

Arun

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12362 OF 2023**

- 1. SHETH DEVELOPERS PVT LTD,**
A company incorporated under the
provisions of Companies Act 1956
having its registered office at:
3rd Floor, Prius Infinity, Paranjape B
Scheme, Subhash Road, Vile Parle
(East), Mumbai 400 057.
- 2. ASHWIN NATWARLAL SHETH,**
3rd Floor, Prius Infinity, Paranjape B
Scheme, Subhash Road, Vile Parle
(East), Mumbai 400 057.

... PETITIONERS

~ VERSUS ~

- 1. MUNICIPAL CORPORATION OF
CITY OF THANE THROUGH
MUNICIPAL COMMISSIONER**
- 2. MUNICIPAL COMMISSIONER,**
Thane Municipal Corporation.
- 3. ASSISTANT DIRECTOR, TOWN
PLANNING,**
Thane Municipal Corporation,
All having their office at:
New Administrative Building, Chandan

ARUN
RAMCHANDRA
SANKPAL

Digitally signed
by ARUN
RAMCHANDRA
SANKPAL
Date: 2023.11.06
14:59:14 +0530

Wadi, Panchpakhade, Mahaplika
Bhavan Road, Thane West,
Thane 400 602.

4. **STATE OF MAHARASHTRA,**
Through its Principal Secretary to the
Urban Development Department,
Having its address at:
Mantralaya, Churchgate, Mumbai
(Copy for the Respondent No. 4 to be
served through the Government
Pleader, having its address at:
Bombay High Court, Fort Mumbai).

... RESPONDENTS

APPEARANCES

FOR THE PETITIONERS	Mr Virag Tulzapurkar, Senior <i>Advocate, with Viraj Parikh, Samit Shukla, Saloni Shah & Mustafa Nulwala, i/b DSK Legal.</i>
FOR RESPONDENTS NOS. 1 TO 3	Mr Mandar Limaye.
FOR RESPONDENT- STATE	Mr Kedar Dighe, Addl. GP, with SL Babar, AGP.

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 1st November 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** by consent returnable forthwith.

2. There is an Affidavit in Reply on behalf of Respondents Nos 1 to 3, the Thane Municipal Corporation (“**TMC**”).

3. The dispute pertains to the decision of the TMC to purportedly keep in “abeyance” its proclaimed Buy-Back Policy (“**BBP**”). This was a policy for the buy-back of lands acquired under Development Control Regulations (“**DCR**”) and of plots reserved under the sanctioned Development Plan (“**DP**”) for public use. The policy was always subject to certain terms and conditions.

4. This Petition under Article 226 of the Constitution of India assails not only the general direction to keep this policy in abeyance but the failure of the TMC to honour the terms of that policy after the TMC has received benefit under it and after the Petitioners have acted on the assurances contained in their policy, significantly altering their position to their prejudice. Of necessity, at least part of the Petition invokes principles of promissory estoppel or legitimate expectations.

5. By and large, the facts are not contentious. On 1st October 2003, the Petitioners acquired development rights over 1,15,018 sq mts of land from Voltas Ltd (“**Voltas**”). The two parties had a Development Agreement. This was registered.

6. On 2nd May 2016, the Maharashtra Government notified an ‘Accommodation Reservation Policy’. This policy was intended to transfer the burden of developing reserved plots to private land owners or developers in consideration of certain incentives. To

explain more clearly what this means, various plots in the command area of the TMC, which is the planning authority under the Maharashtra Regional And Town Planning Act, 1966 (“**the MRTP Act**”) were reserved for various public purposes, amenities and so forth in the sanctioned DP. Ordinarily, these reservations would have had to be developed by the TMC for public use.

7. If there was not an actual acquisition for monetary compensation of a reservation, with all its attendant of lapsing, the owner/developer would obtain development benefits in lieu of the reservation. There are cases where the condition is that the developer is to construct the amenities (typically a municipal market, for instance, or a playground, a dispensary, bus station, fire stations and so on) and hand these over free of cost to the TMC, in consideration of which the developer gets additional buildable area.

8. The present policy of 2nd May 2016 allowed the owners/developers to retain a part of the reserved plot for private development and provided additional Floor Space Index (“**FSI**”) or Transferable Development Rights (“**TDR**”) benefits for the reserved area. While this remained in the form of a policy, it was later incorporated in the finally sanctioned Unified Development Control And Promotion Regulations 2020 for Maharashtra State (“**UDCPR 2020**”) under Regulation 11(1). A copy of the policy is at Exhibit “B” to the Petition.

9. We come directly to Regulation 11 of the UDCPR 2020 at Exhibit “C”. Regulation 11(1) is captioned as “*Manner of*

Development of Reserved Sites in Development Plan (Accommodation Reservation Principles)”. In Table 11-A, the manner of development of various types of facilities are set out. In almost all of them, there is an option available to the Planning Authority. For example, where there is a recreational reservation, instead of acquiring and developing the land, the authority will retain 70% of the land and allow the developer to develop the remaining 30% by using the FSI/TDR of the plot in accordance with the adjoining use and subject to certain stipulated conditions. Similar provisions are made for public utilities (cremation ground, burial ground, slaughter house, sewerage treatment plants, water treatment plants, water tanks); commercial (markets and mandis and shopping centres), health facilities (such as health centres, hospitals and dispensaries etc), transportation, roads, parking, truck terminus, educational complexes, residential reservations, assembly and institutional uses, public and semi-public uses, composite reservation, other compatible reservations, other buildable reservations and reservations for an authority other than the Planning Authority.

