

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
~~WRIT PETITION NO. 11564 OF 2022~~
SUO MOTU WRIT PETITION NO. 2 OF 2023
WITH
COURT RECEIVER'S REPORT NO. 23 OF 2023
IN
SUO MOTU WRIT PETITION NO. 2 OF 2023

~~MONISH CHINTAMAN PATIL,~~
~~Age 28 years, Adult, Occ. Service,~~
~~Residing at Village Ghansoli, Post Ghansoli,~~
~~Tal. & Dist. Thane~~

As per order dated
28/08/2023 an
amendment carried
out.

HIGH COURT ON ITS OWN
MOTION,
(As per Order dated 28/02/2023 passed in
Civil Writ Petition No 11564/2022)

...PETITIONER

SHEPHALI
SANJAY
MORMARE

Digitally signed by
SHEPHALI SANJAY
MORMARE
Date: 2024.03.26
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~ VERSUS ~

1. **STATE OF MAHARASHTRA,**
Through Principal Secretary,
Mantralaya, Mumbai.
2. **THE COMMISSIONER,**
New Bombay Municipal Corporation,
having office at NMMC Head Quarters,
Plot No 1, Nr Kille Gaothan,
Palm Beach Junction, Sector – 59,
CBD Belapur, New Bombay 400 614

3. **CITY AND INDUSTRIAL
DEVELOPMENT
CORPORATION OF
MAHARASHTRA LTD,**
Konkan Bhavan, CND Belapur,
New Bombay.
4. **SANJAY PANDURANG PATIL**
5. **VISHNU KANA PATIL**
6. **SANDESH BABULNATH
PATIL**
7. **ISWAR PATEL**

Respondents Nos 4 to 7 residing at
Village Ghansoli, Tal. And Dist. Thane
8. **MAHARASHTRA
ELECTRICITY
DISTRIBUTION COMPANY
LIMITED,**
Hongkong Bank Building,
MG. Road, Fort,
Mumbai 400 001.
As per Order dated 28/08/2023,
Respondent No 8 is added.
9. **SUBHASH DEORAO MORE,**
Flat No 001
10. **SEEMA SANDIP BORGE &
SANDIP YASHWANT BORGE,**
Flat No 101
11. **RUSHIKESH NIVRUTTI
GADHAVE,**
Flat No 102
12. **SONALI KUNDAN NIKAM &
KUNDAN M NIKAM,**

Flat No 103

13. **AKSHAY PANDURANG
YADAV & PUSHPA
PRAJAPATI,**
Flat No 104
14. **ARVIND PRAKASH MHETRE
(TENANT),**
Flat No 105
15. **RAJULAL NAINLAL KHATIK
& KESAR DEVI,**
Flat No 106
16. **SUBHASH CHANDRAKANT
JADHAV & SHOBHA
JADHAV,**
Flat No 107
17. **BHAGHASHREE SANDIP
BENGADE,**
Flat No 201
18. **BHARAT DEVAJI PAWAR &
SHANUKA BHARAT PAWAR,**
Flat No 202
19. **SACHIN K DHUMAL &
POONAM SACHIN DHUMAL,**
Flat No 203
20. **YASHWANT SHANKAR
JUNGHARE & NANDINI
YASHWANT JUNGHARE,**
Flat No 204
21. **KRISHNA PANDIT KAMBLE
& POOJA KRISHNA KAMBLE
& TEJUBAI PANDIT
KAMBLE,**
Flat No 205

22. **VIKRAM R YADAV,
RAMCHANDRA GUPAT &
SANDHYA R GUPTA,**
Flat No 206
23. **CHNDRAKANT PUNDLIK
KADAM, LEELA C KADAM &
SHUBHAM C KADAM,**
Flat No 207
24. **VILAS SADASHIV JADHAV,
LALITA V JADHAV, NISHA
JADHAV, VISHAKHA
JADHAV & ADITYA VILAS
JADHAV,**
Flat No 301
25. **DATTU GOVIND NAVADKAR
(FATHER OF FLAT
PURCHASER),**
Flat No 302
26. **DIKSHA PRAFUL AUTADE,**
Flat No 303
27. **PRAVIN KHANDU DHAGE &
SUSHMA PRAVIN DHAGE,**
Flat No 304
28. **NITIN GOPINATH
SALUNKHE & SUSHMA
PRAVIN DHAGE,**
Flat No 307
29. **RAJASHREE DILIP KOLI
(TENANT),**
Flat No 403
30. **ARJUN KUMAR PANDEY &
AARATI PANDEY,**

Flat No 404

**31. SAVITRI MISHRA &
KRISHNA MISHRA
(TENANT),
Flat No 407**

... RESPONDENTS

Respondents Nos 9 to 31 are residing at
Om Sai Apartments, 'B' Wing, House
No GHA-1270-0007 and House No
GHA-1109 and House No GHA-1235,
Ghansoli Village,
Navi Mumbai 400 701.

As per Order dated 11/09/2023,
an Amendment is carried out adding 23
occupants as Respondents Nos 9 to 31
to the Petition.

APPEARANCES

AMICUS

**Mr Sharan Jagtiani, Senior
Advocate, with Vishal
Narichania, Sumeet Nankani,
Surabhi Agrawal & Akshay
Doctor.**

**FOR RESPONDENT NO 2-
NMMC**

**Mr Tejesh Dande, with Bharat
Gadhavi, Trushna Shah, Pratik
Sabrad, Vikran Khare, Seema
Patil & Mansi Dande.**

**FOR RESPONDENT NO 3-
CIDCO**

Mr Rohit Sakhadeo.

**FOR RESPONDENTS NOS
4 TO 6**

**Mr Anil Anturkar, Senior
Advocate, with Akshay
Jadhav.**

FOR RESPONDENT NO 7DEVELOPER **Ms Khushnood Akhtar, with Shivaji Nirmale.**

FOR RESPONDENTS NOS 9 TO 31 **Mr RD Soni, with Jayesh Gawade.**

FOR RESPONDENT-STATE **Mr PP Kakade, GP, with MP Thakur, AGP.**

PRESENT IN COURT **Mr SK Dhekale, Court Receiver, with Sameer Alekar, Section Officer.**

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

DATED : 8th & 11th March 2024

ORAL JUDGMENT (Per GS Patel J):-

1. The Petition began in the name of an individual, one Monish Chintaman Patil. He filed this Petition on 10th August 2022. He complained that on Gat No 316 of Village Ghansoli within the local limits of the Navi Mumbai Municipal Corporation (“NMMC”) and where the City and Industrial Development Corporation (“CIDCO”) is also an authority, there was a massive illegal construction being carried out by four persons of the Patil family, original Respondents Nos. 4 to 6.

2. The Petition was periodically heard without an effective order until August 2023. On 28th August 2023, this Division Bench noted the essence of the Petition and the issues that arose. We specifically observed that the original Petitioner, Monish, had no locus. He had

no interest in Gat No 316. We have always been reluctant, except in a Public Interest Litigation (“**PIL**”) which requires a demonstration that the petitioner has no interest in the subject matter of the petition, to allow individuals to go around filing petitions regarding properties with which they have no direct concern. A PIL petitioner may certainly espouse such a cause; and indeed, the requirement is that the PIL petitioner should have no personal and direct interest in the subject matter of the petition. It was quite another thing for an individual petitioner to do so without filing a PIL.

3. But from what we were told even then it appeared that this was indeed serious because what the Petitioner was saying, despite his not having locus was actually true: that an entire building had come up with no permission whatsoever on CIDCO-owned land and with no disposal of that land in favour of the persons who had put up the construction.

4. This presented our Division Bench with a rather peculiar circumstance. There was no question of allowing the original Petitioner to continue. At the same time, we did not see how we could completely overlook the issue raised. Consequently, we passed the following order on 28th August 2023:

“1. This Petition discloses what appears to us to be a problem endemic to development in virtually all Municipal Corporation areas. The construction in question is, even according to the Planning Authority, the Navi Mumbai Municipal Corporation (“**NMMC**”), Respondent No. 2 represented by Mr Dande, entirely unauthorised and illegal. The plot itself on which the construction stands has been acquired for the City and Industrial Development

Corporation of Maharashtra (“CIDCO”) from the Petitioner’s ancestors. That land was acquired by the State of Maharashtra and given to and vested in CIDCO.

2. The Petitioner has been complaining about the illegal construction for many years now but we do not see how in this Writ Petition the Petitioner has locus. The land, Survey No. 316 at Village Ghansoli, near Ganesh Apartments, Navi Mumbai is no longer the property of the Petitioner. There is some suggestion to the contrary in the Petition but we will let that pass. The Petitioner cannot demand, as an enforceable, legal or constitutional right in a private Writ Petition (not a PIL), the demolition of a structure on someone else’s land.

3. The Petition itself discloses a long history of litigation. We will highlight only a few facets in today’s order in view of the directions we propose to pass. The construction is of a ground and four floor structure by Respondents Nos. 4 to 7. The NMMC has demolished this construction in its early iterations at least four times. Respondents Nos. 4 to 7 then filed a Civil Suit in the Court of the Civil Judge (Junior Division) at Vashi and obtained an ad- interim stay. The NMMC filed an appeal and that stay was vacated by the District Court. A Writ Petition filed by Respondents Nos. 4 to 7 before this Court then failed with the observation that there are no permissions whatsoever.

4. This tells us of the very peculiar situation with which we are confronted. On the one hand, it is clear to us that the Petitioner has no locus. But to dismiss that Writ Petition on that ground alone would effectively mean that this Division Bench ignores the illegality and the unauthorised construction although both public authorities say that it is entirely unauthorised and the NMMC through Mr Dande adds that no permission whatsoever has ever been given for

this construction. Another victim, so to speak, of this is CIDCO itself. Although the land has been acquired by the State and given to CIDCO, by virtue of this illegal construction, almost all of CIDCO's rights over this land are compromised. It cannot demand, for example, a development premium, a lease premium or any other kind of levy on this land because to do so would be to legitimise that which is fundamentally illegal. We are not prepared to countenance an argument that all this can be regularised. That law has been firmly settled a long time ago in 1974 by the Supreme Court in its celebrated decision in *K Ramdas Shenoy v The Chief Officers, Town Municipal Council Udipi & Ors*.¹ illegality is incurable. This proposition has been reaffirmed by the Supreme Court countless times.

5. We believe it is necessary for this Court to step in now and take urgent steps. We note that there is an Affidavit filed by the NMMC from Page No. 119 onwards. It is a short affidavit. On its own this demonstrates the illegality. We request Mr Dande to file a compilation separately of all notices issued and correspondence in this regard. He submits also that if granted sufficient police protection the NMMC will take necessary action. But that is also an area of concern because we have every reason to believe that the moment the NMMC moves against this property without there being a pending Petition in this Court, either the Developer or individual apartment owners will rush to the nearest Civil Court and seek stay orders. This will serve no purpose.

6. Our concern is that in Municipal Corporation areas this kind of rampant illegality and unauthorised construction cannot be permitted to continue. No court of equity can turn a blind eye or a deaf ear to what is presented in such a situation.

