

Dileep Nevatia,
of Bombay, Indian Inhabitant,
residing at Shashi Deep,
5-A, Worli Sea Face, Bombay 400 025.

... Plaintiff

1. Messrs. Arkay Holdings Ltd.
a Company incorporated under
the provisions of the Companies
Act, 1956 and having its registered
office at Maker Chambers-IV,
Nariman Point, Bombay 400 021.
2. Municipal Corporation of Greater
Bombay, a statutory corporation
incorporated under the provisions
of the Companies Act, 1956 and
having its office at Mahanagar
Palika Marg, Bombay 400 001.
3. The Dy. Chief Controller of
Explosives, Explosives Department
of Ministry of Industry, Industrial
Insurance Building, Opp.
Churchgate Station, Bombay 400 020.
4. The Senior Inspector,
Worli Police Station,
BDD Chawls, Bombay 400 018.
5. The Commissioner of Police,
Office of the Commissioner of Police,
D.N. Road, Bombay 400 001.

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Mr. Dileep Balkrishna Nevatia, in person present.

Mr. Dinesh Purandare a/w Mr. Jaydeep Raut a/w Ms. Henna D. i/b Crawford Bayley & Co. for Defendant No.1.

Mr. D.S. Shingade for Defendant No.2 – MCGM.

Mr. Hemant Haryan, Assistant Government Pleader, for Defendant Nos.4 and 5.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 26th SEPTEMBER, 2019.

PRONOUNCED ON : 5th DECEMBER, 2019.

ORAL JUDGMENT :

1 This Suit has been filed by the Plaintiff who is the owner and occupant of a bungalow constructed on Plot No.5 A situated at Worli Sea Face, Mumbai 400 025, against his adjoining neighbour, the Defendant No.1 who is claimed to have illegally constructed its building on the adjoining plot No.5 thereby violating the various regulations of the Development Control Regulations for Greater Bombay 1991 (DCR 1991) as well as the Environment (Protection) Act 1986 and the Rules thereunder and the exclusive licence/permission issued to Defendant No.1. The Plaintiff has sought decree against Defendant No.1 for the sum of Rs.10 crores as and by way of damages, with interest @ 24% p.a. from the date of filing of the Suit till the date of decree and/or payment or realization thereof as set out in the particulars of claim, which are annexed at Exhibit-

K to the plaint. The Plaintiff has also sought for setting aside the permission granted by Defendant Nos.2 to 5 to Defendant No.1 allowing Defendant No. 1 to construct a multi storeyed building with two storeyed basements on the said plot No.5 of Worli Sea Face and/or the permission to use dynamite for blasting the rocks. The other prayers sought for are consequential prayers.

FACTS :

2 It will be necessary to give a background of the facts.

The Defendant No.1 had purchased the suit plot in the year 1993. The suit plot viz. Plot No.5 is the adjoining plot to the plot owned by the Plaintiff viz. Plot No.5A situated at Worli Sea Face. Defendant No.1 upon purchasing the suit plot demolished the old structure thereof and shifted heavy construction machinery on the site to construct a multi storeyed apartment building along with two floors of basements, by removing the rock surface of around 25 feet. It is the Plaintiff's case that Defendant No.1 started blasting dynamite at site on permission granted to him by Defendant Nos.3 and 5. The Plaintiff claims that Defendant No.1 had in 1994, given several assurances to the Plaintiff, on the carrying out of excavation during construction but had reneged on these assurances.

3 The Plaintiff had addressed communications to Defendant No.4 on 21.10.1994 and 24.10.1994 complaining about the alleged activities carried on by Defendant No.1 and requesting for appropriate steps to maintain peace and safety in the area for the well being of the Plaintiff and his family members. The Plaintiff had also addressed communication to Defendant No.1 on 29.10.1994 to permit work to progress further only after getting it confirmed from the appropriate authority that this excavation and basic activity had not endangered the Plaintiff's building. The Plaintiff had addressed further letters to Defendant Nos.4 and 5 in 1994 which also pertained to the uncontrolled and unsupervised blasting undertaken by Defendant No.1 and to take action against the offenders. However, no action was taken by these Defendants. These communications are exhibited in the plaint filed by the Plaintiff. The Suit was filed in the year 1994.

4 It appears that a substantial amendment to the plaint was carried out on 08.03.1997 pursuant to the order of this Court dated 19.04.1997. This was pursuant to a communication addressed by the Plaintiff to Defendant No.2 claiming that Defendant No.1 had carried out illegal construction in violation of the DCR 1991. It is Plaintiff's case that the Plaintiff had repeatedly made representation to Defendant No.2 to stop

the work of Defendant No.1 which was being done in a manner so as to adversely damage the property of the Plaintiff.

5 Soon after filing of the Suit in 1994, a Notice of Motion No.87 of 1995 had been taken out by the Plaintiff. This Court initially by an order dated 23.12.1994 granted ad-interim injunction in terms of prayer clause (d) thereby restraining the Defendant No.1 from carrying out blasting work. By a subsequent order dated 18.01.1995, this Court had recorded the statement of the learned Counsel for the Defendant No.1 that blasting work was complete and no further blasting had been carried out since 21.12.1994. This Court restrained the Defendant from carrying out any further blasting work at site and ordered that construction work may continue at the Defendant's own risk and subject to orders passed by this Court. It appears that thereafter the Notice of Motion was disposed of as it had become infructuous. With regard to prayer clause (d) therein an Architect had been appointed and who submitted a report. A further Notice of Motion No.1642 of 1997 was taken out in the above Suit in accordance with leave granted by this Court. An order came to be passed on 16.06.1997 in the said Notice of Motion declining to grant relief sought for by the Plaintiff with regard to the construction on the neighbouring plot taking into account that the FSI has been wrongly calculated. The

calculations had not taken into account the basement area. There were photographs submitted by the Plaintiff which indicated that a 7 storeyed building had come into existence. By further order dated 17.12.1988 passed by this Court, it was observed by the learned Single Judge of this Court (Coram : D.K. Deshmukh, J.) that the construction of the building on the adjoining plot is being constructed according to a sanctioned building plan. The sanction had been granted to the building plan by the Planning Authority. Accordingly, the Notice of Motion had been disposed of.

6 It is the case of the Plaintiff in the Plaint that the building is being built on the suit plot by dressing the hill upto a level slightly above the approach road viz. Khan Abdul Gaffar Khan Road. In the plaint which was thereafter amended, it is stated that on the suit plot, a structure consisting of the ground floor and additional 7 floors has been constructed. The ground floor is the closest floor to the street and has a direct access to the street and hence, as per the DC Regulations, it cannot be termed as a basement or a cellar. It is further claimed in the amended plaint that Defendant No.1 has wrongly treated the ground floor to be a basement in order to circumvent the height regulations as specified for category 1 of coastal area for Greater Bombay as given in the DCR Rule 59. It is

contended that the height of the building is as high as 24.6 mtrs. and hence it is a multi-storied building. The minimum open space from all sides, except the front side, shall be 7.0 mtrs. which had been grossly violated by Defendant No.1 on two sides of the building. Further, it is contended that the open space on the ground floor is fully covered by the ramps and extra construction made below the ramps. Thus, this makes it impossible for fire engines to enter around the ground floor for emergency. It is further contended in the amended plaint that Defendant No.1 has constructed FSI @192% against a maximum permissible FSI of 133%. The Defendant No.1 had also added one more floor i.e. floor 8th and is making preparation to add yet another floor 9th. The Plaintiff has in the amended plaint thus contended that Defendant No.1 had indulged in gross violation of DCR 1991 with the full blessing of Defendant No.2 and inspite of various complaints written by the Plaintiff to Defendant No.2. Apart from the violations of DCR 1991 which was claimed by the Plaintiff in the amended plaint, the Plaintiff has referred to report of the Central Mine Planning & Design Institute Limited (CMPD Institute) which has reported violations of explosive licence issued to Defendant No.1 by the Defendant No.5. However, it is to be noted that despite the substantial amendment carried out to the plaint in 1997, the prayers in the plaint remain the initial prayers sought for when the Suit was filed in 1994.