10. This Petition concerns itself with one particular sub-item of the Public-Semi Public Reservation i.e., a Fire Brigade Station. The relevant portion of the UDCPR 2020 reads:

“CHAPTER -11

**ACQUISITION AND DEVELOPMENT OF
RESERVED SITES IN DEVELOPMENT PLANS**

11.0 GENERAL

These regulations shall be applicable for the areas within the jurisdiction of planning authorities, unless otherwise

specified.

11.1 Manner of Development of Reserved Site in Development Plan (Accommodation Reservation Principle)

The use of lands situated within the limits of Planning Authority which have been reserved for certain purpose in the Development Plan, shall be regulated in regard to type and manner of development/redevelopment according to the provisions mentioned in following Table No. 11A.

When owner is allowed to develop a reservation, he should have exclusive ownership/title of the land without any restriction under any other Act or Regulations in force.

Table No.11-A-Manner of Development		
Reservation	Person/Authority who may acquire/develop	Principle For Development through Accommodation Reservation subject to which development is permissible
1	2	3
9) Public-Semi public		
a) Govt Offices b) Fire Brigade Station c) Reservations similar to above.	Planning Authority/ Appropriate Authority / Owner	The Planning Authority/ Appropriate Authority may acquire and develop the reservation site for the same purpose. OR

Reservation	Person/Authority who may acquire/develop	Principle For Development through Accommodation Reservation subject to which development is permissible
1	2	3
		i) The Authority may allow the owner to develop the reservation, subject to handing over to the Planning Authority independent plot along with constructed amenity of total area, mentioned in Note-1 below Table & as per norms prescribed by the Authority. ii) The owner shall be entitled to develop remaining land for the uses permissible in adjoining zone with full permissible FSI of the entire Plot and permissible

Reservation	Person/Authority who may acquire/develop	Principle For Development through Accommodation Reservation subject to which development is permissible
1	2	3
		TDR potential of the entire plot. iii) The Authority, if required, shall allow the TDR for the unutilized FSI, if any (after deducting in-situ FSI), to be utilised as per TDR Regulations iv) Reservation may be allowed to be developed in parts.

11. From this tabulation it is clear that acquisition and development by the planning authority is one option available to the Planning Authority. The second option allows the owner to develop the reservation. It has four sub-options built into it as indicated above.

12. At the time when the Petitioners began work, it was the policy and not the Regulation that was operational. In exercise of its powers under Section 79 of the Maharashtra Municipal Corporations Act, 1949 (“**the MMC Act**”), the TMC passed Resolution No 1434. A copy is at Exhibit “D” to the Petition. Broadly stated, by this Resolution the TMC adopted the 2016 policy.

13. On 5th February 2019, the TMC wrote to the Petitioners demanding roughly Rs 19.76 crores for the fire brigade station and Rs 22.51 crores for a MRTS or a Rapid Transit Station.

14. Separately on 9th October 2019, Voltas and the Petitioners executed a Deed of Transfer by which complete title in the reservation was conveyed or transferred to the TMC against or in lieu of TDR. Then on 16th October 2019, the 1st Petitioner and the TMC executed a second Deed of Transfer and under this the TMC transferred title and the reservations to the Petitioners against payment of Rs 42,26,84,962/-. Now this is not a random number. It is 125% of the then prevalent Ready Reckoner value of the physical plot area of the reservation. The permissions granted to the Petitioners were subject to certain conditions and terms.

15. On 4th February 2022, the Petitioners sought the release of proportionate TDR (i.e., linked to the stage of construction) for the amenity building which had been completed up to the fourth floor.

16. By 11th February 2022, the Petitioners had transferred a portion of the property of about 1909 sq mts to the TMC under a Registered Deed of Transfer.

17. It seems that on 20th May 2022, the TMC communicated through the Assistant Director of Town Planning that some question had been raised in the Legislative Assembly and that the Ministry of Town Planning had given an assurance that there would be an enquiry into the BBP.

18. On 27th July 2022 the Petitioners replied saying that they had complied with all conditions under the stated and operated Accommodation Reservation Principle and BBP and there was no question therefore of refusing to grant them the additional pro-rata TDR. As we have noted, the amenity included a 'Fire Brigade Station'. On 16th November 2022, the Chief Fire Officer of the Thane Fire Department issued its No Objection Certificate.

19. The Petitioners continued their correspondence with the TMC and in March 2023 sought an amended development permission in view of the UDCPR 2020 which had increased the FSI allowable to the Petitioners for the *free sale building*. This application was rejected on 28th July 2023 by the TMC. A copy of this communication is at Exhibit "R" to the Petition at page 282. The reason given was that the BBP had purportedly not yet been approved by the State Government and therefore revised plans could not be approved since they were founded or based on an operation of the BBP. Another representation from the Petitioners

followed on 15th September 2023. A copy is at Exhibit “S”. There is no reply. This Petition was filed on 21st September 2023.