1 (1976) 1 SCC 24.

7. We find also that although no permissions were obtained to construct the building, the building is constructed and there are 29 occupants. We presently are not aware how they have been allowed to take possession of illegally constructed flats. They will undoubtedly be affected but that law is also well settled that none can benefit from an illegality.

8. We propose, therefore, to order the deletion of the Petitioner from this Writ Petition but to continue this as a Suo Motu Writ Petition and have it registered as such. We request the Registrar Judicial - I to take the necessary steps and request that the registry make the necessary amendments and the registration of this Petition as a Suo Motu Writ Petition.

9. At this very stage, we appoint the Court Receiver for the limited purposes of a survey and an inspection to visit the site, i.e, the building called Om Sai Apartments, to visit every one of the flats in the building, to get the names of those in occupation and to obtain copies of the documents by which they claim to have acquired rights in those residential tenements, parking spaces, garages, etc. All in occupation are required by this order to cooperate with the Court Receiver and any obstruction to the Court Receiver will be dealt with as an act of contempt and wilful disobedience of this Court. The Court Receiver is also at liberty to take photographs and do videography while carrying out the inspection and demarcation of the property.

10. Until further orders, no civil court will entertain or proceed with any civil suit in respect of the structure in question or any apartments therein. Anyone concerned must make an Interim Application in this Court in this suo motu Writ Petition.

11. We propose to join further as Respondents to the Petition the names of the individuals found by the Court Receiver and to give each of them notice so that they are fully heard by this Court.

12. We make it clear that the issue that this Court will be considering is whether the construction, admittedly without any permission or authorisation from the planning authority can be allowed to be tolerated or whether the law, including the law as declared in various judgments of the Supreme Court, is that the building must be torn down or demolished leaving individual persons to their remedies against Respondents Nos. 4 to 7.

13. There will be some discussion necessary on balancing equities and an assessment of the relevant law including action under Municipal Corporation law against illegal structures and decisions of the Supreme Court. We request the assistance of Mr Sharan Jagtiani, learned Senior Counsel of this Court, in that regard. A copy of the papers and this order are to be sent to Mr. Jagtiani.

14. Lastly, the police authorities at the Ghansoli Police Station will render all possible and necessary assistance to the Court Receiver in executing this commission. They will act on production of an authenticated copy of this order.

15. We also direct the joinder of Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) because we are unable to understand how an electricity connection was obtained to thoroughly unauthorised structures.

16. Another question that Mr Dande will have to answer is how on the one hand the NMMC says the structures are unauthorised but simultaneously says that it is providing Municipal water supply to that very structure. The two positions cannot be reconciled at this stage.”

5. On 11th September 2023, we noted the previous order and then observed that the Court Receiver had implemented it. He had found 23 occupants in the building said to be tenants of the original owners. Five apartments were locked. One was vacant. The developers are among the Respondents against whom the Petition was originally directed. We appointed Mr Jagtiani as amicus. He submitted a note. There was a brief discussion. We held that both NMMC and CIDCO appeared to us then to have been victims. We went on to hold that we would take up the matter as a Suo Motu Writ Petition and we brought the entire building and the plot into receivership, with directions to the Court Receiver to put up this board but without dispossessing any person. We asked that all 23 persons be given notice and actually joined as party respondents to the Petition. That has been done. We also directed notice to the original Respondents Nos 4, 5, 6 and 7. We granted an injunction against creating third-party rights. We asked how it came to pass that there was water supply. Mr Dande for the NMMC informed us that this was being drawn illicitly.

6. On 4th October 2023, the Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) was before us, represented first by Ms Chavan assisted by Ms Ushajee Peri. Our question was that since this building now had electricity connections, whether that power supply would or could be used to validate the structure itself. By this time, the individual flat owners were represented through Mr Soni. We noted that there was no proper disposal of this plot by CIDCO to anyone.

7. On 30th November 2023, we went back to the question of power supply. By then, Ms Chavan had prepared a note. She had suggested certain disclaimers and clarifications. We accepted those. These said that the mere provision of power supply did not and would not operate to justify the legality of the construction or as evidence that the construction was authorised.

8. Since then, Affidavits in Reply have been filed. Mr Jagtiani has prepared two comprehensive notes and two compilations of authorities to which we will shortly refer. The Court Receiver's Report is also on file, and we now have the Affidavits filed by the original Petitioner and by NMMC and CIDCO. To summarise these briefly, NMMC says that it has never granted any permissions whatsoever for this construction. Not once but four times has it had the constructions demolished or partly demolished. Four times was it demolished, and five times was it reconstructed, all without permission. There has been no disposal of this land by CIDCO. Somebody has simply walked in and begun to occupy the land, build on it, sell flats and hand some of them over to third parties. There are Affidavits in Reply by several of the flat purchasers. They claim to be unaware of these illegalities. They say they are persons of insufficient means and they have taken loans from banks. Interestingly, rather than disclose these loan documents, although the name of the bank is referred to and although every Affidavit says that the deponent sought leave to refer to that loan agreement, that reference has been scored out. The rest, therefore, is left to judicial imagination.

9. But the most interesting of all these Affidavits is the one at page 356, of one Ishwar Mavji Patel, Respondent No 7, represented by Mr Akhtar. He is the person who built this structure. But his Affidavit, had it not been phrased by a lawyer in the typically arid language of law courts, could well be a film script for something very much like *Slumdog Millionaire*. In itself, his is a quite fantastic story of a young man who comes to this city of dreams. He has a gruelling and hard life. His imagination is fuelled by high ambition. Unfortunately, in this case that has translated into something else altogether. In paragraph 6, Patel opens by saying that he has passed only the 6th standard. He then says that this is the 'first project' that he undertook. Given what we have noticed and what we will note hereafter, we sincerely hope it is the last or at least the last of this variety. He says he undertook it as a developer of buildings in gaathan areas. The same paragraph goes on to say that for five years Patel worked in a grocery shop at Wagle Estate in Thane. He was a deliveryman. He worked like this for 15 years, from 1994 to 2009. Then for a while from 2010 to 2018, he was a real estate agent. While doing this, apparently, he acquired some knowledge about construction material and what he describes as the source of construction material. He interacted with various builders. He says that he began as a contractor on a plot in Panvel. He was seeking to construct a building on his own by developing an old structure in a gaathan area. He did not have a shred of technical expertise. More importantly, he did not have any documents. He was on the lookout for a joint venture to collaborate with. He approached one Tukaram Mhatre, a broker in the area and Mhatre introduced him to Respondents Nos 4 to 6, the Patil family. Patel says that he told the Patils that he did not have funds to construct a building but he could

enter into a Development Agreement with them in partnership. He would construct two wings of 29 flats each. The first wing would belong to the Patils. Patel would sell the flats in the second building. He claims that the Patils were in possession of the plots for over six decades. He made no further investigation into the Patils' claim to title. He therefore entered into an agreement with the Patils and got a Power of Attorney in his favour. This Development Agreement is of 27th August 2019. The registered Power of Attorney is dated 26th March 2021. The narrative then simply jumps to paragraph 6 where Patel says that he "accordingly" constructed the 'B' Wing, i.e., the free sale wing of 29 flats (the ones he would sell) but 'could not' construct the 'A' Wing because there were civil litigations. After that he was unable to carry on any further construction.

10. Patel says that he has entered into registered agreements with 19 purchasers. He says 10 other flats have also been occupied but those purchasers are yet to pay the full consideration.

11. The yawning chasm in this wondrous narrative is that Patel does not tell us anywhere what permissions he applied for or obtained.

12. In fact, he applied for none. Nobody did.

13. Patel does not say a word about the four demolitions carried out by the NMMC. He simply goes on as if these are irrelevant.

14. He also proceeds on the footing as if CIDCO simply does not exist. Patel's entire Affidavit is on the footing that the Patils were and continued to be the owners of the land in question (Gat No 316). That is far from true. That land was set under acquisition a long time ago. Notifications were issued, possession was taken, an award was made, compensation is being deposited and on their own showing, the owners have filed a First Appeal that is pending adjudication (on the question of compensation). Thus, this land stood vested in CIDCO free from all encumbrances and there was no question of any Power of Attorney or Joint Venture Agreement.

15. If there was any doubt about this, we need to look at the Affidavit of the NMMC from page 119. This says *inter alia* that demolitions were carried out on various dates mentioned in paragraph 6 between 2020 and 2022.

16. Paragraph 9 says that the structure is on a plot owned by CIDCO. There is no traverse of this and CIDCO has filed its own Affidavit through one Vinu Nair, Controller of Unauthorised Constructions. This Affidavit says that CIDCO could not have disposed of the land without an auction process or in accordance with the applicable Land Disposal Rules/Regulations. There is no dispute from any quarter that CIDCO is the owner of the land and that the title to the plot vests in CIDCO.

17. This is therefore the factual conspectus of the matter. The reason that it has assumed these proportions is largely because of the induction of individuals into the flats in one wing of this project.

18. We have heard Mr Jagtiani extensively on the frame of the law. We have also considered the submission of Mr Anturkar for the Patils and Mr Soni for the flat purchasers.

19. The specific question before us is whether, either in equity or in law, anyone can possibly make an application for what is popularly called 'regularisation', or, in the words of the statute 'retention' of a construction when the person who constructs does not have (i) a vestige of title or any form of right to or in the land or any rights linked to ownership of that land; and (ii) a single permission under any law to develop the property in any degree. Certainly, there are provisions in the statute for precisely such regularisation/retention. But what are the parameters of those provisions, how far they extend and what are the pronouncements of the Supreme Court that must be read so that provisions of the statute are not contrary to the law laid down by the Supreme Court and this Court will be our endeavour.

20. We are unwilling to accept as a starting proposition that 'everything that is built can be regularised or retained'. Such a submission was, as we shall presently see, briefly canvassed by Mr Anturkar. For reasons that will shortly become evident, we are unable to sustain that argument.

11th March 2024

21. Before we turn to the relevant provisions of the statute, we must note the case of the NMMC and CIDCO on Affidavit.

NMMC is the 2nd Respondent. It is on record to say that it has taken steps under Section 54 of the Maharashtra Regional and Town Planning Act, 1966 (“**MRTA Act**”) *inter alia* by a notice of 6th January 2020. On 10th January 2020, construction was up to the plinth level, and the NMMC demolished the building. It recovered Rs 25,000 from the Patils and Patel. A few months later, on 11th July 2020, the building had come up again, now to the ground and second floor. There was a second demolition on 14th July 2020. By 6th November 2020, this building — already twice demolished — had now come up for the third time. It was demolished again, this time jointly by the NMMC and CIDCO on 6th November 2020. On 26th December 2020, NMMC lodged a FIR against the Patils and Patel. A Stop Work Notice was issued on 7th April 2021. A fourth part demolition was carried out on 29th March 2022, demolishing the fourth floor; by this time, the three lower floors were already occupied. A *fifth* demolition was organised on 26th April 2022. It was suspended because of local opposition. A notice under Section 268 of the Maharashtra Municipal Corporations Act, 1949 (“**MMC Act**”) calling upon the addressees to vacate the building was issued on 26th May 2022.

