

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 285 OF 2023

COSMOS CONSTRUCTIONS,
A partnership firm registered under
the Indian Partnership Act 1932
Through its partner Manish G Mehta
Having office at: 201, Arihant Agiary Lane,
Jambhli Naka, Thane (W).

...Petitioner

~ VERSUS ~

**MUNICIPAL CORPORATION OF THE
CITY OF THANE,**
through the Municipal Commissioner
Having its office at Mahapalika Bhavan,
Chandan Wadi, Panch Pakhadi,
Thane 400 602.

...Respondent

APPEARANCES

FOR THE PETITIONER	Ms Druti Datar, <i>i/b</i> Rajesh Datar.
FOR RESPONDENT	Mr Ajit Ram Pitale, <i>with</i> Ameya Abhay Pitale and Siddharth Pitale

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

DATED : 31st August 2023

ORAL JUDGMENT (Per GS Patel J):-

1. Notice was issued for final disposal at the admission stage. There is an Affidavit in Reply. Hence, **Rule**, returnable forthwith.
2. We have heard Ms Druti Datar for the Petitioner and Mr Pitale for the sole Respondent, the Municipal Corporation of City of Thane.
3. The Thane Municipal Corporation (“TMC”) insists that a particular reservation continues on a tract of land that belongs to the Petitioner. When the Petitioner applied for a building or development permission, the TMC imposed a condition that the land reservation’s requirement must be met. This condition, styled as Condition No. 1, is said by the TMC to be a reservation for what is called MHADA Housing Site-A for a plot bearing Survey No. 59/A Hissa No. 2/G/2/1 and Gat No. 59/A Hissa No. 2/H situated at Chitalsar, Manpada, Taluka and District Thane. The Development Proposal is No. 2005/160. The Petition seeks that this condition be quashed. According to Ms Datar, this reservation does not subsist. It was deleted following a sanctioned modification to the Development Plan. The TMC cannot insist that this reservation continues. The second prayer is for a mandamus to direct the TMC to approve the Petitioners’ revised building proposals dated 21st February 2022 and 4th May 2022 in respect of lands situated at

59A, Hissa 3B/1/1, 3B/1/2A, 3B/1/2B, 3B/1/2C, 3B/2/1, 3B/4/1, 3B/5, 16/3B/6, 2H, 2/G/2/1, 2/G/2/2, 16B/2/1/2/1, 16B/2/1/2/2 at Village Chitalsar, Manpada, Thane.

4. A short statement of facts will be necessary. These are somewhat complicated. They spiral in different directions, but ultimately funnel to the narrow point we have identified at the forefront.

5. On 6th July 1960, a firm called D Dahyabhai & Co purchased 16 annas of an undivided share in a tract of land known as Manpada Estates at Chitalsar, Manpada, Thane. The total land in question was 433 acres and 36.3/4 Gunthas. At that time, the Urban Land (Ceiling and Regulation Act), 1976 (“**ULC Act**”) was in force. There came to be passed an order under Section 8 (4) of the ULC Act declaring 3,10,079 sq mts of the purchased land as surplus vacant land. There then followed a notification dated 29th April 1983 under Section 10(2) and Section 10(3) of the ULC Act. The surplus land was deemed to have been acquired by the State Government with effect from 30th August 1983. On 6th February 1987 by a special allotment order, the State of Maharashtra allotted 88,971 sq mts out of the total surplus land to Maharashtra Housing and Area Development Authority (“**MHADA**”). Possession of this portion was handed over to MHADA on 29th April 1988.

6. D Dahyabhai & Co filed Writ Petition No. 1927 of 1988 assailing the orders under the ULC Act. This writ petition failed. D

Dahyabhai & Co took the matter higher to the Supreme Court and obtained an order of *status quo*.

7. On 12th November 1988, D Dahyabhai & Co applied to the State Government for retention of 40% of the total surplus land, i.e., 88,971 sq mts.

8. There followed a communication dated 25th January 1989 addressed by the State of Maharashtra through the Housing and Special Assistance Department to the Chief Executive Officer of MHADA requesting him to deliver physical possession of 35,588.40 sq mts to D Dahyabhai & Co. This represented 40% of the total surplus land of 88,971 sq mts. The CEO of MHADA was asked to take steps to utilize the remaining 60% of the land.

9. On 27th January 1989, there followed from the State Government a formal order of exemption under Section 20 of the ULC Act. This order directed that an area admeasuring 35,588.40 sq mts, that is to say, 40% of the total surplus land, was permitted to be retained by the owner for development. This area of 40%, i.e., 35,588.40 sq mts, was, therefore, retention land. On 7th April 1989, physical possession of this area of 35,588.40 sq mts of the exempted or retention land was given to D Dahyabhai & Co by MHADA.

