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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 938 OF 2018

Pantanagar Gokul C.H.S. Ltd. .. Petitioner
Vs.
The Chief Officer
Mumbai Housing And Area
Development Board and others .. Respondents

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Mr. Ashutosh Kulkarni along with Mr. Akshay Prakash Shinde, Advocate for the Petitioner.
Ms. Sharmila U. Deshmukh, Advocate for the Respondent Nos.1 and 2.
Mr. Manish Upadhye, Asst. Government Pleader, State, Advocate for Respondent No.3.
Mr. P.K. Dhakephalkar, Senior Counsel along with Mr. Muttahhar Khan along with Ms. Niyathi Kalra and Ms. Rujuta Patil I/by M/s. Negandi Shah & Himayatullah, Advocate for the Respondent No.4.

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CORAM : B.R.GAVAI &
M.S. KARNIK, JJ.

DATE : 12th SEPTEMBER, 2018

JUDGMENT (PER M.S.KARNIK, J.) :-

Rule. Rule is made returnable forthwith.

2. Heard finally by consent of parties.

3. Petitioner - Pantnagar Gokul C.H.S. Ltd. has approached this Court under Article 226 of the Constitution of

India for declaration that the Notification dated 3rd July, 2017 issued by the Respondent No. 3 – State of Maharashtra is applicable to the redevelopment project undertaken by the fourth Respondent – Developer. The Petitioner has consequently prayed for directions to the Respondent No.4 – Developer to submit amended plans in consonance with the Notification dated 3rd July, 2017. By virtue of the amendment carried out to the Petition, the Petitioner has prayed for further declaration that Clause (9) of the Regulation 33(5) of the Development control Regulations for Greater Mumbai, 1991 ('DCR' for short) is unconstitutional and ultra-virus. The Petitioner also prayed for setting aside the impugned letter dated 26/12/2017 issued by MHADA which is at Exhibit 'H' to the Petition.

4. The facts of the case in a nutshell are as under :-

The Petitioner is a registered Co-operative Housing Society. Lease Deed dated 16/2/2006 was executed between the Respondent No.1 – the Chief Officer, MHADA and the Petitioner Society in respect of land admeasuring 754.359 sq.mtrs. bearing

Survey No.236-A and City Survey No.194-A together with building bearing No.156 situated at Pantnagar, Ghatkopar, Mumbai, for a period of 90 years. The entire property conveyed in favour of Petitioner consists of 32 tenements of building No. 156. At the time of entering into the lease, building No.156 was not amalgamated with building No.154 and 158. The total tenements in these 3 buildings are 96 in number.

5. Building No. 156 was in a dilapidated condition and therefore required to be redeveloped. According to Petitioner, the redevelopment is covered by Regulation 33(5) of DCR. Regulation 33(5) deals with Low Cost Housing Schemes for economically weaker sections and low income groups.

6. Shagun Reality Enterprises was initially entrusted with the work of redevelopment. However Shagun did not commence any development work. The Petitioner therefore approached HDIL. By Development Agreement dated 27/8/2007 executed between the Petitioner and HDIL, the redevelopment

of the property was entrusted to HDIL. The offer letter was issued by MHADA on 7/5/2012 in respect of building No.156 On 9/9/2014, HDIL assigned development rights in favour of M/s. Preet Gruh Nirman Pvt. Ltd. - respondent No.4 herein.

7. According to Petitioner, as per unamended Regulation 33(5) of the DCR, the permissible FSI is 2.5. The proposal was submitted to the competent authority for redevelopment. In the year 2011, the building was vacated and the members shifted to alternate accommodations.

8. Though MHADA had issued NOC/IOD/CC in favour of HDIL in 2011 itself, however, till July, 2017 no development work commenced. Sometime in February 2016 the Respondent No.1- MHADA approved the proposal of amalgamation of building Nos.156, 154 and 158.

9. By Deed of Assignment-cum-grant of Development Rights dated 30th March, 2016 executed between petitioner and

respondent No.4, rights were assigned in favour of the fourth Respondent. The Respondent No.1- MHADA issued NOC in favour of the fourth Respondent on 25th April, 2017. Commencement Certificate came to be issued on 7th July, 2017.

