

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 2665 OF 2018

1 Harshada Co-operative Housing Society Ltd.,	]	
Plot No.74, S.No.121/2, Rambaug Colony,	]	
Paud Road, Kothrud, Pune - 411 038.	]	
 2 Mr. Deepak Shankarlal Pande, Age 62 years,	]	
Adult Indian Inhabitant, Chairman,	]	
Harshada Co-operative Housing Society Ltd.	]	
Plot No.74, S.No.121/2, Rambaug Colony,	]	
Paud Road, Kothrud, Pune - 411 038.	]	... Petitioners

Versus

1 State of Maharashtra, through the Secretary,	]	
Urban Development Department, Mantralaya	]	
Mumbai : Through the Office of the Government	]	
Pleader (A.S.), High Court, Mumbai.	]	
 2 The District Collector, Pune District, Pune,	]	
Through the Office of the Government Pleader,	]	
(A.S.), High Court, Mumbai.	]	
 3 The Commissioner,	]	
Pune Municipal Corporation, Pune 411005	]	
 4 The Commissioner,	]	
Pimpri-Chinchwad Municipal Corporation,	]	
Pimpri, Pune - 411 018	]	
 5 Mr. Kishanrao Dhavji Rathod,	]	
Kushal Saffron Associates, 427/2,	]	
Gultekdi Industrial Estate	]	
(Kataria High School), Pune 411 307	]	
 6 Mr. Pandit Dhavji Rathod	]	
Decom, Manik Baug, Next to Puspa Mangal	]	
Karyalaya, Sinhagad Road, Pune.	]	]

- 7 The Secretary, Environmental Department
Government of Maharashtra, Through the
Office of the Government Pleader (A.S.),
High Court, Bombay.]
- 8 The Divisional Commissioner,
Bund Garden Road, Camp, Pune,
Maharashtra - 411 019]
- 9 The Director General (Road Development)
National Highway Authority of India, G5 & 6,
10, Dwarka, New Delhi - 110 075]
Also at: BAIF Bhavan Campus, Dr. Anibhai
Desainagar, Warge, Pune.]
- 10 The Chief Executive Officer (NH-4),
Reliance Infrastructure Ltd., H-Block, 1st Floor]
Dhirubhai Ambani Knowledge City,
Navi Mumbai 400 710]
- 11 Aam Aadmi Lokmanch, 13 & 14, Balsara]
Apartments, Next to Tata Consultancy Services]
113/2, Tadiwala Road, Pune 411 001]
And Also at : S-8, Indraprastha Apartment,
Tadiwala Road, Pune 411 001] ...Respondents

WITH
WRIT PETITION NO. 299 OF 2018

M/s Shah Promoters & Developers,]
A registered Partnership Firm, Through its]
Partner Shri Sanjay Chandrakant Shah]
Age about 59 years, Occupation Business,]
Having Office at : Ast-1, Success Chambers, 1232,]
Apte Road Corner, Deccan Gymkhana,]
Pune 411 037] ... Petitioner

Versus

1 State of Maharashtra, through its Principal,]
Secretary, Urban Development Department,]
Mantralaya, Mumbai - 400 032.]

- 2 The Director of Town Planning,]
Maharashtra State, Pune]
- 3 The Municipal Corporation of City of Pune,]
Through its Commissioner, having office at]
PMC Building, Shivaji Nagar, Pune]
- 4 The Municipal Commissioner,]
Through its Commissioner, having office at]
PMC Building, Shivaji Nagar, Pune]
- 5 Aam Aadmi Lokmanch, through its President]
Mr. Pannalal Patiram Goya, aged 60 years,]
Occupation : Advocate, having registered office at]
S-8, Indraprastha Apartment, 112, Tadiwala]
Road, Pune 411 001 Having its correspondence]
Office at : 13 & 14, Balsara Apartments, Next to]
Tata Consultancy Services, 113/2, Tadiwala Road,]
Pune 411 001] ...Respondents

WITH
WRIT PETITION NO. 14143 OF 2017

- M/s Suyog Development Corporation Unit-10,]
A Registered Partnership Firm, Through its]
Partner Shri Bharat Keshavlal Shah, age about 67]
years, Occupation : Business, having office at]
Office No.27, Parshwa Building, Sujay Garden,]
12, Mukund Nagar, Pune - 411037] ... Petitioner

Versus

- 1 State of Maharashtra, through its Principal,]
Secretary, Urban Development Department,]
Mantralaya, Mumbai - 400 032.]
- 2 The Director of Town Planning,]
Maharashtra State, Pune]
- 3 The Municipal Corporation of City of Pune,]
Through its Commissioner, having office at]
PMC Building, Shivaji Nagar, Pune]

- 4 The Municipal Commissioner,]
Through its Commissioner, having office at]
PMC Building, Shivaji Nagar, Pune]
- 5 Aam Aadmi Lokmanch, through its President]
Mr. Pannalal Patiram Goya, aged 60 years,]
Occupation : Advocate, having registered office at]
S-8, Indraprastha Apartment, 112, Tadiwala]
Road, Pune 411 001 Having its correspondence]
Office at : 13 & 14, Balsara Apartments, Next to]
Tata Consultancy Services, 113/2, Tadiwala Road,]
Pune 411 001] ...Respondents

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODG.) NO. 705 OF 2018

- 1 Practising Engineers Architects and Town]
Planners Association (India) (PEATA), An]
Association registered under the provisions of the]
Society Registration Act, 1860 and The Bombay]
Public Trust Act, 1950, having its registered]
office at 4 & 5, Gr. Floor, Nagree Terrace,]
Soonawala Agiary Marg, Off M.M. Chotani Road,]
Mahim (West), Mumbai - 400 016]
- 2 Mr. Tarun Motta, the President of Petitioner]
No.1, having his office at ... Petitioners]
4 & 5, Gr. Floor, Nagree Terrace,]
Soonawala Agiary Marg, Off M.M. Chotani Road,]
Mahim (West), Mumbai - 400 016] ... Petitioners

Versus

- 1 State of Maharashtra, through its Secretary]
Urban Development Department, having its]
office at Mantralaya, Mumbai,]
- 2 Aam Aadmi Lokmanch, through its President]
Mr. Pannalal Patiram Goya, aged 60 years,]
Occupation : Advocate, having registered office at]

