SUPREME COURT OF INDIA

Jayant Achyut Sathe

Vs.

Joseph Bain D' Souza

Civil Appeal No. 2970 of 2006

(Dr. Arijit Pasayat and P. Sathasivam)

04/09/2008

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in these appeals is to the judgment of the Bombay High Court which while holding

that Regulation 33 (7) of the Development Control Regulations, 1991 (in short the `Regulations') for the city of Mumbai as amended in the year 1999 does not suffer from any illegality, further observed that the same applies only to dilapidated buildings of `A' category which satisfy the requirement and those declared prior to the monsoon of 1997 under 3rd proviso are covered under Regulation 33(7) and are entitled to extra "Floor Space Index" (in short `FSI'). It also directed that certain site space has also to be provided.

3. The conclusions essentially are as follows:

"For the reasons stated above, we hold that the petition is very much maintainable and we read the provisions of the first part of D.C. Regulation 33 (7) to cover only the privately owned dilapidated buildings which require reconstruction and where the cost of structural repairs exceeds the monetary requirement specified under Section 88(3) of the MHAD Act (vis. Rs.1200/- per sq.meter as of now).

In the circumstances, prayer (b) of the petition deserves to be accepted though not prayer (a) and D.C. Regulation 33(7) will have to be read to mean that only the dilapidated buildings of "A" category which satisfy this requirement (and those declared unsafe prior to the monsoon of 1997 under 3rd proviso thereof) are covered under D.C. Regulation 33(7) and entitled to extra FSI provided therein.

As far as the challenge to the side spaces being reduced to half as against what is otherwise provided, it was submitted that the provision is totally unreasonable. The side spaces will now hardly be about 1.5 metres (about 5 feet) and for a building upto 24 metres, no separate fire fighting arrangement will be insisted. This will almost mean a building of ground plus 7 floors. The fire engines will not be able to go inside. In our view, independently on the merits of this submission, it. is required to be accepted. It was submitted by the respondents that in the erstwhile buildings there was hardly any space between two such buildings and if one goes for a tower, i.e. above 24 metres, obviously the side space will increase and the fire fighting facilities will have to be provided. In our view, this is no answer to the safety of the occupants with height of less than 24 metres. We may not interfere into the reduction of the recreational space or not providing the parking facilities though that will also create difficulties for the residents of such buildings. Considering that there is so much of space crunch, we may not interfere into the decision of the rule makers in that behalf. However, having the side space of only 5 feet for buildings of the height less than 24 metres (of ground plus 7 floors) is on the face of it something difficult to substantiate. That provision of the D.C. Regulations will have to be held as arbitrary, unreasonable and violative of Article 14 of the Constitution. We have no option, but to accept prayer (f) to this extent. The requirement of reducing side spaces for the buildings to be reconstructed is bad in law and they will have to be provided with the minimum side spaces as required in the buildings on small plots, vis. 3.6 metres.

The Apex Court has observed in its order of 21st April, 2006 that no third party rights will be created and it further observed that it will be for the High Court to deal with that aspect. This being the position, we direct, with a view not to cause prejudice to the investors, that those projects of reconstruction, which have already been approved, will proceed as it is. However, the buildings not having the certificate of the cost of structural repairs exceeding Rs. 1200/- per sq. m. under section 88 (3) of the MHAD Act will not be permitted reconstruction henceforth. For future, the certificate under section 88 (3) of the MHAD Act, viz. that the structural repairs cannot be carried out within the monetary limits specified therein will be mandatory requirement whereafter if 70% of the occupants and the landlord come together, the benefit under Regulation 33(7) will be available and not otherwise. Similarly, in all such buildings to be reconstructed, the side spaces will be maintained at least as in the case of other buildings on small plots vis. 3.6 metres."

4. The background facts in a nutshell are as follows:

The three writ petitioners (respondent Nos. 1, 2 and 3 herein) claiming to be public spirited citizens filed a writ petition before the Bombay High Court. The 1st petitioner is a former Municipal Commissioner of Mumbai, who is also a former Chief Secretary of the State of Maharashtra. The 2nd petitioner has been a member of various committees concerning urban development. The 3rd petitioner is a Civil Engineer by profession and for many years was an Executive Committee Member of the Bombay Metropolitan Authority. He was also a member of the Slum Rehabilitation Committee constituted by the State of Maharashtra.