20. On 11th October 2023, we asked that an Affidavit in Reply be filed. A copy is at page 292. It is filed by one Satish P Ugile, the Assistant Director of Town Planning.

21. The Affidavit candidly states that there was indeed such a BBP. But in the context of what has happened thereafter, paragraphs 6 and 7 of the Affidavit at page 294 must be noted. They read as follows:

“6. I say that a query was raised by a Member of the Legislative Assembly (“*MLA*”) before the Legislative Assembly as regards the Buyback Policy introduced by the TMC and Hon’ble Minister of UDD had assured an enquiry with the respect of the said Buyback Policy. I say that in view of the above the Urban Development Department by its Letters dated 25th February 2022 and 20th April 2022 had called for a report from the TMC. Hereto annexed and marked as Exhibit-A are copies of Letters dated 25th February 2022 and 20th April 2022 issued by the Urban Development Department.

7. I say that in response to Letters dated 25th February 2022 and 20th April 2022, the TMC has submitted its Report by Letters dated 28th February 2022 and 18th May 2022. I say that it appears from the said Report that the Buyback Policy introduced by the TMC appears to be in conflict with the provisions of section 79(d) of the MMC Act. I say that at the relevant time when the TMC had introduced the said Buyback Policy, no sanction of the State Government was obtained by the TMC and in view thereof till the Urban Development Department does not approve

the said Buyback Policy, the applications of the Petitioners dated 4th February 2022 and 27th March 2023 will be kept in abeyance and cannot be processed in terms of the said Buyback Policy. Hereto annexed and marked **Exhibit-B** are copies of Letters dated 28th February 2022 and 18th May 2022.”

(Emphasis added)

22. As regards the enquiry, we note that all that has happened is that the Urban Development Department has asked for a report. There is no directive by the State Government to hold the policy in abeyance. There is certainly no directive in regard to what is to be done where the policy has been at least partly operated and especially in case where the Planning Authority has received material benefit either in terms of a cash pay-out or in terms of a built amenity or both. Absent such a directive, we do not know how a simple query and calling for a report can possibly keep in abeyance an entire policy, especially one that has been actively operated and under which a public authority has received benefit. Nothing in this Affidavit suggests that the TMC has even offered to return, let alone with interest, the amount that it had taken from the Petitioners or how the Petitioners would be compensated for the benefits so received by the TMC. As we have noted, the policy has embedded in it the default provision in law which is for acquisition and development by the authority itself. Even this is not being done. In other words, the TMC is quite literally having it both ways. It will not acquire and develop on its own these reservations. It accepts the money under the BBP that it had announced. It allows the amenity to be built, and 80% of that construction has been completed. Now, apparently, the entire process is to be held in stasis.

23. We note that no Municipal Corporation responds like this when a Division Bench of this Court asks a question or calls for an Affidavit.

24. As to Section 79 of the MMC Act, this deals with disposal of municipal property. We reproduce that Section.

“79. Provisions governing the disposal of municipal property.

With respect to the disposal of property belonging to the Corporation, other than property vesting in the Corporation exclusively for the purposes of the Transport Undertaking the following provisions shall have effect, namely:—

(a) the Commissioner may, in his discretion, dispose of by sale, letting out on hire or otherwise, any moveable property belonging to the Corporation not exceeding in value in each instance five hundred rupees or such higher amount as the Corporation may, with the approval of the State Government, from time to time determine, or grant a lease of any immoveable property belonging to the Corporation including any right of fishing or of gathering and taking fruit, and the like, for any period not exceeding twelve months at a time:

Provided that, the Commissioner shall report to the Standing Committee every lease of immoveable property within fifteen days of the grant thereof unless it is a contract for a monthly tenancy or the annual rent thereof at a rack rent does not exceed three thousand rupees;

(b) with the sanction of the Standing Committee the Commissioner may dispose of by sale, letting out on hire or otherwise any moveable property belonging to the Corporation, of which the value does not exceed five

thousand rupees; and may with the like sanction grant a lease of any immoveable property belonging to the Corporation, including any such right as aforesaid, for any period exceeding one year or sell or grant a lease in perpetuity of any immoveable property belonging to the Corporation the value of premium whereof does not exceed fifty thousand rupees or the annual rental whereof does not exceed three thousand rupees;

(c) with the sanction of the Corporation the Commissioner may lease, sell, let out on hire or otherwise convey any property, moveable or immoveable, belonging to the Corporation;

Provided that, where the immovable property or any right belonging to the Corporation has been leased or otherwise transferred in accordance with the provisions of this section by following due procedure of public auction, then it shall be lawful for the Corporation to subsequently renew the said lease or transfer of the immovable property, in accordance with the rules framed by the Government in this behalf.