22. The building still stands.

23. CIDCO in its Affidavit of 3rd July 2023 has categorically asserted that it is the owner of the land. This is undisputed. On 21st August 2023, CIDCO conducted a survey and found the building partly constructed up to the second floor. No permission had been granted by CIDCO for redevelopment. There was no disposal of the

land by CIDCO in favour of any private party. CIDCO confirms that any construction would require: (i) some process of disposal of the land in accordance with applicable land disposal regulations and; (ii) prior permission of the Planning Authority. In this case, neither was obtained. CIDCO issued a notice under Section 54 of the MRTP Act on 31st August 2020. It had itself carried out demolitions on 6th November 2020 and 6th January 2021. Nonetheless, the construction kept going.

24. Sanjay Patil, one of the Respondents claiming ownership, filed Civil Suit No 233 of 2022 and obtained an order restraining CIDCO from demolishing the property “without following the due process of law”. This was set aside in an appeal. A survey conducted on 24th April 2023 noted that the building was complete. There were 30 flats. Of these, six were occupied by persons claiming to be owner. another six by persons claiming to be tenants, but 15 flats were empty.

25. By our order of 28th August 2023, we deleted the name of the original Writ Petitioner. We converted the Petition into a Suo Motu Writ Petition.

26. We come first to the respective roles of the NMMC and CIDCO. The NMMC was constituted well after CIDCO was established. CIDCO’s history partly parallels and that of the MRTP Act itself. Looking back today, both appear to stand testimonial to visionary administrative and legislative decision-making, even if

later developments seem to have swung the pendulum in the opposite direction.

27. In the decade between the early 1950s and the early 1960s, Bombay's (now Mumbai's) is said to have doubled. The explosive growth carried on for another decade. City-based commerce and industry expanded — and with it came a perceptible decline in city services and urban living conditions. Mumbai is a geographically peculiar landmass, bordered on three sides by the sea, much of it reclaimed, and funnel-shaped with the southern end being much narrower than the north. But for a long detour to the north, and until very recently, it has not been connected to the mainland to the east. The eastern seaboard could be compared to the southern edge of Manhattan — minus the connectors. Late in the 1950s, the government appointed SG Barve, then secretary of the Public Works Department — another sad story of precipitous administrative decline — to report and make recommendations on a range of urban issues: traffic, open spaces, mass housing, industrialization and so forth. One of Barve's recommendations was that planning be set in a 'regional context'. This is important, because it explicitly recognized the interdependency and impact of the development of one region on a neighbouring or adjacent region, but also acknowledged that each region would have its own peculiar planning and development needs.

28. There were two important developments in 1965. In March 1965, the government appointed a committee chaired by DR Gadgil, then the director of the Gokhale Institute in Pune, tasked with now

building on Barve's recommendations and formulating the broad *principles for regional planning* for the metropolitan area of Mumbai, Panvel and Pune and the surrounding regional areas. The Gadgil Committee was to recommend steps to establish statutory authorities to prepare and implement development and regional plans in accordance with these overarching principles.

29. At this time, the MRTP Act did not exist. Neither did the first set of our Development Control Rules (of 1967). From a statutory and legislative perspective, and we are much given to taking this for granted, this was a very interesting period. The Bombay Municipal Corporation (now the Municipal Corporation of Greater Mumbai) did exist. It was constituted under the act of 1888. There was a city improvement trust. But there was no concept of a 'planning authority' under a parent or governing statute like the MRTP Act, and there was no delegated legislation (like the Development Control Rules or Regulations) that itself regulated building, construction, development, land use or zoning. In parallel, the BMC was developing additional areas to the north.

30. In the June 1965 Volume 18 No 3 edition of an art magazine called *Marg*, edited by Mulk Raj Anand, there appeared improbably a long article '*Bombay: Planning and Dreaming*', authored by Charles Correa, Pravina Mehta and Shirish Patel. The article had detailed maps, statistics and drawings. It proposed a plan for a 'twin city' across the harbour — New Bombay — with the stated intent of decongesting the old city. By this time, the belts of Thane and Raigad had already begun to see growing industrialization. For the

first time, there was an over-water connector across Thane Creek, now the old Vashi Bridge, that eliminated the need to travel all the way north to Thane to double back south to the mainland. The ‘New Bombay’ area was marshy and low-lying. There were many old settlements and gaothans. Extensive land engineering would be required. This proposal also envisioned the shifting of the seat of the government — and presumably of the High Court — across the harbour, these being identified as among the principal congestion magnets of south Bombay.

31. The Gadgil Committee submitted its report in March 1966. It recommended regional planning boards, starting with Mumbai and Pune. It also recommended the enactment of a dedicated regional planning statute, decentralization of industries in Bombay, and the development of the mainland area across the harbour, thus accepting the principle in the *Marg* article.

32. The MRTP Act was framed in 1966 and came into force in January 1967. A metropolitan region with its own board was constituted for Bombay in June 1967. This board finalized a development plan in January 1970, and it is now that it formally adopted the *Marg* magazine ideation. The proposal was that, across the harbour, there would be a string of settlements, each a nucleus in itself, linked by mass transit axes. Each node was to be reasonably self-contained with its own civic services — schools, commerce, healthcare and so on — with interleaving open or green spaces (another planning ideal we have all but surrendered). To this day, across the harbour there exist these ‘nodes’. The government

accepted the recommendation, specifically under Section 113 of the MRTP Act for creating a ‘new town’ — and CIDCO was born, incorporated on 17th March 1970 under the Companies Act 1956.

33. Meanwhile, and this important for our purposes today, by February 1970, the government notified 86 villages spread over nearly 160 square kilometres of privately owned land for acquisition. Another approximately 30 square kilometres was brought into the project area in August 1973.

34. The MRTP Act was amended in 1971. It brought in Section 113(3A), to provide for the establishment of a ‘New Town Development Authority’. CIDCO was appointed the New Town Development Authority for Navi Mumbai. In October 1971, CIDCO began preparation of a development plan for New Bombay. CIDCO continued to be the Planning Authority for several decades thereafter. There was extensive development.

35. CIDCO held sway for two decades. It was not until 17th December 1991, exercising powers under Section 3 of the then Bombay Provincial Municipal Corporation Act 1949, now the MMC Act, the NMMC was constituted as the Municipal Corporation for Navi Mumbai with effect from 1st January 1992. The NMMC then became the Planning Authority within the meaning of Section 2(19) of the MRTP Act for the city of Navi Mumbai. There were two Notifications of 15th December 1994 and 29th July 2008.

36. There was some division of areas/lands between CIDCO and NMMC. By a notification of 15th December 1994, NMMC was the Planning Authority for the developed nodes of Vashi, Nerul, Sanpada, Belapur, Kopar Khairne and Airoli and was to exercise all powers under Chapters III and IV of the MRTP Act. This Notification also said that considerable portions of these lands were still being developed and disposed of by CIDCO. Consequently, to allow CIDCO to continue discharging its functions as the new town development authority, the notification said it was not necessary for CIDCO to approach NMMC for development permissions. Thus, although the NMMC was the planning authority, CIDCO's powers as the 'new town development authority' continued.

37. This overlap or interplay has been already considered by this Court in *Nishant Karsan Bhagat v The City and Industrial Development Corporation of Maharashtra Ltd & Ors*,² and in *Shelton Infrastructure Pvt Ltd v State of Maharashtra & Ors*.³ We recently had occasion to consider the *Shelton Infrastructure* judgment in a subsequent writ petition by Shelton Infrastructure.⁴ It is not necessary to revisit that now. The position as we have outlined above, has not really been controverted by either of the public authorities at least in regard to their respective jurisdictional remits. In *Nishant Bhagat*, the Division Bench said inter alia that on constitution of the NMMC, there was no intention on the part of

2 2022 SCC OnLine Bom 1758.

3 2023 SCC OnLine Bom 1008.

4 Judgment dated 12th February 2024 in Civil Writ Petition No. 13049 of 2023 and Writ Petition No. 13054 of 2023, along with Writ Petition 13050 of 2023; Neutral Citation: 2024:BHC-AS:7941-DB.

the State Government to divest CIDCO of the powers vested in it as a 'New Town Development Authority' by 1971 notification under Section 113(3A). That notification of 1971 specifically recognized CIDCO as a Development Authority with all powers and duties of a Planning Authority under the MRTP Act. Thus CIDCO was not divested of its powers to develop lands still to be developed even if these fell within the developed zones of Vashi-Sanpada, Nerul, Belapur-CBD, Kopar Khairne and Airoli, where the NMMC was also a Planning Authority. The State Government had issued a Notification under Section 154 of the MRTP Act on 6th September 2021. It said that although CIDCO's work of development of Navi Mumbai areas was complete, its powers to lease lands as the owner was intact. The Court held that it was manifest that although the NMMC was constituted as a Municipal Corporation under the Maharashtra Municipal Corporations Act, 1949, there was no intention of the State Government to denude CIDCO of its authority as the New Town Development Authority or a Planning Authority under the MRTP Act. CIDCO continued to have the power to develop the undeveloped lands (even if developed nodes) that vested in it. It could dispose of these lands under the New Bombay Disposal of Land Regulations, 1975 and Navi Mumbai Disposal of Lands (Amendment) Regulations, 2008. Both NMMC and CIDCO continued to have compartmentalized powers under the MRTP Act.

38. In the present case, the question pertaining to CIDCO is how any land that vested in it free of encumbrances could ever have been purported to be taken over and developed by anyone such as the Patils with or without the involvement of Patel. That the land was

acquired and vested in CIDCO following the acquisition proceedings can hardly be doubted. If a First Appeal is pending from those acquisition proceedings, it is only a question of compensation. The vesting of title is complete. The Patils and certainly Patel had not a vestige of right, title or interest in the plot. There is nothing at all on record to indicate that CIDCO disposed of this land (Gat No 316) in favour of the Patils or Patel. It could not have done so. The land was acquired *from* the Patils or their ancestors, and it vested absolutely in CIDCO.

39. The origins of this entire construction are, therefore, rooted in an initial illegality, one of trespass and encroachment on public land. Any possession that the Patils claimed was never juridical, i.e., not possession that the law recognized.

40. CIDCO itself has framed the Navi Mumbai Disposal of Land Regulations 1975 (“**Regulations**”) and these were amended in 2008. Regulation 4 of these Regulations sets out the manner of disposal of a plot. This is to be done by an open and transparent public tender and public auction except for certain specified categories. Regulation 6 requires the levy of a lease premium. The question of instalment and delayed payment charges were the subject matter of the second and subsequent round of the Shelton Infrastructure Writ Petitions). It is after full payment of the lease premium of all instalments (and delayed payment charges if applicable and permitted), that CIDCO executes a lease. CIDCO continues as the lessor. Regulation 6 specifically covers this aspect of the matter. Regulation 9 allows CIDCO to terminate any

Agreement of Lease and to revoke any license granted. Indeed, CIDCO can only dispose of plots that it holds and that are vested in it by lease and on conditions that are set out *inter alia* in the Regulations. Importantly, Regulation 11(vii) and every single agreement to lease has a specific stipulation that no development is permitted except with the prior written permission of CIDCO and in accordance with the applicable building regulations or Development Control Rules as framed by the Planning Authority in question.

