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

**NOTICE OF MOTION NO.1450 OF 2019
IN
SUIT NO.843 OF 2019**

Kiran Nanik Motwane & Anr. ...Plaintiffs
Vs.
Uday Indukumar Jasani & Ors. ...Defendants

Mr. Vishal Kanade and Mr. Anirudh Hariani, Mr. Virendra Pereira and Aneesha Munshi i/b. Divya Shah Associates for the Applicants / Plaintiffs.

Mr. Ravi Kadam, Senior Counsel, Mr. Rohan Kadam with Mr. Sanjay Kadam, Mr. Sanjeel Kadam, Ms. Sayli Rajpurkar, Nitisha Lad i/b. Kadam & Co. for the Defendant Nos.1 and 2.

Mr. A.Y. Sakhare, Senior Advocate with Ms. Pooja Yadav, Ms. Shilpa Redkar and Mr. Rohan Mirpuri for Defendant Nos.3 to 8 – MCGM.

Dr. Birendra Saraf, Senior Advocate, Aseem Nafade, Anuj Narula and Tarang Jagtiani i/b. Jhangiani Narula and Associates for the Applicant in Interim Application No 463 of 2021.

Mr. Yuvraj Choksy, Pragya Dahiya i/b. Khaitan & Co. for Defendant Nos.12 and 13.

CORAM: R.I. CHAGLA, J.

JUDGMENT RESERVED ON 21ST MARCH, 2022.

JUDGMENT PRONOUNCED ON 26TH APRIL, 2022.

ORDER

1. By the present Notice of Motion, the Applicants / Plaintiffs have sought an interim order and injunction restraining

Defendant Nos.1 and 2, their employee, agents and servants, or any person claiming by or through them, from carrying out construction of any kind on Plot No. A (being old Plot No.435A corresponding to CTS Nos. E/323 (part) and E/325 collectively admeasuring 795.176 square meters or thereabouts). Further injunction is sought by the Applicants / Plaintiffs restraining Defendant Nos.1 and 2 from allotting flats and / or executing any agreements, arrangements or understandings with third parties, inducting them into the flats proposed to be constructed in the building on Plot No. A (being old Plot No.435A corresponding to CTS Nos. E/323 (part) and E/325 collectively admeasuring 795.176 square meters or thereabouts).

2. Consequential relief has also been sought against Defendant Nos.3 to 8 from issuing occupation certificate, in part or full to permit the prospective purchasers to occupy any unit in the building alleged to be illegally constructed on Plot A. Relief of appointment of Court Receiver has been sought and licensed surveyor as well as certain disclosures.

The brief background of facts is as follows:-

3. One Motwane Private Limited (“MPL”) was owner of plot of land bearing CTS Nos. E/323, E/324 and E/325 situated and lying at 14th and 15th Road, Khar (West), Mumbai 400 052 (larger property). MPL was company owned by the Motwane family.

4. On 31st March, 1990, the larger property was notionally divided and conveyed to the different members of the Motwane Family as under:-

(i) Plot A admeasuring 795.176 Square meters was conveyed to Late Hardevi Motwane and Defendant No.9 inclusive of 15% proportionate recreational ground (RG) area;

(ii) Plot B admeasuring 1887.357 square meters was conveyed to the Plaintiffs, Defendant No.14, the Late Girdhar Motwane and the late Maina Nanik Motwane.

(iii) Plot C admeasuring 793.263 Square meters was conveyed to Defendant Nos.9 and 11.

5. The Plaintiffs are the owners and residents of Plot B. Defendant Nos.1 and 2 are the Developers who are developing Plot No. A.

6. Defendant No.1 was granted an IOD to develop Plot A on 17th December, 2009. By the year 2013, Defendant No.1's construction had reached stilt + 2 Podiums + 10 storeys. As of 2019, the construction had reached 12th storey out of the proposed stilt + 2 Podiums + 14 storeys.

7. The Plaintiff addressed a notice to the Municipal Commissioner on 24th November, 2013 through their Advocates wherein it is alleged that development plan had been submitted by Defendant No.1 on the basis of larger property instead of plot A alone. Though the developer of Plot A was to keep a minimum distance of 1.5 meters from the shared perimeter / boundary of Plot B, Defendant No.2 had kept open space around the new building at Plot A but had calculated the said space from the walls of the bungalow of Plot B and not from the common perimeter / boundary line between Plots A and B on the North and West side. The developer of Plot A had built a podium upto the boundary line

which according to Plaintiffs, further open space was required to be kept for any future redevelopment of Plot B. It was thus the contention of the Plaintiffs that minimum open space had not been kept. Further the Developer had failed to ensure provision of 15% RG area on Plot A. The Plaintiffs have claimed that they were not aware of the construction until recently when they claimed to have learnt that the Developer had constructed a podium column at the perimeter between Plot A and B.

8. It is the Plaintiffs case that though in September, 2009 the Plaintiffs had learnt that the then owners of Plot A had negotiated with Defendant No.2 of redevelopment of Plot A and that the Plaintiffs also learnt that owners for Plot No. A had entered into agreement dated 16th February, 2010 with Defendant No.2 for the said purpose, it was only around August, 2013 that the Plaintiffs and Defendant No.14 observed that the Defendant Nos.1 and 2 had carried out the aforementioned construction of podium column touching the common perimeter between Plot A and B without leaving requisite open space as provided under Development Control Rules (“DCR”). The Plaintiffs and Defendant No.14 had appointed their architect to conduct a site inspection to assess the

situation and submit report. It was only upon receiving a report dated 18th November, 2013 from their chartered architect that the violations of DCR which the Defendant No.2 had committed was brought to the knowledge of the Municipal Commissioner on 24th November, 2013.

9. In 2015, Defendant No.1's architect applied to the Municipal Commissioner for loading fungible FSI on the plot and for condonation of deficiencies.

10. Pursuant to the application of Defendant No.1, the Municipal Corporation of Greater Mumbai ("MCGM") published a report dated 14th November, 2015 assessing plans submitted by Defendant No.1. This report recorded that there was no imbalance of FSI and necessary RG area had been deducted within Plot A. The Commissioner had issued directions dated 19th May, 2015 to recalculate open space from notional boundaries between Plot A and Plot B in the North and West sides.

11. Pursuant to the Commissioner's directions for recalculation of open spaces, there was a recalculation of open

space by MCGM from notional boundary between Plot A and Plot B in the North and the West and upon which MCGM observed that there was open space deficiencies with the podium touching the boundary only at one point. However, given due consideration of the fact that the plot being odd and irregular shaped, the MCGM rendered it fit for regularization under 64 B of DCR, 1991.

12. The MCGM further recommended that a registered undertaking be obtained from the developer of Plot A to disclose the fact to the prospective buyers that the building had deficient open spaces and waiving any right to object to the proposed development on the adjacent plot. The future occupants of Plot A would also not object to the proposed development of Plot B with deficient open space. The Fire Officer has granted his no objection to the development upon being satisfied that the fire safety requirements were met. The report of the MCGM was “approved as proposed” by the Commissioner.