10. D Dahyabhai & Co then wrote to the Housing and Special Assistance Department of Mantralaya for permission to develop an aggregate area of 83,634 sq mts. This included the exempted/retention land following the Section 20 ULC order of

27th January 1989 under the aforesaid 60:40 division, dispense, dispensation or split. The proposal was for a composite development in terms of a government circular of 16th November 1987.

11. The reply from the Housing and Special Assistance Department of 24th February 1989 was to clarify that there was no objection to grant permission to develop the land up to the ceiling limit of 2000 sq mts, but with a direction to D Dahyabhai & Co to deliver possession of 60% of the land, i.e., 53,382.60 sq mts to MHADA and to give an undertaking to that effect. On account of this exemption order and since D Dahyabhai & Co now had an order and possession of 35,588.40 sq mts, on 7th March 1989, the firm withdrew its Special Leave Petition in the Supreme Court.

12. There then followed delivery of possession of the 35,588.40 sq mts to D Dahyabhai & Co on 7th April 1989.

13. The position, therefore, was as follows. Of the total land, 40% was retention land in the hands of D Dahyabhai & Co. The remaining 60% was in MHADA's possession. The 40% portion was in the aggregate 35,588.40 sq mts and was split over several Gat numbers divisible into three categories. An area of 12,730.90 sq mts fell into Gat No. 59/2 - Gat No. 59/2B/1A; about 20,110 sq mts fell into Gat No. 59/3; and 2,747.50 sq mts was in Gat No. 59/16 -Gat No. 59/16B-1.

14. On 28th August 1992, there was a mutation entry in the name of one Soma Rama Gawande (“**Gawande**”) on Gat No. 59/2 in relation to an area of two acres following an order of 31st May 1985 by the Tehsildar, Thane. D Dahyabhai & Co challenged that order before the Assistant Collector, Thane. He set aside the order of the Tehsildar on 4th April 1989 and, Gawande carried the matter higher to the Maharashtra Revenue Tribunal (“**MRT**”) in a Tenancy Appeal. On 25th February 1989, Gawande and D Dahyabhai & Co filed consent terms before the MRT. That resulted in an order of 28th February 1991 by which the MRT disposed of Gawande’s revision application on the basis of the compromise. Consequently, the Additional Collector’s order of 4th April 1989 was set aside and a Mutation Entry No. 663 of 13th December 2022 was effected in Gawande’s name in the Record of Rights for Survey No. 59/2 (part) as the only surviving legal heir of the deceased Laxmibai Rama Gawande.

15. To complete this part of the narrative, on 20th February 2003, the Collector, Thane held that Gawande was in possession of a surplus area of 3726.00 sq mts.

16. The ULC Section 20 orders had a prescribed life span. By an order of 7th June 2004, the term of the Section 20(1) order was extended for another three years.

17. D Dahyabhai & Co was permitted to develop the exempted land and submitted building plans to the TMC for approval. D Dahyabhai & Co also got its name mutated in the Record of Rights.

18. Then D Dahyabhai & Co filed a civil suit for a declaration and injunction against Gawande because he now began claiming possession of another portion of the property. On 18th December 2005, the Taluka Inspector of Land Records was appointed as a court commissioner. He made a report. Gawande accepted the report and the boundary shown on it, and admitted that he had no claim over that measured property. This resulted in the suit being compromised by consent terms dated 18th January 2005. Gawande wrote to Additional Collector and Competent Authority for cancellation of the 20th February 2003 order which held that Gawande was in possession of a part of the surplus area of 3726 sq mts. Gawande alleged that this area did not fall within D Dahyabhai & Co's 40% retention portion, but was in the portion occupied by MHADA.

19. These disputes with Gawande continued. He wrote on 19th January 2005 to the Tehsildar, Thane claiming that the mutation entries in his name related to a portion of the MHADA land and asking that changes in the mutation entries should be recorded. He claimed that an area of 3 acres and 30 Gunthas should not be reduced or taken out of the 40% land retained or allowed to be retained by D Dahyabhai & Co, i.e., 35,588.40 sq mts. He also wrote on 19th January 2005 to the Taluka Supervisor, Thane to cancel the plans sanctioned in respect of this land.

20. On 3rd February 2005, finally, the name of D Dahyabhai & Co was entered in the land records by a Mutation Entry No. 718 in relation to the 40% area of the land. MHADA was recorded as the

entity entitled to the balance 60%. This followed the background factors that we have already mentioned above, but excluded now an area of 8000 sq mts that belonged to Gawande. By a later Mutation Entry No. 718 of 16th March 2005, D Dahyabhai & Co's name was recorded as the absolute owner and holder the 40% land of 35,588.40 sq mts.

