SUPREME COURT OF INDIA

Esha Ekta Apartments Co-operative Housing Society Limited

Vs.

Municipal Corporation of Mumbai

C.A.No.7934 of 2012

(G.S.Singhvi, Sudhansu Jyoti Mukhopadhaya JJ.)

27.02.2013

JUDGMENT

G. S. SINGHVI, J.

1. In last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc., have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the concerned authorities against arbitrary regularization of illegal constructions by way of compounding and otherwise. In Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733, this Court examined the correctness of an order passed by the Orissa High Court negating the appellant's right to be heard in a petition filed by the builder who had raised the building in violation of the sanctioned plan. While upholding the appellant's plea, the two-Judge Bench observed:

> "……Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over

their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non- compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders…….

The conduct of the builder in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built-up area on each floor but also added an additional fifth floor on the building, and such a floor was totally unauthorised. In spite of the disputes and litigation pending he parted with his interest in the property and inducted occupants on all the floors, including the additional one. Probably he was under the impression that he would be able to either escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

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 rationalisation 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 it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

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 legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys 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 our 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.

Though the municipal laws permit deviations from sanctioned constructions being regularised 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 misunderstanding 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 underhand 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 utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

(emphasis supplied)

In Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors. (2006) 7 SCC 597, this Court noted that the construction had been made in the teeth of notices issued for stopping the unauthorized construction and held that no authority administering municipal laws can regularize the constructions made in violation of the Act. Some of the observations made in that judgment are extracted below:

"Whatever it be, the fact remains that the construction was made in the teeth of the notices and the directions to stop the unauthorized construction. Thus, the predecessor of the appellant put up the offending construction in a controlled area in defiance of the provisions of law preventing such a construction and in spite of notices and orders to stop the construction activity. The constructions put up are thus illegal and unauthorized and put up in defiance of law. The appellant is only an assignee from the person who put up such a construction and his present attempt is to defeat the statute and the statutory scheme of protecting the sides of highways in the interest of general public and moving traffic on such highways. Therefore, this is a fit case for refusal of interference by this Court against the decision declining the regularization sought for by the appellant. Such violations cannot be compounded and the prayer of the appellant was rightly rejected by the authorities and the High Court was correct in dismissing the Writ Petition filed by the appellant. It is time that the message goes aboard that those who defy the law would not be permitted to reap the benefit of their defiance of law and it is the duty of High Courts to ensure that such definers of law are

not rewarded. The High Court was therefore fully justified in refusing to interfere in the matter. The High Court was rightly conscious of its duty to ensure that violators of law do not get away with it.

We also find no merit in the argument that regularization of the acts of violation of the provisions of the Act ought to have been permitted. No authority administering municipal laws and other laws like the Act involved here, can encourage such violations. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception. The authorities and the High Court were hence right in refusing the request of the appellant."

The aforesaid observations found their echo in Shanti Sports Club v. Union of India (2009) 15 SCC 705 in the following words:

"In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users.

The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air- conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.

Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

In Priyanka Estates International Pvt. Ltd. v. State of Assam (2010) 2 SCC 27, this Court declined the appellant's prayer for directing the respondents to regularize the illegal construction and observed: "It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers

would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder."

A somewhat similar question was recently considered in Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others (2012) 10 SCALE 29. While setting aside the order of the Division Bench of the Calcutta High Court, this Court referred to the provisions of the Kolkata Municipal Corporation Act, 1980 in the context of construction of additional floors in a residential building in violation of the sanctioned plan and observed: "What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors."

2. We have prefaced disposal of these matters by taking cognizance of the observations made in the aforementioned judgments because the main question which arises for our consideration is whether the orders passed by Deputy Chief Engineer, Building Proposals (City) of the Mumbai Municipal Corporation (hereinafter referred to as 'the Deputy Chief Engineer') and the Appellate Authority refusing to regularize the illegal constructions made on Plot No.9, Scheme 58, Worli, Mumbai are legally sustainable.

3. At the outset, we would like to observe that by rejecting the prayer for regularization of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the Appellate Authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed by them have given a hope to the law abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it.

4. The Municipal Corporation of Mumbai (for short, 'the Corporation') leased out the plot in question, of which land use was shown in the development plan as 'General Industrial' to M/s. Pure Drinks (hereinafter referred to as, 'the lessee') in January, 1962. The lessee constructed a factory and started manufacturing cold drinks under the brand name 'Campa Cola'. After about 16 years, the lessee engaged an architect for utilizing the land for construction of residential buildings. The architect made an application under Section 337 of the Mumbai Municipal Corporation Act, 1888 (for short, 'the 1888 Act') for sanction of plans of the proposed residential buildings. The same was rejected by the Planning Authority vide order dated 31.7.1980 on the ground that the required NOCs had not been obtained and the Competent Authority had not given exemption under the Urban Land (Ceiling and Regulation) Act, 1976. Another application made by the architect was rejected by the Planning Authority on similar grounds.

5. In view of the above development, the lessee made an application to the Corporation for change of land use from 'General Industrial' to 'Residential'. The latter forwarded the same to the State Government along with a proposal for modification of the development plan of the area. The State Government accepted the proposal of the Corporation and passed an order dated 31.12.1980 under Section 37(2) of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'the 1966 Act') in respect of 13049 sq. meters leaving the balance 4856 sq. meters for industrial use. This was subject to the condition that development shall be as per the Development Control Rules for Greater Mumbai, 1967 (for short, 'the D.C. Rules') and other relevant statutory provisions. Thereafter, the architect engaged by the lessee submitted revised plans for construction of residential buildings. The Planning Authority granted approval on 8.6.1981 for construction of 6 buildings comprising basement, ground and 5 upper floors. The commencement certificate was issued on 10.6.1981. On 27.6.1981, the Additional Collector and Competent Authority granted permission under Section 22 of the Urban Land (Ceiling and Regulation) Act for demolition of the structure and redevelopment in accordance with the provisions of the D.C. Rules.

6. On 12.8.1981, the lessee executed an Assignment Agreement in favour of P.S.B. Construction Company Limited. Paragraphs 10 and 11 of that agreement read as under:

> "10. The Developer shall construct the said buildings on the said sub- plot in accordance with the approved plan of the said buildings as sanctioned by the Corporation and/or in accordance with modifications and/or amendments thereto as may be sanctioned by the Corporation on the application in that behalf being made by the Owner at the instance of the Developer.
>
> 11. The Developer shall also construct the said building on the said sub-plot in accordance with and subject to the conditions stipulated in the letter of Intent dated 27th May 1981 made by the Additional Collector and Competent Authority under the ULC Act or such modifications and/or amendments thereto as may be sanctioned by the Additional Collector and Competent Authority on the application in that behalf being made by the Owner at the instance of the Developer and the sanction under Section 22 under the ULC Act, to be obtained by the Owner after compliance with the conditions in the said Letter of Intent or any modifications and/or amendments thereto as aforesaid and the development control rules of the Corporation and such other rules and regulations as are applicable".
>
> Simultaneously, an irrevocable Power of Attorney was executed by the lessee in favour of the developer, i.e., P.S.B. Construction Company Limited.