13. The Plaintiffs were aggrieved qua the reservation of RG area and the open space deficiencies between

Plot A and Plot B would impair their commercial rights to development.

14. It is to be noted that on 14th January, 2014, the MCGM had issued stop work notice to Defendant No.2 alleging unauthorized construction.

15. Thereafter, the MCGM upon its report dated 14th November, 2015 being approved and proposed by the Commissioner had issued revised IOD on 22nd June, 2018 for construction upto the 12th floor and on 26th October, 2018 issued a commencement certificate for construction upto the 12th floor.

16. The Plaintiffs being aggrieved by the IOD granted by the MCGM and IOD granted by the Commissioner filed the present Suit on 5th March, 2019. The two main contentions in the present Suit were that the first and second Defendants were illegally attempting to usurp the rights of the owners of Plot B by failing to keep a reservation of 15% RG area on Plot A apart from the fact that plan which had been submitted by Defendant Nos.1 and 2 were of the larger property and thus RG area was being

considered of the larger property. Next grievance of the Plaintiff was that the first and second Defendants were liable to keep minimum 1.5 meter open space from the shared perimeter / boundary between Plot A and Plot B. However, Defendant Nos.1 and 2 had not left adequate open space of 1.5 meters on North and West side of Plot A and had incorrectly calculated open space from the walls of bungalow on Plot B instead of from common boundary. The Plaintiffs contention was that they would suffer commercial loss since they would be obliged to keep further requisite space on their Plot B which they wished to develop.

17. It is the Plaintiffs contention that Defendant Nos.1 and 2 had illegally submitted plans for approval with respect to the larger property and not the subject Plot A which they were developing though the larger property had been sub-divided. Thus instead of considering Plot A's development, the MCGM and the Commissioner considered the development potential of the larger property.

18. The Plaintiffs had moved a Notice of Motion No.1450 of 2019 for ad-interim relief. This Court had prima facie

found that the Defendant Nos.1 and 2 had failed to keep requisite open space on the North and West side on the proposed development of Plot A near the boundary line shared with Plot B. There was inadequate open spaces left by Defendant Nos.1 and 2 and that podium had been constructed on the West side of Plot A touching boundary between both plots. That Defendant Nos.1 and 2 had submitted plans for redevelopment on basis of larger plot which included plot B, though they had right to only use 795 square meters of plot A. This Court had granted ad-interim relief in terms of prayer clause (a) and (b) of the Interim Application upon considering that there was hardly any space left by the Defendant Nos.1 and 2 in Plot A for fire engine to pass between the building coming up and boundary of plot A. This Court had considered that if the prospective purchasers had investigated the title of Defendant No.2 and inspected the site, they would know what Defendant No.2 was indulging in may not be wholly legal. Further, those people who are prejudiced, may claim for return of money or compensation. Accordingly, the first and second Defendant by the ad-interim injunction order passed in terms of prayer clauses (a) and (b) were restrained from carrying out further construction and selling more flats to third parties. Defendant No.1 had already sold

flats to certain purchasers including the intervenors in the Interim Application (L) No.26802 of 2021.

19. The Defendants accordingly took a decision to revise the building plans to meet the Plaintiffs allegations in the Plaint. Under the revised plan, the Defendant Nos.1 and 2 proposed to maintain open space of 1.5 meter in the North and West along the boundary shared with Plot B. For creating the space, the existing portion of the podium touching the West boundary line between Plot A and Plot B was to be demolished. Defendant Nos.1 and 2 continued to retain the RG area of the proposed building within Plot A's area. It had been noted by the MCGM in its report in 2015 that RG area had been deducted from the gross area of Plot A and not from the larger property. Further, six meter open space would be maintained on the southern side of the plot for ingress / egress of firefighting tenders / vehicles. In addition fireman's lift would be installed which would open at requisite mid landing points on the staircase.

20. Defendant Nos.1 and 2 moved Defendant No.8 (Fire Officer) for his assessment as to whether revised plans met

fire safety norms and assured fire safety. On 7th July, 2020, the Fire Officer issued no objection in respect of the revised plans and certified that it assured fire safety. The Fire Officer took due notice that under the MCGM Circular dated 6th August, 2019, the provisions of 6 meters open space on the one side for a building upto 70 meters in height was permissible, if there was a provision for fire men's lift in the building. This was proposed in the revised building plan of plot A. Accordingly, the Fire Officer accorded satisfaction that provisions of 6 meters open space on the South side of Plot A for ingress / egress of firefighting tenders and the provision of a separate fire men's lift assured adequate safety from fire and / or fire related hazards.

21. The Defendants put up their revised plans before MCGM for their approval. In view of the MCGM expressing its unwillingness to consider these plans on the premise that the Single Judge's ad-interim Order prohibited them from processing the revised plans, Defendant Nos.1 and 2 took out Interim Application No.2439 of 2020 seeking directions against the MCGM to process their revised plans. An order was also sought for vacation of the ad-interim order. This Court by order dated 13th August, 2020

observed that there was no restraint against the Municipal Authorities from considering the revised plans and deciding the application.

22. Mr. Sakhare learned Senior Counsel appearing for the MCGM had stated that the Officer of the MCGM will decide the application in accordance with the applicable norms / law at the earliest possible. All contentions were kept open. The first and second Defendants were granted liberty to renew their applications in terms of prayer clause (b) should the Municipal Authority decide their application favourably.

23. On 24th August, 2020, the Defendant Nos.1 and 2 submitted revised development plan to Municipal Corporation. The Defendant's architect has submitted indicative report for concessions to the MCGM. The major amendment to the plans as per the revised plans were demolition of part portion of existing 2 level podiums on the south and west of Plot A in order to provide 6 meter clear open space. Further, demolition of part podiums on west and north side of Plot A to provide minimum 1.5 meters open space in those places. The refuge area was to be provided on staircase

mid-level now relocated within building line at 6th and 13th floor, separate Fire Man's lift with smoke check lobby proposed at mid-landing level in the external staircase. Further, Defendant's Architect sought condonation of open space deficiencies as well as joint open space deficiencies. The Defendant's architect sought condonation in view of the demonstrable hardship as under:-

- a) The proposal was for redevelopment of an existing building;
- b) Vertical construction was not possible beyond height restriction issued by the Civil Aviation Authorities.
- c) The plot was odd shaped;
- d) In order to make the project financially viable, it was necessary to consume the admissible FSI;
- e) The building had already come upto 12th floor.

24. Pursuant to architect's certificate as well as revised development plans put up by Defendant Nos.1 and 2, the MCGM issued a '4C' report. The report recorded that:-

- a) The MCGM had scrutinized the plans through the

Auto DCR system;

- b) Thereafter, a site visit had been carried out to assess the case for hardship.
- c) Pursuant to these steps, the MCGM found that hardships cited by Defendant No.2 were justified;
- d) The MCGM further noted that the revised plans had been certified by the Fire Officer for fire safety.
- e) Measures proposed by the Architect for neighbourhood safety, structural safety and health safety and that the same could be taken care of by appointing structural engineer, site supervisor and licensed plumber.