21. This is the background with which D Dahyabhai & Co entered into a development agreement on 28th May 2005 with the present Petitioner, Cosmos Constructions, a partnership firm. Cosmos took development rights in respect of this 35,588.40 sq mts. It submitted a building proposal for an area of 26,080 sq mts. TMC granted development permission for two buildings, Building No. 1 being ground (part) plus 14 floors and Building No. 2 being stilt plus 2 floors, a podium recreational ground and a club house and another ground floor area. Those permissions were of 11th August 2006.

22. Then TMC issued a commencement certificate ("CC") on 23rd February 2007 for Building No. 1 and Building No. 2. An amended CC followed on 7th November 2007. A plinth certificate for the two buildings, as also for a third building, came to be issued on 28th May 2008. The property was then further sub divided and the total area was corrected to 35,610 sq mts. A tabulation of the sub division into twelve parts is shown in paragraph 6 of the Petition. The details are not important for our purposes today. What is relevant is that of the total corrected area of 35,610 sq mts, Cosmos had submitted a development proposal for 26,080 sq mts and TMC had approved the plan, issued a CC and an amended CC, and so on.

23. There was also a proposed Development Plan road (“**DP Road**”) and part of the land was ceded for that purpose, in lieu of which Cosmos took FSI or development rights.

24. An amended CC dated 20th August 2009 came to be issued by the TMC for Building No. 1 of ground plus 14 floors, Building No. 2 of stilt and 20 floors, Building No. 3 of stilt and 20 floors, as also Building No. 4 of stilt plus 20 floors, a club house and a ground plus 1st (part) floor, and an additional floor for a swimming pool. Another amended CC of 4th August 2010 had certain changes including a sewage treatment plan and an electric sub-station. A plinth certificate was issued on 4th August 2010 for Building No. 4. On 4th August 2010, TMC issued an Occupation Certificate (“**OC**”) for Building No. 1.

25. Meanwhile, Cosmos submitted proposals for certain additional areas not covered earlier. This is the contentious area. The proposals covered an area that was supposedly earmarked as reserved for “**MHADA Housing Site-A**”. But the land was in possession of D Dahyabhai & Co and, thereafter, in possession of Cosmos in the factual narrative set out above. This proposal was rejected by TMC on 4th December 2007 claiming that the Development Plan for Thane City showed that to the west of the property in question and running in a north-south direction, there was 40 mtr DP Road and that the remaining land, i.e., D Dahyabhai & Co’s land, to the east of the DP Road, was also earmarked for MHADA Housing Site-A. Cosmos preferred an appeal under Section 47 challenging this rejection. That appeal failed on 4th April

2009. At this time, title had not passed to Cosmos and, therefore, D Dahyabhai & Co filed Writ Petition No. 5665 of 2009 challenging the rejection of its appeal and the original rejection of the development proposal. It also sought a declaration that the land reservation for the MHADA housing site did not survive because the land had been formally re-allotted to D Dahyabhai & Co without any objection from MHADA.

26. This Writ Petition was disposed of 21st July 2009. A copy of that order is at Exhibit “F” to the Petition. It notes specifically that the area of 8000 sq mts which would have to go to Gawande had to be from the 40% land of D Dahyabhai & Co. The Court however noted that once D Dahyabhai & Co delivered possession of 8000 sq mts to Gawande, there could not be any further impediment to considering its proposals for development of the balance plot that was in its possession.

27. D Dahyabhai & Co and Cosmos assailed this order of 21st July 2009 before the Supreme Court but that Special Leave Petition failed on 15th March 2010.

28. Thereafter, a development proposal for something called a “Cosmos Lounge” was sanctioned for a portion of 26,080 sq mts of land earmarked as a residential zone. Cosmos proposed an amendment to this proposal. The land of 8000 sq mts shown as the MHADA housing site was not part of this proposal which included all four buildings and a club house. An OC had been granted to Building No. 1 on 4th August 2010 but the OC for the remaining

buildings was not granted because there were certain issues with the Forest Department and MHADA.

29. MHADA preferred a revision appeal on 23rd November 2011 to the Sub Divisional Officer, Thane asking that a further area of 8000 sq mts (i.e., over and above the 8000 sq mts yielded to the tenant Gawande) be deducted from D Dahyabhai & Co's land. The SDO issued mandatory directions on 12th April 2012 that this area of 8000 sq mts be reduced from D Dahyabhai & Co's land and be incorporated in MHADA's share. This order of the SDO effectively said that an area of 7200 sq mts from Gat No. 59/A/2G/1 and a further area of 800 sq mts from Gat No. 59/A/2G/2/1, in the aggregate 8000 sq mts, would be reduced from D Dahyabhai & Co's land and transferred to MHADA by merging this with the land of which MHADA was already in possession, i.e., Gat No. 59/A/2B. Now, this 7200 sq mts was land of which possession had already been delivered to TMC because this was the area that was reserved for a DP road. The remaining 800 sq mts was to be reduced from the land that was in Cosmos and D Dahyabhai & Co's possession from Survey No. 59/A/2G/2/1.