(d) the consideration for which any immoveable property or any right belonging to the Corporation may be sold, leased or otherwise transferred shall not be less than the current market value of such premium, rent or other consideration;

(e) the sanction of the Standing Committee or of the Corporation under clause (b) or clause (c) may be given either generally for any class of cases or specially in any particular case;

(f) the aforesaid provisions of this section and the provisions of the rules shall apply, respectively, to every disposal of property belonging to the Corporation made under or for any purposes of this Act:

Provided that,—

- (a) no property vesting in the Corporation for the purpose of any specific trust shall be leased, sold or otherwise conveyed in such a manner that the purpose for which it is held will be prejudicially affected;
- (b) no property transferred to the Corporation by the Government shall be leased, sold or otherwise conveyed in any manner contrary to the terms of the transfer except with the prior sanction of the appropriate Government;
- (g) notwithstanding anything contained in this section, the Commissioner may, with the sanction of the Corporation and with the approval of the State Government grant a lease, for a period not exceeding thirty years, of a land belonging to the Corporation,—
 - (i) which is declared as a slum area under the provisions of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, to a co-operative society of eligible slum dwellers; or as the case may be, to the eligible slum dweller individually, at a premium to be decided by the State Government and subject to the prescribed terms and conditions; or
 - (ii) to persons who are dishoused as a result of the implementation of any Development Scheme of the Corporation or to the Co-operative Housing Society formed exclusively by persons who are dishoused as a result of the implementation of any Development Scheme of the Corporation; or
 - (iii) to any Department or undertaking of the Government of Maharashtra or of the Government of India, for the public purposes; or

(iv) to a public trust, society or company registered exclusively for medical and educational purposes registered under the Bombay Public Trusts Act, the Societies Registration Act, 1860 or the Maharashtra Co-operative Societies Act, 1960 or the Companies Act, 2013, as the case may be; or

(v) to a public trust registered under the Maharashtra Public Trusts Act, or a society registered under the Societies Registration Act, 1860 or the Maharashtra Co-operative Societies Act, 1960 or a company registered under the Companies Act, 2013, or any person, for the purposes of the provisions of public latrines, urinals and similar conveniences or construction of a plant for processing excrementitious or other filthy matters or garbage,

at such rent, which may be less than the market value of the premium, rent or other consideration, for the grant of such lease, and subject to such conditions as the Corporation may impose.

The approval of the State Government under this clause may be given either generally for any class of cases of such lands or specially in any particular case of such land:

Provided that, where the Municipal Corporation has granted approval to the implementation of the *Pradhan Mantri Awas Yojana* of the Central Government on the land belonging to it, the Commissioner shall grant lease of such land to the eligible individual beneficiary in the manner, as may be notified by the State Government:

Provided further that, the Commissioner may in like manner renew, from time to time, the lease for such period and subject to such conditions as the Corporation may determine and impose.

Explanation.—For the purposes of this clause, “eligible slum dweller” means the eligible slum dweller as defined in clause (c-b) of section 2 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971.”

(Emphasis added)

25. The so-called query to the TMC is unfocused because it is not even demonstrated on Affidavit how the BBP is in any way in contravention of Section 79. The submission seems to be that sub-clause (d) is violated. But sub-clause (d) only says that the consideration cannot be less than the market value of such premium rent or other consideration. What has been computed is 125% of the Ready Reckoner rate. Prima facie it is difficult to see how the policy can be on this ground said to be in conflict with Section 79(d) of the MMC Act.

26. But even leaving that aspect aside, we believe it is now firmly settled that no authority can act in an arbitrary manner in the exercise of its statutory powers. There is much settled law in this regard and it goes back several decades. We will refer to only some of it.

27. But before we do so, we return once again to the UDCPR 2020 and to the 2016 policy. We have considered the Appendix to the policy . We find that but for the most minor and immaterial differences, if any, it is almost identical to the one that we find in Regulation 11 of the UDCPR 2020. Particularly, the public and semi-public caption did not exist in the 2016 policy. There was only

a residual Clause 11 for ‘reservations other than shown in the DP’ and not covered by other items in the policy, but the rest is virtually identical including the terms on which the buy back and the development by the property owner could be permitted.

28. The doctrine of promissory estoppel is firmly part of the jurisprudence in this country. In *Manuelsons Hotels Private Limited v State of Kerala And Ors*,¹ there was a comprehensive review and survey authored by Justice Rohinton Fali Nariman of the law on promissory estoppel and, in that context and in the context of administrative law, the scope of and grounds for judicial review. The discussion covers all the relevant case law on promissory estoppel, *Wednesbury* unreasonableness and judicial review including the celebrated cases of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,² *Union of India v Anglo-Afghan Agencies*,³ *Turner Morrison And Co Ltd v Hungerford Investment Trust Ltd*,⁴ and *Motilal Padampat Sugar Mills Co Ltd v State of UP*.⁵

29. The principle is enunciated in the context of in that case, a question of taxation. The Supreme Court held that where a Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee acting in reliance on it, alters his position, the Government would be held bound by the promise. That promise is then enforceable against the

1 (2016) 6 SCC 766.

2 (1948) 1 KB 223. (CA)

3 1967 SCC OnLine SC 12 : AIR 1968 SC 718.

4 (1972) 1 SCC 857.

5 (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641

Government at the instance of the promisee and this is so even if there is no consideration for the promise and even if that promise is not formally recorded in a contract. The Supreme Court placed this on a fundamental principle that in a republic governed by the rule of law no one is above the law. The Government is no exception to the application of the rule of law. The principle does not demand that the petitioner must show that it has suffered any detriment. It is enough for the invocation of the principle to show that the petitioner relied on the promise or the representation that was held out by the Government and altered its position relying on this assurance.