7 The Defendant No.1 had sought leave of this Court to file its written statement several years after the Suit was filed. Leave was granted by this Court to file written statement on 26.02.2014. It is stated in the written statement that the building of Defendant No.1 on the suit plot was complete as far back as in August 1997. The various contentions in the plaint have been denied by Defendant No.1 through one Mr. R. Rengarajan, who has verified the written statement by stating that other than paragraph 55 of the written statement which states that Mr. R. Rengarajan, is the Authorised Signatory of the Defendant, he has based his averments on information which is derived from the records maintained by Defendant No.1 which he believes to be true. The Deponent in the written statement has stated that the ground floor as claimed by the Plaintiff, has no direct access to the street or open space and thus cannot be termed as the ground floor. It is further stated in the written statement that the calculation of the height of the building by the Plaintiff as 24.6 mtrs. is based on the false notion that the basement is the ground floor of the building. It is further stated in the written statement that adequate open space as required under law has been left by Defendant No.1 on all sides as well as on the front side of the building. It has been stated that the building under reference does not come under the fire regulations as the building abuts two roads with easy access in case of an emergency. It is further stated that two ramps

have been provided at the side of the building for ingress and egress of cars and the same are not located/situated within the limits of compulsory open space. It has accordingly been stated in the written statement that the Defendant No.1 has carried out construction of the building in accordance with the sanctioned plan and as per the provisions of the DCR, 1991, provisions of the CRZ Notification dated 19.02.1991 issued under the Environment Protection Act, 1986.

8 After the pleadings were completed, this Court on 03.03.2014 framed the issues arising out of the Suit. The issues as well as the findings thereon are as under :-

: ISSUES :

SR. NO.	ISSUES	FINDINGS
1.	Whether defendant no. 1 proves that the suit is barred by law of limitation?	Not required to be answered in view of answer to Issue Nos. 5 to 8
2.	Whether the suit is liable to be dismissed on account of non-joinder of necessary parties?	Not required to be answered in view of answer to Issue Nos. 5 to 8
3.	Whether the plaintiff proves that the suit is	Not required to be

	maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure?	answered in view of answer to Issue Nos. 5 to 8
4.	Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 527 of the Bombay Municipal Corporation Act?	Not required to be answered in view of answer to Issue Nos. 5 to 8
5.	Whether the plaintiff proves that defendant no. 1 has committed any illegal construction activity as alleged in the plaint or at all?	In the negative.
6.	If the answer to issue no. 5 is in the affirmative, then whether the plaintiff proves that the plaintiff is entitled to make a claim for damages against defendant no. 1 to the tune of Rs.10 Crore or at all?	Since issue No. 5 is answered in the negative, this issue is answered against the Plaintiff.
7.	Whether the plaintiff proves that he is entitled to claim any amount from defendant no. 1 on account of interest at the rate of 24% per annum from the date of filing of the above suit as alleged or at all?	Against the Plaintiff.
8.	Whether the plaintiff proves that he is entitled to claim exclusively the entire amount of damages (including the amount claimed by the original plaintiff no. 1, viz. Late Mrs. Snehalata Nevatia) prayed in prayer clause (a) of the plaint, in view of the	Against the Plaintiff.

	suit no. 3598 of 1996 pending before this Hon'ble Court?	
9.	What order?	As per final order.

Evidence and Submissions :

9 After framing of the issues, the Plaintiff led his evidence through himself and 10 other witnesses, which witnesses included the Architect responsible for construction of the building as well as concerned officers of Defendant No.2 who have sanctioned the plans for the said construction. In the affidavit in lieu of examination-in-chief, the Plaintiff has referred to the Deed of Assignment dated 10.07.1992 under which the erstwhile lessee assigned the suit plot to Defendant No.1 for a sum of Rs.4 crores and another Rs.40 lakhs was paid towards stamp duty, making a total of Rs.4.40 crores as cost of consideration by Defendant No.1. It is stated that in order to suppress the actual cost of the project and thereby avoid the Environmental Clearance process, the Defendant No.1 deliberately gave a false cost of acquisition of the land/plot of only Rs.5,20,831/- which was the purported annual "lease" rent of the plot. It is stated that Defendant No.1 submitted to Defendant No.2 a highly understated investment of Rs.2,13,13,181/-. The Plaintiff in the affidavit in lieu of examination-in-chief has deposed that violations of the DCR 1991

have been committed by Defendant No.1 in the construction of the building on the suit plot. The Plaintiff has stated that the basement as referred to by Defendant No.1 is nothing but the ground floor at ground level obtained after the razing of the hill and continues to be a little above the Khan Abdul Gaffar Khan Road, the only road which is accessible to the suit plot. He has relied upon the photograph (marked as "Exhibit P-38") which according to him, shows the lowermost floor at the ground level, having direct access to Khan Abdul Gaffar Khan Road. He has stated that the two ramps were provided by completely enclosing the side open spaces go upto the first floor level, which has been falsely described as the "Stilt Floor", with podium constructed on three sides of the building, leaving no open space at the ground level on the north and south sides of the building. This is claimed to have blocked the flow of air and light to the Plaintiff's property and also blocked the movement of fire-fighting vehicles. He has relied upon the photograph (marked as "Exhibit P-39") to show that the entry to the alleged basement is directly from the front Khan Abdul Gaffar Khan Road, as it is floor at the ground level with direct access to the said road and front side open spaces and as such the alleged "Basement" is in fact the "Ground Floor". It is stated that Defendant No.2 who had informed the Plaintiff that the construction work on the suit plot is being carried out as per approved plans, had maintained complete silence on the

Plaintiff's request for inspection of the approved plans and other permissions granted to Defendant No.1 including the purported CRZ clearance granted by the competent authority. The approval granted by the Defendant No.2 on or around 11.08.1997 to the revised building plans submitted by Defendant No.1, has been referred to in the affidavit in lieu of examination-in-chief of the Plaintiff. It is stated that the plan shows the building comprising of floors/areas as set out. It is stated that the plan shows the purported basement for car parking has direct access from Khan Abdul Gaffar Khan Road. The driveway is shown on the other three sides of the building at first floor level is in fact a Podium above the ground floor which has been incorrectly referred as the alleged basement. The stilt floor above the basement for "car parking" on the front (west) side and "Electrical Utilities" on the rear side. Six floors of living area above the stilt floor is shown. The terrace is enclosed with an all around high wall of 5.57 mtrs. or around 19 ft. The minimum side open space of only 2.20/2.80 mtrs. on the south side at the ground floor (basement) level and 4.80 mtrs. at the first floor (stilt) level against the minimum requirement of 10.32 mtrs. The level of the road at the rear of the building i.e. Pochkhanawala Road, has been changed and shown to be above the first floor ceiling level and no access is shown to the plot from this road. The FSI as stated in the said plans, being FSI of all areas of 2.197 times and height of 30.98 mtrs.