25. The Commissioner approved the revised plans on 6th November, 2021 by writing the remark “approved as proposed”.

26. On 20th November, 2020, the Defendant Nos.1 and 2 filed Interim Application No.6700 of 2020 for orders that effectively seek vacation of the ad-interim order.

27. The Plaintiffs thereafter amended their Plaint and took out Interim Application No.463 of 2021 for reliefs restraining the Defendants from acting upon and / or implementing the revised plans and the latest 7th July, 2020 Fire No Objection Certificate (NOC) and all preceding NOC's. Further, injunctive relief was sought restraining Defendant Nos.1 and 2 from creating any third party rights pursuant to the Revised Plans.

28. A preliminary objection has been raised as to the maintainability of the Suit by the MCGM in the Written Submissions filed by them dated 10th January, 2022. Mr. Sakhare, learned Senior Counsel for Defendant Nos.3 to 8 – MCGM has submitted that the objection to the maintainability of the suit is in view of the bar under Section 149 of the MRTP Act. This bar will apply to the challenge in the present Suit which is to the permission granted by MCGM in its capacity as planning authority under the MRTP Act 1966. The Civil Court does not have jurisdiction to go into such challenge as raised in the present Suit. Reliance is placed on the decision of this Court in *Satish Vs. Dr. Gopal*¹ in this context. Mr. Sakhare has further submitted that the Suit is not maintainable

¹ 2015(5) Mh.L.J.463

in view of lack of statutory notice mandated under Section 527 of the MMC Act, 1988. In this context, he has placed reliance on the decision of this Court in *Noor Mohd Vs. Mahi Housing and Development Board*².

29. The preliminary challenge as to the maintainability of the Suit has been dealt with by the Plaintiffs and it is their contention that these objections are raised for the first time and were not raised in the Interim Application No.2439 of 2020 filed by Defendant Nos.1 and 2. Thus the MCGM has waived their objections on maintainability of the present Suit by their conduct. The MCGM has neither at the ad-interim stage raised the maintainability issue nor did they file an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 for rejection of the Plaint on this ground. The non-compliance of Section 527 of the MMC Act, 1988 is not an inherent defect which takes away the jurisdiction of this Court. Further, this Court had in **Kishore S/o. Ramalu @ Rambhau Telang vs. Municipal Commissioner, Nagpur & Ors.**³ held that despite the exclusion of jurisdiction of the Civil Court under Section 149 of the MRTP Act, the grievance in relation

² 2014(1) Mh.L.J 92.

³ 2015 SCC OnLine Bom 3168

to failure to comply with statutory provisions can be examined by the Civil Court. It is the further contention of the Plaintiffs that this Court has held that the Suits required to be filed after one month notice to the MCGM and / or within six months next after the accrual of cause of action under Section 527 of the MMC Act does not apply in case of acts of MCGM which have been done de hors the provisions or in contravention of MMC Act. In support of this contention reliance has been placed on decision of this Court in *Shraddha Associates, Pune & Anr. Vs. St. Patrick's Town CHS Ltd. & Ors.*⁴. The Plaintiffs contentions in the Plaint are that the MCGM has acted de hors the provisions of the Act and thus the lack of notice in writing of one month and / or the Suit being commenced within six month next after the accrual of the cause of action contemplated under Section 527 offers no assistance to the MCGM.

30. The Defendants have distinguished the decision of this Court in **Kishore (Supra)** on the facts arising in that case where notice under Section 53 of the MRTP Act was issued to remove the unauthorized construction but time prescribed therein was less than 30 days statutory period mandated under the Act.

4 2003(2) Mh.L.J. 219.

Accordingly, this Court had held that it had jurisdiction to entertain the Suit, since the notice was a nullity for giving less time for removing the unauthorized development than the period prescribed within the Act. Thus this case offers no assistance to the Plaintiffs as it is based on the general principle of law that notwithstanding expressed statutory bar, the Court would have jurisdiction to entertain the Suit, wherein an action taken is nullity in law and / or without jurisdiction. In the present case the decision of the Commissioner of MCGM is not a nullity since he has acted within the jurisdiction conferred under regulation 6(B) of the DCPR. The decision relied upon by the Plaintiffs in *Shraddha Associates (Supra)* has also been distinguished by the Defendants. It is contended that the Commissioner has acted dehors the provision of the Act or contrary thereto. In the present case the Corporation has acted in accordance with the DCR, DCPR and the extant law. Therefore, this decision has no applications.

31. Prior to considering the issue of maintainability of the Suit, it would be necessary to refer to the other submissions of the Plaintiffs as well as the Defendants.

32. Mr. Kanade, learned Counsel appearing for the Plaintiffs has submitted that the impugned plans which include the original sanctioned plans and revised plans submitted by Defendant Nos. 1 and 2 to the Municipal Corporation of Greater Mumbai contain congenital defects which cannot be cured or condoned and are thus, *ex facie* illegal. He has submitted that the Defendant Nos. 1 and 2 despite knowing that the subject plot A was to be developed and which subject plot admeasured 795 sq.mtr., submitted plans for a multi storey building on the basis that they were to develop the larger property admeasuring 3475 sq.meter. This was without the knowledge of the Plaintiffs, as the Defendant Nos. 1 and 2 neither informed the Plaintiffs nor obtained consent of the Plaintiffs for submitting the plans showing the entire layout of the larger property. It is an admitted position that the Defendant Nos. 1 and 2 proceeded with construction even beyond the commencement certificate which led to issuance of stop work notice issued by the MCGM in the year 2014.

33. Mr. Kanade has further submitted that had the 1st and 2nd Defendants sought permission on the basis of the subject plot A alone, then the structure of the nature of the subject

building, which has been carried out, would never have been permitted. The original plans, if they had been prepared in respect of the subject plot A, would not be compliant either with the provisions of DCR 1991 or DCPR 2034.

34. Mr. Kanade has submitted that Regulation 37(31) provides for podium to be permitted in plot admeasuring 1000 meters or more. Since, the subject plot A admeasured only 795.176 sq. meters, the podium could not have been permitted to be erected in the subject plot A. He has submitted that an illegal building has been constructed on subject plot A which is almost touching the common boundary between plot A and plot B on the northern and western sides. Had the plans been submitted only in respect of Plot A, it would never have been sanctioned as it would be de hors the open space requirement of Regulation 41 of the DCPR 2034 and fire safety requirements of Regulation 47 of DCPR 2034.