S-8, Indraprastha Apartment, 112, Tadiwala]
 Road, Pune 411 001 Having its correspondence]
 Office at : 13 & 14, Balsara Apartments, Next to]
 Tata Consultancy Services, 113/2, Tadiwala Road,]
 Pune 411 001] ... Respondents

WITH
WRIT PETITION NO. 90 OF 2018

1 D B Realty Limited, a company incorporated]
 under the provisions of the Companies Act, 1956]
 having its registered office at DB House,]
 General A.K. Vaidya Marg, Goregaon (E),]
 Mumbai 400 063]

2 Mr. Ishaq Balwa of Mumbai inhabitant, having]
 office at 265-E, Bellasis Road, Mumbai-400008] ... Petitioners

Versus

1 State of Maharashtra through Urban]
 Development Department, Govt. of Maharashtra]
 Mantralaya, Mumbai, 400 032.]

2 Secretary, Urban Development Department,]
 Government of Maharashtra, Mantralaya,]
 Mumbai 400 032.] ... Respondents

APPEARANCES IN APPELLATE SIDE MATTERS:

Mr. Milind Sathe, senior counsel with Mr. Saket Mone, Mr. Vishesh Kalra, Mr. Subit Chakrabarti and Ms. Neha Joshi i/b Vidhi Partners or the Petitioner in WP No. 2665 of 2018.

Mr. Girish Godbole i/b Ms. Shruti Talpade and Mr. Akshay Petkar for the Petitioner in WP No. 299 of 2018 and 14143 of 2017.

Mr. B.V. Samant, AGP, for the Respondent Nos.1 and 2 - State in all the Writ Petitions.

Mr. Vishwanath Patil for Respondent Nos.3 in WP No. 2665 of 2018 and for the Respondent Nos.3& 4 in WP 299 of 2018 and 14143 of 2017.

APPEARANCES IN ORIGINAL SIDE MATTERS:

Mr. Girish Godbole i/b M/s Rustomji and Ginwala for the petitioners in Writ Petition (L) No.705 of 2018.

Ms. Rutuja Patil with Ms. Niyati Kalra i/b M/s. Negandhi Shah and Himayatullah for the petitioners in Writ Petition No. 90 of 2018.

Ms. Jyoti Chavan, AGP, for the Respondent-State in WPL 705 of 2018.

Ms. Geeta Shastri, Addl. Govt. Pleader, for the Respondent-State in WP No. 90 of 2018.

**CORAM : S.C. DHARMADHIKARI &
SMT. ANUJA PRABHUDESAI, JJ.**

**RESERVED ON 26TH APRIL, 2018
PRONOUNCED ON 6TH AUGUST, 2018**

JUDGMENT: [Per S.C. Dharmadhikari, J.]

1 All these petitions involve common questions of fact and law and are being disposed of by this common judgment.

2 We grant Rule in all the petitions. The Respondents waive service. By consent, Rule is made returnable forthwith.

3 The lead arguments have been canvassed in Writ Petition No. 2665 of 2018. Hence, we take the facts from the pleadings in that

petition. The petitioners in that petition are a Co-operative Housing Society registered under the Maharashtra Co-operative Housing Society Act, 1961, and the second petitioner thereto is a senior citizen and Chairman of the petitioner No.1-society. The first respondent is the State of Maharashtra through the Department of Environment and the second respondent is the Collector of Pune District. The third respondent to this petition is the Commissioner, Pune Municipal Corporation and the fourth respondent is the Pimpri-Chinchwad Municipal Corporation. Respondent Nos.5 and 6 are private parties. They are original respondents in the proceedings before the National Green Tribunal (for short "NGT"). They are engaged in construction activities. The seventh respondent is the Secretary of the Environment Department, Government of Maharashtra. The eighth respondent is the Divisional Commissioner and respondent No.9 is the authority in-charge of construction of National Highways. The tenth respondent is the Chief Executive Officer of Reliance Infrastructure Limited, which is a contractor in whose favour the contract has been awarded in respect of National Highway No.4. The eleventh respondent is a registered organisation purportedly concerned with environmental issues and the original applicant in Application No.4 of 2014 before the NGT.

4 This petition is challenging an order passed on 19th May, 2015, copy of which is Exhibit-A to the petition, to the extent of the directions contained in paragraph 17(e) thereof and the request is to call for the records and proceedings in relation to this direction and quash and set aside the same. Then, the request is to quash and set aside an order passed on 29th November, 2017, by the NGT Western Zone Bench, Pune in Execution Application No.11 of 2017 in Application No.4 of 2014. Thereafter, the prayer is also to quash and set aside a Circular, copy of which is at Exhibit-B to the petition, dated 14th November, 2017. That is a Circular issued by the State of Maharashtra.

5 The short point involved is that acting on the directions of the NGT, the State of Maharashtra purported to invoke its powers under section 154 of the Maharashtra Regional and Town Planning Act, 1966 (for short “MRTP Act”) to direct that insofar as the hill-tops and hill-slopes are concerned, no development is permissible on hill-tops and on the hill-slopes having depth of less than 1.5 and, therefore, the area surrounding/abutting to hills and within 100 feet should not be used by exploiting additional FSI or TDR. The other

direction is that insofar as the approved development plan is concerned, the portion admeasuring 100 feet abutting a hill, though permissible to be developed, while granting development permission, the 100 feet area as above shall be declared as non-buildable. That can be used as an open space or a road. Thus, the issue is whether the State Government can direct as above in exercise of its powers to issue directions conferred by section 154 of the MRTP Act, 1966.

6 The arguments are that in exercise of the powers conferred by section 154 of the MRTP Act, no such directives can be issued and issuing the same would tantamount to amending the development plan in force. A development plan can be amended only by taking recourse to the powers conferred in that behalf by the MRTP Act and exercise of such powers has to be strictly in the manner laid down by the Act itself. These provisions cannot be brushed aside or ignored and a direction virtually amending the development plan cannot be issued by invoking section 154 of the MRTP Act.