The respondents in the writ petition were the State of Maharashtra through the Secretary, Urban Development Department, Municipal Corporation of Greater Mumbai which is the Planning Authority for the city of Mumbai under the Maharashtra Regional and Town Planning Act, 1966 (in short the `Town Planning Act') whereunder the regulations are framed. Respondent No.3 was a statutory authority constituted under the Maharashtra Housing and Area Development Act, 1976 (in short the `Development Act'). The concerned authority is Maharashtra Housing and Area Development Authority (MHADA). Respondent No.4 was the former Municipal Commissioner of Mumbai whose report was amongst others led to the amendment of the Regulations in the year 1999. Several parties intervened in the matter. Two of them were the property owners. One was the Property Owners' Association and one claimed to be a tenant in pre 1940 building. One of the interveners was Property Redevelopers' Association. Intervener No.6 was an Architect by profession who supported the petition while others opposed the petition. Earlier, a Division Bench of the High Court rendered a judgment on 17.10.2005. The Division Bench accepted number of grievances and amongst others appointed a few Committees to look into some such aspects which according to it had relevance for the issues highlighted in the petition. One of the interveners filed an appeal relatable to Special Leave Petition(C) No.1376 of 2006 and others also filed appeals. By order dated 14th July, 2006 this Court disposed of the appeals inter-alia with the following observations:

"The High Court has not dealt with the basic issues raised in the petition, i.e. as to whether the

amended Regulation 33(7) suffered from any infirmity. We, therefore, think it appropriate to direct the High Court to examine those issues. The parties shall be permitted to place their respective stands before the High Court. It is open to the appellants to canvass before the High Court as to the non-maintainability of the writ petitions. The High Court shall appropriately deal with the same. It needs no re-iteration that the High Court shall examine the challenge to Regulation 33(7) as amended in 1999."

Therefore, this Court directed the High Court to deal with only that issue relating to the validity of the provisions and the maintainability of the writ petitions. Intervention applications had also been filed before this Court. These applications were also to be directed to be dealt with by the High Court.

The grievances of the petitioners as noted before the High Court were as follows:

"The petitioners are concerned with the problem of congestion of the population in the island city of Mumbai. The island area of the city covers the area from Colaba in the South to Mahim and Sion in the North (which originally consisted of eight islands before they were all linked). The areas of suburbs and extended suburbs are not covered when one speaks of the island city. The existing infrastructure in the island city, particularly with respect to roads, water supply, sewage system, open areas and gardens, is already over stretched and under extreme strain. The petitioners point out that the island city has already reached the saturation point with respect to the population that it can accommodate, which is not disputed by any of the public authorities concerned. According to the report entitled "Report on the Development Plan of Greater Bombay, 1966", the total acreage of the island city is 17, 388.83 acres and the ultimate population, which it can accommodate, is 32.5 lakhs. As of now, the existing population of the island city is already in excess of this figure of ultimate population. It is now estimated to be 33.4 lakhs. It is another matter that the population in the suburbs is much more, but the area covered there is also much more than the island city. The petition is concerning only the island city.

There is no dispute whatsoever that the present pubic amenities are inadequate to cater to the present population. Hence, according to the Petitioners, any cause for the increase in the population in the island city has to be appropriately dealt with. Coupled with this deterioration of the infrastructure in the island city, it is also a fact that a very large number of buildings, i.e. more than 16,500 (16,502 according to one estimate) were constructed prior to 1940 and are in the need of urgent repairs and in some cases reconstruction. The State has taken it upon itself to see to it that these buildings are repaired and, wherever necessary, reconstructed and for that purpose, it created the Bombay Building, Repairs and Reconstruction Board by passing the Bombay Building Repairs and Reconstruction Board Act (Act No.XLVII of 1969). One of the main reasons for this large number of unattended buildings has been the freezing of the rent under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("the Bombay Rent Act" for short). Rents received by the landlords were found very much insufficient for them to carry out repairs.