10. The Respondent No. 3 - State of Maharashtra issued Notification on 3rd July 2017 amending Regulation 33(5) of the DCR whereby FSI shown is 3.0. The Petitioner by communication dated 20th July, 2017 and 12th October, 2017 requested the respondent No.4- Developer about its intention to switch over to 3.0 FSI on the basis of amended Notification. Petitioner also made a similar request to second Respondent vide letter dated 11/10/2017. By communications dated 7/8/2017 and 16/12/2017, Respondent No.4 refused to make the Notification dated 3/7/2017 applicable to Petitioner. The Respondent No.1 – MHADA by issuing impugned letter dated 26/12/2017 rejected the Petitioner's applications dated 11/10/2017 and 12/10/2017.

<u>SUBMISSIONS OF LEARNED COUNSEL FOR PETITIONER</u> :

11. In his challenge to the constitutional validity of Clause (9) of the DCR 33(5) learned Counsel submits that the said Clause (9) violates the fundamental rights of the petitioner guaranteed under Article 14 and Article 300A of the Constitution of India. Learned Counsel would submit that though Clause (9) was a part of the DCR even in the year 2013, there was no occasion for the petitioner to have challenged the validity of the said clause as the cause of action arose only on 26/12/2017 after MHADA issued the impugned letter.

12. It is his submission that if Clause (9) is given effect, only those Housing Societies to whom NOC or offer letter has not been issued by MHADA prior to the issuance of the Notification dated October 2013 would be entitled to the benefit of Notification dated 3rd July, 2017. This according to learned Counsel is unreasonable. According to him, just because offer letter is issued prior to October 2013, the members of petitioner society will get a smaller area, whereas, similar situate societies

to whom offer letter is issued after October 2013 will be entitled to a larger area. This is discriminatory according to him. Learned Counsel would submit that Clause (9) creates an unwarranted and unlawful divide and inequality amongst the Housing Societies, therefore, restriction imposed by Clause (9) being arbitrary and unreasonable, is liable to be struck down. Learned Counsel would submit that the intention in modifying Regulation 33 (5) was to give boost to the redevelopment of the MHADA colonies. The prime intention is providing accommodation with habitable size to members of Housing Societies who are actually belonging to economically weaker section and lower income group. In the submission of learned Counsel, restriction imposed by Clause (9) has no nexus with the intention of the modified Regulation 33(5) which is brought into force.

13. He would further submit that the classification made by Clause (9) for availing the increased carpet area and loading of FSI is on the basis of date of issuance of NOC or offer letter.

He would therefore urge that if no NOC or offer letter is issued prior to the issuance of the Notification, the benefits provided in the said Notification can be claimed, however, the benefits cannot be claimed if NOC or offer letter is issued prior to the issuance to Notification. Learned Counsel would submit that MHADA was not justified in issuing NOC dated 25/4/2017 for redevelopment of the project in issue with permissible FSI of 2.5, when in fact, by Notification dated 8th October, 2013 itself the State Government has categorically provided for FSI as 3.0. The Notification dated 6/12/2008 was not in force in 2016 when the agreement was executed and therefore the petitioner is justified in claiming the benefit of 3rd July 2017 Notification.

14. Learned Counsel would urge that depriving the petitioner the benefits of Notification dated 3rd July, 2017 runs completely counter to the intention of the State Legislature behind introducing Regulation 33(5) which is essentially to give thrust for housing the economically weaker section and lower income group housing. Learned Counsel would submit that it is

not that as if respondent No.4 is at a disadvantage, for respondent No.4 will get the benefit of increased FSI. He submits that depriving the petitioner the benefit of the Notification of 2017 would confer unwarranted windfall for the developer – respondent No.4 who will be enjoying fruits of additional FSI at the cost of members of the petitioner.