30. Of necessity, the doctrine of promissory estoppel is an evaluation of the more commonplace rule of estoppel. No party may resile from a commitment once made nor may that party approbate and reprobate. The law will not allow an unconscionable departure by one party from the subject matter of even an assumption, whether that assumption is of fact or of law, is of the present or of the future, if that assumption is the basis on which the other party conducted itself. The relief to be fashioned in such cases is necessarily flexible to ensure that justice is done to the party aggrieved. Courts will not permit an unconscionable departure from a promise solemnly made and which the other party adopted, accepted, and acted on.

31. It is well known that the origins of the doctrine can probably be traced to the legendary dictum of Lord Denning in *Central*

London Property Trust Ltd v High Trees House Ltd.⁶ Where a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on, estoppel would apply. Although it has been pointed out that the significant parts of the decision is *obiter*, it is nonetheless a reaffirmation and extension of the doctrine of promissory estoppel. Many advances have been made in that jurisprudence since then.

32. Estoppel is both a rule in equity and a rule in evidence. Because it is foundationally in equity, it is necessarily flexible. In India, our jurisprudence recognizes promissory estoppel as a valid basis of an independent cause of action: the famous dictum that it can act as a sword, not merely a shield.⁷ In pursuing such a cause of action, the Petitioner need not show *actual* prejudice or detriment. It is enough for the party to show two things: (i) that a representation was made; and (ii) that the party acted on that representation and altered its position. Where there is a failure to abide by the representation that is made, a writ court will necessarily step in and a mandamus will necessarily be issued to compel the promisor Government to fulfil its commitments and to perform what it said it would perform and on the basis of which assurance the other party altered its position.

33. The law in this regard was considered extensively and more recently by the Supreme Court in *State of Jharkhand & Ors v*

⁶ [1947] 1 KB 130.

⁷ Following, perhaps, *Amalgamated Investment Co v Texas Bank*, [1982] EWHC 84 (QB).

*Brahmputra Metallica Ltd, Ranchi & Anr.*⁸ The *Brahmputra Metallica* case dealt with a State Government Notification also in the context of taxation. The decision covered the jurisprudence on promissory estoppel and also legitimate expectations. As Section H.2 of the *Brahmputra Metallica* decision shows, the *Motilal Padampat Sugar Mills'* ratio has been steadily evolved and expanded. Section H.5 of the *Brahmputra Metallica* decision deals with an important facet running in parallel, that of legitimate expectations. As the Supreme Court observed, these two doctrines, promissory estoppel and legitimate expectation, are often conflated in India. There is a telling comment that this doctrinal confusion has robbed the law of clarity but always citizens have been victims (paragraph 41). The Supreme Court said that the representations by public authorities need to be held to scrupulous standards since citizens continue to live their lives based on the trust they repose in the State as well. Importantly for our purposes the observations albeit of a general nature in paragraph 41 are most apposite.

“41. While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for

8 2020 SCC OnLine SC 968. This has been considered in *Indian Ex-servicemen Movement & Ors v Union of India & Ors*, (2022) 7 SCC 323.

investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates. Professors Jain and Deshpande characterize the consequences of this doctrinal confusion in the following terms:

“Thus, in India, the characterization of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel in the light of the evolution of doctrines like LE (Legitimate Expectations) and abuse of power. If the Supreme Court of India has shown its creativity in transforming the notion of promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the doctrine of LE for judicial review of resilement of administrative authorities from policies and long-standing practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil. Presently, in the absence of a like doctrine to that of promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation.”

(Emphasis added)

34. The Supreme Court in *Brahmputra Metallica* spelt out the foundational basis for the doctrine of legitimate expectations and clearly stated that it is not simply a doctrine that is parallel or analogous to the doctrine of promissory estoppel. the doctrine of legitimate expectations has a separate and independent existence. The weight of learning on legitimate expectations was considered. The Supreme Court looked at Indian decisions and the extent to which these were based on the doctrine as applied under English law.

35. One of the distinctions noted was that the application of the doctrine of the legitimate expectations has as its primary considerations, reasonableness and fairness in State action. Paragraph 45 of *Brahmputra Metallica* says:

“45. In a concurring opinion in *Monnet Ispat and Energy Ltd vs Union of India* (“Monnet Ispat”, [(2012) 11 SCC 1]), Justice H L Gokhale highlighted the different considerations that underlie the doctrines of promissory estoppel and legitimate expectation. **The learned judge held that for the application of the doctrine of promissory estoppel, there has to be a promise, based on which the promisee has acted to its prejudice. In contrast, while applying the doctrine of legitimate expectation, the primary considerations are reasonableness and fairness of the State action. He observed thus:**

“Promissory Estoppel and Legitimate Expectations

289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party

concerned must have acted to its prejudice. In the instant case it was only a proposal, and it was very much made clear that it was to be approved by the Central Government, prior where to it could not be construed as containing a promise. Besides, equity cannot be used against a statutory provision or notification.