The Bombay Buildings, Repairs and Reconstruction Board Act was later on repealed and the activities under the Act were taken over by the Maharashtra Housing and Area Development Authority (MHADA) when the Maharashtra Housing and Area Development Act (MHAD Act) was passed in 1976. A cess was to be contributed by the tenants of the private buildings known as Mumbai Building, Repairs and Reconstruction Cess under Section 82 of the said Act. Lands and buildings owned by the Central Government, State Government, Municipal Corporation of Mumbai, Mumbai Port Trusts, lands and buildings vested in MHADA, lards and buildings of the Public Trusts exclusively occupied for worship or educational purposes and those vested in or leased to a cooperative society, buildings exclusively in occupation of the owner, buildings exclusively used for non-residential purposes and some other properties as mentioned in section 83 were exempted from this requirement of paying the cess. These cessed buildings were divided into the following three categories under section 84 of the MHAD Act.

Category "A" Buildings erected prior to 1/9/ 1940

Category "B" Buildings erected between 1/9/ 1940 and 31/12/1950

Category "C" Buildings erected prior to 1/ 1/ 1951 and 30/12/1969

It appears to be the common case that as of now as per the affidavit of the State Government in the present matter, there are some 16502 buildings in "A" Category, 1491 buildings in "B" Category and 1651 buildings in "C" Category.

Chapter VIII of MHAD Act provided for repairs and reconstruction of dilapidated buildings. Under section 88 from Chapter VIII of the MHAD Act, Mumbai Housing and Area Development Board was supposed to undertake structural repairs of the buildings, which were in ruinous condition and likely to deteriorate and fall. However, section 88 (3) provides that where the cost of the structural repairs exceed Rs.1200/- per sq. m., the Board may not consider such buildings for repairs and issue a certificate to that effect to the owner of the buildings and affix it on the building for the information of occupiers and then proceed to take action as provided in this Chapter. Thereafter where the occupiers were ready to contribute to the cost in excess of Ps.1200/- per sq. metre, the Board may carry out the structural repairs, for which a provision is made in section 89 of the MHAD Act. This will mean that oherwise the steps for reconstruction will be taken by acquiring the property as provided in sections 91 and 92 of this Chapter. Section 91 provides for reconstruction where a building suddenly collapses or becomes inhabitate due to fire, torrential rein or tempest or otherwise. Section 92 lays down the procedure for acquisition where however a building suddenly collapses."

The High Court noted that there was no dispute that there was hardly any progress in the matter of repairs and/or re-construction by the procedure provided. Therefore, even in the year 1981 the

Government appointed a Committee under one Mr. Ajit Kerkar to consider the problems. The Committee emphasized that there should be a shift from re-construction of individual buildings to the re-development of the entire localities and the formulation of a programme of urban renewal.

The High Court noted that it was a common case that MHADA found it difficult to put in adequate funds for acquisition of properties for reconstruction under Chapter VIII of the Development Act and, therefore, Chapter VIII-A was introduced in the said Act. The provisions of this Chapter have been stated to be notwithstanding what was provided in Chapter VIII as stated in Section 103-B of Chapter VIII-A. The provisions under this Chapter were to operate when 70% of the occupiers came together and approached the Government to acquire the property. They were required to assure to contribute towards acquisition and take steps since the landlords were not cooperating and under the Scheme of this Chapter the developed buildings were to be given FSI 2. These provisions also did not receive adequate response.

On 25.3.1991 the Regulations were notified for greater Mumbai. Regulation 33(7) to which these cases relate provided for reconstruction or re-development of cessed buildings in the island city by cooperative housing societies or of old buildings belonging to the Corporation. The Regulation provided for old consumed FSI or FSI 2 whichever is higher. This Regulation was further amended on 25.1.1999 to provide the FSI of 2.5 on the gross plot area or the FSI required for rehabilitation of the existing tenants plus incentive FSI as specified in Appendix III to the Regulations. This amendment was brought about after a report was submitted by Study Group under the Chairmanship of Shri D.M. Sukhtankar, former Municipal Commissioner who was respondent No.4 in the writ petition. The Study Group had submitted its reply to the State Government in July 1997 leading to amendments in the year 1999. The Regulation was further amended by adding a new clause w.e.f. 27th February, 2004 whereby apart from the Corporation buildings, those of Department of Police, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra constructed prior to 1940 were also covered.