41. Now in this case, it is not even the argument of Mr Anturkar for the Patils that either the Patils or Patel had ever acquired title from CIDCO. There is no manner of doubt about this. There is no lease. There is no allotment. There was no public auction. The Patils simply pretended the plot was theirs and got into a transaction with Patel as if the acquisition had never happened. Despite repeated demolitions, the Patils continued encouraging and facilitating further illegality through Patel.

42. CIDCO has been deprived of all benefit of this land. CIDCO is an instrumentality of the State. The loss of its land by the Patils-Patel trespass and encroachment on it is not only a disadvantage to CIDCO. It is a loss to the general public. There was, as we have noted, no auction, no lease, no prior permission from CIDCO for development, no lease premium, and no permission whatsoever.

43. Pausing briefly for a moment, the decision of the Supreme Court in *Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh*

& Ors⁵ makes it clear that any allotment of public land must be founded on a sound, transparent, discernible and well-defined policy. Where allotments are made without an advertisement, i.e., without a public and open process, and even if this process is part of a ‘policy’ empowering such disposal, that policy is liable to be struck down as arbitrary and violating what the Supreme Court describes as “the soul of equality” embedded in Article 14 of the Constitution of India.

44. This is not a case of allotment. This is a clear cut case of trespass. The initial entry of the Patils and Patel on this land after title vested in CIDCO is not juridical. It is not such as the law recognizes. As we shall presently see in this aspect of the matter is one of the two crucial determinants. This is very true not only for Navi Mumbai but for *all publicly held lands everywhere*.

45. We turn immediately to certain relevant provisions of the MRTP Act. The scheme of the Act is well-known. A few definitions will be necessary. We find these in Sections 2(7) (“development”) and 2(9A) (“development right”) added by a 1991 amendment. They read as follows:

“2(7) “development” with its grammatical variations means the carrying out of buildings, engineering, mining or other operations in, or over, or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage; building or its precincts and includes demolition of any existing building structure or erection or part of such building, structure or erection; and

5 (2011) 5 SCC 29.

reclamation, redevelopment and lay-out and sub-division of any land; and “to develop” shall be construed accordingly.

2(9A) “development right” means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilisable either on the remainder of the land or partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide.”

46. A Planning Authority is defined in Section 2(19) as follows:

“2(19) “Planning Authority” means a local authority; and shall include-

(a) a Special Planning Authority constituted or appointed or deemed to have been appointed under section 40; and

(b) a slum Rehabilitation Authority appointed under section 3A of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971.”

47. Of immediate relevance to us is Chapter IV of the MRTP Act. This speaks of the control of development and the use of the land included in development plans. A development plan is the subject of Chapter III of the MRTP Act (and is to be distinguished from a regional plan covered in Chapter II). A few provisions of Chapter IV are immediately relevant for our purposes.

48. Section 43 restricts the development of land after the date on which a declaration of intention to prepare a development plan for any area is published in the Official Gazette. After that time, no

person can institute a change to the use of any land or carry out any development of land without the permission of the Planning Authority subject to the provisos.

49. The 'declaration of intention' in the opening part of Section 43 is a reference to Section 23 in Chapter III of the MRTP Act. Section 43 therefore contains a proscription. It reads:

“43. Restrictions on development of land.—After the date on which the declaration of intention to prepare a Development plan for any area is published in the Official Gazette or after the date on which a notification specifying any undeveloped area as a notified area, or any area designated as a site for a new town, is published in the Official Gazette, **no person shall institute or change the use of any land or carry out any development of land without the permission in writing of the Planning Authority:**

Provided that, no such permission shall be necessary

—

- (i) for carrying out works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance thereof except in case of heritage building or heritage precinct;
- (ii) the carrying out of works in compliance with any order or direction made by any authority under any law for the time being in force;
- (iii) the carrying out of works by any authority in exercise of its powers under any law for the time being in force:

- (iv) for the carrying out by the Central or the State Government or any local authority of any works—
 - (a) required for the maintenance or improvement of a highway, road or public street, being works carried out on land within the boundaries of such highway, road or public street;
 - (b) for the purpose of inspecting, repairing or renewing any drains, sewers, mains, pipes, cable, telephone or other apparatus including the breaking open of any street or other land for that purpose;
- (v) for the excavation (including wells) made in the ordinary course of agricultural operation;
- (vi) for the construction of a road intended to give access to land solely for agricultural purposes;
- (vii) for normal use of land which has been used temporarily for other purposes;
- (viii) in case of land, normally used for one purpose and occasionally used for any other purpose, for the use of land for that other purpose on occasions;
- (ix) for use, for any purpose incidental to the use of a building for human habitation of any other building or land attached to such building.”

(Emphasis added)

50. Section 44 provides for an application for permission for development. It requires this application to be made in writing to the Planning Authority in such form and containing such particulars and

accompanied by such documents as may be prescribed. There is the proviso which does not concern us. Sub-section (2) is also not of immediate relevance. Section 44 reads as follows:

“44 Application for permission for development.

(1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed:

Provided that, save as otherwise provided in any law, or any rules, regulations or by-laws made under any law for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under the Maharashtra Housing and Area Development Act, 1976.

(2) Without prejudice to the provisions of sub-section (1) or any other provisions of this Act, any person intending to execute an Integrated Township Project on any land, may make an application to the State Government, and on receipt of such application the State Government may, after making such inquiry as it may deem fit in that behalf, grant such permission and declare such project to be an Integrated Township Project by notification in the Official Gazette or, reject the application.”

(Emphasis added)

51. Then in logical sequence comes Section 45, regarding the grant or refusal of permission (viz., the permission to be sought in Section 44, without which development is prohibited under Section 43). That permission may be granted conditionally or subject to condition or it may be refused. A Commencement Certificate is to be issued where permission is granted and if there are conditions attached these have to be set out. Sub-section 5 of Section 45 has a deeming provision. This is how Section 45 it reads:

“45. Grant or refusal of permission. —

(1) On receipt of an application under section 44 the Planning Authority may, subject to the provisions of this Act, by order in writing—

- (i) grant the permission, unconditionally;
- (ii) grant the permission, subject to such general or special conditions as it may impose with the previous approval of the State Government ; or
- (iii) refuse the permission.

(2) Any permission granted under sub-section(1) with or without conditions shall be contained in a commencement certificate in the prescribed form.

(3) Every order granting permission subject to conditions, or refusing permission shall state the grounds for imposing such conditions or for such refusal.

(4) Every order under sub-section (1) shall be communicated to the applicant in the manner prescribed by regulations.

(5) If the Planning Authority does not communicate its decision whether to grant or refuse permission to the applicant within sixty days from the date of receipt of his

application, or within sixty days from the date of receipt of reply from the applicant in respect of any requisition made by the Planning Authority, whichever is later, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of sixty days:

Provided that, the development proposal, for which the permission was applied for, is strictly in conformity with the requirements of all the relevant Development Control Regulations framed under this Act or bye-laws or regulations framed in this behalf under any law for the time being in force and the same in no way violates either the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under this Act:

Provided further that, any development carried out in pursuance of such deemed permission which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorised development for the purposes of sections 52 to 57.

(6) The Planning Authority shall, within one month from the date of issue of commencement certificate, forward duly authenticated copies of such certificate and the sanctioned building or development plans to the Collector concerned.”

52. Section 46 requires that the provisions of the development plan, including a draft or final plan or proposal published, submitted, or sanctioned must be taken into account before granting permission. Section 48 then says that every permission granted has a one-year life span, after which it lapses. The proviso allows for an annual renewal but the extended period cannot exceed three years. The second proviso says that unless construction is completed

within a year or the extended period up to the plinth or if there is no plinth up to the upper level of the basement, a fresh permission is necessary. This section reads as follows:

“46. Provisions of Development Plan to be considered before granting permission.—

The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan or proposal published by means of notice submitted or sanctioned under this Act.

Provided that, if the Development Control Regulations for an area over which a Planning Authority has been appointed or constituted, are yet to be sanctioned, then in considering application for permission referred to in sub-section (1), such Planning Authority shall have due regard to the provisions of the draft or sanctioned Regional plan, till the Development Control Regulations for such area are sanctioned:

Provided further that, if such area does not have draft or sanctioned Regional plan, then Development Control Regulations applicable to the area under any Planning Authority, as specified by the Government by a notification in the Official Gazette, shall apply till the Development Control Regulations for such area are sanctioned.”

53. Section 52 then moves to the penalty prescribed for unauthorised development or for use otherwise than in conformity with the development plan. Section 52 and Section 53 are central to our discussion today. We reproduce them below:

“52. Penalty for unauthorised development or for use otherwise than in conformity with Development Plan.—

(1) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land—

- (a) without permission required under this Act ; or**
- (b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;**
- (c) after the permission for development has been duly revoked; or**
- (d) in contravention of any permission which has been duly modified,**

shall, on conviction, be punished with imprisonment for a term which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees for every day during which the offence continues after conviction for the first commission of the offence.

(2) Any person who continues to use or allows the use of any land or building in contravention of the provisions of a Development plan without being allowed to do so under section 45 or 47, or where the continuance of such use has been allowed under the section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall on conviction be punished with fine which may extend to five thousand rupees; and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for

every day during which such offence continues after conviction for the first commission of the offence.

53. Power to require removal of unauthorised developments.—

(1) (a) Where any development of land has been carried out as indicated in clause (a) or (c) of sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve on the owner, developer or occupier a prior notice of 24 hours requiring him to restore the land to conditions existing before the said development took place;

(b) if the owner, developer or occupier fails to restore the land accordingly, the Planning Authority shall immediately take steps to demolish such development and seal the machinery and materials used or being used therefor.

(1A) Where any development of land has been carried out as indicated in clause (b) or (d) of sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve one months' notice on the owner, developer or occupier requiring him to take necessary steps as specified in the notice.

(2) In particular, such notice may, for purposes of sub-section (1), require—

- (a) the demolition or alteration of any building or works;
- (b) the carrying out on land of any building or other operations; or
- (c) the discontinuance of any use of land.

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner

prescribed, apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, and pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use.

(4) The foregoing provisions of this Chapter shall, so far as may be applicable, apply to an application made under sub-section (3).

(5) If the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand; or if such permission is granted for the retention only of some buildings, or works, or for the continuance of use of only a part of the land, the notice shall stand withdrawn as respects such buildings or works or such part of the land, but shall stand as respects other buildings or works or other parts of the land, as the case may be; and thereupon, the owner shall be required to take steps specified in the notice under sub-section (1) as respects such other buildings, works or part of the land.