7 To appreciate this essential argument, we now note certain basic facts.

8 The petitioners submit that the eleventh respondent, purportedly aggrieved by the press reports regarding wanton destruction of the structure and profile of hills all over the country, filed Application No.4 of 2014 before the NGT. In this application, filed on 8th January, 2014, the relief sought was that all hills may be protected by an order and mandatory injunction restraining the destruction thereof. Thus, the hills in the region and local areas should be protected by not allowing any construction thereon and in its vicinity. Thus, the foot of such hills and to the extent indicated in that application be declared as non-buildable and necessarily to be kept open. On 10th July, 2013, on National Highway No.4, an accident occurred. This was due to the unprecedented rainfall and because of unauthorized construction activities carried out by respondent Nos.5 and 6 to the petition on the Katraj hill-top. The drainage lines were blocked on both sides. The soil, debris and mud blocked the middle of the road which made it difficult for the Disaster Management Agency and local bodies to save the lives of victims who were trapped under the debris. The unauthorized construction collapsed and these persons were trapped under the debris. This accident site was then made the focal point and it was alleged that there was illegal hill-cutting at Katraj by some persons which caused heavy damage to the

ecology and environment. There was a death reported of a young girl and her mother who were trapped under this debris.

9 It is alleged that this accident took place outside the city limits of Pune Municipal Corporation. There was no sanctioned development plan. However, as far as Pune Municipal limits are concerned, the State and the Planning Authority has already made a development plan which indicates the land uses and building restrictions and regulations even with regard to construction on hill-top and hill slope zones. The NGT was pleased to pass an order and which order, to the extent relevant, reads as under :

“... ..

e) The Respondent Nos.1, 2, 3, 4, 7 and 8 shall give instructions to the concerned revenue officials working within all districts to have regular vigil within their areas to verify whether fringes or nearby any hill or hill-top construction is / are noticed and if found to be so, due inquiry may be made as to whether it is authorized or unauthorized. So also, instructions may be issued to the Municipal authorities to ensure that no construction permission shall be given to any construction / development work, which is being proposed and is located at a distance may be of 100 ft. away from lowest slope i.e. incline of any hill within its territorial limits, as well as hill-tops, except for Bamboo cottages.

f) In case of emergency or public purpose, the Hill cutting may be done by the concerned office of the Collector /Commissioner by passing a reasoned order or if so required by Law as provided under the Environment (Protection) Act, 1986 and the Regulations thereunder”

10 It is stated that the Development Control Regulations for the city of Pune provided for hill-top and hill slope zones and users permitted therein. There are Regulations governing the development in each zone. Reliance is placed on Appendix M-8 of the Development Control Regulations for Pune. Note 12 is relied upon so as to emphasize the permitted F.A.R. alongwith conditions of development in a particular hill zone which was converted into residential zone. Sub-clause 1.5 of Appendix M-8, post amendment, is also relied upon to urge that these stipulations control and regulate the development activity even in hill-top and hill slope zones. There are restrictions placed and appropriate gradient has been indicated. It is in these circumstances the State Government could not have taken any note of this order, but the record indicates that the Revenue and Forests Department of the Government of Maharashtra filed an affidavit before the NGT which was followed by an affidavit of the Department of Urban Development Department of the Government of Maharashtra stating that steps would be taken to comply with the said directions. That is how the subject Notification has been issued.

11 The petitioners are managing and administering the affairs of a Cooperative Housing Society that owns a building. In that

building, there are units/flats inherited and occupied by the members of the petitioner No.1-society. After setting out as to how the construction and development activity on this plot of land in Pune Municipal limits commenced, was completed and conveyed to the petitioner-society, together with the land beneath, it is urged that after a decade or more of this transfer, a resolution was passed by the petitioner No.1-society resolving to redevelop the property and the existing building. This Resolution, copy of which is Exhibit-K collectively, is dated 9th August, 2015. Thereafter, quotations were invited from interested builders who would undertake the redevelopment activity. Thus, the petitioners claim that though the construction activity resulted in construction of a building that is more than thirty years old, there are 29 members residing in the building which is in urgent need of redevelopment. The members of the first petitioner-society include senior citizens. It is in these circumstances that they were constrained to approach this Court and seek the above reliefs.

11 To such a writ petition, when its copy was duly served on them, the contesting respondents have appeared. On this petition, on 4th April, 2018, a Bench of this Court passed an order directing the

impleadment of the applicants before the NGT. Secondly, this Court also noted the argument of the learned Assistant Government Pleader and his reliance upon the amendments to sub-section (1) of section 154 of the MRTP Act, 1966, brought into effect from 22nd April, 2015 by Maharashtra Act No.43 of 2014. The argument was that the impugned Notification is traceable to this provision and particularly the amendments. That provision enables the Government to ensure efficient administration of the Act. Even the larger public interest can be sub-served by issuing comprehensive directions. It is in these circumstances and when the nature of the issue raised before us being purely legal, that we did not deem it fit and proper to allow the respondents to file any affidavits.

12 Dr. Milind Sathe, learned senior counsel appearing for the petitioners in this petition raised several contentions. He firstly submitted that the NGT's order could not have been construed as a command by the State of Maharashtra for no Court can direct the State to make a law or amend a law or to issue a particular direction. Even otherwise, this order of the NGT was challenged before the Hon'ble Supreme Court and the respondents Nos.4 and 5 to this petition had sought a stay of the same. That has been also granted.

