BEFORE THE NATIONAL GREEN TRIBUNAL

WESTERN ZONE BENCH, PUNE

Appeal No. 122/2018 (Pune Bench)

[Earlier Appeal No. 09/2014 (Western Zone)]

Anil Tharthare .... Appellant

Versus

The Secretary,
Environment Department,
Government of Maharashtra and Others .... Respondents

Affidavit of Appellant in response to the Report of Joint Committee pursuant to the Order dated 11.02.2019 of Hon'ble NGT.

I, Anil Tharthare, Appellant named hereinabove, do hereby state on solemn affirmation as under:-

1. That, I have gone through the final report of the Joint Committee dated 10.12.2022 submitted in compliance with the Order dated 11.02.2019 passed by this Hon. NGT.
2. I say that I filed above Appeal seeking specific prayers viz.:-
   i) for stopping the construction of the project;
   ii) to set aside the impugned Environment Clearance;
   iii) Environment Clearance be decided in respect of entire plot size namely 2.16 lakh sq. mtrs. under Category B – 1 Project;
   iv) SEIAA and SEAC be directed to comply with the office memorandum of MOF dated 12.12.2012 and O.M. of MOF dated 27th June, 2013 and to effect the compliance to all its conditions before grant of Environment Clearance;

v) to pay compensation for the damages caused to the environment under the polluter pays principles u/s. 20 of the NGT Act, 2010;

vi) by prayer clause [b], it is sought that 20% of the land area be earmarked for recreation grounds in terms of the Regulation 23.

3. By Order dated 11.02.2019, this Hon. NGT constituted the Joint Committee for submitting report by assessing the damage caused to the environment. Accordingly, Joint Committee headed by the CPCB through its Regional Director (Bharat K. Sharma) filed the Report on 2nd December, 2022.

4. On page 31 in para no.8, the said Joint Committee gave its conclusion holding,

> *Expansion of residential building project Rustomji Oriana" at Plot bearing CTS No. 646(Pt), Village – Bandra, Gandhi Nagar, Bandra (East), Mumbai by M/s. Resilience Realty Private Limited, from the building configuration having 2 basement + ground + 2 podium floors + stilt (part) + first (Pt) + second (Pt) to 15th floors + 16th (Pt) floors) to the building configuration having two basements + ground + 2 podium + stilt + 18th floors has been held in violation of EIA notification, 2006 by the Hon. NGT vide Order dated 11.02.2019.*"

5. It is further concluded in the Report that said expansion was from BUA of 32,395.17 sq. mtr. to 40,480.88 sq. mtr. resulting into addition of :-

i) two floors namely 16th floor to 18th floor,

ii) 16 flat units (125 flats to 141 flats),

iii) 80 vehicle parking (from 215 parking to 295 parking),

iv) additional water demand of 11KLD (from 98 KLD to 109 KLD),

v) sewage generation of 08 KLD (from 76 KLD to 84 KLD),

vi) solid waste generation of 71 kg per day (from 282 kg per day to 353 kg per day),

etc.

6. Conclusion No. 3 records that the area was already stressed since June-2010 with PM 10 and PM 2.5 in the air exceeding 58.21 % and 39.48% of the monitored day/year respectively as per the standards etc. The Committee suggested a penalty of Rs. 8,65,12,500/- (in Para No. ix) as cost of damages to the environment.

7. It is pertinent to note that in light of the judgement given by the Hon. Supreme Court of India in the case of *Municipal Corpn. of Greater Mumbai v. Kohinoor CTNL Infrastructure Co (P) Ltd., (2014) 4 SCC 538*, the CPCB did not consider the impact of *not providing RG area on motherearth* and further did not assess the corresponding damage caused to the environment.

8. It is pertinent to note that the plot area of the project is 4840 sq. mtr. out of which 1351.50 sq. mtr. is the 'additional RG land (layout RG). Thus, 4840 – 1351.50 = 3490.50 sq. mtr. Is the Plot Area out of this land, 10% of RG area namely 349.05 sq. mtr. was required to be left. Thus, total RG area comes to 1351.50 + 349.50 sq mtr = 1500.55 sq. mtr. total. However, in this case, this RG area has not been provided and no assessment of damage to the environment has been made by the Joint Committee Report.