15. Learned Counsel would further submit that MHADA has failed to appreciate Clause (K) of the Deed of Assignment. The fourth respondent has specifically and categorically agreed that it will apply the policy regarding FSI to petitioner as amended from time to time. Learned Counsel would submit that whereas adjacent societies will get benefit of the Notification dated 3rd July, 2017 by getting more area, but the petitioner is being deprived the said benefit only on account of unlawful and unreasonable application of Clause (9).

16. Learned Counsel for the petitioner relied upon the decision of this Court in the case of **M/s. J.Gala Enterprises &**

another vs. The State of Maharashtra & others reported in **(2013) 4 AIR Bom CR 800** in support of his submission.

SUBMISSION OF LEARNED SENIOR COUNSEL FOR RESPONDENT NO.4.

17. Learned Senior Counsel for the respondent No.4 contends that the present petition is not maintainable as the petitioner seeks adjudication of disputes that are essentially arising out of an agreement dated 30th march, 2016 entered into between the petitioner and the respondent No.4. According to learned Senior Counsel, the reliefs sought against respondent No.4 are purely in the nature of contractual disputes between private parties. The said disputes cannot be entertained in the exercise of this Courts writ jurisdiction. Learned Senior Counsel also invited our attention to Clause 18 of the agreement which provides for adjudication of all disputes arising out of and in connection with the said agreement by reference to arbitration. Learned Senior Counsel submitted that petitioner is well aware about their rights and liabilities in respect of the redevelopment of its buildings which are governed by the terms of the said

agreement. He submits that petitioner is now seeking additional concessions and benefits beyond what was agreed to between the parties by way of the said agreement.

18. Learned Senior Counsel would further contend that under the said agreement, the petitioner is entitled to 425 sq.ft. carpet area in the redeveloped building. Even the rent has been provided to the members of petitioner in lieu of temporary alternate accommodation till 31st July, 2018. The rent has been accepted without any demur. It is pointed out that in furtherance of the said agreement, the respondent No.4 obtained NOC from the respondent No.1 on 25th April, 2017, the IOD on 8th June, 2017 and the CC on 7th July, 2017. The construction work has commenced on 12th July, 2017, as per the notice under Section 347(1)(a) of the MMC Act. Learned Senior Counsel pointed out that till 29th May 2018 the construction upto plinth level has been completed and inspection of the completed work was done by MCGM on 30th May, 2018 for issuance of further CC. In effect, it is the contention of learned

Senior Counsel that the entire attempt on the part of the petitioner is to arm-twist the respondent No.4 for getting additional concessions and benefits beyond what was agreed to between the parties in the said agreement. Learned Senior Counsel would contend that the said agreement expressly records that in accordance with 2.5 FSI which was available at the time entering into the said agreement, the members of the petitioner were entitled to units of 425 sq.ft. carpet area each. He would submit that in order to provide certainty, the entitlement was crystallized by the said agreement. The petitioner is now trying to wriggle out from its contractual obligations citing alleged change in applicable law.

19. Learned Senior Counsel pointed out that the redevelopment of the petitioner's building is undertaken by the respondent No.4 in consonance with DCR 33(5). The said DCR 33(5) as it initially stood was amended by a Notification dated 8th October, 2013. By another Notification dated 3rd July, 2017, certain clauses of the Notification dated 8th October, 2013 and

consequently DCR 33(5) was sought to be amended. Learned Senior Counsel would submit that as per DCR 33(5) as amended by Notification dated 8th October, 2013, it is expressly clear that the members of the petitioner are entitled to receive an area equal to the carpet area of their existing tenements plus 35% subject to a minimum carpet area of 300 sq.ft. As per Notification dated 8th October, 2013, the FSI was increased from 2.5 to 3.0. The members of the petitioner are being offered 425 sq.ft. which is more than what is provided in the said Notification.