Dr. Sathe relied upon the pleadings before the NGT, the NGT's order and directions as also the NGT's order which was passed on the stand of the State Government. Our attention has been invited to the affidavit filed by the District Collector, Pune, before the NGT, Pune, stated to be in compliance with the NGT's order. Thus, the sole basis on which the impugned Circular has been issued is the order of the NGT and that order could not have been construed as a binding direction and command. Such being the stand of the State and the State construing the direction of the NGT as a final command would, therefore, vitiate the impugned Circular. The impugned Circular has the effect of amending the Development Control Regulations which are part and parcel of the Development Plan itself. Mr. Sathe invited our attention to the Maharashtra Regional and Town Planning Act, 1966, to submit that there is an Regional plan and a provision is made therein for conservation and protection of hilly areas within the jurisdiction of the Planning Authority. The State Government and the District Collector could have invited the attention of the NGT to such a Development Plan and which takes care of the hill-top and hill slopes in the region. The NGT could have been shown the Development Control Rules for Pune which clearly demarcate the hill-top and hill slope zone and also contains provisions regulating the

construction activity over and around the hills, including the slopes. In these circumstances, Dr. Sathe would submit that paragraphs 2 and 3 of the Circular are beyond the powers vesting in the State Government. That is virtually making a development control regulation by an executive fiat. Once the Development Control Regulations are part and parcel of the Development Plan, then, all the provisions enabling amendments or modifications to the development plan as appearing in the MRTP Act, 1966, would apply. There is no other mode known to law by which a DCR can be amended. First the draft of the proposed modifications has to be put in public domain or in public knowledge. Secondly, the public has to be given an opportunity to object and make suggestions. Thirdly, there has to be a conscious application of mind to these objections and suggestions. Lastly, the Development Control Regulations or the Development Plan, as modified, has to be forwarded to the State Government for its final sanction. Then alone the same can come into force.

13 Finally, Dr. Sathe submitted that the State cannot justify the issuance of the Circular on the ground that by section 154 of the MRTP Act, as amended, the State is empowered to issue directions so as to sub-serve the larger public interest. Dr. Sathe would submit

that sub-section (1) of section 154, as amended, may contain the words “in the larger public interest”, but for the purpose of exercising the power of control and issuing the directions and instructions, these words and expressions are of no assistance. In other words, mere insertion of these words would not enable the State Government to do something which is not permitted by law. Dr. Sathe invited our attention to sections 26, 31 and 37 of the MRTP Act, 1966, to urge that the impugned Circular is nothing but a modification to the Development Control Rules and which can be made only by recourse to the above substantive provisions in the Act. By recourse to section 154 and merely because they contain the above words and expression, the Circular cannot be issued and if that is the position, it cannot be upheld. Dr. Sathe, therefore, says that the writ petition be allowed. Dr. Sathe has relied upon the following judgments to support his contentions :

- (i) Godrej and Boyce Manufacturing Co. Ltd. vs. State of Maharashtra & Ors., (2009) 5 SCC 24*
- (ii) Lakshminarayan Bhattad & Ors. s. State of Maharashtra and Anr. (2003) 5 SCC 413.*
- (iii) Kausarbag Co-operative Housing Society Ltd. vs. State of Maharashtra & Anr. (2003) 5SCC 413.*
- (iv) Pune Municipal Corporation & Anr. vs. Kausarbag Co-operative Housing Society Ltd. & Anr. (2010) 1 Bom CR 409.*

(v) *D.B. Realty Ltd. & Anr. vs. State of Maharashtra & Anr. (WP No. 2287 of 2010).*

14 Dr. Sathe's arguments have been adopted with some modification by Mr. Godbole, learned counsel appearing for the petitioners in the other petitions.

15 Pertinently Writ Petition (L) No.705 of 2018 [*Practising Engineers Architects and Town Planners Association (India)*] and its office bearers, namely, the President, alleges that the order of the NGT and subsequently the directives contained in the Government Resolution (impugned Resolution) virtually modify Development Control Regulations framed by all the Planning Authorities within the State of Maharashtra. By an executive fiat, the Government of Maharashtra is curtailing and restricting the functions and also superseding the legislative powers conferred on the State under section 31 of the Act. The other petition, being Writ Petition No.14143 of 2017 by Suyog Development Corporation through its Partner proceeds to state that as per the sanctioned development plan of Pune City, the land involved in the writ petition was reserved for shopping centre and also for housing of slum dwellers. This was the position in the year 1966. Then about 42 hectares, including the said

land was shown as reserved for timber industry as per the Draft Development Plan of Pune City. After the publication of the draft, what transpires is that several letters and correspondence followed so as to decide the mode of acquisition of land and other matters. This was the correspondence between the Pune Merchants and Saw Mill Owners' Association, Pune Small Scale Timber Cooperative Estates Limited etc. However, it appears that nothing further could be achieved and then the erstwhile owners of the land served a purchase notice on 14th June, 2001. Then what transpires is that the Government, on 6th February, 2004, directed the Pune Municipal Corporation to commence the process of deletion of designated land admeasuring 21 hectares, including the said land from the reservation of timber market and for including the said land in the residential zone. On 19th June, 2004, this direction was stayed. On 18th November, 2004, a writ petition was filed in this Court being Writ Petition No. 9644 of 2004 which was disposed of directing that the reservation of timber industry has lapsed. That judgment of this Court was challenged before the Hon'ble Supreme Court and the appeal was dismissed. A Review Petition was also dismissed. Thereafter, the draft revised development plan was sanctioned and the said land was included in the excluded portion of the

Development Plan. It is thus clear that the petitioners claim that the land is under residential zone and once the revised development plan was sanctioned, the development in terms of the proposals of the plan was permissible. The petitioners then point out the events leading to the issuance of the impugned Notification. The petitioners say that this Notification travels beyond the scope of the Act and cannot be sustained. It is alleged that the petitioners have been unable to develop and fruitfully utilise its property. It is stated that major portion of the said land falls within 100 feet from the foothill and, therefore, the petitioners are directly affected by the imposition of the conditions in the Government Resolution of 14th November, 2017. On a perusal of the layout of the petitioners land, it can be seen that a 30 meter wide development road cuts through it. In addition to the said reservation, now there is a direction to keep open 100 feet distance from the foot of the hills and with all this, most of the layout becomes unbuildable. Hence, this direction virtually renders the petitioners plot vacant and undevelopable. Mr. Godbole emphasized that the entire Government Resolution is contrary to law unlike Dr. Sathe who restricted his argument to some of the directives / clauses in the Notification.