9. The Kohinoor judgement is binding, as such this RG area admeasuring 1500.55 sq. mtr. has to be compulsorily provided on mother earth by removing the constructed area.

Therefore, assessment of damage to environment in providing the RG area on mother earth is needed to be assessed by the Joint Commitee headed by CPCB on following two counts namely:-

i) the damage caused to the environment due to not providing 1500.55 sq. mtr. RG area on mother earth;

ii) the damage which will be caused due to demolition of constructed area in the project for providing 1500.55 sq. mtr. RG area on mother earth.

10. These two damages have to be assessed hence necessary direction be issued to the Joint Committee on these two counts.

11. Accordingly, I file my above objections and seek a direction to CPCB and the Joint Committee for assessing the damages on above stated two counts. I respectfully pray before the Hon NGT to issue directions to the Joint Committee for said assessments and pass appropriate orders accordingly in the interest of justice.

12. I say that the facts stated hereinabove are true to my knowledge and no material is concealed therefrom.

Solemnly affirmed,

Mumbai

Date: 12.07.2023

Identified, explained and interpreted by,

Pragya Mishra

Advocate, High Court

(Anil V. Tharthare)
Deponent

BEFORE ME

Dhange

Adv. Shivaji N. Dhange
Notary Govt. of India
Regd. No. 15376 MUMBAI (MS)
404, 405, 4th Floor, Davar House,
197/199, Near Central Camera Bldg.,
D.N. Road, Fort, Mumbai-400001

Before Me;

NOTED & REGISTERED

PageNo. 26 Sr.No. 224

Dated. 12/07/2023

(2014) 4 Supreme Court Cases 538 : 2013 SCC OnLine SC 1123

In the Supreme Court of India

(BEFORE H.L. GOKHALE AND JASTI CHELAMESWAR, JJ.)

MUNICIPAL CORPORATION OF GREATER MUMBAI AND OTHERS . . Appellants;

Versus

KOHINOOR CTNL INFRASTRUCTURE COMPANY PRIVATE LIMITED AND ANOTHER . . Respondents.

Civil Appeal No. 11150 of 2013[†], decided on December 17, 2013

A. **Town Planning — High-rise/Multi-storeyed buildings — Minimum recreational/amenity open spaces at ground level as mandated under DCR 23 of 1991 DCRs — Reduction of recreational space area at ground level to only 7.7% of area as against required minimum in present case, of 15% — Impermissibility of — General issue regarding acute problem of excessive construction at the cost of minimum recreational space in Indian cities, considered**

— Held, DCR 23 r/w DCRs 2(64) & (83) of 1991 DCRs make it mandatory that recreational/amenity space has to be on ground level and has to be 15%, 20% or 25% of the area depending upon its size — Requirement of recreational space on the podium under DCR 38(34)(iv) of 1991 DCRs is discretionary — Provision under DCR 38(34) of 1991 DCRs cannot be read in derogation of requirement under DCR 23 of 1991 DCRs as it will result in serious erosion in basic requirements for a good life affecting the guarantee of right to life under Art. 21 of Constitution — Requirement of having trees and open land around them is necessary from an environmental point of view, since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level — Hence, minimum recreational space as laid down under DCR 23 at ground level, cannot be reduced on basis of DCR 38(34) — Recreational space, if any, provided on the podium as per DCR 38(34)(iv), shall be in addition to that provided as per DCR 23 — Such declaration/changes however be implemented with prospective effect, namely, where commencement certificate (CC) has yet not been granted

— Maharashtra Regional and Town Planning Act, 1966 (37 of 1966) — S. 22(m) — Development Control Regulations for Greater Mumbai, 1991 — DCRs 23, 38(34) and 2(64) & (83) and 33(7), (9) & (10) — Primacy of DCR 23 over DCR 38(4) — Inapplicability of DCRs 33(7), (9) & (10) to projects/schemes other than those specifically covered therein

(Paras 19 to 32, 46, 71.2.1 and 71.3)

B. **Constitution of India — Art. 21 — Reiterated, the right to a clean and healthy environment is within the ambit of Art. 21 — Furthermore, the right to a clean and pollution free environment, is also a right under our common law jurisprudence — Common Law — Content of**

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Held :

The right to a clean and healthy environment is within the ambit of Article 21. Furthermore, the right to a clean and pollution free environment, is also a right under our common law jurisprudence.

