 70 mtrs. Height). Such construction projects are highly complex**

because the entitlements for FSI, incentive FSI and Transferable Development Rights (TDR) are dependent upon satisfactory compliance by project proponents of various stipulations laid down by different authorities. Intimation of Disapproval (IOD), Commencement Certificate (CC), Building Completion Certificate (BCC) and Occupation Certificate (OC) are the instruments available to the Planning Authority to regulate complex construction projects in the manner that they comply with rules and regulations. That is why acts of defiance by project proponents in the form of carrying out constructions without proper permissions leads to insurmountable difficulties. Therefore, it is imperative that the Planning Authority enforces the regulations and the project proponents need to eschew temptation to take recourse to defiance and then to present fait accompli to the Planning Authority. Planning Authority is bound by laws and statutes and concerns for public interest, and is under no obligation to accept the fait accompli presented by the project proponent.”

(emphasis added)

73. As reflected from the order of the Apex Court, a grievance was made before the Apex Court that the investment of the Writ Petitioners to the extent of Rs.2,000/- crores was likely to be affected. What we find is that knowing fully well that the FSI from 44th floor to 56th floor would become available only after handing over the possession of the PPL consisting of basement and 15 floors to the Municipal Corporation and after knowing fully well that in law the Petitioners were not entitled to construct anything above the 43rd floor

as there was no commencement certificate granted, the Petitioners have brazenly gone ahead with the construction of the 13 upper floors. As stated earlier, the Division Bench while deciding the PIL observed that the construction may be illegal but not so patently illegal. Much water has flown thereafter. We have found that the case of the Writ Petitioners regarding deemed permission to construct upper floors of the PPL is wholly unacceptable. Even assuming that the said case was accepted, still construction of floors above the 43rd floor was completely illegal. The Petitioners engaged a Company of Architects for the purposes of the project. There is a serious default on the part of the Architects while giving an intimation as contemplated by Clause (4) of Regulation 6 of the said Regulations. It is in this context, the Municipal Commissioner has rightly observed that the project proponents need to “eschew temptation” to take recourse to defiance and then to present “fait accompli” to the Planning Authority. Though repeatedly it is submitted that the construction of the PPL consisting of 900 parking spaces is in public interest, we are sure that but for the incentive FSI which was available prior to the amendment of the Regulations, the Petitioners who are professional builders, would not have constructed the PPL consisting of 900 parking spaces as a social service. The construction of PPL was proposed only because incentive FSI would be available to the Petitioners for construction of floors from the 44th to 56th floor of the residential/main buildings. It is in this context that the

Municipal Commissioner, in our view, has rightly expressed a distress about the manner in which the Petitioners undertook construction of such a huge project by showing defiance to the law. Even according to the case of the Petitioners, they proceeded with the construction of upper floors even without giving a notice to the Municipal Corporation that it was proposing to construct the upper floors on the basis of the deemed permission under Clause (4) of the Regulation 6 of the said Regulations. The contention regarding deemed permission was raised only when the stop work notice was issued under Section 354 of the MMC Act.

74. An Argument have been canvassed regarding investment of large amount in the project. That is no ground to countenance illegal construction of such huge magnitude of 15 floors of PPL and 13 floors of residential buildings. On the contrary, considering the investment, the Petitioners ought not to have proceeded with the construction in high handed and brazen manner. Perhaps, they were under an impression that considering the extent of their investment, no one would raise a finger against them.

***ARGUMENT BASED ON VIOLATION OF SECTION 51 OF
THE MRTP ACT***

75. Lastly, an argument was made by the learned senior counsel appearing for the Writ Petitioners about the last direction issued

by the Municipal Commissioner to submit modified plans. As stated earlier, in the PIL, the Division Bench ordered reconsideration of several aspects by the Municipal Commissioner including the aspect whether the Writ Petitioners are entitled to the incentive FSI in respect of the PPL and free FSI in respect of the entire refuge area as provided. In fact the refuge area was specifically directed to be reworked. Even the issue of passages at manor level, entrances, swimming pool, area over deck and refuge area at the entrance level was ordered to be reconsidered by the Municipal Commissioner by the Division Bench. As far as the Petitioners are concerned, the judgment in the said PIL has become final. As the Municipal Commissioner was ordered to rework the FSI, he had no option but to direct the Petitioners to submit the modified plans in accordance with the Regulations. The argument based on Section 51 of the MRTP Act is not available to the Writ Petitioners as the Commissioner has acted in terms of the directions issued by this Court in the said PIL. The said directions were never challenged by the Petitioners.