35. Mr. Kanade has further submitted that since the original plans submitted were on the basis of the larger property, consent/NOC of the neighbouring plot owners (including Plaintiffs

and other co-owners of plot B and plot C) was necessary. In fact even though NOC/consent of co-owners of plot B and C was necessary, MCGM while sanctioning the original plans stated that the proposal can be processed further in accordance with law, without insisting on undertakings / NOC from the complainant. However, this was made subject to verification of the facts that the sanctioned proposal does not affect or imbalance the FSI of the adjoining plot i.e. notionally sub-divided plot B owned by the complainant i.e. Plaintiff No. 1 and provided 15% RG in proportion to the plot under development does not in any way create any imbalance in the RG of the portion owned by the Complainant. Thereafter, the Municipal Commissioner has stated on the same file that “We will go by the opinion of the law officer as given in the matter. However, the open spaces shall be recalculated from the boundaries of the notionally divided sub-plot.” In spite of the directions of the Municipal Commissioner, neither was the NOC of the co-owners taken nor were the open spaces recalculated from the boundaries of the notionally divided sub-plot. In another report dated 7th November 2015, the MCGM stipulated that Defendant Nos. 1 and 2 were required to submit a registered undertaking to disclose the fact to prospective buyers that the building had

deficient open spaces and that the developer/occupants would not object to development on the adjacent plot with deficient open space. However, this has not been done by Defendant Nos. 1 and 2. This can be seen from the proforma agreement for sale, uploaded by the Defendants on the MahaRERA website which does not contain such disclosure or stipulation.

36. Mr. Kanade has made submissions on the revised plans, namely that the revised plans do not address or alleviate the objections of the Plaintiffs. He has submitted that from a comparison of the original sanctioned plan and the revised plan, it becomes evident that the subject building remains in the same place on the subject plot A and there are no changes in the open area on the Northern side and only minimal changes on the western side. He has submitted that the Municipal Corporation of Greater Mumbai themselves acknowledged in the 4C Report that the original plan had congenital defects. Therefore, it is impossible to rectify the illegalities and deficiencies without demolishing the entire structure due to the illegal construction on subject plot A of the Plaintiffs. There is a fetter on the Plaintiffs' right to develop Plot B in the future. This is due to lack of sufficient open spaces, as the building

on the subject Plot A is almost touching the boundary between Plot A and Plot B.

37. Mr. Kanade has further submitted that the construction of a mechanised car parking on the south - side of the Plot A does not provide, “clear open space” as contemplated under Regulation 47(1)(B)(a) of DCPR 2034. The structure of the car parking space will prevent fire engine access to the end of the subject plot and is thus, a fire hazard and de hors the provisions of DCPR 2034.

38. Mr. Kanade has highlighted from the plans which include the original plans and the revised plans that clearly there is deficient open space at the northern and western side of plot A and that the building constructed on the subject plot A is at the distance of 1.5 meters of plot B, whereas the extant law contemplates for such a building that 9 meters clear open space be left on one side accessible from the road for fire safety under Regulation 47 of the DCPR 2034 and 6 meters open space on all sides and the rear under Regulation 41 of the DCPR 2034.

39. Mr. Kanade has submitted that the MCGM failed to consider the objections raised by the Plaintiffs to the revised plans submitted by the Defendant Nos. 1 and 2 and which is in gross breach of the principles of natural justice. He has submitted that the MCGM ought to have considered such objections and representations filed by the Plaintiffs, prior to passing orders condoning illegalities in the revised/further revised plans.

40. Mr. Kanade has placed reliance on the decision of this Court in **Rajendra Thacker & ors Vs. Municipal Corporation of Greater Mumbai & ors.**⁵ in the context of his submission that the hardship to be considered by the Municipal Corporation of Greater Mumbai is not only the hardship created by the builders / developers/architects but the Commissioner is also required to take into account the hardship which may be caused by the proposed modification in the plans to other directly affected persons such as residents, purchasers and neighbours. While exercising the powers, the Municipal Commissioner shall be duty bound to take into account such representations made by the residents, purchasers and neighbours. The order passed by the Municipal Commissioner must

5 2004 SCC OnLine Bom 401

indicate that he has applied his mind to the existence of demonstrable hardships. It must also indicate that the commissioner has applied his mind to ensure that the grant of such modification/relaxation will not affect the health, safety, fire safety, structural safety of the inhabitants of the building or neighbourhood.

41. The Plaintiffs had informed the MCGM of the violations of the DCR 1991/DCPR 2034 by Defendant Nos. 1 and 2 by letters dated 1st September 2020 and 5th October 2020. However, MCGM did not respond to the said letters. The Municipal Commissioner also did not consider the objections raised by Plaintiffs while permitting such modifications / relaxations in the plans submitted by the Defendant Nos. 1 and 2 in the 4C Report. Thus, there has been violation of principles of natural justice as also a breach of the law laid down by this Court in **Rajendra Thacker** (supra).

42. Mr. Kanade has also made submissions on non compliance of the open space requirements by Defendant Nos. 1 and 2 under Regulation 41 of DCPR 2034. He has submitted that

revised plan and further revised plan do not provide for requisite open space. Due to presence of a dead wall and lack of light and ventilation at least 6 meters of open space is required to be kept open on the sides and rear of the plot where proposed building is between 32 to 70 meters in height and plot size is 1000 meters or less. There is only open space of 6 meters proposed to be kept on one side i.e. southern side which does not face plot B. Further, clear open space of 6 meters is not maintained, as there is a proposed mechanized parking at the western or the southern side. Such deficiency in open area cannot be condoned, since it affects the neighbouring buildings. Considering the concessions granted by the Respondent Corporation, the illegal building in the subject plot A will be at a distance of 1.5 meters of plot B whereas the extant law contemplated for such building to leave 6 meters open space from all the sides and rear.

43. Mr. Kanade has thereafter, made submissions on non-compliance with the requirements under Regulation 47 of the DCPR 2034 by Defendant Nos. 1 and 2 and which is in relation to fire safety. He has submitted that the Defendant Nos. 1 and 2 are in breach of Regulation 47(1)(B)(a) of the DCPR 2034 since they have

not left the requisite 9 meters clear open space on at least one side of the building accessible from the road for fire safety. He has submitted that the administrative circular/transitional policy relied upon by the Defendant Nos. 1 and 2 does not have statutory effect and cannot override the provisions of the parent statute which is DCPR 2034 and in particular Regulation 47 thereof. Defendant Nos. 1 and 2 had made no case at all for condonation of deficiencies in relation to the open space for fire safety. The Defendants' reliance on the Circular dated 15th July 2019 is erroneous and misplaced.

44. Mr. Kanade has further dealt with the issues with regard to the locus of neighbouring plot owners to challenge the construction by placing reliance upon the decision of this Court in **Fatima w/o Caetano Joao Vs. Village Panchayat of Mercedes**⁶. This Court has held that a neighbour who is affected by an illegal construction has an obligation in his favour based on the Suit for perpetual injunction. This Court had therefore, found no difficulty in holding that a neighbour would have right to maintain a Suit.