(Para 30)

Amarnath Shrine, In re, (2013) 3 SCC 247; *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, *relied on*

The provisions of DCR 23 are mandatory. Besides, under sub-clause (*f*) of DCR 23 there is a requirement of keeping the recreational open space permanently open to the sky and trees are to be grown in that space as laid down i.e. five trees per hundred square metres of the recreational space within the plot. DCR 2(64) defines "open space" to mean an area forming an integral part of a site left open to the sky. A "site" is defined under DCR 2(83) to mean a parcel or piece of land enclosed by definite boundaries. These DCRs when read together, very much make it clear that the recreational/amenity space has to be on the land i.e. on ground level and it has got to be 15%, 20% or 25% of the area depending upon its size, as prescribed in DCR 23. The requirement of recreational space on the podium under DCR 38(34)(*iv*) is discretionary. Besides, as DCR 38(34)(*iii*) lays down, the podium shall be basically used for parking. Besides, DCR 38(34)(*iv*) does not contain a non-obstante clause to override the requirement under DCR 23 making it mandatory to provide recreational space on the ground floor. That being so, the provision under DCR 38(34) cannot be read in derogation of the requirement under DCR 23 or else it will result into serious erosion in the basic requirements for a good life affecting the guarantee of right to life under Article 21 of the Constitution of India. Therefore DCR 38(34)(*iv*) has to be read down as inapplicable and not excluding the mandatory provision under DCR 23.

(Paras 19, 27 and 28)

This position is not altered by the fact that the development schemes under DCRs 33(7), 33(9) and 33(10) provide for lesser recreational area/amenity spaces. For redevelopment projects under DCR 33(7) for reconstruction of cessed buildings, and for the urban renewal schemes under DCR 33(9), and for the slum rehabilitation projects under DCR 33(10), it is permissible to reduce the

recreational/amenity open spaces to the limit prescribed in the respective Regulations to facilitate these schemes. Thus, under DCRs 33(7) and 33(10) reduction in the amenity open space is permitted to make the project viable, but still minimum 8% of the project area is required to be maintained as amenity open space. Similarly, for the schemes under DCR 33(9) minimum 10% of the plot area is required to be retained as recreational space. However DCRs 33(7), (9) and (10) are not generally applicable, since in other properties, where there are no such constraints to make the development schemes of rehabilitation or reconstruction of old buildings or slums viable, there is no reason why the amenity open space at the ground level should be read as permissible, to be reduced. The only ground for reducing this mandatory open space at the ground level being given is that more parking and more accommodation may be provided, meaning thereby more construction, concretisation and financial expediency. Such a purpose cannot be read into the provisions as they presently exist, nor is it desirable to do so from the point of view of the requirement of minimum open spaces at the ground level. Besides, the requirement of having trees and open land around them is necessary from an environmental point of view, since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level.

(Paras 20 and 29)

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Thus, having 15%, 20% or 25% of the area (depending upon the size of the lay out) as the recreational/amenity area at the ground level is a mandatory minimum requirement, and it will have to be read as such. Hence, it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreational area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area.