20. According to the learned Senior Counsel, the Notification dated 3rd July, 2017 does not seek to amend the stipulations relating to the rehabilitation area entitlement. In his submission, the amendment sought to be effected by the Notification dated 3rd July, 2017 only relates to the sharing of the balance FSI after exhausting the rehabilitation and incentive components. Thus according to the learned Senior Counsel, in accordance with the terms of the said agreement, apart from the

425 sq.ft. carpet area and the corpus plus rent that was to be provided to each member of the petitioner, the respondent No.4 used the entire FSI available in respect of the petitioner's plot towards the respondent No.4's entitlement. He would thus submit that the reliefs sought by the petitioner are in blatant contravention to the terms and conditions of the said agreement. He would urge that in view of the terms and conditions set out in the agreement, the said agreement being valid and subsisting, the entitlement of the members of the petitioner remains unaffected by the alleged applicability of any change in law. Learned Senior Counsel would submit that in any case, the Notification dated 3rd July 2017 will be applicable prospectively and surely not in the present case when the parties are Governed by the terms and conditions set out in the agreement.

<u>SUBMISSIONS OF LEARNED A.G.P. AND LEARNED COUNSEL FOR MHADA</u> :

21. Learned AGP for the respondent No.3 submitted that vide Notification dated 6th December, 2008, the Government had modified the Regulation 33(5) of the DCR, 1991 for enhancing

the FSI along with other stipulations. The total permissible FSI then was 2.5 on gross plot area. The offer letter was issued by MHADA on 7/5/2012. Thereafter, vide Notification dated 8/1/2013, the DCR 33(5) is modified and substituted with a new DCR 33(5). Learned AGP invited our attention to Clause (9) of Notification dated 8th October, 2013 clarifying which Regulation will be applicable to the redevelopment proposal where NOC or offer letter has already been issued by MHADA. According to the learned AGP, MHADA issued an NOC dated 25th April, 2017 permitting the petitioner to proceed with its redevelopment with the stipulated FSI 2.5 that was available for the redevelopment of the petitioner society. In his submission, the offer letter/NOC is issued by MHADA for 2.5 FSI prior to coming into force of the Notification dated 3rd July, 2017. Learned AGP would submit that the Government has only added sub-paras in Clause (1) and Clause (2) and 2.1(c). Similar contentions are advanced by learned Counsel for MHADA.

<u>CONSIDERATION</u> :

22. We have heard learned Counsel for petitioner, learned Counsel for respondent Nos.1 and 2 and learned AGP for respondent No.3. We have also heard learned Senior Counsel for respondent No.4. We have gone through the Petition and relevant exhibits. The parties have made their submissions in detail.

23. The respondent No.1 – the Chief Officer, MHADA executed a Lease Deed in favour of the petitioner - Society on 16/2/2006 concerning building bearing No.156 for a period of 90 years. The entire property conveyed in favour of the petitioner consists of 32 tenements of the building No. 156. At that point of time building No. 156 was not amalgamated with building Nos.154 and 158. The building was in dilapidated condition and therefore required to be redeveloped. The redevelopment is covered by Regulation 33(5) of the DCR. As the developer with whom the petitioner Society had earlier entered into an agreement could not take the project further, on

9/9/2014, the then developer HDIL assigned the development rights of the petitioner - society in favour of M/s. Preet Gruh Nirman Pvt. Ltd.

24. MHADA had issued NOC/IOD/CC in favour of HDIL in 2011 itself. However, till July, 2017 no development work commenced. The proposal of amalgamation of building Nos.156, 154 and 158 was approved by respondent No.1 – the Chief Officer, MHADA in February 2016. By a registered Deed of Assignment-cum-Grant of Development Rights dated 30th March, 2016 an agreement of redevelopment of building Nos. 154, 156 and 158 was executed and registered. The NOC was granted as per the policy laid down by MHADA vide MHADA Resolution No. 6260 dated 4/6/2007, A.R.No. 6397 dated 5/5/2009 and A.R. No. 6422 dated 7/8/2009, circular dated 16/6/2011 and 21/12/2011 subject to conditions laid down in NOC dated 25th April, 2017. It is specifically mentioned that 2.5 FSI is granted to the developer on a notionally subdivided area, hence the proposal should be considered for 2.5 FSI and all directives

given in the G.R. of UDE dated 6/12/2008 shall be applicable to them.