(6) If within the period specified in the notice or within the same period after the disposal of the application under sub-section (4), the notice or so much of it as stands is not complied with, the Planning Authority may—

- (a) prosecute the owner for not complying with the notice; and where the notice requires the discontinuance of any use of land any other person also who uses the land or causes or permits the land to be used in contravention of the notice; and
- (b) where the notice requires the demolition or alteration of any building or works or carrying out of any building or other operations, itself

cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the Planning Authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operations; and recover the amount of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under clause (a) of sub-section (6) shall, on conviction, be punished with imprisonment for a term which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.

(8) The Planning Authority shall, by notification in the Official Gazette, designate an officer of the Planning Authority to be the Designated Officer for the purposes of exercise of the powers of the Planning Authority under this section and sections 54, 55 and 56. The Designated Officer shall have jurisdiction over such local area as may be specified in the notification and different officers may be designated for different local areas.”

(Emphasis added)

54. As can be seen from the above, the concept of retention, or what is called ‘regularization’, comes from Section 53(3).

55. The central question is whether Section 53(3) allows regularization or retention of *every kind of illegality and permission violation*. In other words, we are required to interpret the scope and ambit of Section 53(3). It is here that the views of Mr Jagtiani, Mr Sakhadeo, and Mr Dande on the one side and Mr Anturkar on the other most widely diverge.

56. As we have seen, Section 52(1) has four sub-parts, each dealing with a separate scenario: no permission; not in accordance with permission; after permission is cancelled; and in contravention of a modified permission.

57. Mr Anturkar puts his case at the broadest but let us first deal with what he does *not* argue. It is not his case that there need not be a vestige of entitlement to development. That is why we set out the definition of a development right. An encroacher is an encroacher, he submits, and we think quite correctly. It is only if a person has some semblance of a right to develop, that person is entitled to apply for retention of the work. He hastens to add that this does not mean that the applicant is necessarily entitled to have that permission for retention granted. But he is certainly entitled to apply for such a retention permission. It is then for the Planning Authority to decide that application. It may or may not be granted. But the *making* of the application for retention cannot be forestalled by saying that no development permission was applied for or obtained.

58. Mr Anturkar points out that Section 53 suffered an amendment. This was in 2017. Prior to that amendment, Section 53(1) and its two sub-clauses read thus:

“53. Power to require removal of unauthorised developments.—

(1) Where development of land has been carried out as indicated in sub-section (1) of Section 52, the Planning Authority may, subject to the provisions of this section, serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified, therein after the service of the notice, to take such steps as may be specified in the notice.

- (a) in cases specified in clause (a) or (c) of sub-section (1) of section 52, to restore the land to its condition existing before the said development took place,
- (b) in cases specified in clause (b) or (d) of sub-section (1) of section 52, to secure compliance with the conditions or with the permission as modified:

Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.”

59. After the amendment, Section 53(1) is split into Section 53(1)(a) and Section 53(1)(b) on the one hand and Section 53(1A) on the other. Sections 53(1)(a) and (b) are now referable only to Section 52(1)(a) and (c), i.e., in cases where development is carried out without permission or after permission has been revoked. Newly added Section 53(1A) deals with sub-clauses (b) and (d) of Section 52(1), i.e., where development is not in accordance with the

permission granted, contravenes a condition of that permission or is in contravention of a modified permission.

60. Mr Anturkar points out that Section 53(3) was not correspondingly amended. It refers to ‘such notice’ and therefore must be held to refer to *every* notice under Section 53(1) whether it is under Section 53(1)(a) or under Section 53(1A).

61. What is so often said in another context is also particularly true in this one, because, on a clear understanding of Mr Anturkar’s submission, the proverbial sting is in the tail. This is because the latter portion of Section 53(3) constitutes an automatic stay on demolition the moment a retention application is made.

62. In other words, on Mr Anturkar’s construct, if something is put up *with no permission at all, none even having been sought*, the noticee is entitled in law to apply for ‘retention’ or regularization — and until that application is decided, this admittedly illegal construction must continue. Or to put it even more dramatically: no one needs ever to apply for a building or development permission. Anyone (with some connection to the land or its development) can simply start development. Never mind the provisions of Sections 43 to 45. That wholly illegal development cannot be touched until an application for regularisation is made and rejected.

63. Courts everywhere are used to insidious — even sinister — arguments being presented in apparently attractive forms, but courts are just as capable of unravelling these and discerning them for what

they really are. Mr Anturkar's arguments clearly amount to this: so long as the person is not a trespasser, he need not apply for any permission whatsoever. He can construct whatever he likes. Because there is always available to him a recourse to Section 53(3) and indeed this is something of a waiting game because this unilaterally driven builder does not even have to apply at this stage. He has to await a municipal notice from the Planning Authority under Section 53(1). Once he receives it, even then all is not lost. He simply has to apply for retention of that for which he sought no permission and he will receive by operation of statute an automatic stay until his application is decided.

64. Mr Jagtiani can barely contain his outrage at this submission. It is contrary to every single judgment of the Supreme Court for the last 40 or 50 years, he says, and it makes a mockery of the entire planning process. For, if this is to be accepted, there is no logical reason why anybody should bother to apply under Section 44 or receive a permission under Section 45 or even have to take recourse to a deeming provision under Section 45(5). The embargo in Section 43 is as good as dust. It literally means nothing.

65. But it is true that the words in Section 53(3) are "any person aggrieved by *such notice*". What does this expression "*such notice*" refer to? What can it reasonably be held to refer to?

66. Before we proceed further, we need to note that there is now a concept of 'compounding' built into the MRTP Act by virtue of the introduction in 2017 of Section 52A. It reads thus:

“52A. Provisions relating to certain developments as compounded structure. —

(1) Notwithstanding anything contained in this Act or any other law, for the time being in force, or in any judgment, order or direction of any Court where unauthorised development has been carried out on or before the 31st December 2015, in the area of Development Plan, the State Government may, upon the request of the Planning Authority, specify the terms and conditions, not inconsistent with the rules made in this behalf, on compliance of which and the compounding charges, infrastructure charges and premium on payment of which, the Planning Authority may declare such development as compounded structure.

(2) On declaration of such development as compounded structure under sub-section (1), no further proceedings under any law for the time being in force against the owner or occupier of such structure shall be taken or continued:

Provided that, no further development shall be permissible in any compounded structure, other than repairs and maintenance, and any development or reconstruction of such structure shall be only as per the provisions of the prevailing Development Control Regulations.”

67. Correspondingly, the definition of a compounded structure was added in Section 2(5A), which reads as follows:

“2(5A) “compounded structure” means any development of land in respect of which the compounding charges, infrastructure charges and premium as levied by the Collector under the provisions of sub-section (2B) of section 18 or by the Planning Authority under section 52A, are paid by the owner or occupier of such structure and

which upon such payment has been declared as compounded structure by the Collector or Planning Authority, as the case may be;”

68. Section 52A allows certain unauthorised developments to be compounded on payment of compounding charges, infrastructure charges and premium. ‘Compounding’ is just perhaps a nice word for regularisation, and it sanitizes the fact that municipal corporations routinely use regularisation as a significant source of revenue. After all, there are not only compounding charges but there is also a premium and there is often a significant hefty penalty attached.

69. But Section 52A is to be read with the Maharashtra Town Planning (Compounded Structures) Rules 2017. These set out certain limited scenarios, including those set out in Rule 6. Section 52A does not assist an owner or developer who has put up unauthorised structures in violation of town planning norms.

70. This aspect of the matter has in fact been considered by a Division Bench of this Court in *Rajiv Mohan Mishra v City and Industrial Development Corporation of Maharashtra Ltd & Ors.*⁶ That was a case where this Court read down Section 52A and Rules 4, 5 and 7 of the Compounding Rules *inter alia* on the basis that authorised development which is contrary to a development plan and the applicable Development Control Regulations cannot be considered for compounding. The submission by Mr Anturkar is that this does not mandate that there must exist all prior

6 2018 SCC OnLine Bom 4132.

permissions. In another manner of speaking, a retention application is permissible if, although there is no prior planning permission, the applicant is able to show that the structure fits within existing development planning norms. Of course, if it is outside existing planning norms, there is no question of permitting it. It is perhaps best to illustrate this submission with an example. Let us assume that development takes place without permission. But the developed structure is one that, had permission been sought, it could have been granted and is within the frame of existing development control policy in terms of Floor Space Index (“FSI”) norms, built-up areas and so on. There is no logical reason, Mr Anturkar says, why retention should not be permitted or should not be allowed to be filed although the structure is otherwise within planning norms.

71. The answer from Mr Jagtiani is that if this was so, Section 52 would not need the four-fold division that it has, and Section 43 would not be necessary either.

72. To appreciate the consequences of accepting Mr Anturkar’s submission more fully, we believe that we need to take a step back from the detailing of these provisions. Two precepts inform not only the MRTP Act particularly, but all planning statutes everywhere. The first is a concept of what is called ‘balanced development’. This is not merely a question of applying Development Control Regulations to building proposals and granting a refusal. This is a complex civil engineering exercise that takes into account a very large spread of land and takes a determination of what kind of development should be permitted, to what extent, of what land use,

where and by whom and how this is to be balanced against other equally important civic means such as open space, playgrounds, water supply, maintenance and preservation of marine and riparian resources, green cover, public civic amenities and so on. It is not only the built form that informs development. In that sense, perhaps it may not be too far-fetched to say that the development law is actually a species of environment law and is a form of environmental planning. Every construction and every development everywhere is an intervention with the environment. The planning norm may not therefore be an *ecological* form such as forest laws or those related to wildlife protection, but that does not make them any less recognizable as environmental laws. It is perhaps time that we recognise that environmental protection is as crucial to our urban fabric as ecological protection is to the natural environment.

73. Sixty-two years after Rachel Carson's epochal *Silent Spring* and its central lesson of interconnectedness, we today have human-built cities on an unimaginable scale, growing at an inconceivable rate. For both the natural environment and the built environment, there is now a firm recognition of one overarching principle: for every species on earth, humankind included, *habitat matters*. It is, perhaps, what matters most of all. And humankind is the only species that can so completely dominate, control and preserve habitat. Or destroy it.

74. The abundant and incautious overuse of the expressions 'balanced development' and 'sustainable development' now risks a complete elision of jurisprudential foundations. The meaning and

heft of these words are under threat. What is to be balanced? How is this 'balance' achieved? What kind of development is 'sustainable'? Are bridges and highways to be preferred over the conservation of water bodies and old-growth forests and wildlife habitats? If 'balanced development' and 'sustainable development' are to be regarded as one of the two core requirements of all town and country planning, then it is necessary to trace these to some fundamental underlying principle. If not, we run the risk of eclipsing meaning and proceeding in the opposite direction.

75. In the environmental jurisprudence in this country, not necessarily always related to town and country planning, several environmental principles have evolved through judicial pronouncement. In *S Jagannath v Union of India*,⁷ the Supreme Court cited the decision from a year earlier in *Vellore Citizens' Welfare Forum v Union of India*⁸ precisely on the concept and interpretation of 'sustainable development'. The *S Jagannath* court held:

49. This Court in *Vellore Citizens' Welfare Forum v. Union of India* [(1996) 5 SCC 647 : JT (1996) 7 SC 375] has dealt with the concept of "sustainable development" and has specifically accepted "The Precautionary Principle" and "The Polluter Pays Principle" as part of the environmental laws of the land. The relevant part of the judgment is as under: (SCC pp. 657-60, paras 10-14)

"The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable

7 (1997) 2 SCC 87.