30. This presented everyone with a dilemma. The area of 8000 sq mts was already merged in the land that belonged to MHADA. The submission was that the MHADA entitlement stood released since an area 8000 sq mts had already been transferred to MHADA. D Dahyabhai & Co and Cosmos released their rights as owners for Gat No. 59A/2G/1 and submitted an amended plan to TMC on 18th March 2013 showing the deduction of 7200 sq mts.

31. The Cosmos Lounge redevelopment had a utilization of Transferable Development Rights or a Development Rights Certificate because of this surrender of 8000 sq mts of land to MHADA. But the result was that the development proposal fell short of the required FSI. Cosmos approached the TMC asking that so-called MHADA housing site plot be amalgamated with an adjoining property. On 16th August 2014, TMC asked for a no objection certificate (“NOC”) from MHADA to this amalgamation proposal. That was obtained and the Petitioners submitted this to the TMC along with an application of 27th March 2015 requesting for an OC. We note that there is also another NOC of MHADA of 23rd March 2016 delivered to the TMC.

32. In that area, further development continued and there was now the proposal for a twin tunnel on the Thane-Borivali road. This required the submission of revised building plans. When these were submitted, on 12th July 2022, TMC once again objected to the building proposal, now claiming that it required an NOC from the Forest Department, an NOC from the Urban Land Ceiling Department, a consent letter from flat holders as per the Unified Development Control and Promotion Regulations (“UDCPR”) and saying that certain lands were in use by MHADA. There was partial compliance by the Petitioner except for the consideration of the land being “in use by MHADA”. This forms Condition No. 1 which is assailed in the present Writ Petition. The Petitioner made a representation on 8th September 2022 setting out these facts, complicated though they are, and a copy of this representation is at Exhibit “L”. There is no response to that representation.

33. To more properly appreciate this, we need to note certain factual issues relating to the Development Plan. This takes us back in time and is interspersed with the chronology that we have set out above, but it is a separate chain of events and, therefore, we have dealt with it separately.

34. On 4th October 1999, the State Government sanctioned the Development Plan for Thane in accordance with the draft Development Plan that was submitted by the Respondent. There were, however, substantial modifications and certain areas were excluded from the sanction, as mentioned in Schedule II of the final sanctioning Notification. One of these was Entry 35 of the Schedule II for the relevant lands and we will turn to that immediately. The entry is in a tabulated form and while it is included in both the Affidavit in Reply and the Petition, we will take it from page **219** of the *Sur-Rejoinder*. The column headings are important, and we include these from page **231** as well.

Sr. No.	Modification No./(E.P.No.)	Designation/ Sector No./Site No.	Description of the land and S. No./C.S. No.	Modifications proposed by Government as published in Notice No. TPS- 1297/1319/CR- 148/97/UD-12, dated 4th October 1999 and corrigendum thereto dated 27th October 1999	Details of EP sanctioned by Government under Section 31(1)
1	2	3	4	5	6
35	35			The land verged in Orange colour shall be reserved as Housing for Dishoused and Transit Camp	The land is reserved for "MHADA Housing site-A" as shown on plan.

35. There is no dispute that Entry 35 relates to this very land. We will consider the effect of this momentarily.

36. On 3rd April 2003, the State Government sanctioned modifications to the Development Plan as described in the map that was appended to the Notification. Again, there is Entry No. 35 which says that the earlier modification of 4th October 1999 and a later corrigendum of 27th October 1999 was now to be sanctioned in the following words:

“the land reserved for MHADA Housing Site-A as shown in the plan”.

37. At this point, we make direct reference to the Development Plan to be read with Entry No. 35. A soft copy has been provided to us. Again, this occurs at two places, in the Affidavit in Reply as also at page 208 of the Petition. A copy is appended to this order. On the right hand side, we see the legend.

38. The left shows the actual layout or sketch. Importantly, on the extreme left is a reference “M/35” and this shows that it is Modification 35 that is of consequence. The earlier reservation of the orange portion was for housing the dis-housed in a transit camp. This is now shown as reserved for MHADA Housing Site-A. To the east of this is the 40 mtr road of which we spoke. To the east of that 40 mtr road is the Petitioner’s land in question which has a wedge shaped line in it.