It is stated by the Plaintiff that Defendant No.2 had given permission to construct the alleged terrace, which is fully enclosed upto a height of 5.07 mtrs. and further height of 0.5 mtrs. i.e. a total of 5.57 mtrs. and still continue to exempt it from both FSI and height calculations of the building. The Plaintiff has, in the said affidavit, further stated that the Defendant Nos.1 and 2 have deliberately suppressed the double storey height of 5.57 mtrs. from calculating the total height of the building and at the same time give benefit of extra FSI of an entire floor and maybe even two floors to the Defendant No.1 on the alleged terrace, which is fully enclosed and a roof/slab put thereon. It is further stated that the Defendant Nos.1 and 2 have deliberately suppressed the total height of the building in order to evade the prohibition of height beyond 22 mtrs. as applicable to CRZ-II Zone under the CRZ Notification, 1991 and also the requirement of fire protection and additional open space requirements under the D.C. Regulations, 1991. If the additional height of 5.57 mtrs. together with the height of alleged basement is taken, the total height increases to 30.98 mtrs.

10 The deponent has further stated that there is violation of the Coastal Regulation Zone Notification, 1991 of the Environment Protection Act, 1986, as no mandatory environmental clearance has been taken from

the Ministry of Environment and Forests, Government of India, despite the investment far exceeding Rs.5 crores, which is in violation of Rule (3)(2) (iv) of the CRZ Notification, 1991. The entire portion of the hill on the suit plot is blasted and permanently flattened, which is in complete violation of sub-rule (xiii) of Rule (2) of the CRZ Notification, 1991. The height of the building is far in excess of 22 mtrs., which is in violation of DC Regulation (59). There is violation of fire safety requirements by suppressing the actual height of the structure to be below 24 mtrs. It is stated in the said affidavit that the Plaintiff and his family members have suffered tremendous mental agony and breach of peace because of unauthorized activities on the part of the Defendant No.1 with the blessings of Defendant Nos.2 to 5. For almost two decades, the Plaintiff and his family members have been deprived of proper light and ventilation on account of illegal construction by the Defendant No.1. The particulars of claim given in the said affidavit is by way of damages of Rs.10 crores for the tremendous mental agony and breach of peace already suffered by the Plaintiff and his family members upto the date of the filing of the suit. Further damages for the tremendous mental agony, breach of peace, deprivation of ingress and egress of air and light claimed to be suffered by the Plaintiff and his family members from the date of filing of the Suit to the date of demolition of the alleged illegal suit building of Defendant No.1, which is required to be

quantified. Further interest is claimed @ 24% p.a. from the date of filing of the Suit till the date of the decree and/or payment or realisation.

11 The Plaintiff has led evidence through other witnesses viz. PW2 to PW11 in order to prove some of the documents filed by the Plaintiff through the makers of these documents. The Plaintiff has relied upon the evidence of the witness PW2, Shri J.S. Arjani from CMPD Institute. The documents produced by him were marked as Exhibit P-56 to Exhibit P-59, for proving that approximately 1700 mtrs. volume of rock had been removed from the Suit plot by using around 1200-1400 kg. of explosives. The evidence of Plaintiff's witness PW5, Mr. Bohman Irani, who was the Architect who prepared the building plans in 1997 and got them finally approved in the year 2001 on behalf of Defendant No.1 and also obtained completion certificate for the suit building has been referred to by the Plaintiff. This in order to contend that this witness could not give answers to certain questions put to him such as the checking of the basement floor level as well as the work done before or after the witness came into picture and whether either the witness or the Defendant No.1 had applied for CRZ clearance. The witness to a question put to him i.e. Question No.54 viz. "After completing the building, did you personally check whether all the requirements as per the approved plans have been complied with?", has

answered that, "Approval is only given on plans which are already approved". The Plaintiff has relied upon the evidence of the Plaintiff's witness PW5. He has submitted that from this evidence, it is evidently clear that there is only one entry to the suit plot/building i.e. from Khan Abdul Gaffar Khan Road. There was no further work carried out to make an alleged basement of alleged depth of 0.99 mtrs. From the 0.00 level, the height of the building is 2.40 plus 21.76 plus 3.57 plus 0.50 mtrs. i.e. total of 28.23 mtrs. and thus, a multi-storied building. There was no application made for CRZ clearance and an unauthorized floor 8 and even 9 has been made on the alleged terrace, which is covered with a huge wall and glass facade.

12 The Plaintiff has led the evidence of PW10 Mr. Vilas Ganpati Khilare, who at the relevant time in 2001 was the MCGM Sub-Engineer who had visited the suit site and given approval to the final building plans. The Plaintiff has referred to certain questions put to this witness, including Question No.12 viz. "When you went for inspection, did you take measurements to see whether they had tallied with the plans?", to which his answer is "No". To a Question i.e. Question No.26 viz. "Whether these plans tally with the last approved plans (Exhibit P-73 to Exhibit P-75)?", the witness has answered in the affirmative. A Question was put to the witness

i.e. Question No.38 viz. “Which area is closer to the road - the stilt area or the area below that?” The Answer given is that “The area below the stilt area. This area is shown as basement.” To a further question viz. Question No.41 viz. “Are you aware whether this building has got a CRZ clearance?” The answer is “I cannot remember”. The Plaintiff has submitted that through this witness it is clear that the plans approved in the year 1997 tally with the plans finally approved in the year 2001 and that the area shown as alleged basement is closest to the road and that there is no CRZ approval granted to the project.

13 The Plaintiff has submitted that upon closing of his evidence on 18.01.2018, the Defendant No.1 informed this Court on 31.01.2018 that it will lead evidence. However, on the next date i.e. on 12.03.2018 the Defendant No.1 informed the Court that it does not wish to lead evidence and accordingly the Suit was kept for final hearing.

14 The Plaintiff has relied upon various decisions of the Supreme Court as well as the other High Courts in support of his contentions. He has relied upon the judgment of the Supreme Court in *Iswar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and another*¹ to contend that the Defendant No.1 having abstained from the witness box and not making

¹ AIR 1999 SC 1341

statement on oath in support of its pleadings set out in the written statement, an inference is required to be drawn against Defendant No.1 that what is stated in the written statement is not correct and that the Court is fully justified in passing the decree in favour of the Plaintiff and against the Defendant No. 1. Insofar as the locus of the Plaintiff is concerned for filing the Suit, he has relied upon the decision of this Court in *Fatima Joao v. Village Panchayat of Mercas and another*² which has held that the Suit at the instance of a neighbour for violation of plans or rules and bye-laws resulting in an invasion of their right to light, air, privacy or causing material injury, would furnish the Plaintiff a cause of action and it would be open to the Plaintiff to file a Suit to challenge the invasion of his rights causing material injury. He has relied upon the decision of the Supreme Court in *Badat and Co., Bombay v. East India Trading Co.*³ in support of his contention that under Order viii Rules 3, 4 and 5 of Code of Civil Procedure, the written statement must deal specifically with each allegation of fact in the plaint and in this case the Defendant has not specifically denied facts and his denial of facts is evasive, then the said facts shall be taken to be admitted. In such event, the admission itself being proof, no other proof is necessary.

