

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

**WRIT PETITION NO. 203 OF 2014**

Apurva Natvar Parikh & Co. Private Limited. ... Petitioner.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 1898 OF 2009**

Kukreja Construction Company and others. ... Petitioners.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 2262 OF 2010**

Apurva Natwar Parikh & Co. Pvt.Ltd. and others. ... Petitioners.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 1823 OF 2012**

Jitendra Amritlal Sheth and others. ... Petitioners.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 839 OF 2015**

Geeta alias Chandani Umesh Gandhi. ... Petitioner.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH**

**WRIT PETITION NO. 2871 OF 2015**

Jameel A. Hussain and others. ... Petitioners.  
V/s.  
State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 2107 OF 2016**

M/s.Byramjee Jeejeebhoy Pvt.Ltd. and another. ... Petitioners.  
V/s.  
The Municipal Corporation of Greater Mumbai  
and others. ... Respondents.

**WITH  
WRIT PETITION NO. 2170 OF 2016**

Girdharlal D. Rughani Alia Thakkar H.U.F.  
and another. ... Petitioners.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH  
WRIT PETITION NO. 384 OF 2017**

Oberoi Realty Limited and another. ... Petitioners.  
V/s.  
Municipal Corporation of Grater Mumbai  
and others. ... Respondents.

**WITH  
WRIT PETITION NO. 541 OF 2017**

Nanabhoy Jeejeebhoy Pvt.Ltd. and another. ... Petitioners.  
V/s.  
The State of Maharashtra and others. ... Respondents.

**WITH**

**WRIT PETITION NO. 1860 OF 2017**

M/s.New India Construction Co. ... Petitioner.  
V/s.  
The State of Maharashtra and others. ... Respondents.

W.P.No.203/2014:

Mr.Pravin Samdani, Senior Advocate with Mr.Raghav Gupta, Ms.Bindi Dave and Mr. Kashish Mainkar i/b. Wadia Gandhi & Co. for petitioner.  
Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr.Amit Shastri, AGP for respondent- State.  
Ms. Kiran Bagalia for respondent Nos.3 and 4.

W.P.NO.1898/2009:

Mr.Mahesh Menon i/b. DSK Legal for petitioners.  
Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate, Mr.Amit Shastri, AGP and Mr.Rajiv Mane, AGP for respondent- State.

W.P.NO.2262/2010:

Mr.Pravin Samdani, Senior Advocate with Mr.Raghav Gupta, Ms.Bindi Dave and Mr.Kashish Mainkar i/b. Wadia Gandhi & Co for petitioner.  
Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr. Rajiv Mane, AGP for respondent- State.

W.P.NO.1823/2012:

Mr.Milind Sathe, Senior Advocate with Mr.Bhushan Deshmukh, Mr.Gaurav Gopal and Ms.Neveti Reshamwalla i/b. Wadia Ghandy & Co for petitioners.

Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.

Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr.L.T.Satelkar, AGP for respondent State

W.P.NO.839/2015:

Mr.Pradeep Thorat with Mr.Chandraprakash Mishra i/b. Mr.Lalit Jain for petitioners.

Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.

Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Ms.Geeta Shastri, Addl. GP for respondent State.

W.P.NO.2871/2015:

Mr.Pravin Samdani, Senior Advocate with Mr.Sameer Pandit and Madhupreetho Elango i/b. Wadia Gandhi & Co. for petitioners.

Mr.Dushyant Kumar for respondent BMC.

Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Ms.Geeta Shastri, Addl.GP for respondent- State.

W.P.NO.2107/2016:

Mr.Jehangir Jejeebhoy and Mr.Mohan Salian i/b. MGS Legal for petitioners.

Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpur, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.

Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr.Rajiv Mane, AGP for respondent- State.

W.P.NO.2170/2016:

Mr.Pravin Samdani, Senior Advocate with Mr.Sameer Pandit and Madhupreetho Elango i/b. Wadia Gandhi & Co for petitioners.  
Mr.B.M.Chatterji, Senior Advocate with Mr.Dushyant Kumar, Mr.Rohan Mirpury and Ms.Shital Mane for respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr.Geeta Shastri, Addl. GP for respondent State

W.P.NO.384/2017:

Mr.Pravin Samdani, Senior Advocate with Mr.Hemant Shah Mr.Pratik Kothari i/b. I.C.Legal for petitioner.  
Mr.Dushyant Kumar for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Mr.Milind More, Addl.GP for respondent- State.

W.P.NO.541/2017:

Mr.Pravin Samdani, Senior Advocate with Mr.Raghav Gupta and Mr.Kashish Mainkar i/b. Wadia Gandhi & Co. for petitioners.  
Mr.Dushyant Kumar for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Ms.Geeta Shastri, Addl.GP for respondent- State.

W.P.NO.1860/2017:

Mr.Pravin Samdani, Senior Advocate with Mr.Sameer Pandit and Madhupreetho Elango i/b. Wadia Gandhi & Co. for petitioner.  
Mr.A.Y.Sakhare, Senior Advocate with Mr.Rohan Mirpury, Mr.Dushyant Kumar and Ms.Shital Mane for the respondent- MMC.  
Mr.A.A.Kumbhakoni, Advocate General with Mr.S.B.Kolage, Panel-A Advocate, Mr.Akshay Shinde, Panel-B Advocate and Ms. Uma Palsule-Desai, AGP for respondent- State.

**CORAM : A.S.OKA AND RIYAZ I. CHAGLA, JJ.**

**RESERVED ON : 14<sup>th</sup> August 2018.**

**PRONOUNCED ON : 18<sup>th</sup> December 2018.**

**JUDGMENT :** (Per A.S.Oka, J.)

### **OVERVIEW**

The issue involved in these petitions is concerning the interpretation and implementation of the decision of the Apex Court in the case of *Godrej & Boyce Manufacturing Co.Ltd. v. State of Maharashtra and others*<sup>1</sup>. The said decision of the Apex Court dealt with Regulation 34 read with paragraph-6 of Appendix-VII to the Development Control Regulations for Greater Bombay, 1991 (for short “the DCR”). In case of some of the petitioners, they were holding plots of land shown reserved in the sanctioned development plan under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short “MRTP Act”) which were reserved Development Plan Road (for short “DP Road”) and other purposes. The petitioners constructed DP Roads at their own cost and voluntarily surrendered the reserved lands to the Municipal Corporation of Greater Mumbai (for short “the said Corporation”). In view of surrender of the reserved lands, in terms of clause (b) of sub-section (1) of section 126 of the MRTP Act read with Regulations 33 and 34 as well as clause (5) of Appendix-VII of DCR, the petitioners were granted Floor Space Index (FSI) and/or Transferrable Development Rights (TDR) in the form of Development Rights Certificates

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<sup>1</sup> 2009 (5) SCC 24

(DRC) equal to the gross area of the plots surrendered by them. Paragraph-6 of Appendix-VII (prior to its amendment) provided that when an owner or a lessee also develops or constructs the amenities on the surrendered plot at his own cost and hands over the developed/constructed amenity to the Municipal Commissioner of the said Corporation, he is entitled to DRC in the form of FSI or TDR equivalent to an area of construction/ development done by him. The word “amenity” has been defined in sub-section (2) of section 2 as well as clause (7) of Regulation 3 of DCR. Circulars were issued on 9<sup>th</sup> April 1996 and 5<sup>th</sup> April 2003. The first circular provided that DRC equivalent to 15% area of the area of DP Road constructed by the owner or lessee on the surrendered plot will be provided when the owner or lessee surrenders developed amenity together with the reserved plot. By circular dated 5<sup>th</sup> April 2003, in case of lands reserved for DP Road or set back area, the figure 15% was enhanced to 25%.

2. The contention before the Apex Court in case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra) was that the DCR is a subordinate legislation and the circulars were contrary to paragraph-6 of Appendix-VII of DCR which did not limit DRC to 15% or 25%. The Apex Court held that the use of word “equivalent” in paragraph-6 of Appendix-VII would entitle the owner or lessee to 100% FSI or TDR for the construction of amenity at his cost. Thus, FSI or TDR for construction of an amenity like a road will not be confined to 15% or 25% of DP Road area and it will be equivalent to 100% of the area of the road developed by the owner or the lessee.

3. In these petitions as filed, initially, there was a claim made on the basis of the decision in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra) followed by further decisions of the Apex Court and this Court. The grievance is about the refusal by the said Corporation to grant 100% additional TDR equivalent to the area of amenity developed.

4. On 16<sup>th</sup> November 2016, DCRs were amended by the State Government by exercising the power under clause (c) of sub-section (1AA) of section 37 of the MRTP Act. By the said notification, Regulation 34 of DCR was amended. The modifications in DCR as mentioned in the schedule to the said notification were made. Clause (4.2) of the schedule provides for grant of TDR against construction of amenity. This brought about a major change to provision of paragraph-6 of Appendix-VII. In fact, Appendix-VII was obliterated from DCR.

5. By way of amendment to some of the petitions, the said notification dated 16<sup>th</sup> November 2016 was subjected to a challenge and, therefore, apart from the issue of validity and legality of the said notification, the issue as to whether the modifications made by the said notification to the DCR will have retrospective or retroactive operation also arises in this group of petitions.

#### **FACTUAL ASPECTS**

6. Now, it will be necessary to make a brief reference to the facts of each case.

**WRIT PETITION NO.203/2014:**

The petitioner is a private limited company. The case of the petitioner is that at its own cost, 40/60 meters road/East Island Freeway admeasuring 6,864 sq.meters was developed and the same was surrendered to the third respondent- Mumbai Metropolitan Region Development Authority (MMRDA). The petitioner is relying upon a deed of conveyance executed by it in favour of the third respondent as well as a completion certificate of the work of construction of the road dated 13<sup>th</sup> December 2006. The deed of conveyance in respect of the reserved land was executed on 5<sup>th</sup> February 2007 and the possession was also handed over on the same day. On 11<sup>th</sup> May 2007, DRC was issued by the second respondent. On 10<sup>th</sup> December 2010, two separate DRCs were issued. On 14<sup>th</sup> December 2011, advocates for the petitioner called upon fourth respondent, an officer of the third respondent to recommend to the said Municipal Corporation grant of 100% DRC. It is pointed out that construction of road was made on an area of 6,864 sq.meters and additional DRC was issued only in respect of 25% of the said road area. The petitioner relied upon various reminders issued in the year 2012 to the third respondent. As remaining DRC of 75% was not granted, the present petition was filed seeking a writ of mandamus to grant balance TDR by issuing DRC. An amendment has been carried out for challenging notification dated 16<sup>th</sup> November 2016. The stand taken, in brief, in reply to the unamended petition by the said Corporation is that the present case was concluded in the year 2007 and, therefore, the same cannot be reopened on the basis of the subsequent decision of the Apex Court. The State Government filed affidavit-in-reply of Shri Sanjay S. Banait, Deputy Director of Town Planning which is dated 16<sup>th</sup> September

2017 to which notification dated 16<sup>th</sup> November 2016 was annexed. A stand is taken that surrender by the petitioner is in year 2007 and now the case cannot be reopened.

**WRIT PETITION NO.1898/2009 :**

In this writ petition, the case of the petitioners is that an area out of the total area of 6,342.22 sq.meters was reserved out of their property as DP Road. According to the case of the petitioners, on 19<sup>th</sup> August 1994, a completion certificate for amenity road was issued. In the year 1994, the work storm water drain was completed and even the petitioners paid necessary charges for street lights. On 21<sup>st</sup> July 2003, the petitioners made an application for grant of TDR as per Regulation 34 read with clause (6) of the Appendix-VII of DCR. By way of reply, the said Corporation called upon the petitioner to pay charges for laying down sewer line. The petitioners did not pay the said amount. On 28<sup>th</sup> August 2009, a demand was made by the petitioners for 100% additional TDR on the basis of the decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra). There is a reply filed by the Municipal Corporation taking a stand about the conclusion of the entire transaction long back.