The main grievance in the writ petitions was that there was gross misuse of the amended Regulation 33(7) when applied to private buildings with which the petitions were concerned. They submitted that taking shelter under the amended Regulation 33, there has been misuse by pulling down buildings which are otherwise in good conditions merely because they were constructed prior to 1940. It was further submitted that there are no guidelines under the Regulations to lay down as to who are the tenants or occupiers who are eligible to be protected under the Regulations. Numbers of instances were cited. It was submitted that builders and developers and people with money and muscle power were dishousing genuine tenants/occupiers. The numbers of tenants/occupiers were being inflated by creating bogus tenancies to claim extra FSI. The consequence, it was submitted, was that there was going to be unjustified and tremendous increase in the population in the island city causing further strain on its infrastructure. It was their case that the extra FSI as per the amended Regulation was meant for the reconstruction of unsafe and dilapidated buildings only and not for all the 16502 `A' category cessed buildings. The dilapidated buildings are supposed to be just about 10% of them. Accordingly, there was a prayer to prevent strong and sound cessed buildings which are not in danger of collapse to be not pulled down and Regulation 33(7) should be

declared to be applicable only to those cessed buildings which are dilapidated and are in unsound and in unsafe condition.

Challenge was to the reduction in the marginal open space requirement for the buildings under Regulation 33(7) read with Appendix III as provided for the buildings under other regulations and it was prayed that same should be also struck down.

Stand of the respondents apart from questioning the maintainability of the writ petitions, the locus standi of the writ petitioners, was that Regulation 33(7) as amended was applicable to all `A' category cessed buildings which are constructed prior to 1940. Whenever 70% of the tenants/occupiers of such buildings came together alongwith their landlords for redevelopment of their properties, they were entitled to get extra FSI. This will provide houses with minimum 225 sq.ft. free of cost to all tenants in these pre- 1940 buildings. Many of them are otherwise cramped in still smaller tenements. The benefit could not be restricted only to the old and dilapidated buildings. There was no such restriction contemplated under Regulation 33.

The High Court while upholding the validity of Regulation 33(7) accepted some of the prayers of the writ petitioners which are led to the filing of the appeals.

5. Stand of appellants in these appeals is that the amended Regulation 33(7) came into force on 25th January, 1999 after inviting suggestions/objections from the public at large under Section 37 of the Town Planning Act, 1966 and after considering the same. Neither any suggestions nor any objections were filed by the writ petitioners nor did they challenge the said amended D.C. Regulation 33(7) from 1999 till October, 2004. In other words there was a delay of nearly 6 years.

6. It is submitted by learned counsel for the appellants that Public Interest Litigation as claimed to have been filed is not maintainable. Such a petition lies at the instance of the a third party only when it is shown that the affected person is unable to approach the Court. It would not lie if a section of the public was not interested in the cause. The writ petitioners did not file any objections or suggestions when statutory notice was issued. Therefore, they could not have invoked Article 226 of the Constitution and to pray that the High Court should consider their suggestions and restrict the regulation to old and dilapidated buildings beyond economic repair as set out in Section 88 of the Development Act or to consider impact on environment or infrastructure due to unlimited FSI or to restrict the FSI given to MHADA. They, therefore, seek to substitute the High Court for the statutory authorities. This is not permissible. The affected parties to any dispute on the PIL are essentially the property owners and the persons against whom serious allegations of alleged misuse of the regulation were made. These persons were not impleaded.

It is a settled position in law that in cases of public interest litigation the principles of natural justice apply and any order passed without impleading the affected parties would be bad. The prayer was to amend the Regulations as framed. This prayer could not have been accepted. As per the Kerkar Report the FSI permissible to the Board ranged between 3.19 and 5.88. By the impugned judgment the applicability of Regulation 33(7) was restricted to dilapidated buildings, the cost of repair which was beyond the statutory time limit fixed under Section 88 of the Development Act. Such a course is impermissible as it is contrary to the intention of the delegated legislation in view of the clear use of the expression "subject to the provision of MHADA Act" which has been used in the directives issued under Section 154 of Town Planning Act in January 1989. Notification dated 9.3.1989, DC Regulation of 1991 and the amendments made in 1994 to the DC Regulations of 1991 were deleted. The expression "old and dilapidated cessed buildings" have been used in the Government Policy on reconstruction of old buildings of 12.11.1984 and in the letter dated 20.3.1987 regarding Regulations of 1991, and the amendments made in 1994 to the Regulations of 1991. The expression "old and dilapidated cessed building" had been used in the Government Policy on Reconstruction of old buildings of 12.11.1984 and in the letter dated 20.3.1987 regarding Regulations, and the said expression is not found in Regulation 33(7). It has been consistently held that landlord need not wait for the building to get dilapidated as he is entitled to re-construct to augment his income.