15 He has relied upon the decision of the Supreme Court in

² Reported in AIR 2000 Bombay 444

³ AIR 1964 SC 538

*Vellore Citizens Welfare Forum v. Union Of India and Ors.*⁴ in support of his contention that the onus of proof is on Defendant No.1 to show that its action is environmentally benign on the polluter pay principle and once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. He has relied upon the judgment of this Court in *Felix Menino Jusus Serrao v. State of Goa and others*⁵ in support of his contention that no construction in such area can be carried out without prior approval of MoEF and that construction carried out without such permission are illegal and as such, liable to be demolished. He has further relied upon decision of the Supreme Court in *Piedade Filomena Gonsalves v. State of Goa and others*⁶ which holds that construction raised in violation of CRZ Notification cannot be lightly condoned. This decision has been referred to by the Supreme Court in a recent decision which was passed on 08.05.2019 and by which the Supreme Court has ordered that no development activity could have taken place in prohibited CR Zone and the permission granted by the Panchayat was illegal and void. This is the decision of the Supreme Court in *Kerala State Coastal Zone Management*

4 AIR 1996 SCC 2715

5 AIR 2001 Bombay 294

6 AIR 2004 SC 3112

*Authority v. State of Karala Maradu Municipality and others*⁷, by which the Supreme Court ordered demolition of number of apartment blocks in Kochi which were purchased by a few hundred home buyers on the ground that the development was in a prohibited CRZ.

16 He has further relied upon a decision of the Supreme Court in *Commissioner of Income Tax v. Panbari Tea Co. Ltd.*⁸ in support of his contention that the cost of acquisition of the suit plot should be taken into account as it is by way of deed of assignment by which the erstwhile lessee had assigned the perpetual lease of 999 of suit plot to Defendant No.1 for a premium of Rs.4 crores. The Supreme Court has held that when the interest of the lessor has been parted with for a price, the price paid is premium or salami but the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. He has also relied upon the decision of the Kerala High Court in *Manakunnam Village v. State of Kerala and others*⁹ and which holds that the valuation of land purchased which itself more is than Rs.5 crores, the Respondent Companies can be permitted to proceed with the project only subject to clearance by the Minister of Environment, Government of India, New Delhi.

17 He has further relied upon the decision of the Supreme Court

⁷ Civil Appeal Nos.4748-4785 of 2019

⁸ AIR 1965 SC 1871

⁹ Writ Petition No.18742 of 2007 judgment dated 16.12.2015

in *Municipal corporation of Greater Mumbai and others v. Kohinoor CTNL Infrastructure Company Pvt. Ltd. and another*¹⁰ which has held that leaving no space on ground floor will have a serious impact on the life not only of the residents but also of people in the adjoining areas. Further, the issue of safety of occupants of high - rise buildings, that of the residents in the neighbourhood and the firemen requires urgent consideration. He has submitted that in view of the various violations of the DCR's committed by Defendant No.1 in the construction carried out in the suit plot which has a serious impact on the right to life of the Plaintiff and his family members occupying the adjoining plot, the Suit filed by the Plaintiff be decreed with compensatory cost.

18 The learned Counsel appearing for Defendant No.1 has submitted that both the Plaintiff and Defendant No.1 are lessees of the respective plots which they have acquired on a 999 years lease from Defendant No.2. He has submitted that there is no relief claimed against or relatable to Defendant Nos.3, 4 and 5. He has submitted that the Suit was originally filed by the Plaintiff along with his mother Mrs. Snehlata Nevatia who died somewhere prior to the year 2014. Thereafter, the plaint was amended by only deleting the name of Mrs. Snehlata Nevatia, who was the original Plaintiff No.1. The legal heirs of original Plaintiff No.1 though

¹⁰ AIR 2014 SC (Supp) 1048

alive, were not brought on record by the Plaintiff. He has submitted that the plaint as originally filed i.e. prior to its substantial amendment on 09.05.1997, had sought for reliefs as prayed on the ground that Defendant No.1 was proceeding to construct a building with two floors of basement and for the same had started blasting operations by using explosives on its plot of land. It was submitted in the plaint as originally filed that the Worli Sea Face is a continuous rock structure and any disturbance on account of construction activities in one of the plots would be dangerous to the foundation of the surrounding buildings. The Plaintiff had challenged the legality, validity and propriety of the permissions granted by Defendant Nos.2 to 5 to construct multi-storied building with two storied basement on the suit plot and also the legality, validity and propriety of allowing Defendant No.1 to use dynamite for blasting rocks on the plot. The Plaintiff had claimed damages to the extent of Rs.10 crores by making averment in paragraph 19 of the Plaint that the construction activities of Defendant No.1, which included carrying on work after sunset, using loud machines, heavy compressors and rock drills have caused extreme distress to the family members of the Plaintiff. It is further alleged that Plaintiff No.1 was a patient of high blood pressure who has seriously affected by these activities. It is further alleged that the uncontrolled blasting activities carried out by Defendant No.1 was likely to affect the building foundation

of the Plaintiff very badly.

19 He has submitted that the Defendant No.1 changed the entire plan for the building and decided to construct one basement, one floor of stilt parking and 6 floors for residential accommodation for its executives, which plan was duly sanctioned by Defendant No.2. The plaint was accordingly amended to challenge the construction carried out as per the amended plans. However, in the amended Plaint, the original prayers were not amended and which had sought for cancellation of the original plan of multi – storied building with two storeyed basement. He has submitted that from the prayers it is apparent that there is no prayer for setting aside the sanctioned plans.

20 He has submitted that the construction of the building is as per the sanctioned plan. This is apparent from the evidence of the Plaintiff's witness No.10 Mr. Khillari, who was Assistant Engineer of Defendant No.2 at the relevant time of the construction carried out and who in answer to Question Nos.26 and 27 put to him by the Plaintiff, stated that the actual construction of the building was in accordance with the sanctioned plans. He has submitted that it is an admitted position that in order to obtain the building completion certificate, Defendant No.1 submitted to Defendant No.2 the "as built" drawings on the basis of which the construction was

checked and the building completion certificate was issued. He has submitted that the Plaintiff has merely relied upon the Report obtained by him from M/s. B.D. Sahasrabhojane & Associates, an Architects firm. He has submitted that the Architect neither visited the construction site nor examined the sanctioned plans issued by Defendant No.2. The said Architects' firm has made its Report only on the basis of observing the construction from the Plaintiff's plot and on the basis of some drawings which was supplied by the Plaintiff to the said firm. The drawings provided by the Plaintiff to the Architect, on the basis of which the Report was prepared have not been produced in the present trial and did not form a part of the records and proceedings of the Suit. The said Architect who prepared the Report or anyone else from the firm has not been examined in order to prove the Report. He has, thus, submitted that the Architect's Report which forms the foundation of all the allegations contained in the amended plaint is not brought before this Court. The Plaintiff has also not produced any expert evidence to prove that the building is in any manner illegal or constructed in violation of the provisions of law. He has submitted that although the Plaintiff chose to examine the Architect who completed the building project on behalf of Defendant No.1, he has not put his case to the Architect or to any of the Municipal Officers who have produced and proved the building plans that there existed any violation of

DCR 1991 or any other law. The Plaintiff also does not claim to have any expertise or substantial knowledge about the requirements of building regulations. This is apparent from his answer to Questions (3) to (6) during the course of cross - examination of PW1. His oral testimony is nullified by the expert evidence of the Architect which has been produced by the Plaintiff himself. The plaint which was amended had been re-verified by the Plaintiff who had solemnly declared that the averments made therein is by way of information and believe. Thus, the Plaintiff has neither knowledge nor expertise on these issues.