**WRIT PETITION NO.2262/2010 :**

According to the case of the petitioner, various amenities such as two separate recreation grounds and a garden on the land owned by it were developed by the petitioner. On 19<sup>th</sup> April 2007, the said Corporation granted DRC in respect of two recreations grounds. On the same date, DRC in respect of garden was granted. On 11<sup>th</sup> February

2010, the petitioner applied for grant of additional 100% TDR on the basis of the decision of the Apex Court. Ultimately, by letter dated 10<sup>th</sup> July 2010, the said Corporation informed the petitioner that DRC has been already issued and, therefore, request of 100% additional DRC cannot be considered as per the policy prevailing. Thereafter, in May and July 2010, similar requests were made by the petitioner to the Municipal Corporation. In the reply filed by Municipal Corporation, it is contended that recreation grounds and garden are not buildable amenities and, therefore, TDR cannot be granted. Additional affidavit was filed by the Municipal Corporation to contend that the surrendered land was not developed by the petitioner.

There is a rejoinder filed by the petitioner of one Shri Manohar W. Oak, General Manager. It is contended that, in fact, after the work was carried out the said Municipal Corporation has granted completion certificate to the work of making recreation grounds and garden.

**WRIT PETITION NO.1823/2005 :**

The petitioners in this petition claim that there was a reservation for DP Road on their property. It is contended that after constructing DP Road on the reserved land, the petitioners handed over the same to the said Municipal Corporation on 5<sup>th</sup> March 2005. It is stated that on 12<sup>th</sup> January 2007, the name of the said Corporation was recorded in the property register card in respect of the reserved land. On 24<sup>th</sup> February 2009, the petitioners through their Architect addressed a letter to the second respondent for pointing out that only 25% of FSI has been granted in respect of the work carried out of construction of road and balance FSI of 75% was required to be issued. On 18<sup>th</sup> November

2009, the petitioners issued a reminder. The said request was turned down on 7<sup>th</sup> December 2009 by the second respondent- Municipal Corporation by a letter of the Executive Engineer (Development Plan). The present petition was lodged on 30<sup>th</sup> July 2012. It appears that for explaining the delay, an amendment was carried out by adding certain paragraphs. It is contended by way of amendment that along with the letter dated 7<sup>th</sup> March 2010, the petitioners handed over the file to their advocates for drafting the petition. It is alleged that by email dated 8<sup>th</sup> January 2011, the petitioners enquired with their advocate whether the draft of writ petition was ready and on 25<sup>th</sup> January 2011, a draft was forwarded to the petitioners. It is claimed that on 25<sup>th</sup> June 2011, there was a meeting in the office of the petitioners' Solicitor which was attended by the petitioners' senior advisors, legal consultant and liaising Officers etc. On 18<sup>th</sup> July 2011, there was another meeting. It is claimed that by email dated 26<sup>th</sup> August 2011, the Legal Consultants of the fourth petitioner addressed a letter to the fourth petitioner. The petitioners contacted the Architects and requested them to hand over the necessary papers. It is stated that after deliberation, on 15<sup>th</sup> June 2012, the Architect furnished relevant documents and, thereafter the petition was filed on 30<sup>th</sup> July 2012. A reply has been filed by the said Corporation to the said petition and there is a rejoinder filed. We may note here that there is no challenge in this petition to the notification dated 16<sup>th</sup> November 2016 though the same was placed on record by the State Government by filing an affidavit dated 7<sup>th</sup> March 2017 and though it was contended that in view of the said notification, no relief can be granted to the petitioners.

**WRIT PETITON NO.839/2015 :**

In this petition, the petitioners claim that the petitioners constructed amenity admeasuring 1,633.30 sq.meters which is a DP Road on the property of the petitioners. The possession was handed over to the said Corporation on 20<sup>th</sup> May 2005. It is contended that the petitioners received about 22.94% FSI of the constructed road on 30<sup>th</sup> December 2006. It is contended in the petition that on 1<sup>st</sup> December 2009, the petitioners' Architect requested the second respondent- Municipal Corporation to grant balance 75% FSI/ TDR. Thereafter there were letters dated 20<sup>th</sup> June 2014 and 1<sup>st</sup> December 2014 addressed by the petitioners or their advocate calling upon the Municipal Corporation to release 75% FSI. The prayer in the original petition was for issuing a writ of mandamus for granting balance FSI of 75%. By amendment, the challenge has been incorporated to the notification dated 16<sup>th</sup> November 2016. There is a reply filed by the said Municipal Corporation in which reliance is placed on the notification dated 16<sup>th</sup> November 2016 and it is contended that the petitioners will not be entitled to FSI of 75%.

**WRIT PETITON NO.2871/2015 :**

The first two petitioners are claiming to be the owners of the land subject matter of the petition. It is claimed that they have appointed the third petitioner as Developer. It is contended that an area of 455.67 sq.meters out of their land was reserved for DP Road. It is claimed that after the construction of DP Road, the possession was handed over thereafter to the said Corporation and on 29<sup>th</sup> July 2004, the said Corporation issued possession receipt. A completion certificate was issued on 23<sup>rd</sup> August 2004. On 17<sup>th</sup> February 2012, the petitioners

requested the second respondent- Municipal Corporation to grant 100% TDR/ DRC in respect of the portion of the land developed by them. By the letters dated 7<sup>th</sup> April 2012 and 21<sup>st</sup> April 2012, the second respondent requested the petitioners to submit a regular proposal through an Architect. Accordingly, on 28<sup>th</sup> July 2014, the petitioners applied for grant of DRC. The application was rejected on 30<sup>th</sup> January 2015 and the present petition was filed on 16<sup>th</sup> September 2015. In the petition, there is a challenge to the circular dated 17<sup>th</sup> June 2010 issued by the Corporation and there is a prayer for issuing writ of mandamus to grant additional TDR in respect of the entire road area. There is reply filed by the State Government opposing the petition.

**WRIT PETITION NO.2107/2016 :**

The petitioners claim to be the owners of the land described in the petition. It is stated that on the part of the said land, there was a reservation for DP Road having width of 27.45 meters. It is stated that on 5<sup>th</sup> January 2006, the said Corporation issued completion certificate in respect of DP Road and under a possession receipt dated 5<sup>th</sup> June 2007, took over the possession thereof. It is stated that by the year 2009, the said Corporation issued FSI only to the extent of 25% of the road constructed on the reserved land. On 15<sup>th</sup> September 2009, the petitioners requested for grant of 100% TDR and demanded balance 75% additional TDR. On 7<sup>th</sup> December 2009, a legal notice was issued by the petitioners calling upon the said Municipal Corporation to grant balance 75% additional TDR/FSI for the amenity constructed. On 21<sup>st</sup> July 2016, the second petitioner called upon the said Corporation to grant balance 75% TDR/FSI. Ultimately, a writ petition was filed on 1<sup>st</sup> September

2016 claiming writ of mandamus to grant balance 75% FSI. By way of amendment, the said notification dated 16<sup>th</sup> November 2016 has been challenged. There is a reply filed by the said Municipal Corporation opposing the petition. It is contended that the said Corporation never received an application for grant of additional FSI in a prescribed format and never received prescribed fees.

**WRIT PETITION NO.2170/2016 :**

The petitioners claim that there was a reservation of DP Road on their land which is more particularly described in the petition. On 20<sup>th</sup> October 1994, a completion certificate was issued by the said Corporation to the petitioners in respect of construction of DP Road. The possession thereof was taken over on 20<sup>th</sup> December 1995 by the said Corporation under the possession receipt. On 5<sup>th</sup> August 2014, the petitioners applied for grant of 100% TDR. In the petition, the only prayer made is to issue a writ of mandamus for 100% TDR on the basis of the decision of the Apex Court in the case of *Godrej & Boyce Manufacturing Co.Ltd.* (supra).

**WRIT PETITION NO.384/2017 :**

The case of the petitioners is that between the years 2004 and 2008, they constructed seven DP Roads admeasuring 5,145.90 sq.meters. It is alleged that in the year 2001, for DP Road admeasuring 25,915.20 sq.meters, the petitioners were granted 100% FSI for the land reserved for DP Road. Ultimately, the said Municipal Corporation released 25% additional FSI in respect of the construction of roads. The case of the petitioners is that in the year 2011, they filed Writ Petition No.420/2011 in this Court claiming balance 25% FSI. The writ petition was allowed by

a judgment and order dated 10<sup>th</sup> July 2014. An appeal preferred against the said judgment and order by the said Corporation was dismissed by the Apex Court by order dated 5<sup>th</sup> May 2016. On 10<sup>th</sup> June 2016, the petitioners made a representation to the said Corporation for grant of balance 75% TDR. On 4<sup>th</sup> August and 6<sup>th</sup> August 2016, there were reminders issued by the petitioners. The petitioners are relying upon an opinion of the Legal Department of the said Municipal Corporation submitted on 2<sup>nd</sup> September 2016 recommending grant of 100% TDR. In the meanwhile, a notification dated 16<sup>th</sup> November 2016 was issued. In the writ petition, the challenge is to the communication dated 30<sup>th</sup> November 2016 issued by the said Municipal Corporation in which it was stated that the proposal submitted by the petitioners was not in consonance with the Regulation 33(1) of DCR. Initial challenge was to the said communication. By amending the petition, a challenge to the notification dated 16<sup>th</sup> November 2016 has been incorporated.

**WRIT PETITION NO.541/2017 :**

The first petitioner claims to be the owner of the subject property and it is claimed that the second petitioner is the Developer appointed by the first petitioner. The petitioners have contended that they developed eleven different DP Roads. The possession of the first DP Road was handed over to the said Corporation on 13<sup>th</sup> April 2004. The possession of the second road was handed over on 20<sup>th</sup> March 2001. The possession of the third road was handed over on 27<sup>th</sup> March 2002. The possession of fourth road was handed over on 6<sup>th</sup> September 2001. The possession of fifth road was handed over to the said Corporation on 13<sup>th</sup> February 2006. The possession of the sixth road was handed over on 27<sup>th</sup>

October 1997. The possession of the seventh road was handed over on the same date. Even the possession of eighth road was handed over on the same date. The possession of ninth road was handed over to the said Corporation on 21<sup>st</sup> December 2002. The possession of tenth road was handed over on 21<sup>st</sup> December 2002 and the possession of eleventh road was handed over to the said Corporation on 14<sup>th</sup> August 2002. Thus, the claim of the petitioners in this petition is in respect of DP Roads constructed by them from the year 1997 to 2006. On 11<sup>th</sup> July 2014 and 19<sup>th</sup> August 2014, the petitioners addressed separate letters to the said Municipal Corporation demanding additional TDRs in the form of DRC in respect of DP Roads. The first letter was in respect of first, second, third, fourth, seventh and tenth DP Roads and second one was in respect of fifth, sixth, eighth and ninth DP Roads. The said letters were followed by letters dated 26<sup>th</sup> August 2014, 6<sup>th</sup> September 2014, 4<sup>th</sup> October 2014, 2<sup>nd</sup> September 2015 and 8<sup>th</sup> January 2016. As the TDR was not granted, the present petition was lodged in November 2016 praying for issue of a writ of mandamus for grant of additional FSI. In this petition, there is no challenge to the notification dated 16<sup>th</sup> November 2016.

**WRIT PETITION NO.1860/2017 :**

The case of the petitioner is that a part of the land owned by it was reserved for DP Road. On 24<sup>th</sup> February 2016, under a possession receipt, the said Municipal Corporation took over the possession of the DP Road. On 9<sup>th</sup> September 2016, the said Corporation granted DRC in respect of the land reserved for the DP Road. On 20<sup>th</sup> October 2016, the petitioner's Architect forwarded to the said Corporation all details and called upon the said Corporation to grant additional TDR in respect of the

DP Road. On 13<sup>th</sup> February 2017, the said Corporation rejected the prayer. Therefore, the present petition in which a writ of mandamus has been prayed for grant of additional 100% TDR in respect of the amenity constructed and for setting aside the communication of refusal.

### **SUBMISSIONS**

7. Detailed submissions have been made on behalf of the petitioners, the said Municipal Corporation and the State Government. We are reproducing only the gist of submissions.