39. The argument from Mr Pitale for the TMC is that Entry No. 35 does not expressly show the deletion of the MHADA reservation from the Petitioner’s land (with the wedge shaped portion) to the east of the 40 mtr DP road and, therefore, it must be held that the reservation continues. It is his submission that the modification as sanctioned only relates to the change of reservation for the MHADA land to the west of the DP road but does not affect the continuance of the reservation on the Petitioner’s land that is to the right of the DP road.

40. To appreciate how this comes to pass, we must have regard to certain provisions regarding the preparation of Development Plans. These fall in Chapter III of the Maharashtra Regional and Town Planning Act, 1966 (“**the MRTP Act**”). Section 21 tells us what is a Development Plan. Section 22 deals with contents of a Development Plan. Section 22A is important for our purposes because it deals with modifications of a substantial nature and is to be read with Section 31. Section 22A reads thus:

“22A. Modifications of substantial nature

In section 31, the expression “of a substantial nature” used in relation to the modifications made by the State Government in the draft Development Plan means,—

(a) any modification to a reserved site resulting in reduction of its area by more than fifty per cent or reduction of such amenity in that sector by an area of more than ten per cent in the aggregate;

(b) insertion of a new road or a new reservation or modification of a reserved site or a proposed road widening resulting in inclusion of any additional land not so affected previously;

(c) change in the proposal of allocating the use of certain lands from one zone to any other zone provided by clause (a) of section 22, which results in increasing the area in that other zone by more than ten per cent in the same planning unit or sector in a draft Development plan;

(d) alteration in the Floor Space Index beyond ten per cent of the Floor Space Index prescribed in the Development Control Regulations.

41. Part (a) of Chapter III comprising Sections 21 to 22A relates to the declaration of intention, preparation, submission and sanction to a development plan. Part (b) of Chapter III deals with the procedure to be followed in preparing and sanctioning development plans. Section 26 provides for the preparation and publication of a notice of a draft Development Plan. Then there are provisions for objections to a draft Development Plan. Section 30 deals with the submission of a draft Development Plan. Section 31 deals with sanction to a draft Development Plan, which is set out below:

“31. Sanction to draft Development plan

(1) Subject to the provisions of this section, and not later than six months from the date of receipt of such plan from the Planning Authority, or as the case may be, from the said Officer, the State Government may, after consulting the Director of Town Planning by notification in the *Official Gazette* sanction the draft Development plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper, or return the draft Development plan to the Planning Authority, or as the case may be, the said Officer for modifying the plan as it may direct or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan:

Provided that, the State Government may, if it thinks fit, whether the said period has expired or not, extend from time to time, by notification in the *Official Gazette*, the period for sanctioning the draft Development plan or refusing to accord sanction thereto, by such further period not exceeding, —

- (i) twenty-four months, in the aggregate, in case, the area of such Development plan falls in the jurisdiction of a Metropolitan Planning Committee constituted under the Maharashtra Metropolitan Planning Committee (Constitutions and Functions) (Continuance of Provisions) Act, 1999;
- (ii) twelve months, in the aggregate, in any other case, as may be specified in such notification:

Provided further that, where the modifications proposed to be made by the State Government or submitted by the Planning Authority under Section 30 and proposed to be approved by the State Government without any further change are of a substantial nature with respect to

the draft Development plan published under section 26, the Government shall publish a notice in the *Official Gazette* and also in not less than two local newspapers inviting objections and suggestions from any person in respect of the proposed modifications within a period of one month, from the date of such notice.

Provided also that, if the Government does not publish its decision by notification in the *Official Gazette*, regarding sanctioning the draft Development plan submitted to it, for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper, or return the draft Development plan to the Planning Authority, or as the case may be, the said Officer for modifying the plan as it may direct or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan, within the period under this section, such draft Development plan shall be deemed to have been sanctioned as submitted to the Government under section 30, on the date immediately following the date of expiry of the period under this section:

Provided also that, where any modification submitted by the Planning Authority or, as the case may be, the said Officer, under section 30 is of substantial nature with respect to the draft Development plan published under section 26, such modification shall not be deemed to have been sanctioned and the Government shall publish a notice regarding such modifications of substantial nature and the provisions relating to publication of the notice in the *Official Gazette* and two local newspapers for obtaining suggestions and objections as stipulated in the second proviso, shall apply.

(2) The State Government may appoint an officer of rank not below that of a Group A officer and direct him to

hear any such person in respect of such objections and suggestions and submit his report thereon to the State Government within one year from the date of publication of notice under second proviso to sub-section (1).

(3) The State Government shall before according sanction to the draft Development plan take into consideration such objections and suggestions and the report of the officer.

Provided that, the time-limits as provided in sub-sections (1) and (2) shall not apply for according sanction to the modifications published under sub-section (1):

Provided further that, the Government shall take final decision regarding such modifications within one year from the date of receipt of the report from the officer appointed under sub-section (2).