He has submitted that the two issues which would first arise for determination are issue Nos. 5 and 6 which are as under :

5. Whether the plaintiff proves that defendant no. 1 has committed any illegal construction activity as alleged in the plaint or at all?
6. If the answer to issue no. 5 is in the affirmative, then whether the plaintiff proves that the plaintiff is entitled to make a claim for damages against defendant no. 1 to the tune of Rs.10 Crore or at all?

He has submitted that this Court would have to decide as to whether the Plaintiff has proved that Defendant No.1 had committed any illegal construction. The issue of illegal use of explosives is not an issue which has been framed. He has, however, submitted that the Plaintiff has been unable

to prove that he is entitled to any relief on this ground. He has submitted that the blasting operation by use of dynamite for excavation are of no consequence anymore. The admitted position being that the excavation and use of dynamite was completed in the year 1994 itself. The Plaintiff's structure has not suffered any damage for the past 25 years and that this Court does not need to examine this issue with regard to the correctness of the blasting operations or likelihood of damage to the Plaintiff's property. He has further submitted that the Plaintiff had led no evidence whatsoever to prove that the blasting operations have caused any damage to the Plaintiff's property. He has submitted that the examination and cross-examination of PW2 who is an officer of the CMPD Institute with reference to the Report of the CMPD institute dated 20.02.1990, proves that the Report was merely a Preliminary Study Report and that the observations of the said Institute are not at all of a conclusive nature. This Report which has been relied upon by the Plaintiff is only a preliminary study based on the plans submitted by the Plaintiff. A letter was issued by the CPMD Institute dated 20th February, 1990 (Exhibit P58) with reference to the said Report and which states that about 1200 to 1,400 kg of explosives were used for blasting. However, the Plaintiff had failed to produce in evidence the said plan (s) which had been submitted to the said Institute. He has submitted that it is the case of the Plaintiff himself that apart from blasting,

there was continuous use of rock drills for the purpose of excavation. The Plaintiff has claimed Rs.10 crores towards damages based on violations created by these drilling machines and accompanying compressors. He has submitted that without prejudice to the above submission if there was any violation of the licence, then at best this could be an offence under the provisions of the Explosives Act which is a complete code in itself for the purpose of determining the nature and quantum of punishment for violation or breach of the license conditions. This Court therefore, does not have the jurisdiction to try or entertain any action for the breach of the licence conditions or for the violation of the provisions of the Explosives Act.

21 He has submitted that the issue of the structure having a basement or not is required to be first decided before considering whether there is any violation of the DCR 1991 as claimed by the Plaintiff. He has submitted that the term “basement” has been defined in the DCR at Regulation 10 to mean the lower storey of a building below or partly below the ground level. Hence, any structure that is even partly below the ground level is also a basement. He has submitted that the ‘ground level’ is a term which is understood in the DCR 1991 at almost all relevant places, to mean and refer to the average surrounding ground level or the average

ground level contiguous to the structure. This is borne out by Regulation 2(3)(11)(i) which defines a multi-storeyed building, and Regulation 2(3)(51) which defines the height of a building wherein the height is calculated taking into account 'the average surrounding ground level' and 'average level of the ground around and contiguous to the building', respectively. He has submitted that the term 'ground level' obviously refers to the topography of the land including the slope of the plot. He has submitted that for the purpose of measurement, the line of the ground level is to be considered as the average ground level. The average ground level in case where the ground is sloping, is computed by adding the highest point on the slope in the plot to the lowest point on the slope and then divide by two. This will give the average level of the ground around and contiguous to the building. He has submitted that Regulation 38(9)(i) of DCR 1991 clearly explains that the total area of any basement shall not exceed the area of the plot or twice the plinth area of the building whichever is less. It further allows a basement to be in one or two levels. Regulation 38(9)(ii) prescribes the minimum height to be 2.4 mtrs. Further, Regulation 38(9)(v) prescribes that the upper basement shall be atleast 0.9 mtrs. and not more than 1.2 mtrs. above the average surrounding ground level. He has submitted that Regulation 38(9)(v)(e) provides that vehicular ramps going to the basement shall meet the requirements of Regulation 38(18)(ii). This

Regulation clarifies that atleast two ramps of adequate width and slope shall be provided at opposite ends which means the two ends of the face of the building on the front side. This regulation contains an enabling clause where such vehicular ramps, may be permitted in the side and rear marginal open spaces if sufficient space is left for movement of fire fighting vehicles.

22 He has placed reliance upon the photographs of the Defendant's plot when the construction of the building was in progress. He submits that the photograph at page 508 of the compilation of documents, clearly shows that the Defendant's plot is a slopping plot and the excavation was being carried out in the middle of the plot leaving the earth at the edge of the plot intact. This is further borne out from the photograph at page 509 of the compilation of documents which shows the excavation and existence of the slope towards the compound wall and that the entire periphery of the plot was left intact. He has further relied upon the photograph at page 510 of the compilation of documents in support of his contention that the central portion of the plot except for the margins on the side was excavated from a point towards the rear end of the plot upto the Worli Sea Face Road on the plot. This is further borne out from the photograph at Exhibit-P38 which also reveals that the slopping earth going

up towards the rear of the plot while pillars forming the basement are clearly visible. The photographs at Exhibits P29 – 40 show that the excavation was carried out for the purpose of constructing the basement. The building was constructed with the ramp going down to the basement is clear from these photograph at Exhibit P39. He has submitted that for the purpose of constructing a basement, the slopping portion of the plot has to be excavated and the excavation will be substantially more where the height of the slope is maximum which in the present case is at the rear of the plot and will be lesser at the end where the slope is at its least which will be the Worli Sea Face side of the plot in the present case. He has submitted that the excavation was done for the purpose of leveling the earth and constructing the foundation and floor of the basement. He has submitted that the plinth area of the building is what is visible and accessible from the area above the ground. The two sides and the rear of the basement upto the plinth boundary of the stilt floor is covered under the earth.