6 2000 (3) Mh. L.J. 624

45. Mr. Kanade has made submissions with regard to the intervenor applications by which the interveners seeking impleadment as party Defendants in the Suit by submitting that the intervenors are not *bonafide* purchasers for value without notice. There is no privity of contract between the Intervenor and Defendant Nos. 1 and 2 which can be fulfilled qua the Plaintiffs by intervening in the present suit.

46. Mr. Ravi Kadam, learned Senior Counsel appearing for the Defendant Nos. 1 and 2 has submitted that the *ad-interim* order which had been passed by this Court on 26th August 2019 by which *ad-interim* relief had been granted in terms of prayer clauses (a) and (b) of this Notice of Motion, was upon consideration of the original plans. He has submitted that in view of the subsequent facts as well as the submission by the Defendant Nos. 1 and 2 of the revised plan to the MCGM and the sanction thereof, the premise on which the *ad-interim* order had been passed is no longer available. He has submitted that as a matter of fact, the grievance of the Plaintiffs expressed in the Plaint filed in the above Suit were addressed in 2015 itself. The MCGM had granted revised permissions on the basis of the Report dated 14th November 2015.

In the said Report, it was mentioned that there was no imbalance of FSI and necessary RG had been deducted within the subject plot A. The Commissioner had issued a direction to recalculate open space from the notional boundaries between Plot A and Plot B in the North and the West. Pursuant to the directions, open space was recalculated by the MCGM as directed. The MCGM observed that there were open space deficiencies with the podium touching the boundary at only one point thereon. However, the “odd and irregular shaped nature” was a “demonstrable hardship” that justified condonation under Regulation 64 [b] of DCR 1991. It was further mentioned in the subject Report that the fire officer has granted NOC to the development upon being satisfied with the fire safety requirements.

47. Mr. Kadam has further submitted that in view of the Plaintiffs’ grievances having been resolved, there was no necessity for the Plaintiff to file the Suit nearly four years thereafter. He has submitted that the Defendant Nos. 1 and 2 had preferred an Appeal from the *ad-interim* order passed by this Court on 26th August 2019 and which Appeal (L) No. 465 of 2019 was admitted

by Division Bench of this Court and liberty was granted to apply for interim relief.

48. Mr. Kadam has submitted that in view of commercial considerations and the obligation to complete the development on subject plot A, the Defendant Nos. 1 and 2 took a decision to revise the building plans to meet the Plaintiffs' allegations in the Plaint. Under the revised plans, open space was to be maintained of 1.5 meters in the North and West along with the common boundaries between subject plot A and plot B. For creating this open space, the existing portion for podium touching the west boundary line between the subject plot A and plot B was to be demolished. Defendant Nos. 1 and 2 were to retain the RG area of the proposed building within the subject plot's area, 6 meters of open space would be maintained on the South side of the subject plot A for ingress / egress of fire fighting tenders/vehicles. A fireman's lift would be installed which would open at requisite mid landing point at the staircase. The revised plans took care of the grievance of the Plaintiffs and hence, there was no subsisting basis for continuing the injunction granted under the *ad-interim* order.

49. Mr. Kadam has submitted that upon the Defendant Nos. 1 and 2 submitting the revised development plan to the MCGM for approval and these Defendants' Architects indicative concession Report to the MCGM, a 4C Report on the revised plans and the Report submitted by the Defendants' Architect was issued by MCGM. In the Report submitted by the Architects of Defendant Nos.1 and 2 condonation had been sought in view of the hardship expressed which included the following :-

- (i) The proposal was for redevelopment of an existing building.
- (ii) Vertical construction was not possible beyond height restriction issued by the Civil Aviation authorities.
- (iii) The plot was odd shaped as noticed in the previous MCGM Report of 14th November 2015.
- (iv) In order to make the project financially viable, it was necessary to consume the admissible FSI.
- (v) The building had already come upto 12th floor.

50. The MCGM had considered the aforementioned hardship submitted by the Defendants' Architect in the Report. The MCGM found that the hardship cited by the Defendant No. 2 was justified after conducting a site visit and scrutiny. Further, the revised plan had been certified by the fire officer for fire safety. The MCGM thus accepted that the measures had been proposed by the Architect for neighbourhood safety, structural safety and health safety and that the same could be taken care of by appointing structural engineer, the supervisor and license plumber. The Municipal Commissioner approved the revised plan on 6th November 2020 as "approved as proposed".

51. Mr. Kadam has submitted that the MCGM had rigorously vetted and scrutinized the 2nd Defendant's application which was thereafter put up before the Municipal Commissioner who has duly applied his mind. There is a discretion vested in the Municipal Commissioner under Regulation 6(B) to allow cases of demonstrable hardship defined in Regulation 2(36) of DCPR 2034. Thus, discretion exercised by the Municipal Commissioner in the present case has been exercised in circumstances that fall within the said definition and in accordance with the policy set out under the

2019 Circular. He has submitted that the Plaintiffs' reliance on the decision of the Division Bench of this Court in **Rajendra Thacker** (supra) is misplaced. In that case the Commissioner had condoned illegalities in nearly 111 proposals without due application of mind. It was in this context that this Court held that the Commissioner is required to take into account the hardship which may be caused by any proposed modification to the building plans which directly affect residents, purchasers and neighbours. The representations of such persons, if made, are required to be considered. He has submitted that in the case of **Rajendra Thacker** (supra) there is no mention of giving a right of hearing to neighbours such as the Plaintiffs. To contend otherwise would make development or redevelopment impossible since all neighbours would have a supra veto right over property that does not belong to them. At the highest, this Court in **Rajendra Thacker** (supra) suggests that the rights of the neighbours to fire safety must not be compromised by an arbitrary exercise of discretion. In the present case, the MCGM and fire officer have acted in accordance with law. They have relied upon the 2019 circular by which the MCGM issued transitional policy and under which they took cognizance of the Chief Fire Officer's recommendation that fire safety would be assured and

adequate for developments, between 32 and upto 70 meters in height. The deficiencies in open space could be condoned by the Commissioner if a case for demonstrable hardship was made out. The Plaintiffs have accepted that the 2019 circular assures fire safety since the same was not challenged.

52. Mr. Kadam has submitted that the Defendant Nos. 1 and 2 have complied with the circular dated 15th July 2019 issued by the MCGM by providing in the revised plan clear open space of 6 meters on the south side of plot A, which in the east borders at 12.20 meters wide 14th Road and providing for fireman's lift. The fire officer being satisfied with the provisions in the revised plan for fire safety issued NOC on 7th July 2020 in accordance with the transitional policy of the MCGM dated 15th July 2019.