25. Under un-amended Regulation 33(5) of the DCR the permissible FSI available for the developer is 2.5. As indicated earlier, by registered Deed of Assignment-cum-Grant of Development Rights dated 30th March, 2016, a consensus was arrived at between the respondent No.4 and petitioner to assign work of redevelopment to fourth respondent. MHADA issued NOC in favour of fourth respondent on 25th April, 2017. MHADA issued IOD on 8th June, 2017 in favour of fourth respondent and further issued commencement certificate dated 7th July, 2017. On 3rd July, 2017, the third respondent issued Notification sanctioning modification to Regulation 33(5) of the DCR and has made the amendment applicable to the redevelopment at Pantnagar. As per the Notification, the FSI is shown as 3.00 and further housing stock given to MHADA is exempted for plots below 4000 sq.mtrs. As per unamended Regulation 33(5) each member of the petitioner is entitled to minimum carpet area of

300 sq.ft. and fungible carpet of 405 sq.ft.

26. It is the contention of petitioner that the Notification is not only beneficial to petitioner but also to the fourth respondent as the fourth respondent will get extra FSI. It is in this backdrop that the petitioner society unanimously resolved to switch the redevelopment project from 2.5 FSI to 3.00 FSI as per the Notification dated 3rd July 2017. It is the contention of the petitioner that the fourth respondent has on misconception and misinterpretation of the Notification dated 3rd July, 2017 refused to make same applicable to the petitioner.

27. MHADA by the impugned communication dated 26/12/2017 has rejected the request made by the petitioner purportedly on two grounds namely :

a) The Deed of Assignment executed by the petitioners in favour of the fourth respondent records that the petitioners have agreed for allotment of tenements admeasuring 425 sq.ft. Carpet area to its members.

b) Clause 9 of the notification dated 8th October, 2013 which amended the D.C.R. 33(5) stipulates that the redevelopment proposals where NOC has been issued by Mumbai Board or Offer letter has already been issued prior to the date of coming into force of that modification and which is valid, shall continue to be governed by the Regulation applicable prior to the modification. Since NOC has already been issued by MHADA to the Petitioners society the notification of 2017 is not applicable to the redevelopment project of Petitioner society.

In these circumstances, the petitioner has raised the challenge to the constitutional validity of Clause (9) of the DCR 33(5) on the ground that Clause (9) of the DCR 33(5) violates the fundamental rights of the petitioners enshrined under Article 14 and Article 300A of the Constitution of India and prays that the same be struck down.

28. Clause (9) of the DCR 33(5) which is under challenge reads thus :-

"(9) The Redevelopment proposals where NOC has been issued

> by Mumbai Board or Offer Letter has already been issued prior to the date of coming into force of this modification (hereinafter referred to as the "appointed date") and which is valid as on the appointed date, shall continue to be Governed by the Regulation applicable prior to this modification."

29. It would pertinent to note that under the Deed of Assignment dated 30th March, 2016, the parties had agreed to rehabilitation tenements of 425 sq.ft. The members of petitioner - society are now seeking additional area of 508 sq. ft. on the basis of the Notification dated 3rd July, 2017. It is also pertinent to note that so far as building No. 156 is concerned, the offer letter was issued on 7/5/2012 and No Objection Certificate was issued on 3/6/2015. The No Objection Certificate was issued for FSI 2.5 as per the Notification dated 6/12/2008 under DCR 33(5). The provisions of DCR 33(5) were amended by Notification dated 8th October, 2013 increasing the FSI to 3.0 on the gross plot area and rehabilitation area entitlement to basic entitlement equivalent to the carpet area of existing tenement plus 35% thereof subject to a minimum carpet area of 300 sq.ft. Clause (9) of the said Notification provided

that the redevelopment proposals where the NOC or offer letter has already been issued prior to the date of coming into force the said Notification (8/10/2013) shall continue to be governed by the regulation applicable prior to the modification.