23 He has submitted that the Plaintiff in his evidence i.e. answers to Question Nos.18 and 63 of his cross-examination has confirmed that the building has been constructed accordingly to the sanctioned building plans. The relevant building plans are at Exhibit-P48 (colly) which are the same

as Exhibits P70 and P71 and thus Exhibit-P48 (colly) are the same as the as-built plans which are Exhibit-D1 and Exhibit-D3. Upon a reading of the plans, it becomes obvious that the height of the basement is not less than 2.4 mtrs., the area of the basement is not more than twice the plinth area of the building and that two vehicular ramps are provided in front of the building. The plans also show that in order to enter the basement, the ramp is used and that the ramp climbs down the height of 0.9 mtrs. from the beginning of the ramp. Once the floor of the basement is admittedly below, it answers the description of basement as defined in Regulation 2(3)(10), which mandates that any storey of a building even partly below the ground level is the basement. He has submitted that the floor of the basement is 3 ft. below the ground level. The plans show that there is a staircase from the stilt level to the floor of the basement and that the entire portion is below the earth at the rear end. He has submitted that it is obvious that one has to climb a ramp of 3 ft. to reach the ground level of the plot and then climb down from within the plot to reach the gate which is at the street level. He has submitted that it is accordingly exclusively proved and beyond doubt that the bottom floor in the building is the basement as it meets all criteria contained in Regulations 2(3)(10), 2(3)(41), 38(9) and 38(18) of the DC Regulations.

24 He has submitted that once it has been established that the bottom floor is the basement, the total height of the building from the average ground level to the ceiling of the top floor i.e. the floor of the terrace is 21.76 mtrs. i.e. less than 22 mtrs. This is as per the sanctioned plan and correctness of the measurements has been admitted by the Plaintiff. Regulation 2(3)(11) defines a multi-storeyed building as a building of a height of 24 mtrs. from the average surrounding ground level. Further, Regulation 2(3)(51) determines that a height of a building shall be vertical distance measured from the average level of the ground around and contiguous to the building to the highest point of the building. Further, Regulation 31 mentions that appurtenant structure like roof tanks and their supports ventilation or air-conditioning shafts, lift rooms etc. shall not be included in reckoning the height of the building. Hence, the height of the building according to the sanction plan is less than 22 mtrs. He has accordingly submitted that it is conclusively proved that the structure in question is not a multi-storeyed building.

25 He has submitted that there is enough open space available for the fire engine to move around and the ramps which have been provided are in conformity with Regulation 38(18)(ii). He has submitted that since the building is not a multi-storeyed building, then the entire case

of the Plaintiff with regard to the inadequacy of open space fails. He has submitted that it is clear from the plans that the portion of the plot which has an open space of 4.66 and 4.8 mtrs. respectively, does not derive light and ventilation from an exterior open space and hence, under Regulation 29(i)(f), the open space is reduced to $1/5^{\text{th}}$ of the height of the building. As the height is less than 22.0 mtrs., a minimum open space of only 4.4 mtrs. is required. He has submitted that admittedly in the present case as per the plan, there is more than 7 mtrs. open space on all the three sides of the building except at the entry points of the building where the open space is 4.66 mtrs. and 4.8 mtrs. on the North and South sides respectively. However, since this is not the multi-storeyed building, it is not required to be shown as to whether there is adequate open space or not. In any event the requirements under the relevant Regulations of the DCR 1991 have been met.

26 He has submitted that the grievance of the Plaintiff is that the Defendant No.1 had utilized 192% FSI as against the maximum permissible of 133%. This calculation of FSI is not proved. It is premised on the basis that the basement is the ground floor, and therefore, the building is one of ground + 7 stories. Further, the Plaintiff has calculated the floor space of the basement and the stilt area as part of the FSI whereas the DCR clearly

states that the basement and stilt areas are excluded for the purpose of calculating FSI. He has submitted that the Plaintiff has claimed that a wall of 3.57 mtrs. has been built at the terrace level. This is to be added to the height of the building. However, the Plaintiff has not averred in the plaint that the wall at the terrace level is illegal, as contended in oral arguments. He has accordingly submitted that the arguments and contentions which are beyond the scope of the pleadings should not be entertained and that this Court should not enter any finding on allegations which are beyond the scope of the pleadings. Without prejudice to the above, it is submitted that the wall in question is merely a wall which covers the lift machine room, staircase room and water tanks. The admitted sanction plans clearly show the parapet wall above the structure. The Planning authorities have found this to be acceptable and that there is no roof constructed above the terrace. This does not constitute the construction of a floor. This has been confirmed by the PW10 at Q/A No.25 with regard to the height of the building.

27 He has submitted that there is no violation of the CRZ Notification dated 19.02.1991 published by the Ministry of Environment and Forest under Section 3 of the Environment (Protection) Act, 1986 and the Rules thereunder. There are no prohibited activities as suit plot is not

influenced by tidal actions on the landward side. The construction is legal and valid including the dressing of the natural features. This is in fact permitted within the Notification itself. The Notification sets out that the suit plot falls under CRZ-II category which permits building on the landward side of the existing roads and makes them subject to existing Municipal laws. He has submitted that insofar as the Plaintiff's argument that the construction activity was at a cost of more than Rs.5 crores and hence, under paragraph 3 of the Notification, Central Government permission is required, cannot be accepted. The Plaintiff himself has brought on record the documents filed by Defendant No.1 with the Municipal Corporation showing that the cost of construction as Rs.2.5 crores. He has submitted that it is obvious from the reading of the relevant part of the Notification that the investment in the construction activity relates to the construction activity and not the cost of acquisition of land. He has submitted that the Act is not concerned with the transfer of ownership and that the obvious purpose of the clause in the Notification is to determine the scope and extent of the activity in the coastal area.

28 He has submitted that the Plaintiff has led no evidence whatsoever in support of damages of Rs.10 crores. He has submitted that in the examination-in-Chief, the Plaintiff proceeds to depose that the

damages allegedly suffered by the Plaintiff is required to be quantified. He has submitted that there is no material to show that there was any mental agony to the Plaintiff or any injury or loss caused to the Plaintiff. He has referred to the cross-examination of the Plaintiff wherein he has stated that he maintains medical record of himself and his family members (Q/A 103 to 107 of cross-examination of PW1). However, the Plaintiff has not produced any documentary evidence to prove the alleged case of mental agony. The Plaintiff's claim is required to be dismissed.

29 He has submitted that the decisions relied upon by the Plaintiff are totally irrelevant and do not apply to the facts of the present case. He has submitted that the full bench of the Orissa High Court in *Krushna Kishore Bal v. Sankarsan Samal and others*¹¹ relying upon various judgments including judgment of the Privy Council reported in 1914 PC 45 had determined questions involved in the matter which are very much identical to the issues involved in the present matter. The Court had held that interference with light and air which is not substantial does not give a cause of action to a person entitled to such right even though there is a violation of Municipal Laws. This finding was arrived at by the interpreting Sections 28, 33 and 35 of the Indian Easements Act. He has submitted that in any event in the present matter, the Plaintiff has been unable to prove

¹¹ AIR 1974 Ori.89(FB) Orissa High Court

that there has been a violation of Municipal laws. Assuming without admitting that there is any such violation, still in view of a clear ratio laid down by the above judgment, the present Suit is liable to be dismissed with costs as the Plaintiff has failed to prove 'substantial damage' and/or 'obstruction creating nuisance' and/or 'material injury' as contemplated in the above judgment. He has thus, submitted that the present Suit is required to be dismissed.