8 (1996) 5 SCC 647.

Development’ is the answer. In the international sphere, ‘Sustainable Development’ as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called ‘Our Common Future’. The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as ‘Brundtland Report’. In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called ‘Caring for the Earth’ which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. **During the two decades from Stockholm to**

Rio ‘Sustainable Development’ has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. ‘Sustainable Development’ as defined by the Brundtland Report means ‘Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs’. We have no hesitation in holding that ‘Sustainable Development’ as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

Some of the salient principles of ‘Sustainable Development’, as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that ‘the Precautionary Principle’ and ‘the Polluter Pays Principle’ are essential features of ‘Sustainable Development’. The ‘Precautionary Principle’ — in the context of the *municipal law* — means:

(i) Environmental measures — by the State Government and the statutory authorities — must anticipate, prevent and

attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.

‘The Polluter Pays Principle’ has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996) 3 SCC 212 : JT (1996) 2 SC 196] . . .

The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. **Article 21 of the Constitution of India guarantees protection of life and personal liberty.** Articles 47, 48-A and 51-A(g) of the Constitution are as under:

(Emphasis added)

76. This clearly sets the concept of sustainable development / balanced development in the frame of Article 21 of the Constitution of India, the guaranteed right to life.

77. On interdependency, we would do well to recall the words of the Supreme Court in *Sachidanand Pandey v State of West Bengal*⁹ — not the famous opening paragraph, but what follows.

3. Today society’s interaction with nature is so extensive that the environmental question has assumed

9 (1987) 2 SCC 295.

proportions affecting all humanity. Industrialisation, urbanisation, explosion of population, over-exploitation of resources, depletion of traditional sources of energy and raw materials and the search for new sources of energy and raw materials, the disruption of natural ecological balances, the destruction of a multitude of animal and plant species for economic reasons and sometimes for no good reason at all are factors which have contributed to environmental deterioration. While the scientific and technological progress of man has invested him with immense power over nature, it has also resulted in the unthinking use of the power, encroaching endlessly on nature. If man is able to transform deserts into oases, he is also leaving behind deserts in the place of oases. In the last century, a great German materialist philosopher warned mankind:

“Let us not, however, flatter ourselves overmuch on account of our human victories over nature. For each such victory nature takes its revenge on us. Each victory, it is true, in the first place brings about the results we expected, but in the second and third places it has quite different, unforeseen effects which only too often cancel the first.”

Ecologists are of the opinion that the most important ecological and social problem is the widespread disappearance all over the world of certain species of living organisms. Biologists forecast the extinction of animals and plant species on a scale that is incomparably greater than their extinction over the course of millions of years. It is said that over half the species which became extinct over the last 2000 years did so after 1900. The International Association for the Protection of Nature and Natural Resources calculates that now, on average, one species or

sub-species is lost every year. It is said that approximately 1000 bird and animal species are facing extinction at present. So it is that the environmental question has become urgent and it has to be properly understood and squarely met by man. **Nature and history, it has been said, are two component parts of the environment in which we live, move and prove ourselves.**

4. In India, as elsewhere in the world, uncontrolled growth and the consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem. The once imperial city of Calcutta is no exception. The question raised in the present case is whether the Government of West Bengal has shown such lack of awareness of the problem of environment in making an allotment of land for the construction of a five star hotel at the expense of the zoological garden that it warrants interference by this Court?

(Emphasis added)

78. Finally, some observations of the Supreme Court in *MC Mehta v Kamal Nath* (the *Span Motel* case, which developed the public trust doctrine)¹⁰ are entirely appropriate to our present discussion:

23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled *An ecological perspective on property : A call for judicial protection of the public's interest in environmentally*

10 (1997) 1 SCC 388.

critical resources published in Harvard Environmental Law Review, Vol. 12 1988, p. 311 is in the following words:

“... There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources — for example, wetlands and riparian forests — can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature

cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions.”

(Emphasis added)

79. This discussion is important precisely because of the implications of Mr Anturkar’s argument. It is based on a fundamentally flawed premise, one of reductionism and isolationism: that what somebody does on a piece of land has no effect or impact on anything else. Therefore, planning permissions are just an irritant, a legacy of the licensing raj. Anybody can and should be able to build anything anywhere without needing to seek or obtain permission; and then, only after confronted with a municipal notice, should be allowed to seek ‘retention’ or ‘regularisation’ on a narrow view of what is ‘permissible’ under extant building control regulations (with no regard to overall planning considerations). Even if Mr Anturkar does not articulate it in these words, this is the inevitable consequence of his submission.

80. The second precept, but one with which we are not in any way concerned, that informs every planning statute, is the concept of public participation in the planning process.

81. We highlight these two because it seems to us clear that if we remove either of these, the concept of planning is virtually done away with.

82. Tied to these two concepts is the oft-repeated phrase of the public trust doctrine, evolved in *Kamal Nath*. This is most often construed as a sort of jurisprudential interpretation of a fiduciary relationship between a public authority that holds certain lands and is said to be vested in them for the larger public good. It is that in force. But the public trust doctrine is perhaps considerably more subtle and operates in different ways. The achievement of balanced development is also a part of the public trust that is imposed on every planning authority. It is impossible to accept that a planning authority would favour development at the cost of all other considerations that would not only betray the statute and the first precept, but even absent a statute that would be a failure of a dimension of the public trust doctrine. The implementation of these restrictions is not to cause hardship to individuals or to builders, although Mumbai builders have been known to argue otherwise. The purpose is to ensure equality and uniformity consistent with a sanctioned development plan. If it were otherwise, and we are now taking Mr Anturkar's illustration head on, it means that every individual can, without any regard to the law requiring permission, construct whatever he or she thinks is appropriate and to his or her liking or fancy and await a notice under Section 53(1) after which they can apply for retention under Section 53(3), obtain a stay and risk losing only that part that exceeds the planning norms.

83. That is not the purpose of planning. There is a reason why prior permission is required. It is so that all development and planning proceeds, or at least supposedly proceeds, in an orderly — and balanced — fashion. Construction on one plot is not isolated in its impact from the neighbourhood, the surrounding area or even

the development planning region. If everyone started doing what Mr Anturkar commends, there would only be imbalance.

84. The intention of Section 53(3) is not to give voice to some philosophical libertarianism that one might find in the works of Ayn Rand where no law applies except that which one decides to make for oneself.

85. Section 53, as amended, makes a clear differentiation between *types* of violations. Violations under Section 52(1)(a) and (c) are in one category and are segregated from those in 52(1)(b) and (d). That the ones in (a) and (c) are more serious is clear because the notice for violations under Section 52(1)(a) or (c) receives only a 24-hour notice. The notice for a violation under Section 52(1)(b) or (d) gets a month's latitude.

86. Further, Section 53(1)(d) emphasises this because it relates to the serious violations under Section 52(1)(a) or (c) which require 24-hour notice and says that where there is no compliance within the 24-hour notice period, the Planning Authority shall *immediately* take steps to demolish. That gives us clarity about the extent of the seriousness and the gravity of the transgression under Section 52(1)(a) and (c). Section 53(1A) is more relaxed. There is a one-month notice period and the noticee is required to take the necessary steps as specified in the notice.

87. There is another perspective, one that is possibly dispositive. The amended Section 53 now makes a clear distinction between an

illegality and an *irregularity*. Section 52(1)(a) and (c) cases — development with no permission or where permission is revoked — are *illegal*. Hence the shorter notice and immediate demolition. Section 52(1)(b) and (d) cases — where there is some permission, but it has been contravened — are *irregularities*. Hence the longer notice period and the opportunity to ‘comply’.¹¹ There can be no question of ‘compliance’ in a case of illegality.

88. Importantly, the *Rajiv Mohan Mishra* decision on which Mr Anturkar relies has one interesting observation. While dealing with Section 52(1)(a) the Court held that the *Section cannot operate to regularise illegal developments that are otherwise impermissible*. This is wholly against Mr Anturkar’s formulation. It stands to reason, for if Section 43 is read with Section 44 and then that is read with Section 52(1)(a) and (c), it would mean that any construction that violates these sub-sections is not an irregularity but is an illegality. It is directly contrary to the statute. The fact that had it been applied for it could have been granted does not make it any less illegal.

89. This distinction is therefore perfectly sound, and it is in complete consonance with the 50-year old dictum of the Supreme Court, never once diminished in *K Ramadas Shenoy v The Chief Offices, Town Municipal Council, Udipi & Ors*:¹² an illegality is incurable.

¹¹ Indeed, it would seem that even in the unamended form, Section 53(1) made a distinction because it said that in regard to violations under Section 52(1)(a) and (c) the noticee was to restore the land to its prior condition, i.e., a complete demolition, whereas for violations under Section 52(1)(b) or (d), the noticee was to comply with the conditions of the modified permissions.

¹² (1974) 2 SCC 506.

90. Section 53(3) does not contemplate ex post facto permission for an illegality. It contemplates the continuance, retention or regularization of that which had some semblance of a permission but where there is an anomaly — to wit, an irregularity.

91. Section 53 does and cannot contemplate the curing of an illegality. If it did, Section 53 would be liable to be struck down *inter alia* on the ground of manifest arbitrariness.

92. For completeness, we note that Section 54 confers on the Planning Authority the power to stop unauthorised development. Section 55 permits the summary removal or discontinuance of unauthorised temporary development.

93. Mr Jagtiani submits that the principle enunciated in *K Ramadas Shenoy* has not been diluted at any point. It remains a decision that the Supreme Court over time has consistently followed.. In *MI Builders Private Limited v Radhey Shyam Sahu & Ors*,¹³ the Supreme Court held that no consideration should be shown to a builder or any person where “construction is unauthorised” — that is to say, without permission. The Supreme Court said that this principle borders the Rule of Law. Unauthorised construction, the Supreme Court said in *MI Builders*, if it is illegal and cannot be compounded, has to be demolished.

94. There are two fundamental principles behind development permissions. *First*, any development presupposes some form of a

13 (1999) 6 SCC 464.

right connected to the land (which includes the right to develop). Without that, there can be no permission because even if it was sought it would be rejected. The Rules under the Maharashtra Development Plans Rules 1970 *inter alia* make it clear that amongst the various requirements for the grant of planning permission are the extracts of record of rights of Property Register Cards and other material particulars. This is to be found in Rule 6. But the requirements of Rule 6 are engrafted into Rule 10 which speaks of the procedure to be followed in retention. Thus, axiomatically, the *right* to develop must first be established.

95. The second part is that retention on its own presupposes that there is at least some minimal permission sought and obtained. Retention cannot apply to a case where *no permission* was ever sought. This approach would completely negate the operation of Sections 43, 44, 45 and other provisions of the MRTP Act. It would run contrary to half a century's jurisprudence in this country.