16 The writ petition filed by D.B. Realty Limited was argued by Dr. Saraf who would contend that the power to issue directions conferred in the State Government cannot be exercised in a manner detrimental to the object and purpose sought to be achieved by the Act. The directions issued should not result in development becoming impossible as is demonstrated in the facts of this case. Dr. Saraf, relying upon the phraseology of section 154(1) and particularly the words “public interest”, would submit that this term cannot be construed and interpreted to mean interest of only some. Else, it would be impossible to ensure an orderly development. Finally Mr. Saraf would argue that the order of the NGT cannot result in making of the law or amending it. The order virtually directs the State Government to carry out the amendment. That would completely frustrate the provisions of the Act. For these reasons, he would submit that M/s. D.B. Realty Limited would not be able to go ahead and develop a plot of land, more particularly described in paragraph 4.4 of the petition. Dr. Saraf submits that though not exactly a hill, due to its topography, location and surrounding development, it may be construed to be so. If it is so construed, it will be impossible for the petitioner to develop the plot, particularly when it is in the advanced stage of finalising the scheme of developing the

plot and constructing residential houses for police. In the circumstances, Mr. Saraf would submit that the relief, as prayed, be granted.

17 In all these matters the State Government has supported the issuance of the Resolution on the ground that the same has been issued to subserve larger public interest. That the order of the NGT resulted in issuance of this Notification does not mean that any construction / development work proposed at a location, namely 100 feet away from the lowest slope (incline on any hill within its territorial limits as well as hill tops) could not have been otherwise prohibited or regulated. In such circumstances, there is no merit in the contentions raised by the petitioners and the petitions be dismissed. This is a common response of the State Government in all the petitions.

18 For properly appreciating the rival contentions, we must make a reference to section 154 of the MRTP Act, 1966, as it read earlier and post its substitution by the Maharashtra Act No.43 of 2014, with effect from 22nd April, 2015:-

“Prior to amendment:-

154. (1) Every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act. * * * * *

(2) If in, or in connection with, the exercise of its powers and discharge of its functions by any Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority or Development Authority, and the State Government, the decision of the State Government on such dispute shall be final.

Post amendment:-

154. (1) Notwithstanding anything contained in this Act or the rules or regulations made thereunder, the State Government may, for implementing or bringing into effect the Central or the State Government programmes, policies or projects or for the efficient administration of this Act or in the larger public interest, issue, from time to time, such directions or instructions as may be necessary, to any Regional Board, Planning Authority or Development Authority and it shall be the duty of such authorities to carry out such directions or instructions within the time-limit, if any, specified in such directions or instructions.

(2) If in, or in connection with, the exercise of its powers and discharge of its functions by any Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority or Development Authority, and the State Government, the decision of the State Government on such dispute shall be final.”

19 Dr. Sathe and the other learned counsel do not dispute that a bill was introduced in the State legislature to amend the MRTP Act. The amendments, *inter alia*, are also to enable and empower the

State Government to issue directions or instructions for implementing or bringing into effect the Central Government or the State Government programmes, policies or projects or for the efficient administration of the MRTP Act or in the larger public interest. Pertinently, the section, as amended, has not been challenged by any of the petitioners before us. Further pertinently, none of the petitioners have brought before us a concrete case of their development activity being prohibited merely because of this Notification. The petitions proceed on the basis that some portion or some part of the petitioners' property or, as argued by Dr. Sathe, areas of the same located near the hill or the incline would result in no development permitted. In other words, that no development activity can be carried out has not been demonstrated to us. Thus, portions or parts or areas of the petitioners' property or lands located within such zone are rendered unbuildable is not proved by citing any real case. Everything is in the realm of speculation and guess work. The challenge to the Government Notification is based on mere conjectures and surmises on the part of the petitioners.

20 The amendment to section 154(1) is to empower the State Government to issue from time to time such directions or

instructions as may be necessary. Sub-section (1) opens with a non-obstante clause and overrides anything contained in the Act or rules or regulations made thereunder. The object in substituting the provision by inserting sub-sections (1) and (2) therein appears to be to arm the Government to issue such directions or instructions as may be necessary for implementing or bringing into effect the Central or the State Government programmes, policies or projects or for the efficient administration of the MRTP Act or in the larger public interest. Thus, the sweep of the power is such that these instructions may enable smooth and efficient implementation of the Central or State Government programmes, policies or projects. The efficient administration of the Act can also be ensured by issuing timely directions or instructions. Further, these can be issued in the larger public interest. We do not see how by substitution of the provision and by empowering the State Government and issuance of the impugned Resolution, development of the immovable property or land becomes impossible. Without the impugned Government Resolution also it was not possible for the owners or persons interested to make any construction on a little top. As far as hill slope is concerned, the construction beyond the gradient or incline to the extent indicated in the D.C. Rules was permissible. Thus, every

planning authority had already taken steps to prohibit, regulate and control construction activity on hill top or hill slope. Such Regulations are already in place insofar as the D. C. Regulations for the City of Pune and other planning areas. It is not as if regulations or rules to altogether stop construction activity on hill top or restrict it as far as hill slope is concerned, are introduced for the first time. They were already in place. None can say that he can make a construction or commence development activity on the top of a hill or on its slope, even if that is steep and the slide is dangerous. The development and construction activities continued despite the restraint as noted above. This resulted in widespread destruction of ecology and environment. The apprehension of accidents and calamities resulting in the loss of human life and property was real and genuine. That came true and incidents of such loss are within public domain. A case of an accident occurring on account of unauthorised construction activity and hill cutting was highlighted before the NGT. Loss of precious human life because of unauthorised and illegal construction on a hill slope was thus a issue raised before NGT. That was after some environment activists moved NGT and complained to it regarding the accident at Katraj Ghats. The NGT issued the direction so as to activate the State machinery by inviting

its attention to alarming rise in cases of hill cutting, stone crushing carried out without permissions and approvals under applicable laws and inaction of the statutory authorities in preventing the same. That this triggered the impugned action does not mean that it is contrary to law.