(Para 32)

C. **Town Planning — Development Control Regulations for Greater Mumbai, 1991 — DCR 43 — Construction of high-rise buildings — Fire safety requirements — Existing mechanism under DCRs, whether adequate and being implemented effectively — Invalidity of DCR 43(1)(A) for redevelopment proposals under DCR 33(7)**

— Held, whereas provisions for mid-rise buildings up to 13 floors are somewhat adequate, those beyond are required to be strictly implemented from within as well — Second proviso to DCR 43(1)(A) cannot stand scrutiny of minimum safety requirement — Not providing a minimum space of 6 m which makes room for the fire engine to access the building amounts to violation of right to life and equality of residents of these buildings —

Thus, held, second proviso to DCR 43(1)(A) is hazardous and discriminatory against occupants of the schemes under DCR 33(7) and is bad in law — Therefore directed, even for redevelopment proposals of plots up to size of 600 sq m under DCR 33(7), an open space of 6 m width within the property which is accessible from the road on one side, has to be maintained unless the building abuts roads of 6 m or more on two sides, or another appropriate access of 6 m to the building is available apart from the abutting road — Besides, Fire Department must insist from developer/society of all buildings to certify at least once in six months that access to the building, internal exits and fire-fighting arrangements are maintained as per expectations under DCR, norms of Fire Department, and must check them periodically, on its own — Such changes however to be implemented with prospective effect, namely, where the commencement certificate (CC) has yet not been granted — Maharashtra Fire Prevention and Life Safety Measures Act, 2006 (3 of 2007) — Maharashtra Regional and Town Planning Act, 1966 (37 of 1966), S. 22(m)

(Paras 33 to 36, 43 to 46. 71.2.3 and 71.3)

Jayant Achyut Sathe v. *Joseph Bain D'Souza*, (2008) 13 SCC 547, *explained* and *distinguished*

D. **Town Planning — Development Control Regulations for Greater Mumbai, 1991 — DCR 31(1) and DCRs 33(7), (8) & (9) — High-rise buildings — Prescription of height of buildings vis-à-vis width of adjoining road — Relaxation of, in case of reconstruction and redevelopment of old buildings undertaken under Regulations 33(7), 33(8) and 33(9) resulting in extreme crowding, traffic congestion and additional pressure on existing infrastructure — Impact of such addition of FSI on traffic situation in Mumbai city, examined — Suggestions given to Government to be incorporated in new Development Plan for Greater Mumbai**

— Held, there must be a scheme-wise approach and proper supervision of the construction — These development schemes and additional FSI

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thereunder, should be examined locality wise — Impact of such high-rise buildings on the adjoining locality and on traffic, required to be examined before granting such permission — While preparing new development plan for the city of Mumbai, aspects concerning restrictions on blanket exemptions, contribution by existing occupants to the reconstruction schemes, locality wise consideration and impact of additional FSI on traffic, ought to be gone into — Government of Maharashtra, Development Plan Drafting Committee, and appellant Municipal Corporation shall consider these suggestions while framing new Development Plan for Greater Mumbai — Maharashtra Regional and Town Planning Act, 1966 (37 of 1966), S. 22

(m)

(Paras 47 to 61 and 71.2.2)

E. **Town Planning — High-rise/Multi-storeyed buildings — In Mumbai — State Government constituted Technical Committee for High-Rise Buildings — Supreme Court reconstituting the Committee by appointing a new Chairman and inclusion of an architect as member and framing additional terms of reference of Committee — Government of Maharashtra directed to issue the necessary notification in this behalf — Appellant directed to render assistance and provide the required honorarium as ordered**

(Paras 62 to 69 and 71.4)

MCD v. *Uphaar Tragedy Victims Assn.*, (2011) 14 SCC 481 : (2013) 1 SCC (Civ) 897 : (2013) 2 SCC (Cri) 555 : (2013) 1 SCC (L&S) 305, *considered*