7. Similar agreements were executed by the lessee on 20.8.1981 in favour of Mohamed Yusuf Patel son of Abdulla Patel and Mohinuddin son of Tayab Soni. On 16.6.1982, P.S.B. Construction Company Limited entered into an agreement with S/Shri B.K. Gupta, Manmohansingh Bhasin and Mohamed Yusuf Abdullah Patel appointing the latter as promoters of the builders and authorised them to develop one portion of the plot by demolishing the existing structures and constructing building Nos. 1, 3 and 8 in accordance with the sanctioned plan.

8. The architect, who was initially engaged by the lessee, continued to work on behalf of the developers/builders and promoters. The amended plans submitted by him for construction of 9 buildings with ground and 5 upper floors were also approved vide order dated 2.2.1983.

9. In 1983, the lessee secured permission from the Chief Minister of the State to raise the height of the buildings up to 60 feet. However, the revised plans submitted for construction of separate buildings comprising stilt and 24 upper floors; stilt and 16 upper floors with additional 6th and 7th floor on building No.2 and additional 6th floor on building No.3 were rejected by the Planning Authority vide order dated 6.9.1984.

10. Notwithstanding rejection of the revised building plans, the developers/builders continued to construct the buildings. Therefore, Executive Engineer, A.E. Division of the Corporation issued 'stop work notice' dated 12.11.1984 under Section 354A of the 1888 Act mentioning therein that if the needful is not done, the construction will be forcibly removed. It is a different story that after issuing 'stop work notice', the authorities of the Corporation buckled under pressure from the developers/builders and turned blind eye to the illegal constructions made between 1984 and 1989. For the sake of reference, notice dated 12.11.1984 is reproduced below:

> "MUNICIPAL CORPORATION OF
>
> GREATER BOMBAY
>
> Notice under section 354A of the
>
> Bombay Municipal
>
> Corporation Act 12.11.1984
>
> No.EB/3347/A of 1981
>
> To
>
> Shri Madanjit Singh C.A. Shri Charanjit Singh, Pure Drinks Pvt. Ltd., Plot. No.9 Worli Scheme No.58 B.G. Kher Marg, Worli Bombay-18.
>
> Whereas the erection of a building work as described in section 342 of the above mentioned act is being unlawfully carried on you at premises NO.C.S.No.868 and 1/868 of Worli situated at plot No.9 Worli Scheme 58 B.G. Kher Marg Worli.

And whereas under section 68 of the said Act the Municipal Commissioner for greater Bombay has duly empowered me to exercise the powers conferred upon him by section 354 A of the said Act. Now I do hereby give you notice that if, after the expiration 24 hours from the service hereof upon you, it is found that the construction of said building work is still being carried on by you, I shall, pursuant to section 354A of the said Act and in exercise of the powers conferred on me as aforesaid, direct that you be removed from the said-premises by police officer.

Work being carried out beyond approved plan in as much as the foundation work of sky scrapper is being lane site incharge plot no.9.

B.G. Kher Marg Worli.

A.E. Division

Executive Engineer

B.P. (City)

Bombay Municipal Corporation"

11. In the interregnum, the lessee and the developers/builders engaged a new architect, namely, Shri Jayant Tipnis. He submitted another set of plans on 3.6.1985 proposing 7 new buildings and requested for withdrawal of stop work notice. The Planning Authority rejected the new plans on the ground that the construction had been raised in gross violation of the sanctioned plan. Thereupon, Shri Jayant Tipnis sent notice dated 9.8.1985 to the lessee that no work should continue till the amended plans are sanctioned. The Executive Engineer of the Corporation sent letter dated 28.9.1988 to Shri Jayant Tipnis with a copy to the lessee and asked them to inform the developers/builders not to proceed with the work till the stop work notice was withdrawn. In turn, Shri Jayant Tipnis wrote to the developers/builders that they should not continue the construction. He also informed the Corporation about the intimation sent to the developers/builders and stated that despite intimation they had illegally and unauthorisedly carried out the construction work by utilizing excess Floor Space Index (FSI).

12. In 1994, Shri Jayant Tipnis submitted further amended plans prepared by M/s. Designs Consortium. The Deputy Chief Engineer rejected the new plans by recording the following reasons:

"(1) Advantage of lift, staircase lobby area claimed which is not admissible as per the prevailing rules, regulations and policy.

(2) Flower-beds are not counted in F.S.I. As per then M.C.'s order the same are to be counted in F.S.I. since they are at the same floor level beyond balcony.

(3) Inadequate parking provisions.

(4) Height of towers contravene D.C. Rule (9) provisions.

(5) R.G. is not as per D.C. Rule.

(6) Plot area for the permissible F.S.I. shall be in accordance with the change of user permitted by U.D. Deptt.'s order."

13. On receipt of the letter of rejection, Shri Jayant Tipnis informed the lessee and the developers/builders that in view of the stop work notice, the construction could not have been made in violation of the sanctioned plan and the D.C. Rules. This was incorporated by him in letter No.BC 1414 (C)-91 dated 22.2.2002 sent to the Executive Engineer, Building Proposals (City-I), the relevant portions of which are extracted below:

"Ref.No.BC 1414 (C)-91 22nd February, 2002 The Executive Engineer,

Building Proposals (City-I),

Municipal Corporation of Greater Mumbai,

Byculla,

Mumbai – 400 008.

Sub : Violation of F.S.I. at Campa-cola compound, plot No.9, Worli Scheme No.58, B. G. Kher Marg, Worli, Mumbai – 400 018.

Dear Sir,

We thank for your letter No.EB/3342/GS/A dated 'nil' personally handed over to us 21.2.2002.

Gist of how file/project moved till date is enclosed. There was no correspondence since the last several years. However, there used to be some notice or letter we used to receive from a few members and correspondence of B.Y.Builders Pvt. Ltd. We have time and again informed you that we have informed all the developers/society members, managing bodies upto what level the plans have been sanctioned, what was the stage of construction they have carried out and to the developers of the project. After site visit the summary report was worked out by the Corporation and it was informed to owners M/s. Pure Drinks Pvt. Ltd., copy of which was sent to us. However, how this file moved, summary of which is enclosed which probably would be useful while going through the matter and would also be clear about the stand we have taken.

On a number of occasions we have informed you that all the developers have been informed to stop the work in view of the stop work notice and such copies have been already on record. The developers have almost vanished from the scene and nobody is coming forward to take on the responsibility of the work done by them inspite of our instructions nor the owners have any query. To sum up it is only interested parties/flat purchasers keep on running here and there for their daily necessities and the matter is reopened after a lapse of few years. We strongly feel that this is a gross violation of Development Control Rules and since the year 1984 the stop work notice is on record. Action under MRTP Act was initiated by you against the developers and the owners but we do not know exactly what happened thereafter.

Sub: Proposed Development at Campa Cola Compound, Plot No.9, Worli Scheme, B.G. Kher Marg, Worli, Mumbai-400018.

1) to 5) xxx xxx xxx

6) By our letter BC 1414 (B)-56 dated 05.01.1990 we addressed to all the Developers stating that the STOP WORK notice issued by the Brihanmumbai Mahanagarpalika against the subject work was not yet withdrawn by them but it was observed they continue to carry out the work of one way or other nature of the proposed structure which was in violation of the directives issued by EEBP (City) to them, for which responsibility

solely rested with them. We, therefore, instructed them to stop the work being carried out by them on all fronts forthwith and if however, they continued any work at site henceforth it would be entirely at their risk and consequences and requested them to confirm to us in writing that the work was stopped by them completely immediately on receipt of the said letter. Copy of the said letter was endorsed to EEBP (City) to note the above instructions issued to the Developers.