21 That a Resolution can be issued in exercise of the amended section 154 is undisputed. The Resolution is not challenged as a whole but what is impugned is a direction or instruction issued thereunder. Pertinently in the writ petition filed by Harshada Cooperative Housing Society Limited & Anr., the direction or instruction No.1 in the operative part of this Government Resolution has not been challenged. In the introductory part of this Government Resolution it is clearly stated that as far as hill tops and hill slopes are concerned, if the gradient is more than 1:5, then, on such slopes, no development should be carried out is the regulation and to be found in the Development Control Regulations for the City of Pune. The argument of the petitioners overlook the fact that the regulatory provision, as has been referred in this introductory paragraph, is already in place. Dr. Sathe has been fair enough to bring to our notice the Development Control Regulations of Pune 1987 in which the

classification and uses permitted are set out in Regulation 14.0. Regulation 14.2 sets out the various building uses and occupancies and premises to be permitted in the various zones that shall be as given in Appendix M. Appendix M-8 refers to hills and hill slope zones. The only use permissible in the hill zones is agriculture, forestry, nursery, public parks, private parks, play fields and recreation of all types, public utility establishment such as electric sub-stations, receiving stations, sewage disposal, water works etc. Then our attention has been invited to Standardized Development Control and Promotion Regulations For Regional Plan Areas in Maharashtra, issued by the Government of Maharashtra, Urban Development Department. These are Regulations for regional plans in Maharashtra. Clauses 1.3, 1.4, and 1.5 of these Regulations read as under :

“... ..

1.3 (a) These Regulations shall come into force from the date of notification and these shall replace existing building bye-laws and Development Control Rules / Regulations of A, B, C Class Municipal Councils which were adopted in the Regional Plan.

1.4 Provisions in Regional Plan :-

*i) **Special provisions in Regional Plan** - Special provisions or express provisions made or special regulations as mentioned in respective sanctioned regional plans under the provisions of Maharashtra Regional & Town Planning Act, 1966, which are not covered under these Regulations, shall prevail, except Regulation for Special Township Projects.*

*ii) **CRZ Provisions** :- Wherever applicable, any development within CRZ areas shall be governed by the Coastal Regulation Zone Notification No.S.O.19(F), dated 6th January, 2011 as amended from time to time.*

*iii) **Heritage Regulations**:- Wherever applicable, the Heritage Regulations, establishment of Heritage Conservation Committee and the list of Heritage Sites shall be applicable as previously sanctioned by the Government / concerned Competent Authority.*

1.5 Conflicts in provisions: *If there is any conflict between the provisions in sanctioned Regional Plan and the provisions in the sanctioned Development Control and Promotion Regulations for Regional Plan area in Maharashtra, in that case, the matter shall be referred to the Director of Town Planning, Maharashtra State, Pune whose decision shall be final.”*

22 Then, in Regulation 2 we have the definitions and as far as Part II is concerned, that is general planning and building requirements. Regulation 11.1 says that no piece of land shall be used as site for construction of building if the site is hilly and having gradient more than 1:5. Thus, these stipulations are already in place. What the National Green Tribunal brought to the notice of the authorities is in-discriminable cutting of hills in the Katraj Ghat. This unauthorized construction by breaking of hills resulted in an accident. That is why the NGT directed that on hill tops and hill slopes and the portion at the foot of the hill and surrounding 100 feet, no construction activity should be permitted and no development permission be issued and such directions be issued to the Municipal Corporations and Municipal Councils. Bearing in mind that there are in place legal provisions restricting the development activity on hill top and hill slope zones, all that the NGT and this Government Resolution directs is that in cases where there has already been a permitted development activity within 100 feet of the hill, then, no permission for additional construction be granted nor any development be permitted by sanctioning additional Floor Space Index (FSI) or Transferable Development Rights (TDR). In the event in sanctioned development plans if area of the above nature is in

buildable zone, then, for carrying out development in such zone and while granting individual development permissions, an area of 100 feet surrounding the hills should be demarcated as non-buildable. It can be used as open space, road etc. We are surprised that an order and direction of the NGT traceable to and in accordance with the planning law it challenged before us. Further, the directions of the State Government, which are but reiteration of the existing regulations, are under challenge. The impugned Government Resolution is in consonance with the provisions of the MRTP Act and the constitutional mandate enshrined in Article 21 and 48 thereof.

23 We are not in agreement with Dr. Sathe, Mr. Godbole and Dr. Saraf that merely because such directions are issued in exercise of the powers conferred by sub-section (1) of section 154, the development Plan for the limits of the Municipal Corporations, namely Pune and Mumbai is altered or modified. We are also not impressed by their argument that by such a Government Resolution, a modification is brought about in the Development Control Regulations and all this is without recourse to the specific powers conferred by the MRTP Act. In other words, these are bypassed and by a Government Resolution, the above stand amended. In that

regard our attention has been invited to the provisions in the MRTP Act enabling modifications or changes in the Development Plan and the procedure prescribed in that behalf.

24 We do not see any modification to the plan being brought about by the subject Government Resolution. If at all, the directions therein complement the provisions of the Development Control Regulations for the cities of the Mumbai and Pune or the concerned Municipal Corporation/Municipal Council areas. As it is, there was no permission to construct buildings other than a electric sub-stations, water works etc. on hill tops. As far as these slopes are concerned, by their very nature, a hill slides down and if the slope is steep, then, no construction activity can be carried out. There is no guarantee or assurance that any construction activity in such areas would be able to withstand a landslide or accidents, resulting from erosion of the hills on account of natural reasons. It is experienced that human intervention is necessarily not responsible for a landslide, mudslide etc. On account of natural causes and calamities, such events can occur. Apart from that, the occurrence increases because of human intervention including a construction activity carried out at the foot of the hill or on top thereof. It is also possible if the hill is cut from its

sides indiscriminately. It is also possible if there is damage to a hill while extracting minor minerals. The hill then becomes uneven. Then, it is not possible to prevent any calamity. Hence, in order to take care of the natural calamities and which have occurred in various places in the State of Maharashtra recently and also on account of unrestricted and unregulated breaking and cutting of the hills resulting in accidents endangering human life and safety that these supplemental directions have been issued. If they are for efficient administration of the Act and if they subserve larger public interest, then no fault can be found with the Government Resolution. Each of the operative directions, namely, serial Nos.1, 2 and 3 of this Government Resolution subserve this object and purpose. If the Government Resolution has been issued after the attention of the Government has been invited to an accident in Katraj Ghat occurring due to unauthorized and illegal cutting of hills, then, it is not as if the State Government has construed it as a command or a binding order and issued the subject Government Resolution. The attention of the State Government being invited to such illegal and unauthorized so also uncontrolled, unregulated and unrestricted hill-cutting, that in order to prevent the same, the Government stepped in. It took recourse to its power conferred by section 154 of the MRTP Act in

order to prevent future occurrences of this nature. If accidents and calamities can be prevented by timely intervention of the State Government in this manner, then, we do not think that on the specious and unsubstantiated pleas of the petitioners, we should strike down the Government Resolution.