8. In Writ Petition No.203/2014 and other writ petitions, the learned senior counsel Shri Samdani appearing for the petitioners in support of the petitions invited our attention to various portions of the decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra). He pointed out that under clause (b) of sub-section (1) of section 126 of the MRTP Act, TDR can be granted in respect of the land under reservation and for development/ construction of the amenity. He invited our attention to the Regulations 33 and 34 of the DCR prior to its amendment on 17<sup>th</sup> June 2010 and after its amendment made on 16<sup>th</sup> November 2016. He analyzed the provisions of Regulations 33(1) and 34 read with Appendix VII.

9. The learned senior counsel appearing for the petitioners further submitted that Regulation 33(1) of DCR enables the owner of the land to take benefit of FSI of the land reserved for DP Road and utilize the same on the remaining land. If the owner opts to separate the development potential of the land covered by the road, recourse could be

taken to clause (5) of Appendix-VII by seeking TDR. He pointed out that till 17<sup>th</sup> June 2010, there was no entitlement to seek FSI under Regulation 33 for construction of amenity and the amenity TDR was available only under Regulation 34 read with clause (6) of Appendix-VII. He pointed out that in a case of reserved land, without opting for FSI for the land component for its use on the remaining land, if the owner after constructing DP Road hands over the same to the said Corporation, he was entitled to TDR in respect of both the components under clauses (5) and (6) of Appendix-VII. He submitted that effect of the amendment made on 17<sup>th</sup> June 2010 to Regulation 33 was that the owner, for the construction of the road, instead of TDR could opt for FSI to be utilized on the remainder of the land. Then he would be entitled to the extent of 25% of FSI. He pointed out that if the land owner constructs amenity but does not avail FSI benefit on the remainder land, then the benefit is separated from the land and is given in the form of TDR under Regulation 34 read with clause (6) of Appendix-VII. He pointed out that the said clause (6) was not amended by the amendment dated 17<sup>th</sup> June 2010. He pointed out that the said amendment took place after the decision of the Apex Court in the case of *Godrej & Boyce Manufacturing Co.Ltd.* (supra) but still no amendment was carried out to clause (6) of Appendix-VII. He submitted that by amendment of 16<sup>th</sup> November 2016, the entire Regulation 34 and Appendix-VII have been substituted. As per the amended provision, the owner is eligible to obtain TDR for the land at the rate mentioned in clause 4.1 of the amended Regulation and the owner who also develops an amenity thereon becomes eligible to receive TDR in terms of clause 4.2. He pointed out that by the said amendment of 16<sup>th</sup> November 2016, Regulation 33(1) did not undergo any amendment. He

submitted that if this amendment is held to be prospective, then it does not attract the vice of unconstitutionality but if it is held to be retrospective in the sense that it will apply to the cases where amenities were developed and were surrendered earlier, it will become unconstitutional. The learned senior counsel apart from relying upon the judgment in case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra) also relied upon certain decisions of this Court which followed the judgment of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra). He pointed out that by the order dated 5<sup>th</sup> May 2016 in the case of **Municipal Corporation of Greater Bombay and another v. Natwar Parikh & Co. Pvt.Ltd**<sup>2</sup>, the Apex Court specifically rejected the prayer of the said Corporation to revisit the decision in the case of **Godrej & Boyce Manufacturing Co. Ltd.** (supra) and also rejected the prayer for declaring that the said judgment will have prospective effect. He also invited our attention to the decision of this Court in the case of **Natwar Parikh & Co. Pvt.Ltd. v. State of Maharashtra and others**<sup>3</sup> in which while following the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.**, an argument of delay and laches was rejected. The learned senior counsel relied upon the decision of the Apex Court in the case of **DGFT and another v. Colour Exports and another**<sup>4</sup>. He submitted that the Apex Court has held that a delegated or subordinate legislation can only be prospective and it cannot be made retrospective unless the rule making provision empowers the rule making authority to do so. He relied upon another decision in the case of **Suhas Pophale v. Oriental Insurance Co.Ltd.**<sup>5</sup> and submitted that if there are rights created

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2 Civil Appeal No.1748/2015

3 2014 SCC Online Bom 495

4 (2016) 2 SCC 226

5 (2014) 4 SCC 657

in favour of any person, whether they are property rights or rights arising out of contract and particularly if they are protected under a Statute, the same can be taken away only by a legislation by making retrospective effect and in the present case there is no retrospective effect given to the notification dated 16<sup>th</sup> November 2016. He relied upon the decision of the Apex Court in the case of ***K.C.Arora v. State of Haryana***<sup>6</sup> in support of the said proposition. He urged that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective effect. He also invited our attention to a decision of the Apex Court in the case of ***Mahabir Vegetable Oil (P) Ltd. & another v. State of Haryana and others***<sup>7</sup> in support of his contention that the notification dated 16<sup>th</sup> November 2016 cannot have retrospective effect. The learned counsel relied upon the decision of the Apex Court in the case of ***K.P.Varghese v. Income Tax Officer, Ernakulam***<sup>8</sup>, which deals with the interpretation of statutes. He referred to the decision of the Apex Court in the case of ***Comorin Match Industries (P) Ltd. v. State of Tamil Nadu***<sup>9</sup>. He submitted that effect of judicial pronouncement cannot be taken away by passing an Act without altering the basis on which the judicial pronouncement is made. On the same point, he relied upon another decision of the Apex Court in the case of ***State of Karnataka v. Karnataka Pawn Brokers Associates and others***<sup>10</sup>. Relying upon the decision of the Apex Court in the case of ***Thakur Narain Singh v. State of Rajasthan***<sup>11</sup>, he urged that vested right conferred by a statute cannot be taken away by subsequent amendment without specifically or impliedly

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6 (1984) 3 SCC 281

7 (2006) 3 SCC 620

8 (1981) 4 SCC 173

9 (1996) 4 SCC 281

10 (2018) 6 SCC 363

11 (1982) 2 SCC 66

providing for that. He relied upon the decision of the Apex Court in the case of *State of Punjab and others v. Bhajan Kaur and others*<sup>12</sup>. He relied upon the decision of the Apex Court *Shyam Sunder & others v. Ram Kumar and another*<sup>13</sup>. He submitted that there is no rule that the beneficial legislation is always retrospective.

10. The learned senior counsel Dr.Sathe appearing for the petitioners in Writ Petition No.1823/2012 has taken us through the relevant part of the decision in the case of *Godrej & Boyce Manufacturing Co.Ltd.* He submitted that there is no dispute on facts that the petitioner had handed over the constructed DP Road to the said Corporation and have received 25% TDR for construction of DP Road. Our attention was invited to clause (b) of sub-section (1) of section 126 of the MRTP Act which was incorporated in the statute book by the Maharashtra Act No.10 of 1994 with retrospective effect from 25<sup>th</sup> March 1991. He submitted that prior to 17<sup>th</sup> June 2010, DCR 33(1) did not provide for a situation where FSI/TDR could be granted for construction of road by the owner. By the said amendment, a provision was made for an additional 25% FSI for construction of DP Road. He submitted that the road will fall in the definition of amenity under the DCR as well as MRTP Act. He submitted that clause (b) of sub-section (1) of section 126 of the MRTP Act specifically provides for grant of compensation in the form of FSI/TDR for the construction of amenity as provided by the relevant DCR. He submitted that DCR, and in particular Regulation 34 thereof read with Appendix-VII provides for a complete code for grant of TDR. He submitted that if a private land is reserved in a development plan for

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<sup>12</sup> (2008) 13 SCC 112

<sup>13</sup> (2001) 8 SCC 24

construction of amenity like a road, in normal course, the same will have to be acquired by taking recourse to the provisions of the law relating to compulsory acquisition. He submitted that the owner has a choice to refuse to surrender the reserved land without compulsory acquisition if he will not be allowed to construct the amenity and claim an additional 100% TDR on account of construction. He submitted that if a recourse is required to be taken to the acquisition proceedings, the said Corporation and the State Government will have to follow tedious process of acquisition and get involved in litigations. Various arguments were canvassed even on Regulation 9 of the DCR which provides for different users. The learned counsel relied upon the decision of the Apex Court in the case of ***Pune Municipal Corporation v. Promoters and Builders Association***<sup>14</sup>, in support of his contention that making of DCR and amendment thereof are legislative functions. He also relied upon the decision of the Apex Court in the case of ***State of Rajasthan v. Basant Agrotech (India) Limited***<sup>15</sup>. In support of other petitions, similar arguments have been canvassed apart from canvassing various factual aspects. The argument based on promissory estoppel was also canvassed. There are arguments canvassed on facts.

11. The learned Advocate General submitted that there is no argument canvassed that the amendment made vide notification dated 16<sup>th</sup> November 2016 is either contrary to the provisions of the Constitution of India or is contrary to the provisions of the MRTP Act or any other statute. There is no argument about competence of the State Government to issue the said notification and hence, the issue regarding

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14 (2004) 10 SCC 796

15 (2013) 15 SCC 1

validity of the said notification need not be gone into. He submitted that it can be said that the impugned notification will operate retroactively as distinguished from retrospectively. He submitted that the notification has been brought in which is intended to apply to all cases which are under consideration of the Planning Authority as well as of this Court. He submitted that if the application for grant of TDR was pending on the date the impugned notification is issued, the same will have to be considered as per the impugned notification. He submitted that the impugned notification only clarifies that the owner will be compensated for constructing amenity on the basis of its value rather than the area thereof. He invited our attention to clause 4.2 introduced by the amendment. He submitted that the amendment made by the impugned notification is declaratory inasmuch as it declares what is always the clear intention of the legislature. He pointed out paragraph-58 of the decision in the case of *Godrej & Boyce Manufacturing Co.Ltd* (supra) and submitted that the Apex Court appreciated rationale behind trying to make the value of the development/construction rather than its area as the basis to compensate the land owner by granting additional FSI or TDR. However, the Apex Court observed that, that was not the law as it stood then and the value of the development/construction can be made the basis of the grant of additional FSI or TDR by making suitable amendments in the law and not by issuing a circular. He submitted that the impugned notification makes amendment exactly in terms of this observation. He urged that it cannot be said that the petitioners acquired any right by developing amenity and by surrendering the same to the said Corporation much less a vested right. He submitted that entitlement to receive compensation for developing amenity is a statutory entitlement and it is not a constitutional right.

12. The learned Advocate General relied upon the decision of the Apex Court in the case of ***Virendra Singh Hooda v. State of Haryana***<sup>16</sup>. Relying upon the said decision, in the alternative and without prejudice to his earlier submission, he submitted that the interpretation of the existing law made by the Court and benefit claimed on the basis of that can be nullified by the Legislature by removing the foundation of such an interpretation. He relied upon the observation made in paragraphs-52 and 62 of the said judgment and submitted that such benefits can be nullified by legislation with retrospective effect. He submitted that only exception to the retrospective operation for such an amendment is that it ought not to be unreasonable or excessive or harsh. He relied upon the decision of the Apex Court in the case of ***Oil and Natural Gas Commission v. Municipal Corporation of Greater Bombay***<sup>17</sup>. He submitted that the argument of promissory estoppel has no basis as there is never a clear or unequivocal promise to do or not to do some act or deed or thing on behalf of the said Corporation or MMRDA or the State Government. He relied upon the decision of the Apex Court in the case of ***State Bank's Staff Union (Madras Circle) v. Union of India***<sup>18</sup> and the meaning assigned by the Apex Court to retrospective law and retroactive law. He relied upon paragraphs-21 onwards of the said decision.