96. In *Friends Colony Development Committee v State of Orissa & Ors*,¹⁴ the Supreme Court dealt with consistent violations of sanctioned building plans and of construction deviations to "*the prejudice of the planned development of the city and at the peril of occupants of the premises constructed or of the inhabitants of the city at large*". The Supreme Court said that such development poses a serious threat to ecology and environment and at the same time to infrastructure. This is precisely the point that we have noted above.

14 (2004) 8 SCC 733.

Paragraphs 22 to 26 of *Friends Colony Development Committee* are reproduced below:

“22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter- meddling with the private ownership of the property may not be justified.

23. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and

unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. **Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of over-crowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.**

24. Structural and lot-area regulations authorize the municipal authorities to regulate and restrict the height, number of stories and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. **Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.** (For a detailed discussion reference may be had to the chapter on Zoning and Planning in American Jurisprudence, 2d, Vol.82.)

25. **Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are**

attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. **A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future.** It is common knowledge that the builders enter into under hand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.

26. The application for compounding the deviations made by the builders should always be dealt with at a higher level by multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of staff which is supposed to keep a watch on building activities should be suitably increased in the interest of constant and vigilant watch on illegal or unauthorized constructions.”

(Emphasis added)

97. In *Royal Paradise Hotel Private Limited v State of Haryana & Ors*,¹⁵ the Supreme Court said that regularisation is the exception

15 (2006) 7 SCC 597.

and not the rule. Further, in *MC Mehta v Union of India & Ors*,¹⁶ the Supreme Court categorically and emphatically proscribed regularisations where these would result in a violation of Article 21 of the Constitution of India.

98. In *Sakib Ayub Khan v Kalyan Dombivli Municipal Corporation*,¹⁷ a Division Bench of this Court speaking through GS Kulkarni J held that where there is complete illegality and construction is without any permission, there is no question of permitting a regularisation.

99. On the question of the planning laws, town planning statutes and the public trust doctrine, we are fortified in our view by previous decisions of the Supreme Court in *Mahendra Baburao Mahadik & Ors v Subhash Krishna Kanitkar & Ors*¹⁸ and our High Court in *Sudhir M Khandwala v Municipal Corporation of Greater Mumbai & Ors*.¹⁹ In *Khandwala*, a Division Bench of this Court said that in exercise of planning norms and statutes and building regulation powers, authorities and officers act as trustees of the public. Paragraph 123 of *Khandwala* merits reproduction in full:

“123. The Supreme Court has time and again expressed its serious concern over unauthorized and indiscriminate constructions in cities and big towns. In fact, the Supreme Court has cautioned against liberal use of the power of regularization and retention of unauthorized works and buildings. The Supreme Court

16 (2004) 6 SCC 588.

17 2023 SCC OnLine Bom 706.

18 (2005) 4 SCC 99.

19 2009 SCC OnLine Bom 2029.

has warned that authorities must take into account considerations of public safety and health, protection of environment and ill-effects of unregulated and uncontrolled construction in cities and towns. Therefore, it cannot be said that every unauthorized construction can be permitted to be regularized by loading of TDRs or by condoning or relaxing the restrictions relating to FSI, open space, set backs, height of the building, etc. In individual cases and by applying the standards and rules strictly and rigorously, the authorities must take an informed decision bearing in mind the building regulations, restrictions and conditions therein. The retention of unauthorized works and constructions should not result in wholesale condonation and relaxation or exemption from the Building Rules and Bye-laws or else there will be chaos and break down of the rule of law. Ultimately, planning authorities have been conferred such powers for public good and in public interest.

As observed by the Supreme Court in the case of *Mahendra B. Mahadik* (supra), all powers are in the nature of Trust. The authorities and officers exercising powers under Building Regulations so also under planning laws, act as trustees of the public at large. The faith and trust that is reposed in them is in the belief and hope that they do not exercise the discretionary powers, without any adherence to the very laws, under which they are empowered to act and decide such cases. They cannot bye-pass their own rules and regulations and sacrifice public health and public safety. These are vital matters and they cannot be a casualty in the hands of the Municipal and Town Planning Authorities. Therefore, before they take any decision they must not only consider the alleged hardship to individual flat purchasers/holders/occupants but bear in the interest of

those residing in the neighbourhood and the public at large. The city and town so also the area as a whole has a vital interest in such matters. Ultimately, planned and regulated development of a city or town is the object of enacting planning laws. Therefore, the interest of all residents is at stake. The Municipal and Town Planning authorities cannot adopt an attitude by which they further the interest and cause of developers and wrongdoers at the cost of the township as a whole. **They must bear in mind the fact that essential and basic amenities like water and electricity are scarce. The pressure on land is immense. It is not possible to construct bridges, roads all the time. Ultimately, a city or town is planned for a certain number of people and population. The infrastructure and basic amenities are provided considering the existing population and growth at a projected rate over a passage of time. If there is increasing pressure and burden on the existing facilities and amenities, then, the whole system would collapse resulting in large scale inconvenience. In every city or town certain number of schools, educational institutions, hospitals, public conveniences etc. are provided on the basis of population figures and by future projection. These matters must therefore have a bearing, when an application for retention is made and it is not possible to hold that the authorities should allow such applications only because the Builder/Developer manages to generate FSI in the form of TDR or otherwise. Similarly, the argument that these constructions be regularized by imposing fine and charging high fees as a matter of course is also difficult to accept, for the aforementioned reasons. If by imposition of fine and charging of compounding fees, large scale unauthorized constructions are regularized, then, that would encourage the Builders and Developers so also others having interest in the development**

activities, to violate laws openly. They will always proceed on the basis that the building regulations can be breached with impunity and all that they would be visited with, is high compounding fees. That is not the intention of the Legislature. **The penal provisions in sections 52 and 53 of the MRTP Act, 1966, are enacted with a defined object and purpose. It is to discourage unauthorized and illegal development and also punish the wrong doers. In addition to punishment of wrong doers and offenders, the Legislature empowers the Planning Authority to pull down, remove or alter the unauthorized development or works. Therefore, there is a twin object and purpose in such provisions. That is to check and control unauthorized construction and development and at the same time penalise all those who are responsible for the same. Therefore, by merely charging compounding fees and imposing heavy fines such construction cannot be regularized. Ultimately, the exercise of this discretionary power must not result in a licence to break planning laws.** Individual's interest in a property, his right to enjoy it is subject to larger public good and purpose. That right has to be balanced with the requirements of the society. It is not absolute. While dealing with request of retention and regularization, the deviation and deficiencies, the extent of irregularities, the damage and ill-effects thereof and the conduct of the parties, are all relevant considerations. **What can be termed as a minor deviation or departure in a given case, may still have adverse effects and consequences on the overall development and planning of the city and town.** Once the population is increasing, then what is a minor deviation and what could be termed to be a major infraction or breach or violation of the planning laws, are matters which must be decided by the Planning Authorities in the facts and circumstances of each case bearing in mind the above objects and purpose. **They**

cannot as a matter of rule regularize unauthorized constructions by allowing the Builder/Developer/wrong doer to compensate for the violation in terms of money or by permitting him to load TDR/FSI from adjoining plots and areas. If we lay down such a general rule, we would be going contrary to the judicial pronouncements in the field. That would be violating the law of the land. We are bound by the Supreme Court decisions and, therefore, cannot lay down any principle contrary to the same.”

(Emphasis added)

100. There are several decisions where the Supreme Court has deprecated the habit of bypassing regulations and building control norms: see: *Shanti Sports Club & Anr v Union of India & Ors*;²⁰ *Priyanka Estates International Private Limited & Ors v State of Assam & Ors*.²¹

101. In the context of Sections 54 to 56 of the MRTP Act, in *Esha Ekta Apartments Cooperative Housing Society Limited & Ors v Municipal Corporation of Greater Mumbai & Ors*,²² the Supreme Court held that these provisions do not mandate or contemplate the regularisation of construction made without obtaining the necessary permissions or in violation. Paragraphs 45.5, 45.6 and 46 of the *Esha Ekta* judgment say:

“45.5 Section 54 empowers the Planning Authority to stop unauthorized development. Section 55 enables the Planning Authority to remove or discontinue unauthorized temporary development summarily.

20 (2009) 15 SCC 705.

21 (2010) 2 SCC 27.

22 (2013) 5 SCC 357.

45.6 Section 56 empowers the Planning Authority to take various steps in the interest of proper planning of particular areas including the amenities contemplated by the development plan. These steps include discontinuance of any use of land or alteration or removal of any building or work.

46. An analysis of the above reproduced provisions makes it clear that any person who undertakes or carries out development or changes the use of land without permission of the Planning Authority is liable to be punished with imprisonment. At the same time, the Planning Authority is empowered to require the owner to restore the land to its original condition as it existed before the development work was undertaken. **The scheme of these provisions do not mandate regularization of construction made without obtaining the required permission or in violation thereof.”**

(Emphasis added)

102. We return to *Rajiv Mohan Mishra* and we reproduce now paragraphs 19, 20, 32, 51, 52, 69, and 70 of that decision:

“19. On conjoint reading of section 44 and section 53 of the MRTP Act, we find that there is a provision in the form of sub-section 3 of section 53 which permits applications being made under section 44 for the retention of the unauthorised building/construction. Such application is required to be considered for all purposes as an application under section 44 MRTP Act for grant of a development permission. There are several orders passed by this Court and the Apex Court by which a liberty has been granted to the person erecting unauthorised construction to apply for the regularisation of the unauthorised construction. When an application for regularisation is made, only those

constructions can be regularized which fulfil all the requirements of DCR as well as sanctioned or draft Development Plan and which are not prohibited by any other provisions of law. There are provisions under other statutes such as the Works of Defence Act, 1903 under which all constructions can be prohibited within a particular area. Therefore, to that extent, the objections raised by the Commissioner of the NMMC appear to be correct when he contends that in the existing framework of law, it is possible for a person who has carried out illegal constructions to apply for regularisation, and therefore, it is not necessary to come out with any such policy for regularisation. As the law stands today, only those constructions can be regularised which fulfil all the requirements of the DCR as well as sanctioned or draft Development Plan and which are not prohibited by any other provisions of law.

20. On the basis of an application for regularisation, an illegal structure which could not have been otherwise permitted in accordance with the provisions of the MRTP Act or other statutes or DCR cannot be regularised.

32. Thus, this Court relied upon a decision of the Apex Court in the case of *Mahendra Baburao Mahadik & Ors v Subhash Krishna Kanitkar & Ors*. **The Apex Court in the said decision has held that while considering an application for regularisation under the MRTP Act, no action can be taken by the Planning Authority contrary to the provisions of the MRTP Act and, therefore, it follows that regularisation cannot be permitted contrary to the building by-laws or DCR which are framed under the MRTP Act.**

51. We have already quoted the provisions of sections 52 to 56 of the MRTP Act which confer/vest powers on the

Planning Authorities to remove illegal constructions/unauthorised developments.