53. Mr. Kadam has therefore, submitted that there is full compliance with Regulation 47 of the DCPR 2034. He has submitted that the Plaintiffs' have confused the two Regulations i.e. Regulation 41 with Regulation 47 of DCPR 2034. He has submitted that Regulation 41 falls within Part VIII of the DCPR which

prescribes “General Building Requirements”. It is plainly of town planning, a prescription concerned with a person’s construction of his building on his own plot. It has no bearing / relevance to urban safety requirements. It is primarily concerned with ensuring that a proposed building has retained open space for its occupants to have light and ventilation. He has submitted that this Regulation is very different from Regulation 47 which falls under Part IX which is titled ‘Urban Safety Requirement’. Regulation 47 provides for fire protection requirements and which the Defendant Nos. 1 and 2 have taken care of in accordance with the transitional policy Circular dated 15th July 2011 issued by the MCGM. The fire officer has also granted NOC upon being satisfied with the provisions made in the revised plans submitted by the Defendant Nos. 1 and 2. The MCGM has after considering factors such as neighborhood safety, structural safety, health safety as well as demonstrable hardships were satisfied by the Defendant Nos. 1 and 2 sanctioned the revised plans. The Municipal Commissioner had exercised discretion under Regulation 6(B) of DCPR 2034 upon considering the demonstrable hardship which was as under:-

- (i) Redevelopment proposal of an existing building.

- (ii) Necessary to consume the admissible FSI to make the proposal financially viable.
- (iii) Height restriction on the building from The Civil Aviation department.
- (iv) Work already completed up to the 12th floor.

54. Mr. Kadam in context of the discretionary power exercisable by the Municipal Commissioner under Regulation 6(B) of DCPR 2034 has relied upon the decisions of the Division Bench of this Court in *Sanjeev Kokil Vs. State of Maharashtra*⁷ and *Rustomjee Central Park CHS Vs. MCGM & Ors.*⁸

55. Mr. Kadam has further submitted that the present Suit suffers from gross delay and laches as the Plaintiffs have moved merely five years from the date of IOD and when the proposed building on the subject plot A had already come upto 12 storeys. The Defendant Nos. 1 and 2 had expended significant sums in putting up the construction. Flats have also been sold to the flat purchasers who have been awaiting anxiously for possession of

⁷ 2013 (2) MhLJ 107

⁸ Writ Petition (L) No.2317 of 2019, decided on 19th December, 2019.

their homes. Thus, there is no conceivable basis for continuing the existing ad-interim injunction against the subject plot A and from creation of third party rights thereon. He has accordingly, submitted that the *ad-interim* injunction order in terms of prayer clauses (a) and (b) be vacated and the Defendant Nos. 1 and 2 be permitted to complete the construction of subject plot A and/or create third party rights thereon.

56. Mr. Sakhare, learned Senior Counsel appearing for the Defendant Nos. 3 to 8 – MCGM has submitted that the MCGM has in accordance with the provisions of DCR 1991 and DCPR 2034 granted concessions sought for by the Defendant Nos. 1 and 2 in the original building plans as well as in the revised building plans. He has submitted that the Municipal Commissioner in exercise of powers under Regulation 6(B) of the DCPR 2034 sanctioned the revised plans on 6th November 2020 for the proposed building comprising stilt + 1st and 2nd podium + 3rd to 17th upper floors. He has submitted that the sanctions granted from time to time are in respect of the fire safety; open space deficiency; permitting lift well, staircase lobby, fireman lift, smoke check lobby free of FSI by charging premium and parking spaces. He has

submitted that the fire NOC had been issued by the Chief Fire Officer considering the revised plans. He has further submitted that the deficiency in the open space has been considered by the MCGM and the same has been granted qua Regulations 41(2), 41(4), 43 and 47(1) (B) (a) of DCPR 2034 after site inspection by concerned officers of MCGM. Further, factors such as neighbourhood safety, structural safety, health safety and demonstrable hardship arising in the present case have also been considered. The other sanctions namely, permitting the lift well, staircase lobby, fireman lift, smoke check lobby free of FSI as per Regulation 31(1)(iv) of DCPR 2034 have been granted by charging premium. This is permissible under DCPR 2034 and policy circulars dated 22nd August 2017 and 30th January 2020. The concession in parking spaces is by allowing mechanized parking tower of 12 parking spaces having height 14.70 meter at south west open spaces and to allowing 2 stack parking protruding upto 0.50 meter in required 4.50 meter open spaces. Considering the hardship and planning constraints, by the Municipal Commissioner in exercise of powers under Regulation 6(B) of the DCPR 2034 has sanctioned the revised plans.

57. Mr. Sakhare has accordingly submitted that the concessions and sanctions have been granted by the MCGM and the Municipal Commissioner to the original plans and revised plans are in exercise of powers under the MRTP Act and in accordance with the provisions of DCPR 2034, after proper scrutiny and application of mind. Accordingly, the challenge canvassed by the Plaintiffs in the above Suit apart from being not maintainable, are devoid of merits and liable to be rejected.

58. Having considered the rival submissions, it would first be necessary to consider the challenge to the maintainability of the Suit raised by the Defendants. There is a two fold challenge, one is with regard the Suit being barred under Section 149 of the MRTP Act and the second is to the maintainability of the Suit for non-compliance of notice requirement under Section 527 of the MMC Act.

59. The objections which have been raised by the MCGM qua the maintainability of the Suit is required to be considered in the light of the fact that when the Interim Application No.2439 of 2020 was moved by the Defendant Nos.1 and 2 seeking

permission of this Court for having their revised plans considered by Defendant Nos.3 to 7, the MCGM had not raised any objection to the maintainability of the Suit either under Section 149 of the MRTP Act or Section 527 of the MMC Act. In fact, this Court had passed an order in the Interim Application clarifying that there was no restraint against MCGM from considering the revised plans. The MCGM were to decide the application in accordance with the applicable norms / law and all contentions of the parties were kept open. The first and second Defendants were granted liberty to renew their application in terms of the prayer clause for permission for the first and second Defendants to implement the revised plans and carry out the construction on the subject property upon approval of the same from MCGM. Thus it would appear that the MCGM had waived their objection to the maintainability of the present Suit. Further, the MCGM has not filed any application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 for rejection of the Plaint.

60. It has also held by this Court in the decision relied upon by the Plaintiffs, namely *Kishore (Supra)* that exclusion of jurisdiction of a Civil Court under Section 149 of the MRTP Act

is not applicable where the Plaint alleges failure on the part of the MCGM to comply with statutory provisions. Such case can be examined by the Civil Court. In the present case the Plaintiffs have pleaded that the MCGM has failed to comply the statutory provisions namely, the DCR 1991 and DCPR 2034. Mr. Sakhare learned Senior Counsel for the MCGM had placed reliance upon the decision of this Court in *Satish (Supra)*. This decision was also concerned with Section 149 of the MRTP Act. The Trial Court whilst deciding the preliminary issue as regards the jurisdiction of the Civil Court found that the Civil Court has no jurisdiction to go into the validity of the permission granted by the Planning Authority as per the sanctioned plans which finding was upheld by this Court. However, considering the Plaintiffs' wider challenge in the present Suit as to non-compliance by the MCGM of statutory provisions and not merely challenge to the validity of the permission granted by the MCGM, this Suit would be maintainable.