REASONS :

30 Having considered the submissions, it would be necessary to refer to these relevant prayers in the plaint which are prayers (a) and (b) and which read as under :

(a) that this Hon'ble Court be pleased to pass a decree in favour of the Plaintiff and against the Defendant for a sum of Rs.10,00,00,000/- (Rupees Ten Crore only) with interest at the rate of 24% per annum from the date of filing of the suit till the date of decree and/or payment or realisation thereof as more particularly set out in the Particulars of Claim annexed as Exhibit 'K' hereto.

(b) that the Hon'ble Court be pleased to call for the records, papers and files pertaining to the issuance of permission granted by Defendant Nos.2 to 5 to the Defendants No.1 allowing them to construct a multi-storeyed building two

storeyed basements on the Plot No.5 of Worli Sea Face and/or allowing them to use a dynamite for blasting rocks and after going through the validity, legality and propriety thereof be pleased to set aside and cancel the said permission/orders;

From these prayers, it is apparent that the Plaintiff has sought damages in the sum of Rs.10 crores with interest @ 24% per annum from the date of filing of the suit till the date of decree and/or payment or realisation thereof. These damages are claimed to be on account of the tremendous mental agony and breach of peace suffered by the Plaintiff and his family members upto the date of filing of the Suit. It is an admitted position that upto the date of filing of the Suit, excavation work was being carried out at the suit plot by the alleged uncontrolled blasting activities which included blasting of continuous rock structure by use of explosives. The actual construction of the building commenced after the filing of the Suit. This is clear from the orders which have been passed by this Court in the Notice of Motion taken out by the Plaintiff in the above Suit viz. Order dated 23.12.1994 which had restrained Defendant No.1 from carrying out the blasting work activities and the order dated 18.01.1995 which had recorded the statement of Defendant No.1 that the blasting work was complete and no further blasting was being carried out since 21.12.1994. Thus, the prayer for damages cannot be extended to the damages which

have been caused by virtue of the alleged illegal construction activity. In fact in the affidavit in lieu of examination-in-chief of the Plaintiff, the Plaintiff himself has stated that the further damages for the mental agony and breach of peace, deprivation of ingress and egress of air and light, suffered by the Plaintiff and his family members from the date of the filing of the suit to the date of demolition of the alleged illegal suit building of Defendant No.1, is to be quantified. It is not for this Court to order demolition of the building of Defendant No. 1 or quantify such damages, if any. This is not even been prayed for in the suit inspite of the plaint having been amended.

31 Insofar as the second prayer viz. Prayer (b) is concerned, the Plaintiff has prayed for the setting aside of the permission/orders granted by Defendant Nos. 2 to 5 to the Defendant No. 1 allowing it to construct a multi-storeyed building having two storeyed basements on the suit Plot and/or allowing them to use dynamite for blasting rocks. This permission had been granted as per the original plan which had been submitted by the Plaintiff to the Defendant No. 2 in 1993 i.e. prior to the plans being amended. It is apparent that the plans which were sanctioned by Defendant No.2 and on the basis of which the construction of the building on the suit plot was carried out by Defendant No.1 has not been sought to be set aside

and/or cancelled by the Plaintiff. This is despite the challenge being raised in the amended plaint that the construction violated the DCR 1991.

32 From the issues which have been framed by this Court, the two substantial issues which would have to first answered are Issue Nos.5 and 6. It is only upon these issues being answered in the affirmative upon the Plaintiff proving that the Defendant No. 1 has committed illegal construction activity and that the Plaintiff is entitled to claim for damages that the other issues would be required to be answered. The parties have also proceeded on the basis that these are the two issues which would require determination before any other issue. Although there were certain arguments on the issue Nos.3 and 4 viz. as to whether the Plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure and whether the plaintiff proves that the Suit is maintainable despite of non-service of statutory notice U/s. 527 of the Bombay Municipal Corporation Act, these issues would be academic if this Court answers Issue Nos.5 and 6 in the negative. Issue No.5 requires the Plaintiff to prove that Defendant No.1 has committed any illegal construction activity as alleged in the plaint and the burden will be on the Plaintiff to establish the same. Further, if the answer to issue No.5 is in the affirmative, then the Plaintiff would also have to prove that he has suffered

damages in the sum of Rs.10 Crores. No issue has been raised as to whether the building on the suit plot is to be demolished as a result of the alleged illegal construction carried out by Defendant No.1 and the only sequitor to that is a claim for damages. I do not accept the submission of the Plaintiff that this Court is required to address the issue of demolition of the building on the suit plot if satisfied that there has been violations of DCR 1991. The decisions relied upon by the Plaintiff viz. *Kerala Coastal Zone* (supra) and the earlier decision of this Court in *Felix Menino Jusus Serrao* (supra) are not applicable in the facts and circumstances of the present case. These decisions have proceeded on the basis that construction carried out without the prior approval of the MOEF or in violation of the CRZ regulations which constructions were prohibited and hence, required to be demolished.

33 In the present case, construction of the building on the suit plot has been carried out by Defendant No.1 in accordance with sanctioned plans. This has also been deposed to by the Plaintiff's own witness viz. PW10 in his examination-in-chief at Q/A Nos.26 and 27 as well as in Q/A No.6 of the cross-examination of the same witness. It appears that the Planning Authority viz. Defendant No.2 had upon inspecting the construction site, had given certificate for construction of the plinth area,

construction of building above plinth area, a building completion certificate recording that building was constructed in accordance with the sanctioned plan and occupation certificate. In order to obtain the building completion certificate, the Defendant No.1 had submitted to Defendant No.2 the as-built drawings on the basis of which the construction was checked and the building completion certificate was issued. The Plaintiff has himself in examination-in-chief admitted that the building plans which were produced by the Plaintiff himself are the same as the as built plans. The Plaintiff has further in cross-examination in answer to Question No.21 states that there was no document on record to show that the actual FSI consumed was more than that shown in the plan at Exhibit-D-1 (as-built plan). It appears that the dimensions given in these plans produced by the Plaintiff are the same as the as-built plans. The height calculations on these plans were done on the basis of the average ground levels which are calculated and marked on the plans. It is clear from the plans that the height of the basement is not less than 2.4 mtrs., the area of the basement is more than twice the plinth area of the building and that two vehicular ramps are provided in front of the building. It appears from the plans that the floor of basement is admittedly below the ground and thus answer the description of basement provided under Regulation 2(3)(10) which mandates that any storey of the building which is even partly below the

ground level is the basement. Once, this conclusion is arrived at viz. that there was a basement constructed in the said building, the contentions of the Plaintiff that there were violations with regard to height and open space will not arise as these violations have been alleged on the basis that the basement is nothing but the ground floor of the building.