13. The learned senior counsel Shri Sakhare representing the Mumbai Municipal Corporation urged that the decision of the Apex Court in Godrej & Boyce is per incuriam as it ignores the effects of Regulation 33

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16 (2004) 12 SCC 588

17 2017 SCC OnLine Bom 9206

18 (2005) 7 SCC 584

of the DCR. He made extensive submissions on this point which are reflected in the subsequent part of this judgment. He urged that in view of clause 3(i) of the amended schedule, in a case where the compensation has been paid partly or fully by any means, TDR cannot be granted. He submitted that in most of the cases before the Court, compensation in the form of 10% or 25% additional TDR has already been granted. He submitted that the notification dated 16<sup>th</sup> November 2016 removed the very basis of the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** and also specifically prohibited issuance of TDR in favour of the persons who have already been compensated. He submitted that there is no vested right for availing TDR in the form DRC. He relied upon the decision of the Apex Court in the case of **National Agricultural Co-operative Marketing Federation v. Union of India**<sup>19</sup> on retrospective amendments. He submitted that the Legislature may cure inadvertent defects in the statute. He relied upon various decisions of the Apex Court which lay down that the basis of judicial pronouncements can be taken away by a retrospective legislation. He submitted that the impugned notification will apply to cases which are pending before the Court and the Municipal Corporation. He submitted that the judicial pronouncement in the form of decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** has been nullified by the impugned notification. He submitted that the demand for 100% TDR in respect of the area of the amenity developed is unreasonable and arbitrary. Another learned senior counsel appearing for the said Corporation relied upon the decision of the Apex Court in the case of **Commissioner of Wealth Tax, Meerut v. Shravan Kumar Swarup and Sons**<sup>20</sup>. He submitted that the impugned

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19 (2003) 5 SCC 23

20 (1994) 6 SCC 623

amendment is brought about to cure the defects and to prevent unjust enrichment. He relied upon the decision of the Apex Court dealing with retrospective statute.

14. The learned Advocate General relied upon the decision of the Apex Court *Howrah Municipal Corporation v. Ganges Rope Co.Ltd.*<sup>21</sup> and urged that DCR applicable on the date of deciding an application for grant of development permission will govern the decision on the application.

15. The learned senior counsel appearing for some of the petitioners submitted that on plain reading of the impugned notification dated 16<sup>th</sup> November 2016, it is crystal clear that it has no retrospective operation. He submitted that the MRTTP Act does not authorize making delegated legislation with retrospective effect. He submitted that on surrender of the land with developed amenity, a right accrues to the owner. He submitted that the notification dated 16<sup>th</sup> November 2016 is merely a delegated legislation and it cannot nullify the effect of a judicial decision. He submitted that this is not a validating Act. He submitted that the right to claim TDR on the development of amenity vests in the owner the moment the permission is granted by the said Corporation to construct the road/amenity. He relied upon Article 300A of the Constitution of India. It is submitted that the said Corporation cannot contend that the decision in case of *Godrej & Boyce Manufacturing Co.Ltd.* is *per incuriam*. He submitted that it cannot be said that Regulation 33 was not noticed by the Apex Court as the decision refers to

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<sup>21</sup> (2004) 1 SCC 663

the said Regulation. He submitted that there are subsequent decisions of the Apex Court which are rendered after 2010 which have upheld the decision in the case of *Godrej & Boyce Manufacturing Co.Ltd.* (supra) He submitted that an option to construct the amenity is incorporated in DCR 34 on account the lack of financial capacity of the said Corporation.

### **CONSIDERATION OF SUBMISSIONS**

16. We have given careful consideration to the submissions. We have also carefully gone through the decisions relied upon by the petitioners and the respondents. It will be necessary to make a reference to the provisions of DCR which are considered by the Apex Court in the case of *Godrej & Boyce Manufacturing Co.Ltd.*. In normal course, we would have straightway accepted the law laid down in *Godrej & Boyce Manufacturing Co.Ltd.* and would have considered the issue of applicability of the said decision to the facts of the cases before us in the context of the impugned notification dated 16<sup>th</sup> November 2016. Considering the argument canvassed by the learned senior counsel appearing for the Mumbai Municipal Corporation that the decision of the Apex Court is *per incuriam*, we are extensively referring to various provisions. In almost all the cases in hand, the action of surrendering the land and developing the amenity has been completed prior to 17<sup>th</sup> June 2010 when Regulation 33 underwent amendment. Therefore, firstly we refer to the unamended clause (1) of Regulation 33 which reads thus:

**“33. Additional Floor Space Index which may be allowed in certain categories:- (1 ) Road Widening and Construction of new Roads: — The Commissioner may permit additional floor space index on 100 per cent of the area required for road widening or for construction of new roads proposed under the development plan or those proposed under the**

**Mumbai Municipal Corporation Act, 1888, excluding areas of internal means of access, if the owner (including the lessee) of such land surrenders such land for road widening or new road construction without claiming any compensation in lieu thereof and hands over the same to the Corporation free of encumbrances to the satisfaction of the Commissioner. Such 100 per cent of the F.S.I, on land so surrendered to the Corporation will be utilisable on the remainder of the land upto a limit of 40 per cent in respect of plot situated in Mumbai City and 80 percent in respect of plots situated in the suburbs and extended suburbs of the area of the plot remaining after such surrender and the balance F.S.I, remaining thereafter shall be allowed to be utilised as a Development Right in accordance with regulations governing Transfer of Development Rights (TDRs) in Appendix VII, or the full FSI on the land is surrendered to the Corporation may be allowed to be used as a Development Right in accordance with the regulations governing Transfer of Development Rights (TDRs) in Appendix VII. Thereafter the road land shall be transferred in the city survey records in the name of the Corporation and shall vest it in becoming part of a public street as defined in sub-section (3) of Section 288 of the Bombay Municipal Corporation Act, 1888.”**  
(emphasis added)

On plain reading thereof, it is applicable to a case when the owner including a lessee surrenders the land or area required for road widening or for construction of new roads proposed under the development plan or those proposed under the Mumbai Municipal Corporation Act, 1888 (for short “the said Act of 1888”). Thus, it will apply to the lands reserved in the development plan for construction of new roads or for road widening. It will also cover the lands which are within the road-line as fixed under the said Act of 1888 on which road has not been constructed. The said provision is not applicable to any other amenity. Regulation 33(1)

provides that in such cases, the Commissioner may permit to avail FSI of 100% of area required for road widening or for construction of DP Roads, new roads or the roads proposed under the said Act of 1988, provided the owner surrenders the said land. As provided thereunder, a part of the FSI can be used on the plot remaining after such surrender and the balance FSI will be permitted to be utilised as TDR by issuing DRC. Such TDR will be governed by Regulation 34 as that is the provision for grant of TDR. Thereafter, the road land stands transferred in the city survey record in the name of the said Corporation and it vests in the said Corporation.

17. Regulation 34 has heading “Transfer of Development Rights”. Thus, essentially it deals with grant of TDR. Regulation 34 before its amendment on 9<sup>th</sup> March 2010 read thus:

*“34. Transfer of development rights.—In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of transferable development rights (TDR). These rights may be made available and be subject to the Regulations in Appendix VII hereto.”*

The concept of TDR is that FSI available in respect of one plot of land can be permitted to be utilized on another plot of land. Grant of TDR was governed by Appendix-VII (which was subsequently numbered as VIIA) which reads thus:

**“Regulations for the grant of transferable development rights (TDRs) to owners/developers and conditions for grant of such rights**

1. The owner (or the lessee) of a plot of land which is reserved for a public purpose in the development plan

and for additional amenities deemed to be reservations provided in accordance with these Regulations, excepting in the case of an existing or retention user or any required compulsory or recreational open space, shall be eligible for the award of transferable development rights (TDRs) in the form of floor space index (FSI) to the extent and on the conditions set out below. Such award will entitle the owner of the land to FSI in the form of a development rights certificate (DRC) which he may use himself or transfer to any other person.

2. Subject to Regulation 1 above, where a plot of land is reserved for any purpose specified in Section 22 of the Maharashtra Regional and Town Planning Act, 1966, the owner will be eligible for development rights (DRs) to the extent stipulated in Regulations 5 and 6 in this appendix had the land been not so reserved, after the said land is surrendered free of cost as stipulated in Regulation 5 in this appendix, and after completion of the development or construction as in Regulation in this appendix if he undertakes the same.
3. Development rights (DRs) will be granted to an owner or a lessee only for reserved lands which are retainable/non-retainable under the Urban Land (Ceiling and Regulation) Act, 1976, and in respect of all other reserved lands to which the provisions of the aforesaid Act do not apply, and on production of a certificate to this effect from the competent authority under that Act before a development right is granted. In the case of non-retainable lands, the grant of development rights shall be to such extent and subject to such conditions as the Government may specify. Development rights (DRs) are available only in cases where development of a reservation has not been implemented i.e. TDRs will be available only for prospective development of reservations.
4. Development rights certificates (DRCs) will be issued by the Commissioner himself. They will state, in figures and in words, the FSI credit in square metres of the built-up area to which the owner or lessee of the said reserved

plot is entitled, the place and user zone in which the DRs are earned and the areas in which such credit may be utilised.

5. **The built-up area for the purpose of FSI credit in the form of a DRC *shall be equal to the gross area of the reserved plot to be surrendered* and will proportionately increase or decrease according to the permissible FSI of the zone wherefrom the TDR has originated.**
6. ***When an owner or lessee also develops or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their satisfaction and hands over the said developed/constructed amenity to the Commissioner/appropriate authority, free of cost, he may be granted by the Commissioner a further DR in the form of FSI equivalent to the area of the construction/development done by him utilisation of which, etc. will be subject to the Regulations contained in this appendix.***
7. A DRC will be issued only on the satisfactory compliance with the conditions prescribed in this appendix.
8. to 19 ..... ”

Clause (1) of Appendix-VII deals with any land which is reserved for public purpose in a development plan. In such a case, there is a provision of grant of FSI in respect of the land in the form of DRC against its surrender. Clause (6) applies when the owner or lessee develops or constructs amenity on the surrendered land.

18. Sub-section (1) of section 126 of the MRTP Act is relevant which reads thus:

**“126. Acquisition of land required for public purposes**

***specified in plans.***—(1) When after the publication of a draft regional plan, a development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the planning authority, development authority, or as the case may be, any appropriate authority may, except as otherwise provided in Section 113-A, acquire the land, —

(a) by agreement by paying an amount agreed to, or

(b) ***in lieu of any such amount, by granting the landowner or the lessee, subject, however, to the lessee paying the lessor or depositing with the planning authority, development authority or appropriate authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894 floor space index (FSI) or transferable development rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional floor space index or transferable development rights against the development or construction of the amenity on the surrendered land at his cost, as the final Development Control Regulations prepared in this behalf provide,*** or

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894, and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of floor space index or additional floor space index, or transferable development rights under this section or under the Land Acquisition Act, 1894, as the case may be, shall vest absolutely free from all encumbrances in the planning authority, development authority, or as the case may be, any appropriate authority,

(2)-(4) .... ..”

For dealing with the acquisition of a land reserved under a development plan for a road or other public purposes, clause (b) of sub-section (1) of section 126 is relevant. The reserved land in the development plan can be acquired by three modes as provided in clauses (a), (b), and (c) of sub-section (1) of section 126. Clause (b) is one of the three modes. Under clause (b), FSI or TDR against the surrender of a land free of cost which is reserved for public purpose can be made available so that on the surrender of the land against TDR or FSI, the land vests in the Planning Authority. In addition, if the owner develops or constructs an amenity on the surrendered plot at his own cost, additional FSI or TDR can be granted as per the provisions of DCR. Therefore, when a reserved land is surrendered free of cost to a Planning Authority after developing an amenity thereon at the cost of the owner or lessee, there is a provision for grant of additional TDR or FSI against the development or construction of amenity which will be in addition to FSI or TDR in lieu of surrender of the land. Thus, a right accrues to the owner to get FSI or TDR against development of amenity on the surrendered reserved land. Thus, he is entitled to FSI or TDR in respect of development or construction of amenity as per the prevailing DCR on the date of surrender of the land with amenity in addition to the FSI or TDR against the area of land surrendered. He must get the TDR or FSI which is available on the date of surrender, as it is given by way of compensation. The right to get compensation accrues on the date of surrender as on surrender of the land and amenity thereon, it vests in the said Corporation. It is a mode of acquiring a reserved land. Moreover, clause (b) uses the word “against” land or construction of amenity. Thus, the FSI or TDR is in exchange of the surrendered land with amenity.