52. Apart from these provisions of the MRTP Act, as far as illegal constructions are concerned, the field is occupied by the Municipal laws such as the Mumbai Municipal Corporation Act, 1888 (for short 'the said Act of 1888'), the Maharashtra Municipal Corporations Act 1949 (for short 'the said Act of 1949') and the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965 (for short 'the said Act of 1965'). The Municipal Corporations and Councils established under the said laws are the Planning Authorities within the meaning of the MRTP Act. The Municipal laws confer power on the Municipalities to take action of demolition of illegal constructions.

69. On comprehensive analysis of the MRTP Act, it is clear that it does not permit any development including erection or re-erection of structures or a layout or subdivision of a land contrary to a Development Plan. A Development Plan controls the use of lands or buildings by providing for various zones such as Residential, Industrial, No Development Zone etc. DCR which is a part of a Development Plan provide for the extent of available FSI, sizes of buildings and its parts such as size of staircases, passages etc. DCR provides for rules regarding maximum height of different categories of buildings, amenities such as water tanks and lifts, open spaces, parking places, projections etc. Even the Rules regarding minimum size of plots are a part of it. Even norms of fire safety are a part of DCR. In short, DCRs control all the building and development activities. It provide for the manner in which and subject to what conditions a development permission can be granted. Therefore, making and amending DCR is always a legislative function as held in the case of *Pune Municipal Corporation v Promoters & Builders*. In fact the

process of making a Development Plan partakes character of a legislative function. Therefore, as provided in section 31(6), Planning Authority is bound by a Development Plan.

70. If an unauthorised development or unauthorised constructions are carried out contrary to the provisions of a Development Plan and/or DCR, the town planning goes haywire. The provisions of DCR and Development Plan provide for a particular FSI in a particular area or restrictions or prohibition on constructions or a particular class of constructions in a particular area, considering the local situations. In a Development Plan, certain areas are reserved for public utilities like gardens, play grounds, hospitals, schools, colleges etc. It provides for construction of roads and for widening the width of the existing roads. The Planning Authority while making a Development Plan and making provisions such as maximum permissible FSI, maximum size of a building, minimum size of plots, minimum width of roads etc takes into consideration several factors such as population density, availability of water supply, the capacity of drainage/sewerage system, availability of roads, vehicle density, availability of parking spaces etc. **Under Article 21 of the Constitution, every citizen has a right to live a dignified and meaningful life. He has right to live in a pollution free atmosphere and environment. A citizen cannot live a meaningful life unless he is provided with civic amenities such as water supply, electricity supply and recreational facilities like gardens, open spaces, playgrounds . This Court has held in the case of *Dr Mahesh Vijay Bedekar (supra)* that right to have roads and footpaths/footways in a reasonable condition is an integral part of the Article 21. For leading meaningful life, a citizen needs facilities like educational institutions, hospitals etc. In fact the principles of sustainable development have been incorporated under the MRTTP Act. It cannot be**

disputed that large number of illegal constructions in any city put enormous burden on civic amenities. Such situation lead to violation of fundamental rights guaranteed under Article 21 to the citizens.”

(*Emphasis added*)

103. This is by no means the first case of this kind. The Bombay High Court has seen this in at least 1986 if not earlier. So has the Supreme Court. A case in point is *Supertech Limited v Emerald Court Owner Resident Welfare Association & Ors*,²³ where two fully constructed towers were ordered to be brought down. In *Dipak Kumar Mukherjee v Kolkata Municipal Corporation & Ors*,²⁴ on the question of unauthorised construction, i.e., one without prior permission, the Supreme Court held that these developments defeat the concept of planned development and also affect the fundamental and constitutional rights of other persons. These facets Mr Anturkar’s argument wholly overlooks.

104. In the careful, elaborate, incisive and remarkably prescient judgment of a Division Bench of this Court authored by GS Kulkarni J in *High Court on its Own Motion v Bhiwandi Nizampur Municipal Corporation & Ors*,²⁵ there was a comprehensive review of this aspect of the law amongst others. The importance of prior permission as part of the planning process was noted. We are not in this case concerned with a dilapidated or a dangerous building. The reference to *Jilani Building* is to point out that this issue of

23 (2021) 10 SCC 1.

24 (2013) 5 SCC 336.

25 2022 SCC OnLine Bom 386.

unauthorised and illicit development is a very real one that is not limited to flat owners or persons on the plot itself. There is a much wider impact.

105. In *Kaalkaa Real Estates Pvt Ltd & Anr v Municipal Corporation of Greater Mumbai & Ors*,²⁶ a Division Bench judgment in which one of us (Kamal Khata J) was a member dealt with an entirely unauthorised development in a supercharged political context. There was a massive development. The project owner was politically influential. It could not be disputed that large portions of the construction were entirely unauthorised. An astonishing submission seems to have been made at that time which is not very far in its parallel to Mr Anturkar's argument today that even if there was an illegality the project owner would shop around in the open TDR market for sufficient FSI to load onto the plot *and thereby legitimise everything that was illegal*. The Court repealed that argument as we do this one and it did so for the same reason that we reiterate here today.

106. In paragraph 109 of *Kaalkaa Real Estate*, the Division Bench culled out certain principles. Some are of immediate relevance. Regularisation is not something that can be granted as a matter of course. It cannot be said, as a general rule that, and this is important, illegal construction *must* be regularised if FSI is available or can be generated in the form of TDR from other sources. It is not intended, the Bench held, that permission for regularisation should be granted by loading of TDR and generating more FSI on existing

26 2022 SCC OnLine Bom 2536.

plots. The Supreme Court has, the Division Bench reminded us, cautioned against the liberal use of the power of regularisation and retention of unauthorised works in buildings.

107. It is not possible to accept the proposition that constructions that are wholly illegal can be regularized only by levying a fine and charging high fees. Importantly, the exercise of the discretionary power allowing regularisation must not result in a license to break existing laws. An individual's interest in his property (and here no individual has a legitimate interest in the property to begin with) and his right to enjoy the fruits of that property are always subject to the larger public good and purpose. The individual right has to be balanced with the requirements of society. Private interest must be subordinated to the public good. Regularisation cannot be allowed as a matter of course by imposing fines or taking compensation.

108. In any such enterprise, it is clear that interests in land will be determined according to law. A developer may have a variety of interests: See: *Sushil Kumar Agarwal v Meenakshi Sahu & Ors.*²⁷ It is also settled that when permissions are granted, and this may be crucial, it is the later and the stricter of the development regimes that apply. This has been repeated more than once by the Supreme Court: *Usman Gani J Khatri v Pune Cantonment Board & Ors.*²⁸ *State of West Bengal v Terra Firma Investment & Trading Pvt Ltd.*²⁹ *Howrah Municipal Corporation & Ors v Ganges Rope Co Ltd & Ors.*³⁰

27 (2019) 2 SCC 241.

28 (1992) 3 SCC 455.

29 1995 (1) SCC 125.

30 2004 (1) SCC 663.

109. If this is the law, then the construction that Mr Anturkar places on Section 53 is directly contradictory to it. It is impossible to accept the propositions that Section 53(3) even extends to cases of illegality, i.e., where there is no planning permission at all or permission has been revoked, i.e., to notices under 52(1)(a) or 52(1)(c) of the MRTP Act.

110. As we noted, there are before us persons who claim to be in occupation legitimately, saying that they innocently took possession and apparently acquired such title as the Patils or Patel (or both) offered them. They will of course have their remedies against the developers: *Priyanka Estates International*;³¹ *Esha Ekta Apartments*.³² The argument about innocent third-party purchasers has never impressed this Court. Such arguments were repelled by this Court in *Bombay Environmental Action Group v Bombay Municipal Corporation & Ors (Arihant Building)*³³ and *West Coast Builders Pvt Ltd & Anr v The Collector of Bombay & Ors*.³⁴ Their rights cannot possibly be protected because they flow from an illegality. Their remedies against the developers are of course kept open.

111. The problem as we noted at the outset is not localised. Every Municipal Corporation faces this. Sometimes it is only a matter of degree. Mr Sakhadeo for CIDCO has supported the submissions of Mr Jagtiani and emphasized that CIDCO in this matter has never been at fault. That is correct. Mr Dande for NMMC says that the

31 *Supra*.

32 *Supra*.

33 1994 SCC OnLine Bom 512.

34 1994 SCC OnLine Bom 54.

Corporation has a zero-tolerance policy. It has adopted a digital technology using drones and radar, said to be almost 80% complete to map all constructions within its command areas. Once this system is online it will be possible to monitor every development accurately and completely.

112. The Supreme Court has in *MCGM v Sunbeam High Tech Developers Pvt Ltd*³⁵ spoken of modern technologies such as Geographic Information Systems, geo-mapping, geo-fencing and so on. This has also been noted in an order of 30th September 2022 in *MC Mehta v Union of India*.³⁶ Satellite mapping should be undertaken where feasible and, in a digital age and especially where the government is moving towards greater digitization, we see no reason why planning permissions and the mapping of what has actually been done on site should remain a matter of manual, analogue, physical verification. Digital real time maps can easily detect these constructions preventing ambiguity and even third-party hardships.

113. The result of this discussion is that we hold that a retention application under Section 53(3) is predicated upon and presupposes not only a right to develop, which is dependent on some sort of right or association with somebody who has a right in the land, but also a minimal permission. Retention cannot be sought for works that are carried out without any permission or after the permission has been revoked.

35 2019 SCC OnLine SC 1389.

36 Order dated 30th September 2022 in Writ Petition (Civil) No 4677 of 1985.

114. In the present case, the entire development is illegal. The occupation on the plot is illegal.

115. There is no method by which this building or this structure can be protected.

116. Accordingly, we direct the NMMC with CIDCO to immediately take steps to have the building evacuated. All residents are before us. Fresh notice is not necessary. They will have six weeks' time in which to vacate the premises. The building is to be brought down within two weeks thereafter. The police authorities at the Rabale Police Station will render all possible assistance. No Civil Court will entertain any application by any of these individuals for a stay or an extension of time. Any such application must be made by way of an Interim Application in this proceeding. Although we are disposing of this Petition, we are specifically reserving that liberty should the need arise. We are also reserving the liberty to CIDCO and NMMC to make an application for implementation.

117. As a general directive, we require CIDCO and NMMC to urgently take up the matter of formulating a working policy and scheme to protect all their lands. This may include fencing, signboards or such other measures as may be appropriate. We cannot lose sight of the fact that all this began because the Patils and Patel simply walked in and started construction. Had there been minimal protection, perhaps things might have unfolded differently.

118. We end this judgment by expressing our gratitude to appearing counsel Mr Anturkar, Mr Dande, Mr Sakhadeo and to Mr Jagtiani who has readily given much of his time. We must especially note the contribution and efforts of his juniors, Mr Vishal Narichania, Mr Sumeet Nankani, Ms Surabhi Agrawal and Mr Akshay Doctor.

119. The Court Receiver is not to remove his boards from the site until the demolition is complete. After that is done, the Court Receiver will stand discharged without passing accounts. His costs, charges and expenses will be paid equally by CIDCO and NMMC.

(Kamal Khata, J)

(G. S. Patel, J)