APPLICATION BY THIRD PARTIES

76. Now before we close the judgment, we deal with the intervention application. One intervention application in the First Appeal by the Petitioners in the PIL No.43 of 2012 . We have already

quoted the earlier orders passed in the Writ Petition which record as to their conduct. Though the PIL intervenor was all along aware of the pendency of the suit, the intervention is sought for the first time in the First Appeal filed by the Municipal Corporation in this Court against the decree passed in the suit. As regards the other Intervenor viz. United Human Rights Federation (Applicant in the Chamber Summons No.107 of 2015), we fail to understand as to how they can intervene in the Writ Petition where the challenge is to the order passed by the Municipal Commissioner. There is a serious challenge to their locus. Though they have filed bulky affidavits in the Chamber Summons, they have not placed on record, any relevant material which is worth considering .

77. Hence, we pass the following order:

ORDER :

(A) **IN FIRST APPEAL NO.884 of 2015:**

- (i) The judgment and decree dated 16th May 2013 passed by the learned Judge of the City Civil Court in L.C. Suit No.2942 of 2011 is hereby quashed and set aside and the said suit stands dismissed with no order as to costs. Hence, the impugned stop work notice shall continue to be valid;

- (ii) The First Appeal is accordingly allowed with no order as to costs;
- (iii) The pending Civil Applications are disposed of.

(B) WRIT PETITION NO.2223 OF 2013:

- (a) The impugned order passed by the Commissioner of the Municipal Corporation which is dated 12th September 2013 is confirmed as far as the Clauses (v), (vi) and (vii) of the operative part of the said order are concerned;
- (b) The direction contained in Clause (ii) of the operative part of the order passed by the Municipal Commissioner is set aside;
- (c) The Municipal Commissioner shall hear the Writ Petitioners and will decide in the light of the observations made in this judgment as to what should be the reasonable refuge area considering the various factors which we have discussed in the judgment and order. The appropriate order shall be

passed by the Municipal Commissioner within a period of four months from today;

- (d) The clause no (iii) is set aside with a direction to the Municipal Commissioner to consider the issue of exclusion of the structural columns from computation of FSI along with the issue of the refuge area;
- (e) Clause (iv) of the operative part of the order of the Commissioner of the Municipal Corporation is set aside and it is held that there is no reason to disturb the grant of FSI of the set back area admeasuring 705.45 sq. meters;
- (f) As regards the Clause (i) of the operative part of the order of the Municipal Commissioner, we hold that the same has become inoperative in view of the findings recorded by us while deciding the First Appeal. We hold that the construction of the PPL above the plinth level and the construction of the floors above 43rd floor of the main building is illegal as the same have been constructed without

obtaining the commencement certificates. However, it will be open for the Writ Petitioners to apply for regularization of the construction made of the PPL above the plinth and the construction of the upper floors of the main building within a period of five months from today;

- (g) We make it clear that for seeking regularization, a fresh proposal for grant of commencement certificate and the Development Permission will have to be submitted by the Writ Petitioners;
- (h) If such proposal is submitted within a period of four months from today, the same shall be decided within a period of 60 days from the date on which the proposal is submitted;
- (i) As the construction of the main/residential building above the 43rd floor and the floors above the plinth level of the PPL is illegal, the appropriate action will have to be initiated by the Municipal Commissioner for demolition after expiry of the period of eight months from today if the same are not regularized;

- (j) The question whether any of the said upper floors of the main building can be saved will depend upon the extent of the incentive FSI which the Petitioners will be entitled to in respect of the PPL;
- (k) After the Municipal Commissioner decides the issue regarding reasonable refuge area, the Petitioners will have to submit a modified plan as directed under the impugned order of the Commissioner of the Municipal Corporation. The necessary modifications can be also sought while applying for regularization;
- (l) Needless to state that unless the modified plans as directed are submitted by the Petitioners and appropriate order is passed thereon, it will not be open for the Petitioners to apply for grant of occupation certificate in respect of the residential building up to 43rd floor;
- (m) The Rule issued in the Writ Petition is made partly absolute on the above terms;

- (n) In view of the order of costs earlier made, there will be no order as to costs in the Writ Petition;
- (o) Chamber Summons No.107 of 2015 stands disposed of.

(C.V. BHADANG, J)

(A.S. OKA, J)