25 All the petitioners concede that they do not have an absolute right and the development and construction activity within the jurisdiction of the Planning Authority cannot be unregulated, unrestricted and uncontrolled. The right to property is not a fundamental right, but is claimed to be a constitutional right. It is stated that the mandate of Article 300A would enable the petitioners to urge that they can exploit the potential of their property in order to derive maximum benefit and to obtain fruits of its development. Hence the argument is that nothing should be done which would prevent exploitation of the full potential of the land and by utilizing the floor space index / additional floor space index and even by acquiring the transferable development rights. The impugned Government Resolution puts a fetter on realisation of the full potential of the investment. Some of the petitioners are builders and developers and they derive right to develop the immovable property

after written agreements are executed in their favour. However, none of them can dispute that such constitutional rights may be derived in absolute terms, but their enforcement is subject to compliance with the laws of the land, including the MRTP Act, 1966. No construction or development can be permitted if the same violates the provisions of the planning and local laws. Therefore, the rights derived under the agreements are always subject to the restrictions placed by the planning and environmental laws. These rights cannot, therefore, enable the petitioners to override the provisions of such laws. The development and construction activity has to abide by the same. Before development activity is carried out, development permissions have to be obtained and development permissions can be granted consistent with the proposals and contents of a development plan. Section 22 clause (m) of the MRTP Act states that the development plan shall make provisions for permission to be granted for controlling and regulating the user and development of land within the jurisdiction of a local authority, including imposition of fees, charges and premium etc., by the State Government or the Planning Authority from time to time for grant of an additional floor space index or for the special permissions or for the use of discretionary powers under the relevant Development Control

Regulations and also for imposition of conditions and restrictions in regard to open space to be maintained about buildings. This clause reads as under :

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

(a)

m) provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, the sub-division of plots, the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and boardings and other matters as may be considered necessary for carrying out the objects of this Act.”

26 A bare perusal of the same would enable us to hold that the Development Control Regulations are traceable to this provision and they are part and parcel of the development plan itself. Hence, creation of right, title and interest in the property or conferring rights to develop the same by themselves would not enable the petitioners and parties like them to carry out the development

activities. Once they have to conform to the provisions of the MRTP Act, then, the petitioners cannot claim any blanket authority to or absolute right of enjoyment of their property rights.

27 We have not been shown any material by any of the petitioners by which they can claim that in the areas which are identified as hill-tops and hill-slopes, there is absolutely no restriction. Rather, we have seen that there is prohibition on development and construction activities as far as a hill top is concerned. A relaxation is permissible only in cases where a construction or installation of electric sub-station, water pump etc. is required to be made. Further, the Development Plan contains proposals for designation of areas for open spaces, playgrounds, stadia, zoological gardens, green belts, nature reserves, sanctuaries and dairies etc. The proposals for flood control and prevention of river pollution, proposals for preservation, conservation and development of areas of natural scenery and landscape so also proposals for allocating the use of land for purposes such as residential, industrial, commercial etc. can be indicated. Thus, conservation of ecology and environment and preventing damage to the same are but features of every development plan. In the

jurisdiction of any local authority, appropriate measures, including preventing damage to ecology and environment, can be taken. Preservation of natural scenery and surroundings and conservation of hills is thus implicit and inherent in the scheme of such laws. Equally, ecological imbalance and damage can be prevented by ensuring that there is no breaking or cutting of hills nor undertaking of such activity in or around the same by which there would be landslides, mudslides and rubble and debris can then fall from hill tops straight on roads or on dwelling houses. Thus, it is implicit that while permitting development and construction activity, a local authority has to ensure that it acts in terms of its constitutional obligation and duty. That, while permitting such activity, the mandate of Article 21 of the Constitution of India is not ignored.

28 It is clear from Part IX and IXA of the Constitution of India read with the relevant schedules therein that a Municipality cannot ignore its duty, for which the necessary powers and authority are conferred in it, to prepare plans for economic development and social justice, to perform functions and the implementation of the schemes as may be entrusted to them, including those in relation to matters listed in the 12th Schedule. The 12th Schedule of the

Constitution, *inter alia*, obliges the Municipality to perform the function and implement a scheme towards that end for urban planning, including town planning, regulation of land use and construction of buildings, planning for economic and social development, public health, sanitation conservancy and solid waste management and particularly urban forestry, protection of the environment and promotion of ecological aspects. Further, while taking other measures it must make provision for urban amenities and facilities such as parks, gardens and playgrounds. Once the Municipalities are endowed with the powers to perform such functions, then, it is futile to urge that the Planning Authority cannot be directed by the State Government to pay due and proper attention so also take care of the ecology and preventing any damage to it. The endowment of powers is to fulfill the responsibilities. Thus, a power is conferred coupled with a duty. Similar is the position with regard to Panchayat areas. The Panchayat areas also have to take steps in terms of Article 243G and in that regard it is endowed with the powers and authority so as to enable it to fulfill its obligations, duties and perform functions as enlisted in the XIth Schedule. The said Schedule obliges the Panchayats to take steps so as to maintain social forestry and farm forestry, to prevent damage to health and make

provisions for sanitation etc. It has also to safeguard and protect every means of communication. In such circumstances, when the Panchayat has to ensure that land consolidation and soil conservation is properly implemented through such schemes, then, it is not possible to agree with the petitioners that the State Government has, in any manner, purported to amend development plans or alter their contents, much less, modify them substantially by issuing the Government Resolution. At best, this Government Resolution, taking a clue from the order and direction of the NGT, has cautioned the local and Planning Authorities that they must perform their statutory and constitutional duty and function by protecting the environment and ecology. It merely supplements what is already indicated in rules and regulations enabling the local bodies to control the development and construction activity within their jurisdiction and limits. Hence, it is not an amendment to the Development Control Rules nor is it an encroachment on the power of the local authority / Planning Authority to sanction and permit development and construction activity within its jurisdiction. This is not an attempt to override the statutory powers of the Planning Authority nor has the State Government done something indirectly which it is prevented from doing directly. The State Government