30. It can thus be seen that by virtue of Clause (9), the petitioner society continued to be governed by the regulation applicable prior to the modification i.e. Regulation dated 6/12/2008 as the offer letter dated 7/5/2012 was issued prior to modification dated 8th October, 2013. In April, 2017, the respondents granted composite No Objection Certificate dated 25th April, 2017 for the redevelopment of the amalgamated building Nos. 154, 156 and 158. The provisions of DCR 33(5) were further modified by Notification dated 3rd July, 2017. However, Clause (9) of DCR 33(5) was not amended and therefore, in our opinion, the respondents are justified in contending that the Notification dated 3rd July, 2017 is not applicable to the redevelopment of the petitioner - society.

31. In this view of the matter, the petitioner then raised a challenge to the constitutionality of Clause (9) of the DCR 33(5). We have already noted various submissions of learned Counsel for the petitioner as regards the challenge to Clause (9) of the DCR 33(5).

32. We also find that though the Notification dated 8th October, 2013 was in subsistence, the petitioner executed a Deed of Assignment-cum-Grant of Development Rights dated 30th March, 2016 which conforms with the Notification dated 6/12/2008. We find substance in the submissions of learned Counsel for the respondents that the rights of the parties are crystallized by the said agreement dated 30th March, 2016 and the dispute between the parties is more in the nature of a contractual dispute. The increase in FSI to 3.0 was already provided by the Notification dated 8th October, 2013 despite which the petitioner entered into an agreement dated 30th March, 2016 on the basis of the Notification 6/12/2008. We are therefore satisfied that the petitioner society is not justified in

demanding additional area on the basis of amended Notification dated 3rd July, 2017. In these circumstances, we are of the opinion that the petitioner's challenge to Clause (9) at this belated stage is hit by delay and laches. We are also satisfied that the petitioner acquiescenced to the 2.5 FSI as per 6/12/2008 Notification and they are now estopped from raising a challenge to Clause (9).

33. Nonetheless, we have examined the petitioner's challenge to Clause (9) on merits. The law as regards challenge to the subordinate legislation is by now well settled. In this context we may firstly refer to the case of **Indian Express Newspapers (Bombay) Private Ltd. & ors. vs. Union of India and ors.** reported in **1985(1) SCC 641.** The Apex Court held that Subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned or on the ground that certain matter was not taken into consideration. Their Lordships observed that a distinction must be made between delegation of

a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary power. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19 (1) (a) of the Constitution.

34. To appreciate the submissions made by the Petitioner, it will also be apposite to refer to the decision of this

Court in the case of **Ramdas s/o. Marotrao Kathle & others Vs. State of Maharashtra & others** reported in **2016 SCC OnLine Bom 8989** to which one of us (Gavai, J. was a member). This Court referring to the observations of the Hon'ble Supreme Court in the case of **State of T.N. and another vs. P. Krishnamurthy and others** reported in **(2006) 4 SCC 517**, has held thus :-

> "**53**. It will be appropriate to refer to the following observations of Their Lordships in the case of State of T.N. v. P. Krishnamurthy (cited supra). They are as under :
>
> "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 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.”

It could thus be seen that Their Lordships in **State of T.N. and another** (*supra*) have held that 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.

35. Applying the tests laid down to the present case, it cannot be held and it is not even the case of the Petitioner that

the State Government is lacking legislative competence to issue the impugned notification. It is also not the case of violation of any of the fundamental rights guaranteed under the Constitution of India. No case thus is made out of violation of any provisions of the Constitution of India but Learned Counsel tried to make out a case of manifest arbitrariness. According to the learned Counsel, the action on the part of the respondents is violative of Article 14 of the Constitution of India.