61. In so far as non issuance of the statutory notice under Section 527 of the MMC Act which Mr. Sakhare has claimed to be fatal to the present Suit and which warrants dismissal at the very threshold, it would be necessary to note that the MCGM had

not insisted on such statutory notice when the Interim Application taken out by the Defendant Nos.1 and 2 in the present Suit being Interim Application No.2439 of 2020 had been moved. This Interim Application had been entertained by this Court and relief granted. MCGM has thus waived such objection to the maintainability of the Suit on the ground of lack of statutory notice.

62. The decisions relied upon by the Defendants are inapplicable in the present case, considering the challenge in this Suit which is filed on the premise that there has been a failure of compliance with statutory provisions and / or acts done by the MCGM de hors the statutory provisions. This can be examined by the Civil Court.

63. Having considered the Suit to be maintainable, it would be appropriate to consider the other rival submissions with regard to the injunction sought for by the Plaintiffs restraining the Defendant Nos.1 and 2 from carrying out construction of any kind on subject plot A and from allotting flats and / or executing agreements, arrangements or understandings with third parties, inducting them into flats proposed to be constructed in the building

on subject Plot A. It is necessary to note that by an ad-interim order dated 26th August, 2019, the learned Single Judge of this Court granted ad-interim relief in these terms. This was in light of the sanction granted by the MCGM to the original plans submitted by first and second Defendants. The learned Single Judge prima facie found that the first and second Defendants had submitted plans in relation to the larger property and not plot A alone, though the larger plot had been sub-divided. There was not enough open space which was left by the first and second Defendants and that the first and second Defendants were attempting to usurp the rights of the owners of Plot B by failing to keep a reservation of 15% RG area and by considering RG area of the larger property.

64. The Plaintiffs had filed the present Suit in the year 2019 on these grievances which were noticed by the learned Single Judge of this Court in the ad-interim order. It is necessary to note that the Plaintiffs had expressed these grievances after much delay and laches as upto 12 storeys of the subject building had already been constructed on the subject Plot A. The Plaintiffs are the owners of the adjacent Plot B. Further, the MCGM had in the year 2015 in its report dated 14th November, 2015 already noted

that there was no imbalance of FSI and that necessary RG area had been deducted from the gross area of plot A and not from the larger property. Further, the MCGM had prior to issuance of the said report considered the deficiencies in open spaces in Plot A's development. The Municipal Commissioner had issued directions on 19th May, 2015 to recalculate the open space from the notional boundaries between Plot A and B in the North and West. The MCGM had in its report considered that the boundary recalculation of the open spaces from the notional boundary between Plot A and B revealed that there were open spaces deficiencies with podium touching boundary only at one point. However, in view of the Plot A being of "odd and irregular shaped", the MCGM rendered it fit for regularization under 64 B of DCR, 1991. The fire safety officer had granted no objection to the developer upon being satisfied that the fire safety requirements were met. The MCGM recommended that a registered undertaking be obtained from the developer of subject Plot A, waiving any right to object to any proposed development on the neighboring plot. The future occupants of subject Plot A would also waive their right to object to any proposed development on Plot B with deficient open space. It would thus appear that the Plaintiffs grievances were sufficiently

addressed by the MCGM, four years before the Plaintiff filed the present Suit.

65. The Defendant Nos.1 and 2 - Developers of Plot A had taken the further step in deciding to revise their building plans to fully meet with the Plaintiffs allegations in the Plaint. They had accordingly in the revised plans proposed to maintain open space of 1.5 meters in the North and West along the boundary shared with plot B and for which the existing portion of the podium touching boundary line between Plot A and Plot B was to be demolished. Defendant Nos.1 and 2 were to continue to retain the RG area of the proposed building within plot A's area. Further, six meter of open space would be maintained on the southern side of the plot for ingress / egress of firefighting tenders / vehicles. In addition fireman's lift would be installed which would open at requisite mid landing points on the staircase. It is necessary to note that on 7th July, 2020, the Fire Officer was satisfied with the fire safety as NOC has been issued in respect of the revised plans. This was upon taking into consideration the MCGM circular dated 6th August, 2019 which had permitted 6 meter open space on one side

of the building upto 70 meters in height if there was a provision for fire men's lift in the building.

66. The Defendant Nos.1 and 2 had taken out Interim Application No.2439 of 2021 in the present Suit for clarification from this Court that the ad-interim order dated 26th August, 2019 does not preclude Defendant Nos.3 to 7 - MCGM to process and approve the revised plans submitted by the Applicants. This Court had clarified that there is no restraint against MCGM from considering the revised plans and to decide the application. The Applicants were granted liberty to renew their application in terms of prayer clause (b) of the said Interim Application which sought permission to implement the revised plans and carry on further construction on the subject Plot A upon receiving approval from the MCGM. In that case, all contentions were expressly kept open.

67. The revised plans were thereafter submitted to the MCGM and it is necessary to note that the Plaintiffs had filed submissions opposing the revised plans being sanctioned. It was the Plaintiffs contention that on a comparison of the original sanctioned

plans and revised plans, it became evident that, the building remains in the same place and there were no changes to the open area on the northern side and minimal changes on the western side with the construction of Plot A carried out by Defendant Nos.1 and 2 which fettered the Plaintiffs right to develop Plot B due to lack of sufficient open spaces. Further, there was submission with regard to the proposal to construct mechanized car parking on the south side of Plot A which does not provide clear open space as contemplated under Regulation 47(1) (B) (a) of DCPR 2034. The structure of the car parking space prevents fire engine access at the end of the plot and is therefore, a fire hazard and dehors the provisions of DCPR 2034.

68. In *Rajendra Thacker (Supra)* this Court held that hardship considered by the MCGM is not only the hardship created by builders / developers / architects but the Municipal Commissioner is also required to take into account the hardship which may be caused by the proposed modification to other directly affected persons such as residents, purchasers and neighbours. In the event such persons make representations, the MCGM is duty bound to take into account such representations and the order must

indicate that the Commissioner has applied his mind to ensure that the grant of such modification / relaxation will not affect the health, safety, fire safety, structural safety of the inhabitants of the building or neighbourhood. The MCGM had been informed by the Plaintiffs vide letters dated 3rd September, 2020 and 5th October, 2020 of the violations of DCR 1991 and DCPR 2034. It is the Plaintiffs grievance that the MCGM had not considered the objections raised by the Plaintiffs whilst permitting concessions in the 4C report.