7. It is pointed out that the historical background has great relevance also. With the advent of the Second World War in 1939, rents in Bombay were frozen at 1939 levels, initially under the Bombay Rent Restriction Act, 1939 and subsequently at 1940 levels under the Bombay Rent Act 1947. As a result of the freezing of rents on the one hand and increase in prices of building materials, wages of workers etc. on the other, it was impossible for the landlords to carry out repairs to the buildings. This led to collapse of some buildings. To meet this situation, the Bombay Buildings Repairs and Reconstruction Board Act, 1969 was enacted on 1st October 1969. It was a temporary Act for ten years. It was applicable only to the island city of Mumbai and not to the suburbs. The buildings in Mumbai were categorized into three groups depending on their year of construction viz.,

Category "A"	Buildings constructed prior to 1/09/1940	16,502 buildings.
Category "B"	Buildings constructed between 1/09/1940 and 31/12/1950	1,491 buildings.
Category	Buildings constructed between 1/01/1951	1,651 buildings.

"C"	and 30/12/1969	
	Total	19,644 cessed buildings

8. A cess was levied on these buildings and the Repair Board established under the said Act, had taken up the responsibility of repairing the said buildings. In case the repairs were beyond economic levels, such buildings were to be acquired by the Board and reconstructed/ redeveloped.

9. The said 1969 Repairs Act was replaced by the Development Act, which consolidated various Acts, including the said 1969 Repairs Act, which was inserted into Development Act as Chapter VIII with modifications. Collection of Cess continued under the Development Act. Basic objective of Chapter VIII of said Act was to carry out structural repairs to the cessed buildings and if they were beyond economic repairs to acquire and reconstruct. This scheme of reconstruction/ redevelopment failed. Thereafter in 1986, Development Act was amended by incorporating Chapter VIIIA by which 70% of the occupiers of "A" category cessed buildings could come together and acquire the property through Development Act for "reconstruction" on paying only 100 months net rent to the owner [the rents were frozen at 1940 levels]. The owner had no role to play in this scheme. The occupiers could acquire the building, demolish the building and reconstruct it. This scheme of reconstruction/ redevelopment also failed. The Government Policy for reconstruction/redevelopment from 12th November 1984 to 23rd November 1991 granting FSI 2 or consumed FSI whichever is more, to the co-operative societies of the owners and occupiers also failed.

10. Therefore, on 23rd March 1991, as part of the Town Planning Act and not as part of Development Act, Regulation No.33 (7) was brought into force in 1991.

11. Under Regulation 33(7), in 1991 the FSI was 2 or the consumed Floor Space Index of the existing old building, whichever is more. There was no incentive FSI. The minimum carpet area for rehabilitating the tenants/occupiers in the new building was 180 sq, ft. minimum upto a maximum of 735 sq. ft. The redevelopment was to be "subject to the provisions of the said Act" i.e. Development Act.

12. In 1994, DC Regulation 33(7) was amended to make the FSI 2 on the gross plot area or the

consumed Floor Space Index, that is, the total built-up area of the existing old building, whichever is more. This was also "subject to the provisions of the said Act" i.e. Development Act. The said amendment to D.C. Regulation 33 (7) in 1994, however failed to achieve the desired object. In 1996, the Maharashtra Government therefore constituted a Committee popularly known as "the Sukhtankar Committee", which committed comprised of members from all affected groups including tenants, landlords, bureaucrats, experts, etc. It was a very broad-based Committee. The terms of reference inter alia included how the reconstruction of the old cess buildings could be speeded up.

13. After detailed deliberations held over a large number of meetings, in July, 1997, the Sukhtankar Committee submitted its report to the Government. It was noted in the said Report that the life of most of the buildings in Category "A" had nearly come to an end and instead of repairing such buildings periodically, their reconstruction would be the only far sighted solution. It was felt that without giving incentive FSI nothing could be achieved in respect of reconstruction and redevelopment of the old buildings.