could have taken the route as set out in the Act and brought about the changes or modifications in the Development Plan proposals and the regulations for controlling and regulating the use and development of land within its jurisdiction. However, this route need not be taken when the Government has enough powers to ensure efficient administration of the MRTP Act. Such powers are to be found in section 154 of the Act and after sub-section (1) has been substituted, as noted above, all the more the State Government can from time to time and rather must from time to time issue such directions as would ensure the efficient administration of the Act or in the larger public interest. Thereafter, it is the corresponding obligation of the authorities to carry out such directions or instructions within the time limit, if any, specified in such directions or instructions. Thus, a power is conferred to issue directions or instructions as may be necessary. In exercising such powers and with the aid of section 154(1), the State Government has neither interfered with the rights of the petitioners nor has it brushed aside or bypassed the MRTP Act itself. It has not brought about any amendment in the Development Control Regulations for the cities of Mumbai and Pune for such Development Control Regulations and the Development Plan proposals pertaining to these cities / planning areas already contain

measures to prevent damage to ecology and environment and to prohibit construction activity on hill tops and hill slopes. Merely because a gradient is prescribed that does not mean that the entire stretch is brought within the sweep of the prohibitory measure. We have found from the Development Control Regulations for the city of Pune that such a gradient is already prescribed. It is apparent that if construction is made on hill tops or on hill slopes, there is every likelihood of such development and construction resulting in accidents by which the whole construction can come down and thereafter cause enormous damage to human life and property. Such events and accidents have occurred in various places and now it is realised that any construction and development activity below or surrounding any hill or on a steep slope would not prevent the recurrence of such accidents, but has a potential of increasing them. Merely because the demands of the population, particularly in urban areas require spreading of the city or town and more residential units does not mean that any construction activity should be permitted in these ecologically sensitive locations. That would mean that the petitioners derive absolute right of putting up construction and carrying on development activity anywhere they please and as per their whims and fancies. This is definitely not intended by law nor

can we allow our discretionary, equitable jurisdiction to be abused in perpetuating such construction activity. Preservation of ecology and environment and preventing damage to it is also a fundamental duty of all citizens. Viewed from this angle and applying the principle of sustainable development, we are unable to accept any of the arguments.

29 In taking the above view, we have drawn support from the judgments of the Hon'ble Supreme Court, rendered in several cases and particularly relating to conservation of natural resources, protection of ecology and environment. In the case of *Susetha vs. State of Tamil Nadu*, reported in (2006) 3 SCC 549 the Hon'ble Supreme Court, while relying on Articles 21, 48-A and 51-A(g), held that while considering the challenge to competing claims of environment and housing, the court must bear in mind that the responsibility of the State to protect the environment is now well accepted notion in all the countries. The two Articles, together with the duty of the State, would enable the court to understand the scope and purport of the fundamental rights guaranteed by the Constitution, including Articles 14, 19 and 21 as also the various laws enacted by the Parliament and the State legislatures. All human

beings have a right to healthy environment commensurate with their well being coupled with the corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as future generations can avail of them equally. These have to be held in trust by the State. It is in position of a trustee and guardian of the public.

30 It is in these circumstances that the Hon'ble Supreme Court has held, merely asserting an intention for development will not be enough to sanction destruction of ecological resources. The court has to follow the principles of sustainable development and find balance between the developmental needs and the environmental degradation. These principles would guide the court while adjudicating matters concerning environment and ecology. It is this principle, which can be safely invoked and applied to the instant case.

31 Further, the development and protection of environment are not enemies. Without degrading the environment and minimising the adverse effects by applying stringent safeguards, it is possible to carry on development activities, applying the principles of sustainable development. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be damage to the economic interest. In case of doubt,

however, protection of environment would have precedence over the economic interest. The harm can be prevented even on the suspicion. It is not always necessary that there must be direct evidence of harm to the environment (see in this context the judgment in the case of *M. C. Mehta vs. Union of India and Ors* .reported in 2004(12) SCC 118.

32 Once we reject the arguments of the petitioners by the above reasoning, then, we have no alternative, but to dismiss these petitions. Each of them are dismissed. Rule is discharged without any order as to costs.

33 None of the judgments cited by the counsel have any bearing on the issue raised before us. In the case of *Kausarbag Co-operative Housing Society Ltd. vs. State of Maharashtra & Anr.* (2003) 5SCC 413, there was an attempt by the State Government to override the provisions of law by taking recourse to the unamended section 154 of the MRTP Act. That is why the Courts consistently held that a power to issue directions to ensure efficient administration of the Act will not take in its sweep a power to override other provisions of the Act and the procedure prescribed

therein, especially for amending the Development Control Regulations and the Development Plan itself. If these are made in exercise of the legislative powers and conferred by a Statute, then, the law has to be amended in a manner permitted by the Statute and not otherwise. Such is not the situation before us nor we have found that the power to issue directions in terms of the amended provision invoked in this case defeats or frustrates the object and purpose of the MRTP Act itself. Far from destroying it, it carries the object and purpose further in ensuring that while controlling and regulating the construction and development activity, the Planning Authority takes measures to preserve ecology and prevent environmental damage, accidents resulting in loss of human life and property. Therefore, the exercise of power cannot be faulted. Whenever such exercise has been interfered with by the Courts in the reported decisions, it was after production of overwhelming evidence and requisite satisfaction based thereon that that such power has been abused. In the garb of exercising such power to issue directions, the statutory provisions are totally frustrated. That would be subversive to the rule of law. Such is not the case before us. Hence we need not refer to each of the decisions cited by the learned counsel appearing for the petitioners.

31 As a result of the above discussion, the petitions are dismissed.

SMT. ANUJA PRABHUDESAI, J.

S.C. DHARMADHIKARI, J.

Syed
Rehmat
Pasha

Digitally
signed by
Syed Rehmat
Pasha
Date:
2018.08.07
12:19:56
+0530