19. The definition of “amenity” is relevant. Sub-section (2) of section 2 of the MRTP Act defines amenity, which reads thus:

“2. (2) ‘Amenity’ means roads, streets, open spaces, parks, recreational grounds, playgrounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences;”

The definition of amenity is provided even in the DCR in clause (7) of Regulation 3 which reads thus:

“Amenity means roads, streets, open spaces, parks, recreational grounds, playgrounds, gardens, water supply, electric supply, street lighting, sewerage, drainage, public works and other utilities, services and conveniences.”

Thus, Regulation 33(1) gives effect to clause (b) of sub-section (1) of section 126. Clause (5) of Appendix-VII lays down the extent of TDR to be granted against the surrender of a reserved land. Clause (6) of Appendix-VII deals with a case where the owner or the lessee develops or constructs an amenity on the surrendered plot at his own cost subject to such stipulation as may be prescribed by the Municipal Commissioner. Thus, clause (6) provides for grant of additional FSI in the form of DRC equivalent to the area of the construction/development done by him as per the stipulations prescribed by the Commissioner. The construction or development has to be at the cost of the owner. Thus, the compensation granted for construction of amenity as provided in clause (b) of sub-section (1) of section 126 of the MRTP Act is in terms of clause (6) of Appendix-VII.

20. Now, coming to the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.**, the challenge was to the circulars dated 9<sup>th</sup> April 1996 and 5<sup>th</sup> April 2003 which are quoted therein. Paragraphs-40 to 42 of the said judgment read thus:

“40. The Circular dated 9-4-1996 provides that 100% FSI (built-up area) would be granted for the following buildable reservations:

- |                                  |                             |
|----------------------------------|-----------------------------|
| “(a) Municipal transport garrage | (b) Central Hospital        |
| (c) Fire Station                 | (d) Auditorium              |
| (e) Electrical crematorium       | (f) Municipal Workshop      |
| (g) Municipal primary school     | (h) Municipal retail market |
| (i) Town duty office             | (j) Office building”        |

41. Para 3 of the circular deals with construction of DP roads, etc. with which we are directly concerned in this group of cases, and insofar as relevant for the present, provides as under:

“3. *Construction of DP roads, widening of existing roads, etc.—(i) Additional development right equivalent to 15% area of DP road* constructed by the owner of the land as per the municipal specifications which includes provisions of SWDs, footpaths, central verge, dividers, providing street lights, laying water mains and sewer lines, etc. shall be considered.

(ii) to (viii) ..... ”

42. Later on, it appears, it came to the notice of the municipal authorities and the State Government that the matter was taken to the Court where the Circular dated 9-4-1996 was challenged and claim was made for additional development right equal to the area of the road constructed on the surrendered plot of land. The extent of the additional development right for construction of DP roads was then increased from 15% to 25% of the area of the road by Circular dated 5-4-2003, the relevant parts of which are as follows:

“Under the circumstances, the quantum of additional TDR for construction of roads/setback lands to be granted to owners/developer of DP roads/setback lands is being enhanced from 15% to 25% for all prospective cases which are not covered under litigation.”

And

“In cases where owners have filed writ petition which is pending in the court, the additional TDR will be granted as per the orders of the court. However, in case these owners are agreeable to accept 25% additional TDR, the same can be considered after withdrawal of the writ petition filed by them in the court.”

The argument of the Municipal Corporation before the Apex Court was that when on a reserved land, an amenity is developed or constructed by the owner, additional TDR in lieu of the amenity must be commensurate to the value of the amenity and not to the area of the amenity. This argument was not accepted by the Apex Court. In paragraph-51 and 52, the Apex Court observed thus:

**“51. Section 126(1)(b) of the Act uses the word “against”: it speaks of granting FSI or TDR “against the area of land surrendered” and further additional FSI or TDR “against the development or construction of amenities on the surrendered land”. Now, one of the meanings of the word “against” is given as “in return of something” e.g. the exchange rate against Franc” (Chambers 21st Century Dictionary, 1st published in India 1997, reprinted 1999). Webster's Third New International Dictionary gives the meaning of the word “against” as “in exchange for: in return for”. Concise Oxford English Dictionary gives one of the meanings of the word as “in exchange for, in return for; as an equivalent or set-off for; in lieu of, instead of”.**

52. Thus, on the basis of the language used in Section 126(1)(b) it could be legitimately argued that what is contemplated is to recompense the landowner proportionate to the *value* of the development or construction of the amenity on the surrendered land. But the matter does not stop there. As seen above in Appendix VII to the Regulations Para 5 uses the words “*equal* to the gross area of reserved plot”. Therefore, insofar as the bare land is concerned there is no difficulty. Para 6 of the appendix, however, uses the words “*equivalent* to the area of the construction/development” and much argument is made on the meaning of the word equivalent.”

(emphasis added)

In paragraphs-57 to 60, the Apex Court observed thus:

“57. The last of the above makes the meaning of the word “equivalent” very clear by explaining it in contradistinction to the word “equal”. It says equivalent is equal in such *properties* as affect the use which we make of things. Seen thus any of the relevant properties e.g. value, area, volume, quantity, quality, etc. may form the basis for determining equivalence. Now, if the words in Para 6 of the Schedule were to be “*equivalent to the construction/development*” then the submission of Mr Naphade would have been fully acceptable as in that case it would be open to determine equivalence on the basis of value of the construction and not on any other basis. But the regulation fixes the measure of equivalence by using the words “equivalent to the *area* of construction/development done on the surrendered land”. “*Area*” of construction/development having being fixed as the measure of equivalence it is no longer open to contend that any other basis such as value may be used for determining equivalence.

58. We may here make it clear that we fully appreciate the rationale behind trying to make value of the

**development/construction rather than its area as the basis to recompense the landowner and for granting the additional FSI or TDR. The submissions of Mr Naphade in that regard are not without substance but that is not the law as it stands and the value of the development/construction can only be made the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular.**

59. In regard to the circular there is something else too that we find quite curious. This aspect of the matter was not argued before us and it is not relevant for the present, nevertheless we would like to point it out as it may help the authorities concerned in future. It is to be noted that both Section 126(1)(b) of the Act and Para 6 of Appendix VII to the Regulations provide for additional FSI or TDR for construction or development of amenity, which term is defined both in the Act and the Regulations. But in the Circular dated 9-4-1996 100% FSI (built-up area) is reserved for public utilities none of which is expressly mentioned in the definition of amenity in Regulation 3(7) of the Regulations. Furthermore “municipal transport garage”, “fire station”, “auditorium”, “electric crematorium”, “municipal workshop”, “town duty office” and “office building” are not even covered by the definition of “amenity” under Section 2(2) of the Act. It is highly debatable if those public utilities can be introduced through the circular as “amenities” within the meaning of the Act or the Regulations.

60. Apart from the contention raised by Mr Naphade, Mr Shishodia, Senior Advocate appearing for the Municipal Corporation, Greater Mumbai resisted the claims of the appellants and the writ petitioners on certain other grounds. Mr Shishodia submitted that for acquisition of the designated plot of land recourse to clause (b) of sub-section (1) of Section 126 of the Act could only be taken by mutual agreement of the parties concerned. It was equally open to the municipal authorities not to accept the surrender of the land under clause (b) as it was open to the landowner to make the offer. Therefore, it followed according to him, that

the municipal authorities could accept acquisition of the land in terms of clause (b) on certain conditions to which the landowner might or might not agree. In case the landowner did not agree to the condition(s) put by the municipal authority he would not surrender the land and then the acquisition of the land could take place either in terms of clause (a) or clause (c) of Section 126(1).”

(emphasis added)

Thus, the Apex Court appreciated the rationale behind trying to make the value of the development/construction rather than its area as the basis to compensate the land owner. The Apex Court, however, found that as per clause (b) of sub-section (1) of section 126, additional TDR was required to be granted as per DCR and that the DCR, and in particular clause (6) of Appendix-VII provided that the TDR will be equivalent to the area constructed/developed. That is why the Apex Court observed that granting of additional TDR on the basis of the value of the development of the amenity is not provided in the DCR.

21. We may note that as held in the case of ***Pune Municipal Corporation v. Promoters and Builders Association*** (supra), DCR have a statutory force. Thus, the Apex Court observed that so long as clause (6) of Appendix-VII was not amended, the additional FSI/TDR for amenities will have to be granted which is equivalent to the area of the construction of amenity and it cannot be on the basis of the value of the development/construction of amenity. Thus, when a land which is reserved in the development plan under the MRTP Act for a public purpose is surrendered by the owner or lessee free of cost and the amenity is developed thereon, on its surrender, the owner or lessee will be entitled

to FSI/TDR equivalent to the area of the surrendered land and an additional TDR equivalent to the area of the amenity developed or constructed by him.

22. The argument of the learned senior counsel appearing for the Municipal Corporation was that on plain reading of Regulation 33(1), it applies only when a part of the land held by a person is reserved or is required for construction of road or road widening. His contention is that clause (6) of Appendix-VII will apply when the entire land is reserved on which amenity is developed and is surrendered. His emphasis was that clause (6) uses the word “plot” and Regulation 33(1) uses the word “area” required for road or road widening and it contemplates that there will be some area on the land which is not reserved. His contention was that under Regulation 33(1), the area reserved has to be surrendered and thereafter FSI/TDR is available whereas under clause (6), it is provided that the owner or lessee has to develop the amenity on the surrendered plot. His submission is that Regulation 33(1) applies to a case where only a part of the land held by the owner or the lessee is reserved for road and clause (6) of Appendix-VII applies when the entire land is reserved and is surrendered after development of amenity. We find that even Regulation 33(1) provides that only a part of the land FSI can be used on the remaining portion of the land and balance FSI has to be provided in the form of TDR. Regulation 33(1) specifically provides further that the TDR shall be as per Appendix-VII. Moreover, Appendix-VII read with Regulation 34 deals only with grant of TDR and the conditions on which TDR can be granted. Thus, even the TDR available in terms of Regulation 33(1) will be governed by Regulation 34 read with Appendix-VII. Clause

(5) of Appendix-VII applies to grant of TDR in respect of the land covered by Regulation 33(1). Clause (6) of Appendix-VII deals with both the cases where entire land held by the owner or lessee is reserved or a part thereof is reserved on which the owner or lessee develops or constructs amenity on the land surrendered to the said Corporation. Thus, clause (6) deals only with grant of an additional TDR for construction of amenity as provided in clause (b) of sub-section (1) of section 126 of the MRTP Act. Regulation 33(1) before 17<sup>th</sup> June 2010 dealt with cases where a land or a part of it is required for road widening or for construction of new road under the development plan or is required for road proposed under the said Act of 1888. Regulation 33(1) does not deal with any other reservation than road reservation. It only deals with FSI or TDR in lieu of surrender of the land required for roads. It does not deal with the grant of FSI or TDR in respect of the road developed thereon at the cost of the owner or lessee. That is dealt with by clause (6) of Appendix-VII. Therefore, it is difficult to agree with the submission canvassed by the learned senior counsel appearing for the Municipal Corporation. After going through all the decisions relied upon by him, we find that none of them help him. There is one more reason why the argument of *per incuriam* cannot be accepted. Perusal of the judgment of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** and, in particular paragraphs-26 onwards thereof shows that the entire scheme of DCR right from Regulation 33 was considered by the Apex Court. Paragraph-30 of the judgment specifically refers to Regulation 33. Therefore, the Apex Court has referred to Regulation 33 and it cannot be said that the decision of the Apex Court ignores Regulation 33. The Apex Court has taken into consideration Regulation 33. If we accept the

submission of the Municipal Corporation, we will be virtually recording a finding that the view taken by the Apex Court is erroneous. It is not impermissible to take such a view.

23. Regulation 33(1) underwent amendment on 17<sup>th</sup> June 2010. The amended regulation reads thus:

**“33. Additional Floor Space Index which may be allowed to certain categories:-**

**(1) Road widening and Construction of new Roads-** The Commissioner may permit additional FSI on 100 per cent of the area required for road widening or for construction of new roads proposed under the development plan or those proposed under the Mumbai Municipal Corporation Act, 1888, excluding areas of internal means of access, if the owner (including the lessee) of such land surrenders such land for road widening or new road construction without claiming any compensation in lieu thereof and hands over the same to the Corporation free of encumbrances and after the owner or lessee has levelled the land to the surrounding ground level and after he has constructed 1.5 mt. high compound wall leaving the setback area (or at a height stipulated Commissioner.