14. Therefore, amendment was made on 25'h January 1999 to Regulation 33(7), under the provisions of the Town Planning Act, whereby for reconstructing "A" category cessed buildings, FSI of 2.5 was granted on the gross plot area or the FSI required for rehabilitating the tenants plus 50% to 70% incentive FS], (as specified in Appendix III] whichever is more. The words "subject to provisions" of Development Act were expressly deleted.

15. Further under the 1st proviso to the amended Regulation 33(7), with the prior approval of the Government, MHADA and the Corporation would be eligible to get additional incentive FSI over the otherwise permissible FSI as specified in Annexure III of these Regulations without any cap.

16. The history of the Regulation 33(7) framed under the Town Planning Act, 1966 for reconstruction and redevelopment and the scheme for reconstruction/ redevelopment under Development Act shows that there are separate schemes under two separate Acts, that are self contained and one cannot borrow the provisions from one Act and incorporate them into the other, without upsetting the scheme of Regulation 33(7) read with Appendix III thereof.

17. The scheme under Regulation 33(7) involves landlords with the consent of 70% of the occupiers. There is no acquisition for redevelopment under this Scheme. Therefore to bring in "old and dilapidated buildings" which is a prerequisite for acquisition and reconstruction under the other Scheme, namely under Chapter VIII of MHADA cannot be included in the provisions of Regulation 33 (7) read with Appendix III.

18. Learned counsel for the original writ petitioners on the other hand submitted that the matters involved are not to be considered in the background of factual scenario only. The concept of Article 21 of the Constitution of India, 1950 (in short the `Constitution') cannot be lost sight of. It is submitted that there is congestion and pressure on the infrastructure facilities such as, sewerage, water, transport. The fire safety requirements cannot be adhered to in the cramped areas. With the increased inflow of persons into the island city of Mumbai, the quality of life will be affected.

19. In reply, learned counsel for the appellant submitted that there was no need for filing a Public Interest Litigation if there was good governance. The buildings in question are situated in extremely congested localities. There are narrow lanes. Traditional buildings are Ground plus First floor and some times two to four or to six floors. Originally, there was no notion of FSI which is presently prescribed.

20. The Development Act does not really deal with present issues. The density development parameters are very relevant. With high FSI the density goes off. The basic challenge was to the non-availability of the infrastructure and the basic quality of life. The Town Planning Act has to ensure descent quality of life. More than 16% buildings fall in `A' category and not all that are in dilapidated condition. Regulation 67 deals with heritage buildings. The structural repairs concept cannot be lost sight of.

21. The basic question raised is applicability of Section 88 vis-a-vis Regulation 33(7). It is pointed out that focus is on structural repairs and for greater preservation of reconstruction.

22. Learned counsel for MHADA, State and the Corporation pointed out that there was no challenge in the writ petitions to the legality of Regulation 33(7) on the ground of either Articles 14 or 21 of the Constitution. It is urged that nothing can be read into Regulation 33(7). Reference is also made to the Development Act, Appendix III dealing with the procedure and the reconstruction Board.

23. It is pointed out that 3.6 meters space as fixed by the High Court is not practicable. No basis has been indicated for fixation of such apace. It has also been pointed out that many constructions already made shall be required to be demolished if the order is followed. It is further pointed out that minimum FSI open space was always there. Reference is made to the situation in 1984, 1987, 1989 and 1991. Clause (6) in the old Appendix continued till 2004 and there was no challenge earlier. It is pointed out that there cannot be any fixed norms to satisfy whether the building is dilapidated or not.

24. Firstly, the scope of judicial review in matters of policy need to be looked into. In Balco

Employees Union (Regd.) v. Union of India and Ors. (2002 (2) SCC 333) it was observed as follows:

"34. Applying the analogy, just as the court does not sit over the policy of Parliament in enacting the law, similarly, it is not for this Court to examine whether the policy of this disinvestment is desirable or not. Dealing with the powers of the Court while considering the validity of the decision taken in the sale of certain plants and equipment of the Sindri Fertilizer Factory, which was owned by a public sector undertaking, to the highest tenderer, this Court in Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India SCC 568 at p.584, while upholding the decision to sell, observed as follows: (SCC para 35)

"We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a superauditor, take the board of directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."