290. ... In any case, in the absence of any promise, the Appellants including Aadhunik cannot claim promissory estoppel in the teeth of the notifications issued under the relevant statutory powers. Alternatively, the Appellants are trying to make a case under the doctrine of legitimate expectations. The basis of this doctrine is in reasonableness and fairness. However, it can also not be invoked where the decision of the public authority is founded in a provision of law, and is in consonance with public interest.”

(emphasis supplied)”

(Emphasis added)

36. Moreover, it had been earlier noted that the doctrine of legitimate expectations could not be claimed as a right in itself but could only be used or invoked when a denial of those legitimate expectations led to an Article 14 violation.

37. This then brought to the forefront the connection between Article 14 and the doctrine of Legitimate Expectations, a matter that fell for consideration before a three Judge Bench of Supreme Court

in *Food Corporation of India v Kamdhenu Cattle Feed Industries*.⁹ This is discussed in paragraph 48 of *Brahmputra Metallica*:

“48. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in *Food Corporation of India vs Kamdhenu Cattle Feed Industries*, speaking through Justice J S Verma, held thus:

“7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision- making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to

9 (1993) 1 SCC 71.

challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. **The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process.** Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

(Emphasis added)

38. Finally, the Supreme Court in *Brahmputra Metalics* concluded that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non arbitrariness enshrined under Article 14 finds concrete expression.

39. It is with this in mind that we turn to the grounds in the Petition and then to the prayers. The entire Petition is positioned squarely on an Article 14 challenge. This is apparent from the very first ground (A) at page 18 which reads thus:

“A. That the Respondents are all ‘State’ within the meaning of Article 12 of the Constitution of India and are required to act in a just, fair and reasonable manner in all their activities dealing with the citizens. In the instant case, the actions on the part of the Respondents clearly demonstrate that the Respondents are acting in a completely high-handed, arbitrary and capricious manner unbecoming of an authority, who is ‘State’ and thus acting clearly in breach of mandate under Article 14 of the Constitution of India.”

40. On the two doctrines that we have briefly discussed above, it is important to note grounds (D), (E), (F), (G) and (M).

“D. That the TMC being the Planning Authority under the MRTP Act, 1966 and also exercising powers under the Maharashtra Municipal Corporations Act, 1949 cannot act contrary to existing policies and notifications such as the Accommodation Reservation Principle and the Buy-Back Policy. Surely, such a drastic action cannot be based only on a query raised in the legislative assembly. The TMC cannot simply do away with or ignore the aforesaid policies and resolutions. The Accommodation Reservation Principle and the Buy-Back Policy continue to have full force of law

and must be implemented in full. There is no discretion or choice in this matter vested in the TMC.

E. That even otherwise, without prejudice to the aforesaid, the Petitioners have acted applied for the repurchase of the Reservations from the TMC. The Petitioners' application was accepted and fully implemented. Full consideration was paid by the Petitioners and accepted by the TMC. The title in the Reservations already stands conveyed back to the Petitioners by the TMC. The transfer of title is already complete as per the Deed of Transfer dated 16th October 2019 So far as the Property and the Reservations are concerned, the Buy-Back Policy has already been fully implemented. That being so, any doubts or issues that the TMC may have with respect to the same cannot become a basis to undo completed transactions and set back the clock as if the Buy-Back Policy never existed.

F. That the Petitioners have already acted upon the Buy-Back Policy and has irretrievably altered its position to its detriment as a result thereof. The Petitioners have paid a large sum of Rs.42,26,84,962/- being the total consideration to repurchase the Reservations from the TMC at market rate i.e., 125% of the ready reckoner value of the area of the Reservations. The Petitioners has already invested more than Rs. 76.11 crores in the development of the Reservations and the Property. The Petitioners have registered its project with MahaRERA. It has sold units to third parties. As such, in accordance with the doctrine of legitimate expectation, the Respondents cannot be permitted to back out of their representations, commitments and existing policies and notifications.

G. Even otherwise, there is absolutely no doubt or query with respect to the merits of the Buy-Back Policy. It presents a win-win scenario for the TMC. *First*, it saves the

exchequer the cost of acquiring the lands reserved for public purpose. *Second*, it generates revenue for the TMC for re-transferring the land, which is effectively at market rate being 125% of the ready reckoner value. *Third*, it also ensures that TMC gets constructed area for the public purpose the land has been reserved for, free of cost and without any encumbrance whatsoever. As such, even if it were open to inquire into the policy, there is absolutely no basis to question its tremendous benefit to the TMC.

M. That the Respondents' stand that the Petitioners' proposals and applications for grant of TDR and development permissions (although in accordance with law) are being kept in abeyance is patently hypocritical, self-serving, and illegal. *First*, the TMC has already received 125% of the ready reckoner value of the Reservations for their buy-back from the Petitioners. *Second*, the TMC has also received conveyance of the area of 1,909 sq meters reserved for the public purpose. It cannot be that the TMC continues enjoying the benefits from the Buy-Back Policy and the Accommodation Reservation Principle that it is entitled to, but refuses to allow the Petitioners to enjoy its share of benefits under the same laws, i.e., issue of TDR and grant of development permissions, This is impermissible."