36. The petitioner is trying to make out a case of manifest arbitrariness on the ground that in respect of those societies where NOC/offer letter is issued by the Board after 8th October, 2013 will get the benefit of the Notification dated 3rd July, 2017, whereas, though the petitioner is similar situate, would be denied the benefit only on the ground that the offer letter has been issued prior to coming into force of the Notification. The decision in the case of **M/s. J.Gala Enterprises** (supra) relied upon by the petitioner is on different set of facts altogether and not at all applicable in the facts of the

present case. What was under challenge before the Division Bench was Clause 10(a) of the Appedix – B under Regulation 33(7) of the DCR for Greater Mumbai, 1991 as involved in Notification dated 21/12/2011. Clause 10(a) therein was in respect of redevelopment scheme as per Regulation 33(7). In the present case, Clause (9) of DCR 33(5) is challenged as unconstitutional. Clause 10(a) of 33(7) in its comparison to Clause (9) are not *pari materia* provisions. The object being different. Here we are considering the constitutional challenge to Clause (9) on the touchstone of the tests laid down by the Apex Court. The decision in **M/s. J. Gala Enterprises** (*supra*) has no application to the facts of the present case.

37. We find that the members of petitioner - society are entitled to 425 sq.ft. carpet area in the redevelopment building in accordance with the terms of the said agreement. The respondent No.4 has provided rent in lieu of temporary alternate accommodation to the members of petitioner - society till 31st July, 2018. The respondent No. 4 has even paid

outstanding rent due and payable by HDIL to the members of petitioner - society. The members of the petitioner Society have accepted the rent without any demur. In furtherance of the terms of the agreement, respondent No.4 obtained NOC from respondent No.1 on 25th April, 2017, the Intimation of Disapproval (IOD) on 8th June, 2017 and commencement certificate on 7th July, 2017. The respondent No.4 has commenced the construction work on 12th July, 2017 as per the notice under Section 347 (1) (a) of the Mumbai Municipal Corporation Act. Even the agreement expressly records that in accordance with 2.5 FSI (without sharing housing stock to MHADA), which was available at the time of entering into the said agreement, the members of the petitioner are entitled to units of 425 sq.ft. carpet area each.

38. DCR 33(5) is in respect of the development/ redevelopment of housing schemes of MHADA. The development/redevelopment is implemented either departmentally on vacant lands for Economically Weaker

Sections (EWS), Low Income Group (LIG) and Middle Income Group (MIG) or redevelopment of existing housing schemes of MHADA is undertaken by the housing Co-operative Societies or the occupiers of such buildings or by the lessees of MHADA in which case the area entitlement, incentive FSI and sharing of balance FSI is provided by the said DCR.

39. Thus after notification was issued on 6/12/2008, the redevelopment of existing societies commenced in accordance with the terms and conditions stipulated in the notification. By the notification dated 8th October, 2013 the FSI was increased to 3.0. The stipulation was therefore provided by way of Clause (9) that the redevelopment proposals where NOC/offer letter has been issued by Mumbai Board prior to the date of coming into force of the modification of 2013 and which is valid, shall continue to be governed by the Regulation applicable prior to the modification. The offer letter was issued by MHADA on 7/5/2012. The whole object of DCR 33(5) is to ensure that the members are entitled for a guaranteed minimum carpet area in

the redevelopment project. It may be that on the date of issuance of the modification, in respect of those societies/redevelopments where offer letter or NOC has not been issued will get the benefit of modification, but that does not mean that every time there is a modification increasing the area, those redevelopments which have commenced on the basis of the notification dated 6/12/2008 will be entitled to additional area based on amended Notification in case there exists a stipulation like Clause (9). If in such circumstances stipulation as contained in Clause (9) is provided, the same cannot be said to be arbitrary or irrational.

40. There has to be some certainty in the redevelopment that has been undertaken. Viewed from this angle, if on the basis of the provisions in the DCR as it then stood, once the offer letter or NOC has been issued and the redevelopment is to proceed accordingly, then there is nothing arbitrary or irrational in imposing a stipulation as contained in Clause (9). Those who are covered by the DCR 33(5) as it stood on the date when the

offer letter was issued form a separate and distinct class than those who are yet to receive the offer letter or NOC. We do not find anything arbitrary or unconstitutional in Clause (9). We therefore do not find any substance in this Petition.

41. Petition is dismissed.

42. Rule is discharged with no order as to costs.

(M.S. KARNIK, J.) **(B.R.GAVAI, J.)**