7) xxx xxx xxx

8) In reply to letter dated 30.03.1992 addressed to the 4 Developers and copy endorsed to us by Campa cola Compound Residents Association, we clarified to them vide our letter No.BC 1414 (B) 6 dated 10.04.1992 bringing to their notice following facts.

8 b) To the best of our knowledge there was no occupation permission granted by Brihanmumbai Mahanagarpalika for any part of the building except building No. 7A and B in any of the units covered by the said proposal and therefore it was informed that they could not occupy the flats without OCC from the Corporation and requested them to vacate the flats occupied by them without delay and to inform us accordingly.

9) Esha Ekta Apartment Co-operative Housing Society Limited addressed a letter dated 04.08.1994 to EEBP (City) and copy endorsed to us and the Director, Engineering Services and Projects and the Municipal Commissioner, stating that they were members occupying building No. 2 and requiring action against Developers.

10a) The Developers concerned with the said Development were kept fully informed by us about the STOP WORK notice issued on the proposal on 24.11.1986 that no work could be carried out at site. On the very same day of receipt of STOP WORK notice on 24.11.1986 we instructed all the Developers concerned to pay the penalty to BMC and also to stop the work of the project forthwith otherwise the plans would not be processed further with the said authority. On receipt of the EEBP letter dated 02.06.1990, we have issued final instructions to the Developers / Lessee to stop the work on the project forthwith and that the responsibility for such work carried out but not cleared by the said authority would be on them We further stated that we were not aware of any occupation already obtained by Esha Ekta Apartment Cooperative Housing Society and therefore we did not undertake any

responsibility for anything contrary to the plans submitted by us to EEBP (City) Office, if found, carried out by the said Society through their Developers. We clarified that we had not been involved at all by the said Developers and, therefore, did not agree with any of their statement mentioned in the said letter.

12) We have informed all the 3 Developers vide our letter No. BC 1414(B)-77 dated 25.11.1994 intimating that amended plans were not approvable and requesting them to coordinate with us for arranging a joint inventory of the premises and copy of the said letter was endorsed to Dy.C.E. B.P. (City)."

14. It is borne out from the record that even before commencement of the construction, some of the developers/builders executed agreements with the prospective buyers. A copy of such an agreement signed on 18.7.1985 between P.S.B. Construction Company Limited and Mrs. Manjula Devi, W/o Amar Chand and Amar Chand was placed before the Court on 5.1.2012 by Shri Harish Salve, who had earlier appeared on behalf of respondent No.4, to show that the buyers of the flat were aware that the revised plans submitted by the architect had not been approved by the Planning Authority till the signing of agreement. This is evinced from paragraphs (v), (w), (x) and (a-1) of the agreement, which are extracted below:

"(v) The Builders plan to demolish the present structures standing on the said Plot X and to put up a new multi-storeyed buildings on the said Plot in accordance with the terms of the said Letter of intent dated 27th May 1981 of the Additional Collector and Competent Authority or any modification thereof may be made by him and the permission under Section 22 of the U.L.C. Act that may be granted by him in pursuance thereof.

(w) Building plans got prepared by the Builders for revising the said plans sanctioned by the said corporation for putting up such new multi-storeyed buildings on the said Plot X have been submitted to the said Corporation for approval and sanction.

(x) The Purchaser has taken inspection of the documents of title relating to the said property, the said Notification dated 25th December 1980, the said Letter of intent dated 27th. May 1981, the said Agreements respectively dated 12th August 1981, 20th August 1981, 1st September 1981 and 10th September 1981 and the said Power of Attorney dated 10th September 1981, and the said plans sanctioned by the said Corporation and the revised plans,

designs and specifications prepared by the Builders' Architects Messrs. B. K. Gupta and of such other documents as are specified under the Maharashtra Ownership Flats (Regulation of Construction, Management and Transfer) Act, 1963 (which the Purchaser doth hereby confirm).

(a-1) The Purchaser has agreed to acquire from the Builders Flat/Shop No.Two on the fifth floor of the Building No.Two and/or covered/open car parking space garage No. NIL in the compound (hereinafter referred to as 'the said Premises') with full notice of the terms and conditions and provisions contained in the documents referred to hereinabove and subject to the terms and conditions hereinafter contained."

15. Similar agreements were executed between the purchasers and the developers/builders. In each of the agreements it was mentioned that the developers/builders had submitted a revised plan for sanction and the purchaser has taken inspection of the documents of title, etc.

16. After executing agreements with the developers/builders, the prospective buyers formed Cooperative Housing Societies, namely, Esha Ekta Apartments Cooperative Housing Society Limited, Patel Apartments Cooperative Housing Society Limited, Orchid Cooperative Housing Society Limited, B.Y. Apartments Cooperative Housing Society Limited, Midtown Apartments Cooperative Housing Society Limited and Shubh Apartment Cooperative Housing Society Limited (hereinafter referred to as 'the housing societies').

17. Although the members of the housing societies knew that the construction had been raised in violation of the sanctioned plan and permission for occupation of the buildings had not been issued by the Competent Authority, a large number of them occupied the illegally constructed buildings. After this, the housing societies started litigation in one form or the other. Midtown Apartments Cooperative Housing Society Limited filed Writ Petition No.1141 of 1999 in the Bombay High Court for issue of a direction to the Corporation and its functionaries to supply water to the building occupied by its members. That petition was decided by the Division Bench of the High Court vide order dated 12.7.1999, which reads as under:

"1. The burning issue of non supply of water to the tenements is now satisfactory resolved. We are not in a position to go into the dispute between the Bombay Municipal Corporation and the builder on the issues of FSI violation and the consequent non-granting of Occupation certificate. This is

a matter where there is a triangular dispute between the Petitioner-Society the Ist Respondent-Bombay Municipal Corporation and the 4th Respondent-builder.

2. We give liberty to the parties to agitate their rights in an appropriate Court of law and obtain such reliefs as they are entitled to in law. This is not an issue which can be satisfactorily resolved in a writ petition since there appear to be several disputed facts.

3. The 1st Respondent BMC shall non dis-continue the water supply of the Petitioner-Society on the ground that there are outstanding arrears or disputes with the 4th Respondent-builder.

4. The 1st Respondent-BMC shall submit a copy of the bill for water charges to the petitioner and shall accept payment from it, if offered.

5. The 1st Respondent-BMC is at liberty in take such action as is permissible in as against the Petitioner-Society and the 4th Respondent-builder for recovery of arrears of all other charges which are alleged to be due.

6. The petitioner and/or the 4th Respondent to comply with the requisitions made by the 1st Respondent-BMC, as specified in the Permission Form date 22.06.1990.

7. In view of the above directions, nothing further needs to be done in the matter which is allowed to be withdrawn and dismissed as such with liberty aforesaid."

(Reproduced from the paper book)

18. Thereafter, other housing societies filed Writ Petition Nos. 2402, 2403, 2904, 2949 of 1999 and 1808 of 2000 for grant of similar relief.