41. This is nothing but an invocation of the two doctrines that we have already examined.

42. The Petition seeks the following reliefs.

“(a) This Hon’ble Court may be pleased to issue a writ of certiorari, a writ in the nature of certiorari, or such other appropriate writ, calling for the papers in relation to the development of development of the Property by the

Petitioners, and after going through the same, be pleased to quash and set aside the Impugned Letters dated 20th May 2022 and 28th July 2023 issued by Respondent No. 3 on behalf of Respondent No. 1 being Exhibits N and R to this Petition.

(b) This Hon'ble Court may be pleased to issue a writ of mandamus, a writ in the nature of mandamus, or such other appropriate writ, directing the Respondents to process the Petitioners' applications dated 4th February 2022 and 21st March 2023 for grant of revised development permissions and issuance of pro-rata TDR to the Petitioners in accordance with law and 2020 UDCPR.

(c) This Hon'ble Court may be pleased to issue a writ of mandamus, a writ in the nature of mandamus, or such other appropriate writ, directing the Respondents to consider and process all the proposals and applications made by the Petitioners with respect to development of the Property strictly in accordance with the terms of the 2020 UDCPR being completely uninfluenced by any queries raised into or inquiries into the Resolution No. 1434 dated 21st November 2017 i.e. the Buy-Back Policy.

(d) That in the alternative to prayers (a), (b) and (c) above, this Hon'ble Court be pleased to direct the Respondents Thane Municipal Corporation to refund the Petitioners for the expenses incurred by the Petitioners in buying back the property and developing the same in terms of letter dated 15th September 2023 (annexed as Exhibit T) with interest at the rate of 12% p.a. from the date of its payment till its realisation by the Petitioners."

43. Incidentally, we note that there is a typographical error in prayer clause (a), the reference should be to Exhibits "N" and "R"

and not Exhibits “O” and “S”. These are the two documents that are impeached at pages 269 and 282 of the Petition.

44. Since this is clearly a case of seeking judicial review of administrative action, we turn to the next aspect of the law. The law in this regard is well settled. Our Supreme Court, on an exhaustive consideration of the law as it evolved in England, and taking into account the principles enunciated in *Associated Provincial Picture Houses v Wednesbury Corporation*¹⁰ and *Council of Civil Service Unions v Minister for the Civil Service (“CCSU”)*¹¹ has drawn a distinction in *Union of India v G Ganayutham*¹² between primary and secondary judicial review. The first occurs where fundamental rights are involved, the second where they are not. The Supreme Court itself has had occasion to comment that there may indeed be cases in judicial review that are covered by both. Further, the evolution of law has taken into account emerging doctrines, that is to say Wednesbury unreasonableness on the one hand and proportionately as a more recent emergent doctrine.

45. In *Wednesbury*, Lord Greene said:

“... It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been

10 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223

11 *Council Of Civil Service Unions & Ors v Minister for the Civil Service*[1983] UKHL 6 : [1984] 3 All ER 935 : [1984] 3 WLR 1174.

12 (1997) 7 SCC 463.

used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. ... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

...

... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."

(Emphasis added)

46. In *CCSU*, Diplock LJ for the House of Lords spoke of 'irrationality' in these words:

By 'irrationality' I mean what can by now be succinctly referred to as *Wednesbury* unreasonableness. **It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.**

(Emphasis added)

47. Even as *Wednesbury* unreasonableness continued to inform decisions of Courts with the power of judicial review, not only here but in many other jurisdictions, there came into ascendance a parallel doctrine of proportionality. This is not necessarily linked to the award of punishment. It may be a facet of reasonableness. Its tests are slightly different from those of *Wednesbury* unreasonableness. The doctrine tells us that in any executive or administrative action, the act or thing done or ordered to be done cannot be so disproportionate to the cause for that order. To put it more colloquially, an administrator or an executive cannot use our hammer to kill an ant.¹³

48. In *CCSU*, Diplock LJ foresaw the advent of the proportionality doctrine:

“Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. *I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’...*”

¹³ See: *R v Goldstein*, [1983] 1 WLR 151 : [1983] 1 All ER 434 : per Diplock LJ: “This would indeed be using a sledge-hammer to crack a nut.” Or a paring knife, not a battle axe: *Central Cooperative Bank v Coimbatore District Central Cooperative Bank Employees Association & Anr*, (2007) 4 SCC 669.

49. The *CCSU* standard was accepted in *Union of India & Anr v G Ganayutham*.¹⁴ The two doctrines received an elucidation in *Om Kumar & Ors v Union of India*,¹⁵ particularly on the question of primary judicial review (where fundamental rights are involved) and secondary judicial review (where they are not).¹⁶ The scope of the proportionality principle came to be examined in *Coimbatore District Central Cooperative Bank v Coimbatore District Central Cooperative Bank Employees Association & Anr*.¹⁷ The Supreme Court said:

17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. **If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the “doctrine of proportionality”.**

18. **“Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule**

14 (1997) 7 SCC 463.

15 (2001) 2 SCC 386.

16 See also: *Kerala State Beverages (M&M) Corporation Ltd v PP Suresh & Ors*, (2019) 9 SCC 710.

17 (2007) 4 SCC 669.

of permissible priorities.

...

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no “pick and choose”, selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a “sledgehammer to crack a nut”. As has been said many a time; “where paring knife suffices, battle axe is precluded”.