(4) The State Government shall fix in the notification under sub-section (1) a date not earlier than one month from its publication on which the final Development plan shall come into operation.

(4A) The State Government may, by notification in the *Official Gazette*, delegate all the powers and functions under this section to the Director of Town Planning in such cases and subject to such conditions, if any, as may be specified in such notification.

(5) If a Development plan contains any proposal for the designation of any land for a purpose specified in clauses (b) and (c) of section 22, and if such land does not vest in the Planning Authority, the State Government shall not include that in the Development Plan, unless it is satisfied that the Planning Authority will be able to acquire such land by private agreement or compulsory acquisition not later than ten years from the date on which the Development plan comes into operation.

(6) A Development plan which has come into operation shall be called the “final Development plan” and shall, subject to the provisions of this Act, be binding on the Planning Authority.

42. Part (c) of Chapter III is also important because it speaks for provisions for preparation of interim Development Plans, plans of areas of comprehensive development etc, and Section 37 deals with modifications of a final Development Plan.

43. Entry No. 35 relates to Sector IV. About this there is no dispute. The 3rd April 2023 Notification which is at page 201, is expressly stated to be in exercise of powers under Section 31(1) of the MRTTP Act and it expressly sanctions the modifications in respect of Sectors II to XI of Thane as shown in colour on the plan, and more particularly described in the Schedule. It fixes 14th May 2023 as the date on which the modifications must come into force.

44. To reiterate, modification Entry No. 35 did two things simultaneously. What it did not do and was not required to do was to specifically state an exclusion from an earlier situation. What the 2003 Notification did was to clarify finally and to sanction the reservation that *would* continue, *obviously meaning that anything that was not shown as reserved was excluded from reservation.*

45. Ms Datar submits that is inconceivable that after such a sanctioned a modification, a reservation could continue when the modification itself is stated to be the only continuing reservation. It is not possible to read Entry No. 35, she submits, and we think quite

correctly, without regard to the accompanying Development Plan or map simply because Entry No. 35 speaks of the descriptor which is 'land verged in orange colour'. the sanctioned modification speaks of the land being reserved for MHADA Housing Site-A "*as shown on the plan*". Mr Pitale's argument on behalf of the TMC is, in Ms Datar's submission, defeated because the reservation of which he speaks for MHADA is not shown on the plan.

46. To view it otherwise, Ms Datar submits, would render unworkable every Development Plan and the entire town planning process. Any Planning Authority could, at any stage, simply say that a deleted reservation continues because it is not expressly said to have been deleted although the modification sanctioned shows the only continuing reservation.

47. Arithmetically also, she says that a continuance of the reservation according to the TMC calculus makes no sense whatsoever. In a private lis, of the 35,610 sq mts, 8000 sq mts is admittedly the property of the tenant Gawande. Another 8000 sq mts (7200 plus 800), has gone for road widening or to MHADA or a combination of the two. This leaves 19,610 sq mts and no more available to the Petitioner's part of the retention land despite the fact that the original retention was for 35,610 sq mts, thus modifying the initial division of 60% to MHADA and 40% to the owner to 78% to MHADA and 22% to the owner. Besides, if almost the entirety of the MHADA reservation is to be fed out of the retention land, then the Petitioner will effectively be left with a *negative* 6,470 sq mts.

That would necessarily result in surrendering a portion of the 26080 sq mts which it has already developed.

48. This cannot be reconciled with the TMC's own OC, CC and Plinth Certificate that have already been granted. If the TMC calculation is correct, then that reservation went back to the very beginning and none of the proposals submitted by Cosmos or D Dahyabhai & Co could ever have been sanctioned. It is not TMC's case, Ms Datar submits, that the construction by Cosmos is illegal, unauthorised, or without building permission. TMC cannot create a situation where its stand in this Writ Petition is in direct conflict with, or else she puts it, in a head-on collision with its own permissions, sanctions and certificates previously granted. There has to be consistency in the approach and the actions of the TMC must be such that they can be reconciled not only with the permissions that were granted, but the reservations that TMC now claims still exist on the site.

49. Plainly read, we are unable to agree with the submission by Mr Pitale that some earlier reservation that is not shown on the 2003 Plan accompanying the 2003 Notification of the sanctioned modification still continues. We do not see how this can be. If it was a mere change in nomenclature, then the Development Plan would have shown the reservation on both sides of the 40 mtr north-south DP road. Clearly, that shaded portion lies only to the west of the 40 mtr DP road. The Petitioner's land is entirely to the east of the DP road and no part of it is shown as being under a continued or continuing reservation.

50. We understand that neither the State Government nor MHADA are parties to the Writ Petition, but they need not be. If this reservation was to be continued, then surely TMC should have been able to show some communication from the State Government or MHADA laying claim over the Petitioner's land that is to the east of the 40 mtr DP road. Even this is not done. MHADA itself is clearly in possession of the land that has been reserved to it.