19. During the pendency of the writ petitions, Shri Jayant Tipnis submitted application dated 22.2.2002 for regularization of the unauthorized construction by stating that 9292.95 sq. fts. had been consumed over and above the FSI granted for the project and this was done without his knowledge. His proposal was rejected by the Deputy Chief Engineer vide order dated 7.7.2003, which reads as under: "Dy. Ch. E.B.P. (C)/1627/ Gen Ben 7.7.03

MUNICIPAL CORPORATION OF GREATER MUMBAI

No. EB/3342/GS/A

Shri Jayant C. Tipnis,

Architect,

Sadguru Darshan, 1050,

New Prabhadevi Road,

Mumbai-400 025.

Sub: Proposed development of Plot No.9, Worli Scheme No. 53, CTS No.868, 1/868, Worli Division, B.G. Kher Marg, Mumbai 400 018 Popularly known as Campa Cola compound.

Ref: Your letter addressed to M.C. bearing No.BC-1414 (:'C)-117 dated 02.06.2003

Sir,

By directions, this is to inform you that your request to exempt the area of staircase, lift and lift lobby from F.S.I, computation cannot be acceded to, since the same is not in conformity with the provisions of D.C. Regn. 35 (2)(c). Further, proposal under reference was decided by the Corporation prior to coming into force of D.C. Regn. 1991 and C.C. for the entire work was issued on 08.09.82. The permissible F.S.I, has already been exhausted.

Yours faithfully,

Sd/-

Dy. Chief Engineer,

Building Proposals (City)"

20. Shri Jayant Tipnis challenged the aforesaid order by filing an appeal under Section 47(1) of the 1966 Act and prayed that the Corporation be directed to

reconsider the proposal under Development Control Regulations for Greater Mumbai, 1991 (for short, 'the 1991 Regulations') and regularize the FSI consumed in constructing the buildings by charging premium. The Chief Minister of the State, who was also in-charge of the Department of Urban Development, dismissed the appeal vide order dated 4.6.2010, the relevant portions of which are extracted below:

> "The statement of residential buildings approved by MCGM on the above plot under reference along with the progress of the work of the buildings constructed is as under :-
>
> |Building |Approval details as |Present position | |No. |plans dated 2.2.83 | | |Building |Basement + stilt + 5 |No work carried out| |No. 1 |upper floors | | |Building |Basement + Ground |Basement + Stilt + | |No.2 |Floor (pt.) + Stilt |7 upper floors + | | |(pt.) + 5 upper floor |8th upper floor | | | |(pt.) | |Building |Basement + Stilt (pt.)|Basement + Stilt | |No.3 |+ Ground Floor (pt.) |(pt.) + Ground | | |+ 5 upper floors |Floor (pt.) + 5 | | | |upper floors + 6 | | | |upper floor (pt.) | |Building |Basement + Stilt (pt.)|Basement + Ground | |No.4 |+ Ground Floor (pt.) |Floor (pt.) + 6 | | |+ 5 upper floors |upper floors + 7 | | | |upper floor (pt.) | |Building |Stilt (pt) + Ground |Stilt + 19 Upper | |No.5 |Floor (pt.) + 5 upper|floor + 20th upper | | |floors |floor (pt) | |Building |Stilt (pt) + Ground |Ground Floor + | |No.6 |Floor (pt) + 5 upper |17 upper floors | | |floors | | |Building |Stilt + 5 upper floors|Stilt + 5 upper | |No.7A | |floors + 6 upper | | | |floor (pt.) | |Building |Stilt + 5 upper floors|Stilt + 6 upper | |No.7B | |floor | |Building |Stilt + 5 upper floors|Work not carried | |No. 8 | |out |
>
> Accordingly, MCGM has initiated necessary action as per the provisions of ... M.C. Act. 1888 / MRTP Act, against the Builder / Developer and the same are ... vigorously followed and occupation permission has not been granted to any of the building in the Campa Cola Compound till date.
>
> Architect Shri Jayant Tipnis vide his letter dated 7.6.2002 No. BC / C-92 addressed to the Ex. Eng. (B.P.) City has stated that roughly 9292.95 sq.ft. of area has been consumer over and above the FSI granted to the said project and almost the area of 14148.22 sq.ft. has been consumed in the staircase lift and lift lobby which if made available to the complex on payment of premium, it is possible that the whole complex as is and as built up could be regularized on the payment of concessional penalty, as the builders who have developed this property are not in developers and he can not be blamed

and / or held responsible for the same. Balance FSI from their remaining part shall not be utilized to regularize this unauthorized constructions. The unauthorized construction carried out by the Developer is not as per the provisions of the Development Control Regulations-1967. The MCGM has given the permission prior to 1991. Therefore, Development Control Regulations, 1991 will not be applicable and accordingly, the unauthorized construction cannot be regularized. Hence, appeal may be rejected.

In this matter, Hon'ble High Court passed an order dated 17.03.2010. In this order, Hon'ble High Court gave directives to the Minister (UDD) to hear and dispose off the appeal under Section 47 filed by the applicant within 12 weeks from the date of the Order.

It is pertinent to note here that Appellant Architect Shri Jayant Tipnis submitted the amended plans BC / 1414 C-95 dated 3.7.2002 by claiming the area of staircase, lift and lift lobby area free of FSI as per the Clause 35 (2) of Development Control Regulations 1991 to MCGM. However the said plan was rejected by MCGM vide letter No. Dy. Ch. Engineer (B.P.) City / 2186 / Gen. dated 6.8.2002 stating therein that the amended plans submitted cannot be considered for approval as the area of staircase lift, lift lobby can not be exempted on FSI computation. Since the proposal under reference was approved and CCl was also issued prior to DCR (1991) coming into force i.e. 25.3.1991 and the same was already intimated to the applicant vide MCGM's letter dated 19.11.1994.

Considering the Hon'ble High Court's order dated 17.03.2010 and the representation made by appellant, MCGM M/s Pure Drinks P. Ltd. and considering the plot under reference is situated in CRZ area, exemption under Section 35 (2)(c) of the Development Control Regulations, 1991 for the area of staircase, lift, lift lobby from floor space index computation cannot be granted. Appeal is not maintainable. Since the land belongs to MCGM, for the issues other than FSI appellant may approach MCGM separately."

21. When the writ petitions filed by the housing societies and their members for issue of direction to the Corporation to supply water to their buildings were taken up for hearing, the Division Bench of the High Court noted that even though the buildings were constructed in violation of the sanctioned plan, the Corporation had not taken action against those responsible for such construction and passed order

dated 11.10.2005 for appearance of Additional Commissioner of the Corporation. The relevant portions of that order are extracted below:

> "In the course of the argument, it was revealed by the Advocate for the Corporation on taking instructions that original licence for construction was granted in favour of four persons viz. Shri Manjit Singh Madanjit Singh, Power of Attorney Holder of S. Karanjit Singh, Chief Executive Officer of Pure Drink Pvt.Ltd., Shri Ishwarsingh Chawla of PSD Construction Pvt.Ltd., Shri D.K.Gupta of D.Y. Builders Pvt.Ltd. and Abdula Yusuf Patel. Pursuant to the illegality in construction having been found, notices were issued under Section 53-1 of the M.R.T.P. Act on 20th February, 2002 to all the four persons mentioned above. Thereafter, sanction was granted for prosecution of all the four persons and decision in that regard was taken on 19th May, 2003 by the Executive Engineer (Building Proposal), CT/1 of the Corporation. Meanwhile, the panchanama of the illegal construction was carried out on 13th November, 2002. Besides, the prosecution was launched against builder, developer and all the occupants of the building and they were convicted on admission of guilt and sentenced by way of imposition of fine from Rs.600/- to Rs.2000/- imposed by the Magistrate. Apart from the above actions, no other action has been taken by the Corporation in relation to the illegal construction. The affidavit-in-reply filed on behalf of the Corporation before issuance of rule in the petition by Shri Kurmi Deonath Sitaram, Executive Engineer, DP(City)(I) discloses that initial approval was granted for six wings consisting of ground plus five upper floors and it was issued on 9th June, 1981 and Commencement Certificate was granted on 10th June, 1981. The amendment plans were approved for nine wings of ground plus five upper floors on 2nd February, 1983. Thereafter, amendment plans proposing stilt plus twenty-four floors and stilt plus sixteen floors with additional sixth and seventh floor to building nos.2 and 4 and additional sixth floor for the part of building no.3 were submitted but they were refused on 6th September, 1984. Inspite of that, the constructive activities continued and the work beyond the approved plans was carried out, and therefore Stop Work notice was issued under Section 353-A of the MMC Act on 12th November, 1984. However, the work continued. Again new architect submitted further plan with a fresh notice under Section 337. The same was rejected by the Corporation.
>
> The affidavit also discloses the various illegalities committed in the course of construction of the buildings which include construction of additional floors without approval, increase in the height of the building and carrying

of construction beyond the permissible limits of FSI, apart from other illegalities. The affidavit, however, does not disclose as to what action, if any, for prohibiting the developer and the owner from proceeding with the construction, was taken as wall as what action was taken after illegal construction having been carried out, apart from launching prosecution and issuance of notices. Even in the course of the argument, learned Advocate appearing for the Corporation could not satisfy us about any concrete action having been taken by the Corporation for stoppage of illegal construction or demolition of illegal construction. In fact, the arguments in the matter were heard partly on 27th September and again yesterday and as well as today. On the very first day of the argument, it was orally informed by the learned Advocate for the Corporation that he would ensure the presence of the officer of the Corporation to assist him in order to enable him to give correct detail information in the matter. Inspite the officer being present, we are not able to get the detail information regarding the action taken by the Corporation as also the detail description of the illegalities committed by the builder and any other persons on his behalf in the matter. It is to be noted that undisputedly the records disclose some illegalities in the matter of construction carried out since the year 1984 onwards. Inspite of affidavit having been filed in the year 2000, the Corporation has not explained the reason for failure on its part to take appropriate action against the illegal construction and even today. Apart from being assisted by the officer of the Corporation, the Advocate appearing for the Corporation is unable to disclose the reason for the same. We find it necessary to issue notice to the Additional Commissioner to appear in person before us on Friday i.e. 14th October, 2005 at 11.00 a.m. to explain the same alongwith all records in the matter, as it is informed by the Advocate for the Corporation that Commissioner is out of India."

22. On the next date of hearing, the Commissioner of the Corporation appeared before the High Court and gave an assurance that necessary steps will be taken in accordance with law within a period of two months. Thereafter, the Corporation issued notices dated 11.11.2005, 19.11.2005 and 5.12.2005 under Section 351 of the 1888 Act giving details of the illegal structures proposed to be demolished. The housing societies submitted their respective replies which were rejected by the Corporation vide order dated 3/8.12.2005.

23. Faced with the threat of demolition of the buildings, the housing societies and some of their members filed Long Cause Suits for quashing the notices issued under Section 351 of the 1888 Act and order dated 3/8.12.2005. They pleaded that

the buyers of the flats were not aware that the buildings had been constructed in violation of the sanctioned plan. They also filed applications for restraining the Corporation from demolishing the illegal portions of the buildings. Initially, the trial Court stayed the demolition of the illegal construction but, after hearing the parties, the applications for temporary injunction were dismissed on the premise that the developers/builders had constructed a number of floors without obtaining permission from the Planning Authority, that too, despite the stop work notice issued under the 1888 Act and that the application made for regularization of the illegal construction had been rejected by the Corporation. The trial Court rejected the contention of the members of the housing societies that they had purchased the flats without knowing that the same were illegally constructed by the developers/builders. The trial Court noted that the architect had repeatedly told the developers/builders that construction of buildings beyond the sanctioned plan was illegal and the members of the housing societies were very much aware of this fact.

24. The appeals filed by the housing societies and their members were dismissed by the learned Single Judge of the Bombay High Court, who agreed with the trial Court that members of the housing societies were in know of the fact that the flats occupied by them had been constructed in violation of the sanctioned plan.

25. The housing societies and their members challenged the order of the High Court in Special Leave Petition (C) Nos. 33471, 33601, 33940, 35402 and 35324 of 2011. After hearing the counsel for the parties at length, this Court expressed the view that the special leave petitions are liable to be dismissed. However, keeping in view the submission of the learned counsel that demolition of the illegal and unauthorized construction would adversely affect the flat buyers and their families and the writ petition filed by them for regularization of the disputed construction was pending before the High Court, it was considered appropriate to transfer the writ petition to this Court. Accordingly, order dated 29.2.2012 was passed, paragraphs 16 to 19 of which are reproduced below:

> "16. In these cases, the trial Court and the High Court have, after threadbare analysis of the pleadings of the parties and the documents filed by them concurrently held that the buildings in question were constructed in violation of the sanctioned plans and that the flat buyers do not have the locus to complain against the action taken by the Corporation under Section 351 of 1888 Act. Both, the trial Court and the High Court have assigned detailed reasons for declining the petitioners' prayer for temporary injunction and we do not find any valid ground or justification to take a different view in the matter.

17. The submission of Dr. Abhishek Manu Singhvi that the constructed area should be measured with reference to the total area of the plot cannot be accepted for the simple reason that the State Government had sanctioned change of land use only in respect of 13049.45 sq. meters.

18. In view of the above, we may have dismissed the special leave petitions and allowed the Corporation to take action in furtherance of notices dated 19.11.2005 and orders dated 3/8.12.2005, but keeping in view the fact that the flat buyers and their families are residing in the buildings in question for the last more than one decade, we feel that it will be in the interest of justice that the issue relating to the petitioners' plea for regularization should be considered by this Court at the earliest so that they may finally know their fate.

19. We, therefore, direct the petitioners to furnish the particulars of the writ petitions filed for regularization of the construction which are pending before the High Court. The needful be done within a period of two weeks from today. Within this period of two weeks, the petitioners shall also furnish the particulars and details of the developers from whom the members of the societies had purchased the flats. List the cases on 16th March, 2012 (Friday)."

26. In compliance of the direction issued by this Court, learned counsel for the petitioners informed that Writ Petition Nos.6550/2010 filed for regularization of the disputed construction is pending before the High Court. They also furnished the particulars of the developers/builders from whom members of the housing societies are said to have purchased the flats. Thereafter, this Court suo motu ordered transfer of the writ petition pending before the Bombay High Court and impleadment of the developers/builders with a direction that notice be issued to them.

27. The record received from the Bombay High Court revealed that Writ Petition No.6550/2010 was filed by Campa Cola Residents Association, which is said to have been registered on 3.2.1992 and of which the residents of the six housing societies are members, and its Secretary - Shri Rohit Malhotra for quashing orders dated 7.7.2003 passed by the Deputy Chief Engineer and 4.6.2010 passed by the Appellate Authority as also the notices issued under Section 351 of the 1888 Act with a further prayer for issue of a mandamus to the Corporation to regularize the disputed constructions.