When an owner or lessee or Power of Attorney holder/ Authority holder also develops or constructs the road on the surrendered land at his cost subject to such stipulations as may be prescribed by the Commissioner to his satisfaction, and hands over the said developed/ constructed road to the Commissioner free of cost, he may be granted by the Commissioner additional FSI equal to 25% of the area of this construction/ development done by him (***This modification will not apply in cases where road FSI is utilized and also full occupation certificate is granted.***)

Such 100 per cent F.S.I. on land so surrendered to the Corporation and/or FSI towards road area constructed, will be utilizable on the remainder of the land up to a limit of 40

per cent in respect of plot situation in Mumbai City and 80 per cent in respect of plots situated in the suburbs and extended suburbs of the area of the plot remaining after such surrender and the balance F.S.I. remaining thereafter shall be allowed to be utilized as a Development Right in accordance with regulations governing Transfer of Development Rights (TDRs) in Appendix VII, or the full FSI of land surrendered to the Corporation may be allowed to be used as a Development Right in accordance with the Regulations governing Transfer of Development Rights (TDRs) in Appendix VII. Thereafter the road land shall be transferred in the City survey records in the name of the Corporation and shall vest it in becoming part of a public street as defined in sub-section (3) of section 288 of the Mumbai Municipal Corporation Act, 1888.”

Prior to this amendment, Regulation 33(1) did not deal with FSI/TDR on in lieu of construction of roads. It dealt with only the FSI/TDR against the surrender of the land reserved for road. This amendment is applicable only when the owner or lessee or a power of attorney holder develops the land reserved for road by constructing a road thereon as per the stipulation of the Commissioner and hands over the constructed road to the Commissioner free of cost. In such case, an additional FSI equivalent to 25% of the area of the construction of road can be granted to him. A part of such FSI can be consumed on the remaining land and the remaining part of FSI will be provided in the form of TDR. Thus, this amendment to Regulation 33(1) is applicable to reservation for road and not for any other amenity. Moreover, this portion of amendment will not apply where the FSI granted in lieu of road is utilized and full occupation certificate is granted prior to 17<sup>th</sup> June 2010. Therefore, from 17<sup>th</sup> June 2010, in case of a land reserved for road or road widening which is surrendered, if the amenity of road is constructed by the owner on the land surrendered, the additional FSI as provided in clause (b) of sub-

section (1) of section 126 will be 25% of the area of the construction of road. Therefore, for such amenity, in terms of clause (6) of Appendix-VII, the owner or lessee will not get TDR equivalent to entire area of the road constructed by him. It will remain confined to 25% of the area. We may note that Regulation 33(1) as amended on 17<sup>th</sup> June 2010 is not modified by the impugned notification dated 16<sup>th</sup> November 2016.

24. The effect of the notification dated 16<sup>th</sup> November 2016 is that Regulation 34 stands substituted by the schedule to the said notification. Even Appendix-VII stands deleted as the Schedule deals with grant of TDR. Clause 3(i) of the schedule makes it clear that the same is not applicable in case of earlier land acquisition or development for which compensation has been already paid partly or fully by any means. For such surrender, no TDR will be available in terms of the Schedule. But there is no clause in the Schedule that it will apply to the applications for grant of TDR which were pending on 16<sup>th</sup> November 2016. There is no indication in the said notification that the rights of those who earlier surrendered the reserved land with developed amenity free of cost stand forfeited. There is no provision in the MRTP Act which empowers framing of DCRs with retrospective effect. Moreover, clause (b) of sub-section (1) of section 126 has not been amended. The notification does not even refer to the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd** (supra). Clause 4.2 of the schedule deals with grant of TDR against construction of amenity. Clause-4.2 reads thus:

“4.2 Transferable Development Rights (TDR) against Construction of Amenity-

When an owner or lessee with prior approval of Municipal Commissioner, may develop or construct the amenity on the surrendered plot or on the land which is already vested in the Planning Authority, at his own cost subject to such stipulations as may be prescribed and to the satisfaction of the Municipal Commissioner and hands over the said developed/ constructed amenity free of cost to the Municipal Commissioner then he may be granted a Transferable Development Rights (TDR) in the form of FSI as per the following formula:-

$$\text{Construction Amenity TDR in sq.m.} = A/B * 1.25$$

Where,

A= cost of construction of amenity in rupees as per the rates of construction mentioned in Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced.

B= land rate per sq.m. as per the Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced.”

Thus, clause- 4.2 is the only clause which is applicable with effect from 16<sup>th</sup> November 2016 which deals with grant of TDR against construction of amenity and from 16<sup>th</sup> November 2016, clause (6) of Appendix-VII will not apply to the lands with amenity surrendered after that date. Thus, clause 4.2 will be applicable when the surrender is made on or after 16<sup>th</sup> November 2016.

25. Now, before we deal with the argument of retrospectivity or retro-activity, we must deal with the constitutional challenge to the said notification. As observed earlier, DCR is a subordinate legislation. The parameters on which challenge can be made to a subordinate legislation

have been laid down by the Apex Court in several judgments and the law on this aspect which is fairly settled. One such decision is case of *Cellular Operators Association of India and others v. Telecom Regulatory Authority of India and others*<sup>22</sup>. Paragraph-34 thereof reads thus:

***Parameters of judicial review of subordinate legislation***

**34.** In *State of T.N. v. P. Krishnamurthy* [*State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517] , this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus: (SCC pp. 528-29, paras 15-16)

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. **It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:**

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and

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22 (2016) 7 SCC 703

then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.”

We must note that in none of the petitions before us in which there is a challenge to the validity of the notification dated 16<sup>th</sup> November 2016, any of the grounds in clauses (a) to (f) above have been pleaded. The only argument is that if the notification dated 16<sup>th</sup> November 2016 is held to be applicable to the lands which are reserved on which amenity is constructed and which are surrendered before 16<sup>th</sup> November 2016, then the accrued right will be taken away and, therefore, the notification becomes illegal. With greatest respect to the submissions, unless one of the grounds as stated above is urged and established, the challenge to the subordinate legislation cannot be entertained. At highest, if the said notification is held to be applicable in a case where surrender has already taken place after development of amenity, manifest arbitrariness can be alleged.

26. As far as retrospective operation of a subordinate legislation is concerned, the law is very well settled. In the case of *DGFT and another v. Colour Exports and another* (supra), in paragraph-113, the Apex Court held thus;

**“113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the**

**rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective.** No doubt, this section confer powers upon the Central Government to “amend” the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospectively. This legal position is rightly discussed by the Bombay High Court in the impugned judgment in the following words: (*Kanak Exports case* [*Kanak Exports v. Union of India*, 2005 SCC OnLine Bom 1678] , SCC OnLine Bom paras 26-29)

“26. We are unable to accept the submissions of the learned Additional Solicitor General. The word ‘amend’ does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The connotation of the word ‘amend’ when it is used for the exercise of power by a legislature cannot be pressed to construe the word ‘amend’ in relation to the power to make delegated legislation. In this regard the following observations of the Supreme Court in *Accountant General v. Doraiswamy* [*Accountant General v. S. Doraiswamy*, (1981) 4 SCC 93 : 1981 SCC (L&S) 574] are pertinent: (SCC p. 99, para 7)

‘7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In *B.S. Vadera v. Union of India* [*B.S. Vadera v. Union of India*, AIR 1969 SC 118] , this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature

enacted a law on the subject-matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that “any rules so made shall have effect subject to the provisions of any such Act”. Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the 1974 Rules cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27-7-1956 must be held ultra vires.’

27. The reliance placed on the power to regulate under Section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate, therefore, cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into Section 3 of the Act.

28. Section 21 of the General Clauses Act on which reliance is placed by the learned Additional Solicitor General is also of no assistance to sustain the retrospective operation of the notification. Section 21 of the General Clauses Act embodies a rule of construction, nature and extent of application of which must inevitably be governed by the relevant provisions of the statute

which confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring the said power. (See *Gopichand v. Delhi Admn.* [*Gopichand v. Delhi Admn.*, AIR 1959 SC 609 : 1959 Cri LJ 782], *Lachmi Narain v. Union of India* [*Lachmi Narain v. Union of India*, (1976) 2 SCC 953 : 1976 SCC (Tax) 213] and *State of Kerala v. K.G. Madhavan Pillai* [*State of Kerala v. K.G. Madhavan Pillai*, (1988) 4 SCC 669] .) The ratio in *H.C. Suman case* [*H.C. Suman v. Rehabilitation Ministry Employees' Coop. House Building Society Ltd.*, (1991) 4 SCC 485] also cannot be applied because in that case it was found that Section 88 of the Delhi Cooperative Societies Act, 1972 contained the power to exempt and if the provisions of Section 12 of the said Act were to be exempted the provisions which provided that bye-laws are effective from the date of registration. The notification issued under Section 88 would exempt it and Section 88 would contain the power to exempt retrospectively. Similarly, Section 14 of the General Clauses Act has no application as it merely provides that where any power is conferred on the Government, then that power can be exercised from time to time as occasion requires.

29. Under that Scheme the status-holder is eligible for benefits upon achieving the incremental growth of 25% of the FOB value of exports in the current year over the previous year. It, therefore, follows that no sooner the status-holder achieves 25% incremental growth, the status-holder would be entitled to the benefits under the Scheme. Immediately upon attaining the prescribed incremental growth, the status-holder becomes eligible to certificate for duty-free import and thereby a right vests in the exporter to receive the same.”

(emphasis added)

We must note here that none of the learned counsel have pointed out any provision of the MRTTP Act which authorizes or permits the amendment to be carried out which will have retrospective effect or retrospective

operation. In fact, none of the rule making provisions therein provide for enacting DCR with retrospective operation.

27. To be fair to the State, the learned Advocate General has essentially argued that the notification dated 16<sup>th</sup> November 2016 has retroactive application and not retrospective application. We, therefore, hold that the said notification cannot have retrospective operation. We must note that there is nothing in the recitals in the said notification which indicates that it was intended to take away the basis of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd** (supra). The said decision is not even referred therein. Non-obstante clause is absent therein.

28. Now, we turn to the argument of retroactive operation. The learned Advocate General relied upon the decision of the Apex Court in the case of **State Bank's Staff Union (Madras Circle) v. Union of India** (supra) and, in particular paragraphs-21 to 26 and 31. His submission is that in case of **Godrej & Boyce Manufacturing Co.Ltd.**, the Apex Court observed that the Regulation can be amended so as to provide for grant of additional FSI in respect of developed/ constructed amenity which will be commensurate to its value. The question is whether the said notification dated 16<sup>th</sup> November 2016 will apply to the transactions which are already completed in the sense that developed amenity is already surrendered. In fact, clause 3(i) of the notification is to the contrary. There is no such express provision in the said notification. Even such an intention cannot be inferred by implication.

29. The contention of the learned Advocate General based on the decision of the Apex Court in the case of ***Howrah Municipal Corporation v. Ganges Rope Co.Ltd.*** (supra) was that where applications are pending for grant of benefit in terms of clause (6) of Appendix-VII on 16<sup>th</sup> November 2016, they will be governed by the impugned notification. In the said decision in the case of ***Howrah Municipal Corporation v. Ganges Rope Co.Ltd.*** (supra), it was held that when application for grant of building permission is made, the same has to be decided in accordance with the rules prevailing on the date the application is considered and not the date on which it is made. With greatest respect, the application for grant of additional TDR made under clauses (5) and (6) of Appendix-VII in respect of a land surrendered by the owner or lessee on which he has constructed the amenity at his own cost cannot be equated with an application made for grant of building permission. In case of application invoking clause (6) of Appendix-VII, the condition precedent for grant of additional FSI is already complied with by spending considerable amount for developing amenity. The acquisition under clause (b) of sub-section (1) of section 126 of the MRTP Act can be made only by mutual agreement and, therefore, it is open to the Municipal Corporation not to accept surrender of the land and in such a case, recourse can be taken to clause (a) or (c). In cases where such surrender has been accepted by the Municipal Corporation, a right accrues to the owner or lessee to get compensation in terms of clause (b) of sub-section (1) of section 126 of the MRTP Act as per DCRs prevailing on the date of surrender as the surrender takes place by a mutual agreement. In fact, on surrender, the vesting in the said Corporation is complete. After having accepted the surrender, if the Municipal Corporation refuses to

give TDR as per the prevailing DCR on the date of surrender or on the date of completion of construction of amenity, it will amount to violation of the right under Article 300A of the Constitution. Hence, the argument of retrospective operation cannot be accepted.