51. Finally, Ms Datar submits, there is the principle or doctrine of proportionality, apart from a consideration of every aspect of *Wednesbury* unreasonableness that must apply in a case like this. What has been completely overlooked is that the initial site was enormous, 433 acres or more. What has been left to the Petitioner is a fraction, although it is substantial, of 35,610 sq mts. A very large amount has gone to MHADA. Nobody has complained about that possession being given to MHADA. If the attempt now is to reduce even further the Petitioner's land (let alone turn it into a negative holding), then it must be clearly shown that there is an existing and ongoing reservation. This cannot be done by some convoluted process of implication or conjecture, but it must be shown as such, i.e., as a continuing reservation on a finally sanctioned Development Plan or on the modification that has been sanctioned under the MRTP Act. If this is not done, she submits, and we think quite correctly, the principles of *Wednesbury* unreasonableness and the doctrine of proportionality will necessarily apply.

52. We have had occasion to consider the law on this aspect of the matter recently, in a number of cases, and we may summarize the position thus.

53. 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*¹ and *Council of Civil Service Unions v Minister for the Civil Service* (“CCSU”)² has drawn a distinction in *Union of India v G Ganayutham*³ 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.

54. 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 used and is frequently used as a general

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

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

3 (1997) 7 SCC 463.

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)

55. 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)

56. 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.⁴

57. 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’...*”

⁴ 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.

58. The *CCSU* standard was accepted in *Union of India & Anr v G Ganayutham*.⁵ The two doctrines received an elucidation in *Om Kumar & Ors v Union of India*,⁶ particularly on the question of primary judicial review (where fundamental rights are involved) and secondary judicial review (where they are not).⁷ 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*.⁸ 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**

5 (1997) 7 SCC 463.

6 (2001) 2 SCC 386.

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

8 (2007) 4 SCC 669.

nature of exercise—the elaboration of a rule 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)

59. 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.*⁹ 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)

9 (2010) 6 SCC 614.

60. 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.*¹⁰ 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 a complete 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**

10 (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.”

“assess the balance or equation” struck by the decision-maker. Proportionality test in 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)

61. Thus, Ms Datar is correct in her submission that the two doctrines are not antithetical. Both may be applied, and she is justified in invoking each separately and both together in the facts of this case.

62. The reply on behalf of the TMC by Satish Ugile, Assistant Director of Town Planning really does not take the matter much further. We have considered this reply which is from pages 122 onwards. The relevant portion, as far as we can tell, is in paragraphs 16 and 17 which read thus:

“16. I say that since from Gut No. 59A/2/G/1, 7200 sq. mt. area was transferred in name of MHADA and therefore said area affected by road has been reduced to the extent of proportionate F.S.I. from the said development proposal. In order to cure this defect, the Architect had submitted a revised proposal on 04.08.2010 for getting C.C. in respect

of building No. 2, 3 and 4. The said request was principally accepted on 16.09.2015. In the said sanction dated 16.09.2015, the Architect had included area reserved for MHADA housing site (A) and therefore all provisions in respect of reservations became applicable to the said proposal. Since the said sanction was principally granted on the basis of no objection given by MHADA on 24.03.2015 which is prima-facie seen that the area of reservation has been shown in the residential zone, which is not permissible.

17. It is matter of record that on 08.02.2021 a revised development proposal came to be submitted as per U.D.C.P.R. by excluding 8000 sq. mt area reserved for U.D.C.P.R., the additional basic F.S.I., premium F.S.I., T.D.R. and Ancillary F.S.I. has been included in respect of construction of building No. 1, 2, 3, 4 with building No. 5 (A & B wing) and building No. 6 (A, B, C wings).”

63. This Affidavit, therefore, does not even begin to answer the question that is raised in the Petition in regard to the sanction of the modification to the Development Plan.

64. In view of the foregoing discussion, we are satisfied that the Petitioner has made out a sufficient case for grant of relief. Rule is accordingly made absolute in terms of prayer clauses (a) and (b) which read as follows:

“(a) that this Hon’ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India, thereby quashing and setting aside condition no 1 imposed by the Respondent vide communication/letter/order dated 12 July 2022 (Exhibit K

hereto) thereby directing the Petitioner to submit building proposal after considering the land use as MHADA Housing Site 'A' in respect of plots of land bearing Survey No 59/A Hissa No 2/G/2/1 and Gat No 59/A Hissa No 2/H situated at Chitalsar, Manpada, Taluka and Dist Thane vide Development Proposal No 2005/160;

(b) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India, thereby directing the Respondent to forthwith approve the revised Building Proposal dated 21 February 2022 and 4 May 2022 submitted by the Petitioner vide Development Proposal No 2005/160 in respect of land situated on Gat No 59A, Hissa 3B/1/1, 3B/1/2A, 3B/1/2B, 3B/1/2C, 3B/2/1, 3B/4/1, 3B/5, 16/3B/6, 2H, 2/G/2/1, 2/G/2/2, 16B/2/1/2/1, 16B/2/1/2/2 at Village Chitalsar, Manpada, Thane without insisting for submission of Development Proposal after considering land use as MHADA Housing Site 'A' as mentioned in condition no 1 of impugned communication/letter dated 12 July 2022."