28. The writ petitioners have pleaded that the flat buyers should not be penalized for the illegalities committed by the lessee and developers/builders in connivance with the officers of the Corporation. According to the petitioners, the purchasers of the flat were not aware of the fact that even though the Planning Authority had not sanctioned the revised plans, the developers/builders constructed additional floors and utilized the FSI far in excess of what is permitted by the 1888 Act and the D.C. Rules.

29. The lessee and respondent No.4 have filed separate counter affidavit. Their stand is that the purchasers of the flat cannot plead innocent ignorance because they were very much aware of the fact that the revised plans submitted by the developers/builders had not been sanctioned by the Planning Authority and also that construction had been made despite the stop work notice issued by the Corporation. It is also the case of the lessee that while executing Assignment Agreement, it had made it clear to the developers/builders that they must raise construction strictly in consonance with the sanctioned plan. On its part, respondent No.4 has pleaded that it had purchased the remaining portion of the plot in question by paying a huge amount of Rs.30 crores and the petitioners have nothing to do with that portion of the plot.

30. Shri Ravi Shankar Prasad, learned senior counsel appearing for the petitioners in the transferred case argued that the order passed by the Deputy Chief Engineer and the Appellant Authority are liable to be quashed because neither of them applied mind on the petitioners' prayer for regularization. Learned senior counsel laid considerable emphasis on the fact that the members of the housing societies were not aware of the illegal nature of construction made by the developers/builders and argued that the innocent buyers should not be penalized for the misadventure of the lessee and the developers/builders. Shri Prasad read out portions of agreement dated 10.6.1981 executed between the lessee and the developers/builders and sample of the agreement entered into between the developers/builders and the flat buyers to show that the latter were not apprised of the fact that some floors of the buildings were constructed in violation of the sanctioned plan and submitted that the Corporation cannot take advantage of its own wrong of not taking any action against the lessee and the developers/builders, who are solely responsible for constructing the buildings in violation of the sanctioned plans. He then relied upon the 1991 Regulations and argued that the Corporation should be directed to regularize the additional FSI by charging appropriate penalty. Shri Prasad also referred to Circular No.CHE/2005/DP/GEN dated 4.2.2011 issued by the Corporation for regularization of the illegal

construction by charging penalty and submitted that this Court may exercise power under Article 142 of the Constitution for directing regularization of the disputed construction else the flat buyers will be deprived of the only shelter available to them.

31. Dr. A. M. Singhvi, learned senior counsel appearing for some of the housing societies and their members emphasized that the flat buyers should not be made victim of the illegalities committed by the lessee in collusion and connivance with the developers/builders. He argued that the Corporation cannot take advantage of its own wrong, i.e., failure to take prompt steps to stop the illegal construction. Learned senior counsel then referred to the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, 'the 1963 Act') and argued that the developers/builders and promoters should be held liable for acting in violation of the sanctioned plans but the disputed construction should be regularized by invoking the provisions of the 1991 Regulations.

32. Learned Attorney General referred to Sections 44, 45, 47, 52 and 53 of the 1966 Act and argued that the extra floors constructed by the developers/builders cannot be regularized because that would tantamount to violation of the D.C. Rules. He further argued that the Deputy Chief Engineer and the Appellate Authority did not commit any error by refusing to entertain the prayer made by the architect of the lessee for regularization of the buildings because the same fall within the CRZ area. He relied upon the judgment in Suresh Estates Private Limited v. Municipal Corporation of Greater Mumbai (2007) 14 SCC 439 and argued that the petitioners cannot rely upon the 1991 Regulations for seeking regularization of the illegally constructed floors.

33. Shri C.U. Singh, learned senior counsel appearing for the lessee and Shri Dave, learned senior counsel for respondent No.4 relied upon the sanction accorded by the State Government vide order dated 31.12.1980 for change of land use subject to the condition of compliance with relevant statutory provisions including the D.C. Rules and argued that the appellants do not have the locus to challenge the action taken by the Corporation for demolition of the illegal and unauthorized construction or seek regularization thereof, more so, because even before commencement of the construction, the flat buyers knew that the Planning Authority had not sanctioned the revised plans submitted by the developers/builders through their architect.

34. We have considered the respective arguments/submissions. The first question which arises for consideration in the transferred case is whether the writ petitioners are entitled to seek regularization of the illegal and unauthorized construction made by the developers/builders. At the cost of repetition, it will be apposite to note that the Deputy Chief Engineer had rejected the request made by the architect for exemption of the area of staircase, lift and lift lobby from FSI by observing that the same is not in conformity with Clause 35(2)(c) of the 1991 Regulations because the Corporation had decided the proposal prior to coming into force of those regulations and the permissible FSI had already been exhausted. The Appellate Authority agreed with the Deputy Chief Engineer that the 1991 Regulations cannot be invoked for regularization of the disputed construction because the same were enforced much after rejection of the amended plans and the plot in question is situated in CRZ area.

35. In our view, the reasons assigned by the Deputy Chief Engineer and the Appellate Authority are in consonance with the law laid down by this Court in Suresh Estates Private Limited v. Municipal Corporation of Greater Mumbai (supra). The facts of that case were that after purchasing a plot measuring 8983 sq. mtrs. situated at Dr.Babasaheb Jaykar Marg, appellant Nos. 1 and 2 submitted plans to develop the same by constructing a luxury hotel in terms of the D.C. Rules. In the application, the appellants mentioned that they are entitled to additional FSI as per Rule 10(2) of the D.C Rules. The Corporation made a recommendation to the State Government that in view of the CRZ notification and the D.C. Rules, additional FSI be granted to the appellants. The Ministry of Environment and Forest sent communication dated 18.8.2006 to the Principal Secretary, Urban Development Department, Government of Maharashtra clarifying that the D.C. Rules, which existed on 19.2.1991 would apply to the areas falling within the CRZ notification and the word 'existing' means the rules which prevailed on 19.2.1991. It was also mentioned that the draft regulations of 1989, which came into force on 20.2.1991 would not apply. At that stage, the appellants filed a writ petition before the High Court with the complaint that the Corporation had not communicated its decision within 60 days. The same was disposed of by the High Court with a direction to the State Government to decide the application of the appellants within six weeks. Before this Court, it was argued on behalf of the Corporation that the D.C. Rules would not apply to the development permission sought by the appellants and the 1991 Regulations are applicable in the matter. According to the Corporation, the 1991 Regulations do not provide for additional FSI for the proposed hotel project. It was further argued that the restrictions contained in the CRZ notification will be attracted because the plot is situated in CRZ area. This Court noted that the 1991 Regulations were notified on 20.2.1991

and came into force on 25.3.1991 whereas CRZ notification was issued on 2.2.1991 and observed:

> "The word "existing" as employed in the CRZ notification means the town and country planning regulations in force as on 19-2-1991. If it had been the intention that the town and country planning regulations as in force on the date of the grant of permission for building would apply to the building activity, it would have been so specified. It is well to remember that CRZ notification refers also to structures which were in existence on the date of the notification. What is stressed by the notification is that irrespective of what local town and country planning regulations may provide in future the building activity permitted under the notification shall be frozen to the laws and norms existing on the date of the notification.
>
> On 2-2-1991 when the CRZ notification was issued, the only building regulations that were existing in city of Mumbai, were the DC Rules, 1967. In view of the contents of CRZ II notification issued under the provisions of the Environment (Protection) Act which has the effect of prevailing over the provisions of other Acts, the application submitted by the appellants to develop the plot belonging to them would be governed by the provisions of the DC Rules, 1967 and not by the draft development regulations of 1989 which came into force on 20- 2-1991 in the form of the Development Control Regulations for Greater Bombay, 1991.
>
> The argument that in view of the provisions of Section 46 of the Town Planning Act, 1966, the Planning Authority has to take into consideration the draft regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI is devoid of merits.
>
> Section 3 of the Environment (Protection) Act, 1986 inter alia provides that the provisions of the Act and any order or notification issued under the said Act will prevail over the provisions of any other law.
>
> The phrase "any other law" will also include the MRTP Act, 1966. As noticed earlier the Notification dated 19-2-1991 issued under the provisions of the Environment (Protection) Act, 1986 freezes the building activity in an area falling within CRZ II to the law which was prevalent and in force as on 19-2-1991. The draft regulations of 1989 would therefore not apply as they were not existing law in force and prevalent as on 19-2-1991.

In view of the peculiar circumstances obtaining in the instant case, the Court is of the opinion that Section 46 of the MRTP Act, 1966 would not apply to the facts of the instant case. Further, when the sanctioned DC Regulations for Greater Bombay, 1991 do not apply to areas covered within CRZ II, since those Regulations came into force with effect from 25-3-1991, its previous draft also cannot apply. The draft published is to be taken into consideration so that the development plan is advanced and not thwarted. The draft development plan was capable of being sanctioned, but when the final development plan is not applicable, its draft would equally not apply as there is no question of that plan being thwarted at all. As far as development in the area covered by CRZ II is concerned, one will have to proceed on the footing that the draft plan after CRZ notification never existed. Even otherwise what is envisaged under Section 46 of the MRTP Act is due regard to draft plan only if there is no final plan. The DC Rules of 1967 were in existence as on 19-2-1991 and therefore the plan prepared thereunder would govern the case.

The draft regulations of 1989 were not in force as on 19-2-1991 and, therefore, would not apply to the plot in question. What is emphasised in Section 46 of the MRTP Act, 1966 is that the Planning Authority should have due regard to the draft rules (sic regulations). The legislature has not used the phrase "must have regard" or "shall have regard". Municipal Corporation of Greater Mumbai which is the Planning Authority had given due regard to the draft DC Regulations of 1989 in the light of CRZ notification and recommended to the Government to grant additional FSI of 3.73 times permissible as per the Development Control Rules, 1967 over and above 1.33 permissible, to the appellants. Having regard to the facts of the case this Court is of the opinion that the contention that the Planning Authority has to take into consideration the draft regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI, cannot be accepted and is hereby rejected."

(Emphasis supplied)

36. In view of the aforesaid judgment of the three Judge Bench, it must be held that the Appellate Authority had rightly declined to invoke the 1991 Regulations for entertaining the prayer made by the architect Shri Jayant Tipnis for regularization of the constructions made in violation of the sanctioned plan.

37. The argument of Shri Prasad and Dr. Singhvi that the flat buyers should not be penalized for the illegality committed by the lessee and the developers/builders in raising construction in violation of the sanctioned plan sounds attractive in the first blush but on a closer scrutiny, we do not find any merit in the same. Admittedly, the flat buyers had entered into agreements with the developers/builders much before commencement of the construction. They were aware of the fact that the revised plans submitted by the architect had not been approved by the Planning Authority and the developers/builders had foretold them about the consequence of rejection of the revised plans. Therefore, there is no escape from the conclusion that the flat buyers had consciously occupied the flats illegally constructed by the developers/builders. In this scenario, the only remedy available to them is to sue the lessee and the developer/builder for return of the money and/or for damages and they cannot seek a direction for regularization of the illegal and unauthorized construction made by the developers/builders.

38. We shall now notice the provisions of the 1966 Act. Section 44(1) of that Act postulates making of an application to the Planning Authority by any person intending to carry out any development on any land. Such an application is required to be made in the prescribed form incorporating therein the relevant particulars and must be accompanied by such documents, as may be prescribed. This requirement is not applicable if the Central or State Government or local authority intends to carry out any development on any land. Similarly, a person intending to execute a Special Township Project on any land is not required to make an application under Section 44(1). Instead, he has to make an application to the State Government. Section 45 postulates grant or refusal of permission. In terms of Section 45(1), the Planning Authority is empowered to grant permission without any condition or with such general or special conditions which may be imposed with the previous approval of the State Government. It is also open to the Planning Authority to refuse the permission. As per Section 45(2) the permission granted under sub-section (1), with or without conditions, shall be contained in a commencement certificate in the prescribed form. Section 45(3) mandates that the order passed by the Planning Authority granting or refusing permission shall state the grounds for its decision. Section 45(5) contains a deeming provision and lays down that if the Planning Authority does not communicate its decision within 60 days from the date of receipt of application, or within 60 days from the date of receipt of reply from the applicant in respect of any requisition made by the Planning Authority, then such permission shall be deemed to have been granted on the date immediately following the date of expiry of 60 days. However, the deemed permission is subject to the rider contained in the first proviso to Section 45(5) that the development proposal is in conformity with the relevant

Development Control Regulations framed under the 1966 Act or bye- laws or regulations framed in that behalf under any law for the time being in force and the same is not violative of the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under the Act. The second proviso to this sub-section lays down that any development carried out pursuant to such deemed permission, which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorized development for the purposes of Sections 52 to 57. Section 52 prescribes the penalty for unauthorized development or for use of land otherwise than in conformity with development plan. Any person who commences, undertakes or carries out development, or institutes or changes the use of any land without obtaining the required permission or acts in violation of the permission originally granted or duly modified is liable to be punished with imprisonment for a term of at least one month, which may extend to three years. He is also liable to pay fine of at least Rs.2,000/-, which may extend to Rs.5,000/-. In case of continuing offence, an additional daily fine of Rs.200/- is payable. 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 that section, continues such use after expiry of the period for which the use has been allowed, or in violation of the terms and conditions under which the continuance of such use is allowed is liable to pay fine which may extend to Rs.5,000/-. In the case of a continuing offence, further fine of Rs.100/- per day can be imposed. Section 53 empowers the Planning Authority to require the wrongdoer to remove unauthorized development. Of course, this power can be exercised only after following the rules of natural justice, as engrafted in sub-sections (1) and (2) of Section 53. By virtue of Section 53(3), any person to whom notice under sub-section (2) has been given can apply for permission under Section 44 for retention of any building or works or for the continuance of any use of the land pending final determination or withdrawal of the application. If the permission applied for is granted, the notice issued under Section 53(2) stands automatically withdrawn. If, however, the permission is not granted, the notice becomes effective. If the person to whom notice under Section 53(2) is given or the application, if any, made by him is not entertained, then the Planning Authority can prosecute the owner for not complying with the notice. Likewise, if the notice requires the demolition or alteration of any building or works or carrying out of any building or other operation, then the Planning Authority is free to take steps for demolition, etc., and recover the expenses incurred in this behalf from the owner as arrears of land revenue. Section 54 empowers the Planning Authority to stop unauthorized development. Section 55 enables the Planning Authority to remove or discontinue unauthorized temporary development summarily. 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.