69. In my view, reliance placed by the Plaintiff on the judgment in *Rajendra Thacker (Supra)* is misplaced. In that case the Commissioner had summarily condoned illegalities in nearly 111 proposals without due application of mind. Further, the law did not define what constituted a ‘demonstrable hardship’. The Commissioner’s discretionary power under DCR 1991 were consequently unchecked and not canalized. The present case is very different from that case. The MCGM has considered the demonstrable hardship not only of the Defendant Nos.1 and 2 - Developers of the subject plot A, but also of the other persons concerned namely, residents, purchasers and neighbours. The MCGM appears to have thoroughly vetted and scrutinized the first

and second Defendants' application and thereafter has put it up before the Municipal Commissioner who had duly applied his mind to demonstrable hardship as defined under Regulation 2(36) of the DCPR 2034. The discretion under Regulation 6 (B) of DCPR 2034 has been duly exercised in circumstances that fall within the definition of demonstrable hardship and the policy set out under the 2019 Circular. I am prima facie of the view that the discretionary powers exercised by the Municipal Commissioner as well as the sanction of the original plans and revised plans by the MCGM and Municipal Commissioner do not fall foul of the decision of this Court in *Rajendra Thacker (Supra)*. Further, the Chief Fire Officer has also granted NOC upon considering fire safety not only of Plot A but also of surrounding plots including Plot B.

70. There is no merit in the submissions of the Plaintiffs that the non-conformity with the open space requirements under Regulation 41 of DCPR 2034 could not have been condoned by the MCGM and / or Municipal Commissioner. Regulation 41 falls within Part VIII of the DCPR 2034 which prescribes "General Building Requirements" it is clear that the open spaces prescribed under this Regulation is with regard to the open spaces required to

be kept by the person / developer's construction of his building on his own plot and does not have any bearing on urban safety requirements. This is primarily concerned with ensuring that the proposed building has retained open space for the occupants therein to have light and ventilation. It has no relevance to fire safety which is provided in Regulation 47 which falls under Part IX of DCPR 2034 which prescribes "Urban Safety Requirements". It would thus be open for the MCGM and Municipal Commissioner to grant concessions regarding open space deficiencies by considering demonstrable hardship of the person / developer who has in the present case constructed upto the 12th storey on the subject plot A.

71. I further find that there is no merit in the submission of the Plaintiffs that there has been a violation of Regulation 47 of the DCPR 2034 as the proposed building on Plot A having height of more than 32 meters and upto 70 meters has not kept clear open space at 9 meters at ground level on at least one side accessible from the road side. I have taken into consideration the circular issued by MCGM dated 15th July, 2019 which inter alia provides for developments between 32 meter to 70 meter in height, if a fireman's lift for use of firefighters to attend any fire is

provided, clear open space of 6 meters at ground level on at least one side may be allowed. This requirement has been met in the revised plans sanctioned by the MCGM and the Municipal Commissioner by the provisions of 6 meters open space upon the southern side of Plot A which in the east borders a 12.20 meters wide 14th Road and also on the south side of Plot A (other than road side). There is also provision of fireman's lift. The Defendant has not challenged the MCGM Circular dated 15th July, 2019 and hence absent such challenge, the Plaintiffs cannot claim that the MCGM circular cannot be followed as it is contrary to the DCPR 2034.

72. It is further necessary to note that the MCGM has sanctioned the revised Plans by considering factors such as neighbourhood safety, structural safety, health safety and the demonstrable hardship, which includes:-

- i) Redevelopment proposal of an existing building.
- ii) Necessary to consume the admissible FSI to make the proposal financially viable.
- iii) Height restriction on the building from the Civil Aviation Department;
- iv) Work of the subject building already completed upto the 12th floor.

v) The shape of Plot A was odd and irregular.

73. There was submission with regard to the locus of the Plaintiffs as a neighbour to file the present Suit. This Court in *Fatima (Supra)* relied upon by Mr. Kanade has held that a neighbour who claims to be affected by an illegal construction has an obligation in his favour based on which he can maintain a Suit for perpetual injunction. However, it is not necessary to go into this issue as the Suit has been entertained and I have found the suit to be maintainable.

74. I have also considered the submissions of Dr Birendra Saraf, learned Senior Counsel for the Applicants / Intervenors in Interim Application (L) No.28602 of 2021. I have arrived at a finding that the revised plans sanctioned by the MCGM and the Municipal Commissioner cannot be found fault with. Thus, the further construction of the proposed building on subject plot A cannot be held up. Accordingly, the grievance of the intervenors have been addressed.

75. I have considered the decisions of the Division Bench of this Court relied upon by Mr. Kadam namely *Sanjeev*

Kokil (Supra) and *Rustomjee Central Park CHS (Supra)* in support of his submission on exercise of power under Section 64(B) of DCR 1991 equivalent to 6(B) of DCPR 2034. In *Sanjeev Kokil (Supra)*, the Division Bench of this Court held that the authority which in this case is the Municipal Commissioner by merely making endorsement of “approved as proposed” does not mean that there is non-compliance of the requirement of recording reasons in writing. It pre-supposes that he agreed with every aspect mentioned in the proposal. Further, in *Rustomjee Central Park CHS (Supra)* it was held that the Municipal Commissioner in considering whether to condone the deficiency in open space must consider that in not doing so there will be demonstrable hardship, in that the proposed construction would not be possible. It is in fact for the Plaintiff to show that as a result of the Commissioner’s exercise of discretion there is a slightest endangerment of health safety, fire safety, structural safety or public safety of the inhabitants. In my view, the Plaintiffs have in the present case failed in showing this requirement as laid down by the Division Bench of this Court. Thus, in my prima facie view, the discretion exercised by the Municipal Commissioner under Regulation 6(B) of DCPR 2034 in

sanctioning the revised plans by duly considering demonstrable hardship cannot be found fault with.

76. Accordingly, the relief sought for in the above Notice of Motion is not granted. The ad-interim relief granted in terms of prayer clauses (a) and (b) of the Notice of Motion by ad-interim order dated 26th August, 2019 stands vacated.

77. In view of rejection of the relief sought for in the Notice of Motion, Interim Application (L) No.6700 of 2020 taken out by Defendant Nos.1 and 2 has worked itself out and is accordingly disposed of. Further, Interim Application 463 of 2021 taken out by the Plaintiff also does not survive and is disposed of. Interim Application (L) No. 26802 of 2020 taken out by the intervenors also does not survive and is disposed of.

78. The above Notice of Motion No.1450 of 2019 is disposed of with no order as to costs.

(R. I. CHAGLA J.)

79. After pronouncement of the judgment, Mr. Vishal Kanade, learned Counsel appearing for the Applicants/Plaintiffs has applied for continuation of the ad-interim relief granted by ad-interim order dated 26.08.2019 passed in the above Notice of Motion No.1450 of 2019.

80. This is opposed by Mr. Kadam, learned Counsel appearing for Defendant Nos.1 and 2 as well as by Mr. Sakhare, learned Senior Counsel appearing for Defendant Nos.3 to 8. Mr. Sakhare has stated that in any event the work on the subject building cannot start until final permission is issued in pursuance of the revised plans.

81. Considering the findings in the judgment dated 26.04.2022 and the fact that ad-interim order dated 26.08.2019 was passed prior to the submission of the revised plans which received the sanction of the MCGM and Municipal Commissioner, I find no reason for continuing the ad-interim relief granted by the ad-interim order dated 26.08.2019. Accordingly, the Application is rejected.

(R. I. CHAGLA J.)