65. There will be no order as to costs.

66. In parting with this case, we express our appreciation of the very able assistance rendered by Ms Datar, with complete mastery of complex facts, an accurate analysis of the central issue and a proper appreciation of the governing law.

(Kamal Khata, J)

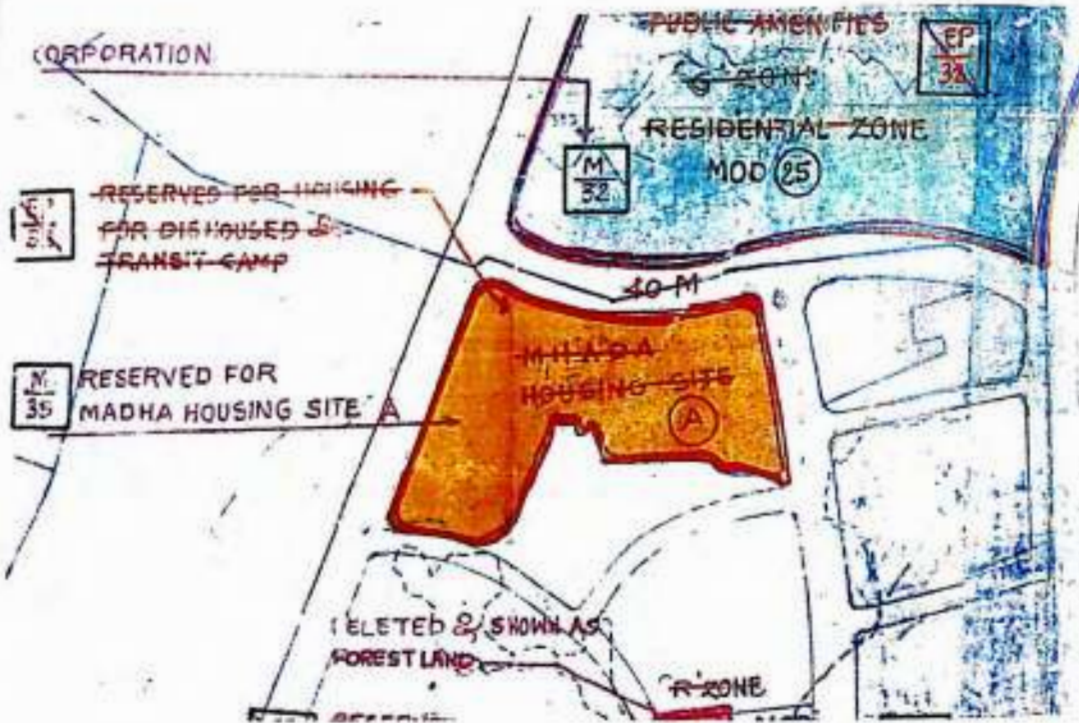
(G. S. Patel, J)

Note: This order is modified as per order dated 5th September 2023 passed on a praecipe. The corrections are shown in bold and italics in paragraph 34.

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 19/08/2023
 4/7

DEV. PLAN - THANE (R) [EXCLUDED PART] SECTOR-IV

EXCLUDED PART SANCTIONED VIDE GOVT. NOTIFICATION



Development Plan of Thane
 (Revised & Additional Area)
 Modifications Sanctioned By Government
 under Notification
 G.O. No. 120/24 CR 24/24 dated 10/11/2023
 Intd. 13.4.2023 for Exclusion Part - EP

LEGEND:-

- SECTOR BOUNDARY
- RESIDENTIAL
- COMMERCIAL
- INDUSTRIAL
- MHADA / BMRDA HOUSING
- PUBLIC / SEMI PUBLIC
- RECREATIONAL
- PUBLIC UTILITY
- TRAFFIC & TRANSPORTATION
- FOREST
- AGRICULTURE 'G' ZONE
- MODIFICATIONS MADE BY PLANNING AUTHORITY
- MODIFICATIONS U/S 28(4) & 29
- MODIFICATIONS / E-P. PUBLISHED U/S-31
- MODIFICATIONS/ E-P. SANCTIONED U/S-31(3)



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