30. There is a relevant argument made by the Municipal Corporation. The contention is that if the surrender of land with amenity has taken place much prior to the decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** and the owners have happily accepted 25% TDR as per surplus without any protest, the cases should not be allowed to be reopened years after the decision of ***Godrej & Boyce Manufacturing Co.Ltd.*** The argument is that where the matters are closed by unconditional acceptance of 25% FSI, whether advantage can be allowed to be taken of the decision of ***Godrej & Boyce Manufacturing Co.Ltd.*** after lapse of orders.

31. Even on this aspect, there are decisions of the Court. In the case ***Natvar Parikh & Co. Pvt.Ltd.*** (supra), 25% TDR was granted to the petitioner in the year 2006-2007. On the basis of the decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra), on 3<sup>rd</sup> February 2010, the petitioner filed a petition in this Court. In this case, a specific argument was made on the basis of delay and laches. The argument was that 25% TDR was granted in the year 2006-2007 and the whole thing was tried to be reopened in the year 2010. Paragraph-7 of the said decision deals with the aspect of delay and laches which reads thus:

“7. It is relevant to note that affidavit dated 22<sup>nd</sup> October 2010 filed by the Respondents and the averments made therein have never withdrawn and so also the action of grant of 25% TDR as recorded above. The Respondents unable to deny and/or distinguish the judgment *Godrej* (Supra) so declared about the grant of 100% TDR in lieu of construction of DP Road and of surrendered land as recorded above. The submission in this regard, about the alleged non-construction of road as recorded above, therefore, even if, tried to make for the first time in this writ petition without invoking their own action, is not acceptable and as it is clear from the affidavit so recorded above that it is afterthought and intend to deny the entitlement of the petitioner. The Respondents-Corporation are bound by their own affidavit and their own earlier orders/action. There is nothing on record to show that except the self destructive averments made in affidavit/submission in the pending writ petition and during the course of argument, they have raised earlier the issue of “*Petitioner has not built upon the amenity*” as contemplated under Regulation 34 Appendix VII Clause 5 and 6. We are inclined to observe that the opposition of the Corporation is untenable and unacceptable, as it is contrary to the record. The rights of the Petitioner as crystallized on the basis of above admitted position on record and now even confirmed by the Supreme Court Judgment *Godrej* (Supra), just cannot be taken away, though claimed since long. The cause of action in our view is still continuing. There is no question of any delay and/or laches as contended. We are inclined to accept the submission made by the senior advocate appearing for the Petitioner based upon the Supreme Court in the case of *Union of India v. I.T.C. Limited*<sup>2</sup> that the approach of a person/party soon immediately and/or after coming to know about the judgment of the Supreme Court cannot be stated to be guilty of any laches to claim/reliefs so prayed and/or is barred by the limitation in the present case as recorded above. After the Supreme Court judgment in case of *Godrej* (supra) on 6.2.2009, the Petitioner vide its letter dated 6.7.2009 requested the Respondents to grant the TDR/DRC in question. The reminder was sent on 11.9.2009. The petition,

therefore, so filed on 10 February 2010, as the Respondents did not grant reliefs, in no way can be stated to be beyond limitation and/or suffers from any laches or delay.”

This decision was challenged before the Apex Court by the Municipal Corporation by filing Civil Appeal No.1749/2015 wherein the Apex Court rejected the argument that the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra) should apply prospectively. The Apex Court confirmed the decision in the case of **Natvar Parikh & Co. Pvt.Ltd.** (supra). Thus, the Apex Court seems to have taken a view that as the demand for grant of TDR was made within few months from the date of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra), the question of delay will not arise. That is the test applied by the Apex Court. The issue of delay came up for consideration in the case of **Novartis India Ltd., Mumbai v. Municipal Corporation of Greater Mumbai**<sup>23</sup>. In this case, against the order denying TDR, an appeal was preferred to the State Government. Though in the appeal a claim was made for grant of 25% TDR, it was specifically mentioned that as the writ petitions were pending on the issue of getting 100% TDR, the petitioners were reserving their right to get balance 75% TDR. It appears from the facts of the case that in the year 2009 itself, the petitioners applied for additional TDR in terms of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra) which request was rejected on 22<sup>nd</sup> December 2009. The Division Bench relied upon paragraph-7 of the decision in the case of **Natvar Parikh & Co. Pvt.Ltd.** (supra). In the facts of the case, in paragraph-11 of the judgment, the Division Bench observed

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23 2014 SCC OnLine Bom 1366

that the cause of action is continuing, especially when the petitioners themselves carried out amendment and reserved their right to the balance entitlement. In the case of *Natvar Parikh & Co. Pvt.Ltd.* (supra), TDR of 25% was granted in the year 2006-2007 and the petitioners applied for grant of additional TDR in the year 2009.

32. The aforesaid cases have been decided by this Court on facts. Writ jurisdiction under Article 226 of the Constitution of India is always discretionary. Gross and unexplained delay is always a ground on which a Writ Court can decline to exercise its jurisdiction even if existence of a right is established by the petitioner. If after surrendering the developed land, additional TDR of 100% is not claimed in respect of amenity for a very long time, the question is whether a Writ Court can grant relief. If petitioners in such a case were to seek monetary compensation by filing a suit, it will be governed by the law of limitation. Whether there is a gross delay or not depends on the facts and circumstances of each case and, therefore, each case will have to be examined on facts because there cannot be a straight-jacket formula for deciding where the Court should exercise its discretion or not. The petitioners in these petitions are either affluent land owners or professional builders. They are not illiterate or helpless litigants. Moreover, in the city of Mumbai, a judicial notice will have to be taken that there has been a continuous upward rise in the market value of FSI or TDR. The petitioners cannot be permitted to take undue advantage of the delay on their part. They cannot be allowed to reopen the cases which were treated as closed by their own conduct. The delay will have to be also considered in this context.

33. An additional FSI or TDR in term of clause (6) of Appendix-VII as well as in terms of clause (1) of Regulation 33 becomes available on surrender of the land reserved with or without amenity as the case may be. After 17<sup>th</sup> June 2010, if there is a surrender of land reserved for road or road widening on which road is constructed by the owner or lessee, the FSI or TDR will be available in respect of amenity of road as per Regulation 33(1) as amended. Therefore, the right to get FSI/ TDR accrues at the time of surrender. But on the ground of delay and laches, a Writ Court can refuse to enforce the right. We have already held that the decision of the Apex Court in the case of *Howrah Municipal Corporation v. Ganges Rope Co.Ltd.* (supra) will have no application to the case of grant of TDR. The reason being is that the provision in DCR for grant of TDR against surrender of reserved land or surrender of reserved land after developing the amenity thereon will have a direct nexus with clause (b) of sub-section (1) of section 126 of the MRTP Act. In a sense, the additional FSI or TDR is payable by way of compensation under clause (b) of sub-section (1) of section 126. Therefore, the argument that the notification dated 16<sup>th</sup> November 2016 will have retroactive operation in the sense that it will apply to all pending applications for grant of TDR cannot be accepted as the right accrues on the surrender of the land. Therefore, now we turn to the facts of individual cases.

#### **CONSIDERATION OF FACTUAL ASPECTS**

34. In Writ Petition No.203/2014, the surrender is in the form of a deed of conveyance dated 5<sup>th</sup> February 2007 and the possession was handed over on 7<sup>th</sup> February 2007 to the third respondent- MMRDA. On

11<sup>th</sup> May 2007, DRC was granted by the said Corporation on account of surrender of the land. Within three years from the surrender, on 2<sup>nd</sup> February 2010, the petitioner requested an officer of MMRDA to recommend to the Municipal Corporation to issue 100% additional TDR in respect of construction of amenity. On 10<sup>th</sup> December 2010, DRC of 25% of the amenity was granted. Going by the averments made in the petition, there is no specific rejection of balance 75% FSI. An advocate's letter was sent demanding 75% balance FSI on 14<sup>th</sup> December 2011 and reminder was issued on 3<sup>rd</sup> August 2012. The petition was filed in October 2013. Thus, in the facts of the case, within one month from the date of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra), the petitioner applied to the third respondent- MMRDA for recommending to the Municipal Corporation for grant of 100% TDR in respect of amenity developed. The said application was acted upon and 25% FSI was granted on 10<sup>th</sup> December 2010. Thereafter, a legal notice was sent. Therefore, in this case, it cannot be said that the conduct of the petitioner is such that it will prevent the Writ Court from granting relief in terms of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra).

35. In Writ Petition No.1898/2009, the petitioners' land was reserved for 18.3 meters wide DP Road. The petitioners surrendered the reserved land and were granted TDR in lieu of the reserved land. Thereafter, the petitioners constructed DP Road as claimed in the petition and a completion certificate was issued on 19<sup>th</sup> August 1994. According to the case of the petitioners, they carried out work of storm water drain for which completion certificate was issued 17<sup>th</sup> March 2003. According

to their case, the TDR in respect of the land was issued on 16<sup>th</sup> March 1994 and 5<sup>th</sup> April 2003. On 21<sup>st</sup> July 2003, the petitioners through their Architect applied for grant of additional TDR under clause (6) of Appendix-VII. But the application made by the petitioner (Exhibit-I) shows that on 21<sup>st</sup> July 2003, only 25% additional TDR was claimed in respect of amenity of DP Road. It is not the case of the petitioners that thereafter they followed the said application by issuing reminders. For six years or more, no claim was made for 100% TDR on account of construction of the amenity. However, on 28<sup>th</sup> August 2009, through their Architect, the petitioners applied for grant of additional TDR for the amenity equivalent to 100% of the area. The said application was made only after the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra) and the present petition was lodged on 15<sup>th</sup> September 2009. Therefore, in facts of the case, no relief can be granted as for a period of more than six years after surrender, no claim was made for 100% TDR.

36. Writ Petition No.2262/2010 relates to three plots reserved more particularly described in paragraph 2.1. First two are for recreation grounds (called as “RG-1” and “RG-2”) and third one for “ground” (called as “G-1”). It is claimed that in case of RG-1 and RG-2, the possession was handed over on 7<sup>th</sup> March 2007 after developing the said plots, and in case of G-1 also, the possession was handed over on the same date. On 19<sup>th</sup> April 2007, according to the case of the petitioners, TDR was granted only in respect of reserved lands and not for developing the amenities. On 11<sup>th</sup> February 2010, within three years from surrender, the petitioners applied for grant of additional FSI in the form of TDR. By

communication dated 8<sup>th</sup> March 2010, the said Municipal Corporation declined to consider the said request. Thereafter, letters were sent by the petitioners on 10<sup>th</sup> May 2010 and 10<sup>th</sup> July 2010 calling upon the said Corporation to grant additional FSI. Thereafter, the petition was filed on 26<sup>th</sup> October 2010. Therefore, this petition does not suffer from delay and laches and the Municipal Corporation will have to consider the case for grant of additional TDR in terms of the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra). However, the petitioner will have to satisfy the said Corporation that there was development of amenity actually carried out by them.