(Emphasis added)

50. As the Supreme Court itself noted, the proportionality principle is a test of whether the decision-maker has achieved the correct balance: *Chairman, All India Railway Recruitment Board & Anr v K Shyam Kumar & Ors*.¹⁸ In *Ganayutham*, the Supreme Court said:

To arrive at a decision on “reasonableness” the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one.

(Emphasis added)

18 (2010) 6 SCC 614.

51. At least one decision of the Supreme Court reviews more recent thinking in England that the doctrine of proportionately has supplanted *Wednesbury* unreasonableness but our Supreme Court held that there is no such clear-cut division: *Jitendra Kumar & Ors v State of Haryana & Anr.*¹⁹ In given cases both will apply. *Wednesbury* unreasonableness will speak to the rationality of a decision-making process. It has distinct components. One of these is a test of procedural irregularity. Another test is one of reasonableness, to test whether the decision is of a kind that no reasonable person could ever take. In the words of Diplock LJ in *CCSU*, the *Wednesbury* principle, formulated by Lord Greene, is whether the decision is so outrageous in its defiance of law or logic that it cannot possibly be sustained. Proportionality will speak to, as the Supreme Court said in *All India Recruitment Board*, examining if the decision achieves the required balance. In its analysis, the Supreme Court held:

Wednesbury and Proportionality

36. *Wednesbury* [Associated Provincial Picture Houses Ltd. v. *Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] **applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to “assess the balance or equation” struck by the decision-maker. Proportionality test in**

¹⁹ (2008) 2 SCC 161 : “We, with greatest respect, do not have any such problem. This Court not only has noticed the development of law in this field but applied the same also.”

some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalise or lay down a straitjacket formula and to say that *Wednesbury* has met with its death knell is too tall a statement. Let us, however, recognise the fact that the current trend seems to favour proportionality test but *Wednesbury* has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future.

37. **Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.**

38. Leyland and Anthony in Textbook on Administrative Law (5th Edn. OUP, 2005) at p. 331 has amply put as follows:

“Proportionality works on the assumption

that administrative action ought not to go beyond what is necessary to achieve its desired results (in everyday terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision.”

39. The courts have to develop an infeasible and principled approach to proportionality, till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. **Proportionality as the word indicates has reference to variables or comparison, it enables the court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision-maker.**

Application of the principles

42. We will now apply the proportionality test to the three alternatives suggested. Principle of proportionality, as we have already indicated, is more concerned with the aims of the decision-maker and whether the decision-maker has achieved the correct balance. **The proportionality test may require the attention of the court to be directed to the relative weight according to interest and considerations.** When we apply that test and look at the three alternatives, we are of the view that the decision-maker has struck a correct balance in accepting the second alternative. The first alternative was not accepted not only because such a process was time-consuming and expensive, but nobody favoured that option, and even the candidates who had approached the court were more in favour of the second alternative. Applying the proportionality test also in

our view the Board has struck the correct balance in adopting the second alternative which was well balanced and harmonious.

43. We, therefore hold, applying the test of *Wednesbury* unreasonableness as well as the proportionality test, the decision taken by the Board in the facts and circumstances of this case was fair, reasonable, well balanced and harmonious. By accepting the third alternative, the High Court was perpetuating the illegality since there were serious allegations of leakage of question papers, large scale of impersonation by candidates and mass copying in the first written test.

(Emphasis added)

52. In view of this discussion, we are unable to see how the applications by the Petitioners could have been rejected simply and solely on the ground that the policy is in abeyance, that there is an enquiry, that a report has been called for or that the policy has not been approved by the State Government. Once the UDCPR 2020 has been brought into force, and the sanctioning authority for the DP of which the Regulations are a part, is always the State Government under the MRTP Act, then there is no question of saying that the 2016 policy was not approved by the State Government.

53. This is why we have been at some pains to point out the provisions of the UDCPR 2020 and to show that they are not in any material manner distinct from the 2016 policy. Thus, whether or not formally approved by the State Government in the form of the policy as it stood between 2016 and 2020, it is safe to hold that the

policy as embodied in the UDCPR 2020 vide Regulation 11 now has State Government approval and sanction. It is, therefore, not possible for the TMC to refuse to apply the policy. It is required to do so on the basis not only of the UDCPR 2020 but based on the policy of 2016 that was assured, invoking both principles of the doctrine of promissory estoppel and of legitimate expectations. It cannot be denied that under that very policy not only have the Petitioners altered their position, but prejudice has been demonstrated and, correspondingly, great benefit to the TMC including considerable financial benefit has already been shown.

54. As the Petition points out in ground (G), the BBP presents an entirely beneficial scenario for the TMC. But that requires necessarily the policy to be operated in the way it was announced and assured. The TMC cannot have the benefit of a cash component as well as development of the amenity without performing its obligations and keeping its assurances under the policy.

55. The impugned rejections would violate the principles against Wednesbury unreasonableness and the doctrine of proportionality. Such a decision is manifestly arbitrary and cannot withstand the test of non-arbitrariness in administrative action mandated by Article 14. Viewed from any perspective, the impugned rejections cannot be sustained.

56. Rule is accordingly made absolute in terms of prayer clauses (a), (b) and (c).

57. No costs.

(Kamal Khata, J)

(G. S. Patel, J)