36. In State of M.P. v. Nandlal Jaiswal the change of the policy decision taken by the State of Madhya Pradesh to grant licence for construction of distilleries for manufacture and supply of country liquor to existing contractors was challenged. Dealing with the power of the Court in considering the validity of policy decision relating to economic matters, it was observed at pp.605-06 as follows: (SCC para 34)

"34. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government has done, unless it appears to be plainly arbitrary, irrational or mala fide. We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in R.K. Garg v. Union of India. We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution

through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be

dealt with, greater play in the joints has to be allowed to the legislature. We quoted with approval the following admonition given by frankfurter J in morey v. Doud:

`In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events -- self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'

What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call `trial and error method' and, therefore, its validity cannot be tested on any rigid `a priori' considerations or on the application of any strait-jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or `play in the joints' to the executive. `The problem of Government' as pointed out by the Supreme Court of the United States in Metropolis Theater Co. v. State of Chicago:

`are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to

our judicial review. It is only its palpably arbitrary exercises which can be declared void'.

The Government, as was said in Permian Basin Area Rate cases, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution.

37. A policy decision of the Government whereby validity of contract entered into by Municipal Council with the private developer for construction of a commercial complex was impugned, came up for consideration in G.B. Mahajan v. Jalgaon Municipal Council and it was observed at p.104 as follows: (SCC para 22)

"The criticism of the project being `unconventional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all governmental enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of Government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against timescales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority."

38. To the same effect are the observations of this Court in Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India in which Kasliwal, J. observed at p. 375 as follows: (SCC para 31)

"31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."

39. In Premium Granites v. State of T.N. while considering the Court's powers in interfering with the policy decision, it was observed at p.

"54. It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be."

92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often

a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court."

25. It is to be noted that if different language is used in the same section or in different sections, the legislative intent is that they are intended to lead to different results and there is a conscious intent. (See the Member Board of Revenue vs. Arthur Paul Benthall (1955 (2) SCR 842, 845 846.) Similar was the view expressed in Commissioner of Income Tax, New Delhi (now Rajasthan) v. M/s East West Import and Export (P) Ltd. (now known as Asian Distributors Ltd.), Jaipur (1989 (1) SCC 760). It was inter alia observed as follows:

"7. The Explanation has reference to the point of time at two places: the first one has been stated as "at the end of the previous year" and the second, which is in issue, is "in the course of such previous year". Counsel for the revenue has emphasised upon the feature that in the same Explanation reference to time has been expressed differently and if the legislative intention was not to distinguish and while stating "in the course of such previous year" it was intended to convey the idea of the last day of the previous year, there would have been no necessity of expressing the position differently. There is abundant authority to support the stand of the counsel for the revenue that when the situation has been differently expressed the legislature must be taken to have intended to express a different intention."

26. It is of significance to note that in the writ petitions filed there was no challenge to Regulation 33(7). Only incentive FSI was challenged. So far as Regulation 33(7) is concerned, there will be no acquisition in Chapter VIII. Stress is on spending money out of the funds and of acquisitions. Chapter VIII-A essentially deals with occupiers. Acquisition and the Board's role is that of certification. Under Regulation 33(7) the occupier and the landlord are involved. There is no acquisition and there is no government fund utilized. There is a Transferable Development Right (in short `TDR') and the concept of incentive FSI.

27. It is the case of the appellant that the TDR is utilized to recover the money spent for subsidizing other constructions.

28. Certain other aspects also need to be noted.

29. The provisions relating to buildings which have been declared unsafe are specifically covered by Regulation 33(6) and reconstruction by MHADA is covered by Regulation 33(9). When the situation has been differently expressed in different sections, the legislature must be taken to have

intended to express a different intention.

30. A survey conducted by the Corporation in 1980-81 showed that 30,237 buildings would have crossed their life span by 1996. The Kerkar Committee report also recorded that the vast majority of the buildings would have to be reconstructed. The report on the Development Plan for Greater Bombay showed that in 1981, 5,82,200 tenements were required to house the natural growth of population.

31. In 1991 nearly 73% of the households occupied one room tenements - vertical slums; 18% occupied two rooms i.e. most of the persons - more than 90% lived in small areas. Those occupying large areas constitute 2.7% only. Between 1961 and 1991, the number of households increased to 20,88,000. Most of the tenements are of 100 to 120 square feet area only.

32. It is thus clear that the policy was to enhance the quality of the lives of those living in such poor conditions by increasing the living space to nearly double. This is to be contrasted with the need to give a better lifestyle to those who can afford it namely those who can afford the time to live a leisurely life. If such people have to undergo some hardships, the policy cannot be faulted especially when they constitute a minority.