39. 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.

40. Circular dated 4.2.2011, on which reliance was placed by Shri Prasad, cannot be invoked for entertaining the prayer for regularization. That circular only contains the procedure for regularization of unauthorized works/structures. It neither deals with the issues relating to entitlement of the applicant to seek regularization nor lays down that the Planning Authority can regularize illegal construction even after dismissal of the appeal filed under Section 47 of the 1966 Act. Therefore, the procedure laid down in Circular dated 4.2.2011 is of no avail to the flat buyers.

41. Though the argument of Dr. Singhvi that the developers / builders / promoters are responsible for the illegal construction finds support from the provisions of the 1963 Act, but that does not help the housing societies and their members because there is no provision under that Act for condonation of illegal/unauthorized construction by the developers/builders and promoters or regularization of such construction. Section 2(c) of that Act defines the term ‘promoter’ in the following words:

> “Section 2(c) “promoter” means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats, or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both;”

Section 3 specifies general liabilities of the promoter. Sub-section (1) thereof contains a non-obstante clause and declares that notwithstanding anything in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or taken on ownership basis, shall in all transactions with persons intending to take or taking one or more of such flats, be liable to give or produce, or cause to be given or produced, the information and the documents mentioned in the section. Section 3(2) lays down that a promoter, who constructs or intends to construct such block or building of flats, shall –

"(a) make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed; such title to the land as aforesaid having been duly certified by an Attorney-at-law, or by an Advocate of not less than three years standing, and having entered in the Property card or extract of Village Forms V or VII and XII or any other relevant revenue record;

(b) make full and true disclosure of all encumbrances on such land, including any right, title, interest or claim of any party in or over such land;

(c) give inspection on seven days' notice or demand, of the plans and specifications of the building built or to be built on the land; such plans and specifications, having been approved by the local authority which he is required so to do under any law for the time being in force;

(d) disclose the nature of fixtures, fittings and amenities (including the provision for one or more lifts) provided or to be provided;

(e) disclose on reasonable notice or demand if the promoter is himself the builder, the prescribed particulars as respect the design and the materials to be used in the construction of the building, and if the promoter is not himself the builder disclose, on such notice or demand, all agreements (and where there is no written agreement, the details of all agreements) entered into by him with the architects and contractors regarding the design, materials and construction of the buildings;

(f) specify in writing the date by which possession of the flat is to be handed over (and he shall hand over such possession accordingly);

(g) prepare and maintain a list of flats with their numbers already taken or agreed to be taken, and the names and addresses of the parties and the price charged or agreed to be charged therefor, and the terms and conditions if any on which the flats are taken or agreed to be taken;

(h) state in writing, the precise nature of the organisation of persons to be constituted and to which title is to be passed, and the terms and conditions governing such organisation of persons who have taken or are to take the flats;

(i) not allow persons to enter into possession until a completion certificate where such certificate is required to be given under any law, is duly given by the local authority (and no person shall take possession of a flat until such completion certificate has been duly given by the local authority);

(j) make a full and true disclosure of all outgoings (including ground rent, if any, municipal or other local taxes, taxes on income, water charges and electricity charges, revenue assessment, interest on any mortgage or other encumbrances, if any);

(k) make a full and true disclosure of such other information and document; in such a manner as may be prescribed; and give on demand true copies of such of the documents referred to in any of the clauses of this sub-section as may be prescribed at a reasonable charge therefor;

(l) display or keep all the documents, plans or specifications (or copies thereof) referred to in clauses (a), (b) and (c), at the site and permit inspection thereof to persons intending to take or taking one or more flats;

(m) when the flats are advertised for sale, disclose inter alia in the advertisement the following particulars, namely: -

(i) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(ii) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which the installments thereof may be paid;

(iii) the nature, extent and description of the common areas and facilities; and

(iv) the nature, extent and description of limited common areas and facilities, if any.

(n) sell flat on basis of carpet area only:

Provided that, the promoter may separately charge for the common areas and facilities in proportion 'to the carpet area of the flat'.

Explanation – For the purposes of this clause, the carpet area of the flat shall include the area of the balcony of such flat."

Section 4(1) also contains a non-obstante clause and lays down that a promoter who intends to construct or constructs a block or building of flats shall, before accepting any money as advance payment or deposit, which shall not be more than 20 per cent of the sale price, enter into a written agreement for sale with the buyer. Section 4(1A) specifies the particulars to be included in such agreement and the documents which must form part of it. Section 4(2) casts a duty on the promoter to get the agreement registered in accordance with the provisions of the Registration Act, 1908. Section 7 contains a prohibition against alterations or additions in the plans and specification without the consent of the persons who have agreed to take the flats. The promoter is also required to rectify the defects noticed within three years. Section 7(2) casts a duty on the promoter to construct and complete the building in accordance with the plans and specifications. Section 13 postulates punishment to any promoter who is found guilty of violating the provisions contained in Sections 3, 4, 5 (except sub-section (2)) and 10 and 11.

42. Rule 3 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, etc.) Rules, 1964 lays down the manner of making disclosure by the promoter to the flat buyers. Rule 5 specifies the particulars to be incorporated in the agreement required to be entered into between the promoter and the flat purchaser. Form V appended to the rules contains the model form of agreement to be entered into between promoter and flat purchaser.

43. The above noted provisions were interpreted by this Court in Jayantilal Investments v. Madhuvihar Cooperative Housing Society (2007) 9 SCC 220. After noticing the relevant statutory provisions the two Judge Bench held:

> "Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand vis--vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Form V of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 are quoted hereinbelow:
>
> "3. The promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions, if any, which may have been imposed by the local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned occupation and/or completion certificates in respect of the flat.
>
> 4. The promoter hereby declares that the floor space index available in respect of the said land is … square metres only and that no part of the said floor space index has been utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of said floor space

index by him. In case while developing the said land the promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the promoter to the flat purchaser. The residual FAR (FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the society the residual FAR (FSI), shall be available to the society."

The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject- matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.

In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc."

44. It is thus evident that the 1963 Act obligates the promoter to obtain sanctions and approvals from the concerned authority and disclose the same to the flat buyers. The Act also provides for imposition of penalty on the promoters. However, the provisions contained therein do not entitle the flat buyers to seek a mandamus for regularization of the unauthorized/illegal construction.

45. In view of the above discussion, we hold that the petitioners in the transferred case have failed to make out a case for directing the respondents to regularize the

construction made in violation of the sanctioned plan. Rather, the ratio of the above-noted judgments and, in particular, Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors. (supra) is clearly attracted in the present case. We would like to reiterate that no authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The Courts are also expected to refrain from exercising equitable jurisdiction for regularization of illegal and unauthorized constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas.

46. In the result, the appeals and the transferred case are dismissed and it is declared that there is no impediment in the implementation of notices issued by the Corporation under Section 351 of the 1888 Act and order dated 3/8.12.2005 passed by the competent authority. The Corporation is expected to take action in the matter at the earliest.

47. We also direct that the State Government and its functionaries/officers as also the officers/employees of the Corporation shall not put any hurdle or obstacle in the implementation of notices issued under Section 351 of the 1888 Act.

48. It is needless to say that the flat buyers shall be free to avail appropriate remedy against the developers/builders.