34 The Plaintiff has merely relied upon a Report obtained by him from M/s. Sahasrabhojane & Associates, an Architect firm to contend that there are various violations of the DC Regulations. However, it is to be noted that the said Architect Firm had neither visited the construction site of Defendant No.1 nor examined the plans sanctioned by the Defendant No.2. The said Architect Firm has made his report only on the basis of observing the construction from the Plaintiff's plot and on the basis of some drawings which were supplied by the Plaintiff to the said Firm. The concerned Architect who had prepared the Report or anyone else from the said Architect Firm has not been examined to prove the Report. Thus, the Architect's Report which appears to form the foundation of the allegations contend in the amended plaint remains unproved. The Plaintiff has also not relied on any expert evidence in support of his allegations of the building on the suit plot in any manner being constructed in violation of the provisions of law. The Plaintiff has examined himself in support of his

allegations. However, the Plaintiff is admittedly not an expert on issues of construction and Development Control Regulations. This is clear from the re-verification of the amended plaint, wherein the Plaintiff has solemnly declared that the averments made by way of amendment were on basis of information and belief. The Plaintiff has also in his cross-examination been unable to prove that he was an expert on issues of construction and Development Control Regulations. He claims to have an education qualification of B.Sc. Degree from Bombay University in Chemistry and manages family properties. This is clear from his answer to Question Nos.3 and 4 of his cross-examination. Thus, the Plaintiff has been unable to prove through any expert that there has been any violation of DCR, 1991 other than himself claiming that the violations have been committed. In fact, in the evidence of the expert Architect who was present during the construction of the building on the suit plot and who was brought as witness of the Plaintiff has in fact established that there were no violations of the DCR, 1991. In answer to Question No.10 of his cross-examination, where he was asked, whether he agreed that all the terms and conditions mentioned in the IOD and completion certificates were complied with and therefore, the occupation certificate was granted by BMC, he has answered in the affirmative. The Plaintiff's other witness Mr. Khillare (PW10) has in his answer to Questions put to him in examination-in-chief by the Plaintiff

has affirmed that the actual construction of the building was strictly in accordance with the plans at Exhibit-P-73 to Exhibit-P-75 (Q & A No.27). He has in fact supported the case of Defendant No.1 that the lowest floor of the building is the basement and the level which one entered the building is the road level and the area closer to the road is the area below the stilt level which area is the basement (Q & A Nos.35 and 38).

35 Thus, the Plaintiff has not been able to establish from his witnesses that there has been any violation of the DCR, 1991. I further find that there is no violation of the CRZ Notification dated 19.02.1991 published by the Ministry of Environment under Section 3 of the Environment (Protection) Act, 1986 and Rules thereunder. The suit plot is on the landward side of an existing road and hence, not influenced by tidal actions. I do not accept the contention of the Plaintiff that the cost of acquisition is to be taken into account and/or the construction activity was at the cost of more than Rs. 5 crores and a Central Government permission was required which has not been taken. A bare perusal of the Notification makes it clear that investment in construction activity relates only to construction activity and not the cost of acquisition of the land. Hence, there is no merit in the contention of the Plaintiff. In view thereof, Issue No.5 is answered against the Plaintiff and in the negative.

36 In view of Issue No.5 having been answered in the negative, the question of damages will not arise and likewise issue No.6 is also answered against the Plaintiff. In any event, assuming that this issue would have to be gone into the Plaintiff has been unable to prove any damages. The Plaintiff has not brought on record any material to show mental agony, breach of peace or any loss caused to the Plaintiff by reason thereof. In fact in the cross-examination of the Plaintiff, he has stated that he maintains medical records of himself and his family members, (Q/A 103 to 107). However, he has not produced any medical record to establish a case of mental agony and hence the claim of damages is required to be dismissed. The other claim of damages which arises on account of tremendous mental agony, breach of peace, deprivation of ingress and egress of air and light suffered by the Plaintiff and his family members from the date of filing of the Suit to the date of demolition of the alleged illegal suit building of Defendant No.1, is not quantifiable. In view of the finding that the Defendant No. 1 has not committed any illegal construction activity there is no question of this Court ordering demolition of the suit building. There is also no such prayer or issue framed. In any event, it is not for this Court to quantify such alleged damages. Hence, the relief of damages which has not even been prayed for in the amended plaint deserves to be rejected.

37 With regard to the decision of the full bench of the Orissa High Court relied upon by the Defendant No.1 in *Krushna Kishore Bal* (supra), this decision would apply to the facts of the present case. The Plaintiff as in that case has not been able to establish that there has been an inference with light and air which is either substantial or at all and hence, this cannot give a cause of action to the Plaintiff presuming that there is violation of Municipal laws.

38 Regarding the decisions relied upon by the Plaintiff, these decisions have been decided on the facts of those cases and are not applicable in the present case, particularly where the construction of Defendant No. 1 is in accordance with the sanctioned building plans. Further, the Plaintiff on whom the burden of proof was lying has failed to discharge that burden by proving that Defendant No. 1 has committed any illegal construction activity as alleged in the Plaint. Hence, it was not necessary for the Defendant No. 1 to have led evidence. Further, if one was to go only by the plaint by ignoring the written statement filed, the averments therein having not been established, issue Nos. 5 and 6 which are the material issues, are decided against the Plaintiff.

39 Insofar as the other issues are concerned, in view of the answering issue No.5 in the negative, issue Nos.1, 2, 3, 4, 7 and 8 have

really become academic. Issue Nos.3 and 4 are as under :

3. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure?
4. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 527 of the Bombay Municipal Corporation Act?

There were arguments of the Plaintiff in support of his contention that the Suit is maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure, reliance was placed upon the decisions of the Supreme Court in *State of Andhra Pradesh and others v. Pioneer Builders*¹² and decision of Allahabad High Court reported in *Gaja and others v. Dasa Koeri and others*¹³ to contend that there had been a waiver of such statutory notice. This was countered by the learned A.G.P. for the State, by relying upon the decision of *Bihari Chowdhary and another v. State of Bihar and others*¹⁴. It appears in the decision of the Supreme Court in *Bihari Chowdhary* (supra) that notice under Section 80 of C.P.C. is a mandatory provision and hence would be required to be complied with. It is thus apparent that in absence of such notice, the Suit itself is not maintainable on this ground. With regard to the notice under Section 527 of the Bombay Municipal Corporation Act is concerned, reliance has been

¹² AIR 2007 SC 113

¹³ AIR 1964 Allahabad 471

¹⁴ AIR 1984 SC 1043

placed by the Plaintiff on the decision of *Motilal Mahadev Sharma and others v. Municipal Corporation of Greater Bombay*¹⁵ to contend that when the Plaintiff seeks urgent orders of this Court by way of injunction, it is not necessary to issue statutory notice under Section 527 of the Act. It appears that this decision would give assistance to the Plaintiff in contending that an urgent ad-interim injunction order had been sought from this Court on account of the blasting work carried out on suit plot. It is appropriate to notice that the learned Counsel for the Municipal Corporation Defendant No.2 had in fact appeared when the ad-interim injunction order was passed. However, considering that the issue Nos.5 and 6 have been decided against the Plaintiff and that the Plaintiff having failed to make out any case for relief sought for, it would be an academic exercise to answer these issues, other than making the above observations.

40 Considering that the Suit is required to be dismissed in view of the above findings, Issue Nos.1 and 2 are not required to be answered and issue Nos.7 and 8 are answered against the Plaintiff.

41 Suit is accordingly dismissed with no order as to costs.

(R.I. CHAGLA, J.)

¹⁵ AIR 2005 Bombay 344