33. In interpreting a statute, the meaning of particular words is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and object that is intended to be attained.

34. The writ Petitioners did not challenge the validity of Regulation 33(9) pertaining to reconstruction by MHADA or Regulation 33(7) in so far as it applies to the reconstruction by the Government or the Municipal Corporation even though the FSI is the same. The proviso to Regulation 33(7) allows Government, MHADA/Corporation to get even more than the FSI specified in Appendix III.

35. Most of the buildings constructed prior to 1940 (17,490 buildings) were constructed prior to 1905. Most of the buildings have outlived the period of their survival by 1979. 80% were occupying one-room tenements. [See: Vivian Joseph Ferreira and Anr. v. The Municipal Corporation of Greater Bombay and Ors. 1972 (1) SCC 70 (paras 9, 10 and 11).

36. In Mahadeolal Kanodia v. The Administrator General of West Bengal (1960 (3) SCR 578), it was held that rules of grammar require that an adjectival phrase qualifies the proximate substance.

[pages 584-585]. Applying that rule, the term "which attracts the provisions of MHADA Act, 1976" could only qualify the proximate substance "cessed building of A category in Island city" and nothing more.

37. It would be seen that with respect to reconstruction of buildings both Chapters VIII and VIIIA require the building to be acquired by the Board for the reconstruction in terms of Sections 92 and 103B (3). This is not the case with Regulation 33 (7).

38. Appendix III casts several duties on the Board for the working of Regulation 33 (7) as inter alia:

(a) Clause 3 requires certification of the occupiers and irrevocable consent to be certified by the Board;

(b) Clause 4 requires that the tenements have to be allotted to the occupiers as per the list certified by the Board;

(c) Clause 11 requires the FSI as in Regulation 33 (7) should be allowed only after the Board is satisfied that the redevelopment proposal satisfies all the conditions to be eligible for the benefits under the Regulations.

39. The challenge to the restriction of five feet open space (1.5 metres) is hopelessly delayed and barred by time as inter alia:

(i) the requirement of limiting the open space to five feet has been in existence since 1984 and was also a part of Development Control Regulation of 1991.

40. When the Board reconstructs a building it covers almost the entire land save for five feet open space. The Sukthankar Committee also recommended that the open space should be 5 feet. The challenge to the restriction of five feet open space has been made on the basis that the open spaces are already too low and that the DC Regulations made it even less. This is a contention which was rejected by this Court in Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and Ors. (2006) 3 SCC 434) at paras 297 & 298.

41. The State and MHADA filed affidavits in CA 2970 of 2006 supporting the appeals. In the affidavit dated 12th March filed by the State, it was set out that :

(i) The Tour Planning Act does not define category A cessed buildings and the reference to the provisions of Development Act were only to explain what the term "category A cessed buildings" meant.

(ii) By and large the old buildings constructed prior to 1940 were built when there was no concept of FSI and the open spaces were at times only 2 to 3 feet.

(iii) The width of most of the plots was about 30 feet and requiring a 12 feet open space to be left would mean that there would be no scope to redevelop the building.

(iv) Where a building was in the set back area as per the development plan, the land covered by the set back area had to be given to the authorities and the road was widened.

42. In the affidavit dated 17th March 2007 filed by MHADA, it was set out that:

(i) Reference to Development Act is with reference to the definition of cessed buildings which is not found under the Town Planning Act or the DC Regulations and is found only in the Development Act.

(ii) A perusal of Regulation 33 (7) shows that the emphasis is on pre 1940 buildings and nothing more.

(iii) Confining Regulation 33 (7) to only the private buildings and not the Government buildings would make the Regulation arbitrary.

(iv) Under Regulation 33 (10) the open space is 5 feet and to insist on 12 feet as per the High Court judgment it would make the same unreasonable and prevent even buildings which are on the verge of collapse from being redeveloped.

43. Above being the position, the inevitable conclusion is that the High Court was not justified in reading additional requirements into Regulation 33(7) after holding the same to be valid. The appeals are allowed but in the circumstances with no order as to costs.

44. In view of the order passed in Civil Appeal No.2970/2006 and other connected appeals, no order is necessary to be passed in contempt petition.