37. Now, we come to Writ Petition No.1823/2012. In this case, the possession of DP Road after its construction was handed over by the petitioners to the Municipal Corporation on 5<sup>th</sup> March 2005. On 24<sup>th</sup> February 2009, the petitioners' Architect for the first time applied for 100% FSI in lieu of the constructed amenity. There was inaction for more than 3 years and 11 months and claim for 100% additional TDR was not made. The averments made in the petition show that on 18<sup>th</sup> November 2009, a reminder was issued. By communication dated 7<sup>th</sup> December 2009, the proposal of the Architect was specifically rejected. The petition was affirmed on 30<sup>th</sup> July 2012 i.e. two years after the prayer for grant of 100% TDR was turned down. The explanation for delay given by way of amendment to the petition is that on 7<sup>th</sup> March 2010, a file containing correspondence and judgments of the Supreme Court was handed over to the attorneys. It is stated that amendment of 17<sup>th</sup> June 2010 to the DCR was made available to the petitioners in July 2010. On 8<sup>th</sup> January 2011, the Legal Consultant of the fourth petitioner by writing an email enquired

with the Solicitors whether draft was ready. On 25<sup>th</sup> January 2011, it is claimed that the draft was forwarded. Thereafter, on 18<sup>th</sup> July 2011, a meeting was held between the petitioners, their Legal Consultant and Architect. It is claimed that the documents were furnished by the Architect to their advocate on 15<sup>th</sup> June 2012 and, ultimately, on 30<sup>th</sup> July 2012, the petition was filed. This is hardly an explanation for delay of 2½ years, especially when in the facts, of the case after construction of DP Road, the possession of the same was handed over on 5<sup>th</sup> March 2005. There is no explanation for not claiming 100% TDR within three years from that date. Even after entrusting the case to the Advocate, there is a long delay. Hence, considering the gross delay and laches which is not at all explained, this is a case where a Writ Court should not allow the party to invoke its extra ordinary jurisdiction under Article 226 of the Constitution of India.

38. In Writ Petition No.839/2015, the possession of DP Road was handed over to the Municipal Corporation on 20<sup>th</sup> May 2005. On 31<sup>st</sup> December 2006, 25% FSI/TDR in respect of the constructed road was granted. On 1<sup>st</sup> December 2009, the petitioner through her Architect requested to release balance 75% TDR towards the amenity developed. The perusal of the averments made in the petition shows that after lapse of 4½ years thereafter, by a letter dated 20<sup>th</sup> June 2014, the petitioner requested the Municipal Corporation to issue balance 75% TDR. Thereafter, there was a legal notice sent on 1<sup>st</sup> December 2014. The petition was filed one year thereafter in January 2015. There is absolutely no explanation as to why there is a complete inaction on the part of the petitioner from 1<sup>st</sup> December 2009 when the petitioner's

Architect applied for grant of remaining 75% additional TDR till 20<sup>th</sup> June 2014 when similar request was made by the petitioner. As there is no explanation for this inaction for a period of more 4½ years and the delay involved thereafter, this is not a fit case wherein a Writ Court should exercise jurisdiction under Article 226 of the Constitution of India.

39. In Writ Petition No.2871/2015, the reservation of the land claimed by the petitioners was for DP Road. The possession of the developed portion of the reserved land was taken over by the said Corporation on 29<sup>th</sup> July 2004. The completion certificate was issued on 23<sup>rd</sup> August 2014. It is claimed in the petition that FSI in respect of surrender of land was granted but FSI in respect of amenity constructed thereon was never granted. Going by the averments made in the petition, though the petitioners claim to have surrendered the reserved land with amenity on 29<sup>th</sup> July 2004, the petitioners never applied for grant of 100% TDR in respect of the amenity. Even after the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra) which is of 6<sup>th</sup> February 2009, the petitioners did not apply for grant of additional FSI/ TDR in respect of amenity surrendered in the year 2004 and for the first time by a letter dated 17<sup>th</sup> February 2012, the petitioners applied for grant of additional TDR. The proposal for grant of additional TDR was rejected on 30<sup>th</sup> January 2015. Thereafter the petition was filed. Thus, after surrendering the reserved land on 29<sup>th</sup> July 2004, the petitioners never claimed TDR in respect of the amenity developed by them till 17<sup>th</sup> February 2012. The application was made three years after the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra). Considering this conduct of the

petitioners which virtually amounts to abandonment of their right, no relief can be granted to the petitioners in this petition.

40. In Writ Petition No.2107/2016, according to the case of the petitioners, they constructed DP Road. They surrendered the reserved land on 5<sup>th</sup> June 2007. Their Architects/ Licensed Surveyors made an application on 4<sup>th</sup> September 2009 for grant of 100% additional TDR in the light of the decision of the Apex Court. A legal notice was issued by their advocate on 7<sup>th</sup> December 2009. Thereafter, the petitioners took no steps and after a gap of 6½ years on 21<sup>st</sup> July 2016, the petitioners called upon the said Corporation to grant additional FSI/TDR. The correspondence made by the petitioners in the year 2009 was based on the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra). The petitioners sought to rely upon the subsequent decision of the Apex Court dated 5<sup>th</sup> May 2016 in the case of **Municipal Corporation of Greater Mumbai v. Natvar Parikh & Co. Pvt.Ltd.** (Civil Appeal No.1479/2015) which followed the decision of the Apex Court in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra). There is no explanation offered in the petition as to why there was complete inaction on the part of the petitioners from 2009 to 2016. Therefore, considering this conduct of the petitioners, they are dis-entitled to any relief.

41. In Writ Petition No.2170/2016, the case of the petitioners is that on 20<sup>th</sup> October 1995 they handed over the possession of their land reserved for DP Road to the said Corporation. They claimed that after completing the construction of DP Road on 20<sup>th</sup> October 1994, a

completion certificate was granted by the Municipal Corporation. It is not the case of the petitioners that thereafter they applied for grant of additional 100% TDR in respect of the amenity developed. Only on 5<sup>th</sup> August 2014 (i.e. ten years after developing the amenity) that the petitioners applied for grant of additional TDR through their Architect. For a period of 10 years, the petitioners never claimed 100% additional TDR in respect of the amenity. Even thereafter, no action is taken and the present petition is filed in July 2016. Considering the conduct of the petitioners, they are not entitled to any relief.

42. In Writ Petition No.384/2017, the case of the petitioners is that between 2004 and 2008, they developed seven DP Roads and handed over the possession thereof to the said Corporation. However, they made representation for the first time on 10<sup>th</sup> June 2016 claiming additional TDR in respect of amenity developed. The representation was rejected on 30<sup>th</sup> November 2016 by the said Corporation. Thus, even after the decision in the case of **Godrej & Boyce Manufacturing Co.Ltd.** (supra), the petitioners did not apply for grant of additional TDR. The petitioners sought additional TDR after lapse of eight years and more. Therefore, for a period of eight years or more, the petitioners never claimed additional TDR. Hence, considering the delay and laches on the part of the petitioners, no relief can be granted.

43. In Writ Petition No.541/2017, the case of the petitioners is that there were eleven reservations on their property for DP Roads. The petitioners have referred to the said reservations as DP Road-I to DP Road-XI. According to the case of the petitioners, after developing the

amenities, the possession of DP Roads was handed over to the said Corporation on 13<sup>th</sup> April 2004, 20<sup>th</sup> March 2001, 27<sup>th</sup> March 2002, 6<sup>th</sup> September 2001, 13<sup>th</sup> February 2006, 27<sup>th</sup> October 1997, 27<sup>th</sup> October 1997, 29<sup>th</sup> October 1997, 21<sup>st</sup> December 2002, 22<sup>nd</sup> May 2002 and 14<sup>th</sup> August 2002 respectively. For the first time additional TDR was claimed by the petitioners by making application on 11<sup>th</sup> July 2014. Thus, in all cases except one, the possession was handed over after the development of DP Roads before the year 2003. In some cases, the possession of DP Road was handed over in the year 1997. In one case, the possession was handed over in the year 2006. Thus, after lapse of several years after handing over possession of DP Roads i.e. in 2014, belatedly a request was made for grant of additional TDR. The request was made after a gap of about 8 to 13 years for which there is no explanation. Thus, the petitioners by their conduct have virtually abandoned their claim for additional FSI/TDR in respect of amenity.

44. In Writ Petition No.1860/2017, the case of the petitioner is that a part of its property was reserved for DP Road. The possession of DP Road was handed over on 24<sup>th</sup> February 2016. The case of the petitioner is that the petitioner received TDR only in respect of the land and, on 13<sup>th</sup> February 2017, the Municipal Corporation wrongfully refused to accept the application of the petitioner for grant of additional FSI/TDR. The petitioners by their advocate's letter dated 4<sup>th</sup> March 2017 called upon the said Corporation to withdraw the communication dated 13<sup>th</sup> February 2017. Thus, in this case, though the notification dated 16<sup>th</sup> November 2016 will not apply, the grant of additional FSI in respect of amenity of road will be governed by the amendment made to Regulation 33(1) with

effect from 17<sup>th</sup> June 2010 and the FSI or TDR will remain confined to 25% of the road constructed.

45. In those cases where we have held that the petitioners were entitled to the benefit of decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Co.Ltd.*** (supra), the Municipal Corporation will have to consider the cases in accordance with law.

46. Where the surrender of the reserved land on which road is constructed has taken place after 17<sup>th</sup> June 2010, the additional FSI/ TDR will have to be granted as per the amended Regulation 33(1).

47. Accordingly, we pass the following order:

- (i) We hold that the notification dated 16<sup>th</sup> November 2016 is legal and valid. However, the said notification will not have retrospective or retroactive application to a land reserved under the development plan which is surrendered and amenity is developed on the said land by the owner or lessee thereof at his own cost prior to 16<sup>th</sup> November 2016. Such cases will be governed by the Regulation 33(1) and clauses (5) and 6 of Appendix VII. In case of a land reserved for a road, either in development plan under the MRTP Act or under the provisions of the said Act of 1888 and surrender is made and road is developed on or after 17<sup>th</sup> June 2010 but before 16<sup>th</sup> November 2016, the FSI or TDR in lieu of

amenity will be governed by the Regulation 33(1) as amended on 17<sup>th</sup> June 2010;

- (ii) We reject the argument that the decision of the Apex Court in the case of ***Godrej & Boyce Manufacturing Company Limited*** (supra) is *per incuriam*.
- (iii) We hold that whether the writ jurisdiction of this Court under Article 226 of the Constitution of India can be allowed to be invoked on the basis of the said decision or not depends upon the facts of each case and the conduct of the petitioners especially the delay and laches on their part;
- (iv) Writ Petition No.203 of 2014 is allowed. We direct the third respondent-MMRDA to make recommendation to the Mumbai Municipal Corporation for grant of 75% additional FSI/TDR in terms of the aforesaid decision of the Apex Court within a period of two months from today. The Municipal Corporation shall examine the said recommendation and if the petitioners are otherwise entitled to TDR for amenity in terms of the aforesaid decision of the Apex Court, necessary DRC shall be issued within a period of two months from the date on which recommendation of MMRDA is received;
- (v) Writ Petition No.1898 of 2009 is rejected;

- (vi) In Writ Petition No.2262 of 2010, the petitioners will be entitled to additional 100% amenity FSI in terms of the aforesaid decision of the Apex Court provided by producing the documents, they satisfy the Mumbai Municipal Corporation that work was actually carried out by them for developing the recreation grounds and the ground;
- (vii) Writ Petition No.1823 of 2012 is rejected;
- (viii) Writ Petition No.839 of 2015 is rejected;
- (ix) Writ Petition No.2871 of 2015 is rejected;
- (x) Writ Petition No.2107 of 2016 is rejected;
- (xi) Writ Petition No.2170 of 2016 is rejected;
- (xiA) Writ Petition No.384/2017 is rejected.
- (xii) Writ Petition No.541 of 2017 is rejected;
- (xiii) Writ Petition No.1860 of 2017 is partly allowed. We direct the Mumbai Municipal Corporation to grant additional FSI in respect of amenity of road as provided by Regulation 33(1) as amended with effect from 17<sup>th</sup> June 2010.

(xiv) We make it clear that wherever we have held that the petitioners are entitled to 100% amenity TDR in accordance with clause 6 of Appendix-VII in terms of the aforesaid decision of the Apex Court, the Mumbai Municipal Corporation will have to examine whether the petitioners are otherwise eligible for grant of TDR;

(xivA) The Petitions are disposed of accordingly.

(xv) There will be no order as to costs.

(RIYAZ I. CHAGLA, J.)

(A.S.OKA, J.)