F. **Town Planning — Development Control Regulations for Greater Mumbai, 1991 — DCR 33(24) [as amended w.e.f. 22-6-2011] — Overriding effect of, in respect of development approved prior to amendment — Extent of — Approval and commencement certificate granted for development of multi-storeyed public parking lot — Subsequent stop-work notice, asking respondent to modify its plans in consonance with new conditions under amended DCR 33(24) (vide Municipal Circular dt. 22-6-2011) limiting the height of public parking to 4 floors instead of 13 floors in deviation of permission granted earlier — Quashed by High Court — Subsequent memorandum of settlement entered into between the parties accepting Municipal Circular dt. 22-6-2011, confining the public parking building only to ground + 4 upper floors, confirmed in order dt. 25-7-2013, *Kohinoor*, (2014) 4 SCC 574, re-confirmed — Held, both parties shall act strictly in accordance with the settlement — Clarified, Municipal Circular dt. 22-6-2011 was not in any way held to be bad in law in order dt. 25-7-2013 arrived at on the controversy between the parties before the court, considering the acute problems in the city of Mumbai with respect to shortage of recreational space, fire hazards and high density of traffic, a further deliberation on the aforementioned issues was felt necessary and examined by Supreme Court — Maharashtra Regional and Town Planning Act, 1966 (37 of 1966), S. 51**

(Paras 2 to 6, 71.1 and 71.5)

Municipal Corpn. of Greater Mumbai v. *Kohinoor CTNL Infrastructure Co. (P) Ltd.*, (2014) 4 SCC 574, *clarified* and *followed*

Kohinoor CTNL Infrastructure Co. (P) Ltd. v. *Municipal Corpn. of Greater Mumbai*, (2013) 1 Mah LJ 88 : (2013) 3 Bom CR 410, *referred to*

B-D/52714/C

Advocates who appeared in this case:

R.P. Bhatt, Senior Advocate (R.A. Malandkar, Ms U.H. Deshpande, Jernold Xavier, S. Sukumaran, Anand Sukumar, Bhupesh Kr. Pathak and Ms Meera Mathur, Advocates) for the Appellants;

Dr A.M. Singhvi, Joaquim Reis and Shyam Divan, Senior Advocates [Shivaji M. Jadhav, Brij Kishor Sah, Chirag M. Shroff, Abhishek Singh, Sanjay Kharde, Shubhangi Tuli (for Ms Asha Gopalan Nair), Anand Verma, Kedar Nath Tripathy, Gauhar Mirza, Ms Pragya Baghel, Ankur Saigal, Mahesh Agarwal, Rishi Agrawala and E.C. Agrawala, Advocates] for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2014) 4 SCC 574, *Municipal Corpn. of Greater Mumbai* v. *Kohinoor CTNL Infrastructure Co. (P) Ltd.* — 542*f*, 543*a-b*, 545*a-b*, 545*e-f*, 547*c*, 551*d*, 553*c*, 553*e*, 572*g-h*, 573*f-g*

2. (2013) 3 SCC 247, *Amarnath Shrine, In re* — 556*a*

3. (2013) 1 Mah LJ 88 : (2013) 3 Bom CR 410, *Kohinoor CTNL Infrastructure Co. (P) Ltd.* v. *Municipal Corpn. of Greater Mumbai* — 542*d-e*, 544*b-c*

4. (2011) 14 SCC 481 : (2013) 1 SCC (Civ) 897 : (2013) 2 SCC (Cri) 555 : (2013) 1 SCC (L&S) 305, *MCD* v. *Uphaar Tragedy Victims Assn.* — 548*b*

5. (2008) 13 SCC 547, *Jayant Achyut Sathe* v. *Joseph Bain D'Souza* — 560*e-f*, 562*a*

6. (1996) 5 SCC 647, *Vellore Citizens' Welfare Forum* v. *Union of India* — 556*b*, 556*c-d*

The Judgment of the Court was delivered by

H.L. GOKHALE, J.— Leave granted. This appeal is directed against

the order dated 9-7-2012[1] passed by a Division Bench of the Bombay High Court whereby Writ Petition No. 143 of 2012 filed by the respondents was allowed, and which quashed the stop-work notice dated 22-12-2011 issued by the Executive Engineer (Building Proposal), City III, Municipal Corporation of Greater Mumbai, and order dated 27-4-2012 passed by the Additional Municipal Commissioner restricting to four floors the height of Wing C (providing for public parking lot — "PPL", for short) of the buildings being constructed on Plot No. 46 of Town Planning Scheme III, N.C. Kelkar Road, Shivaji Park, Dadar, Mumbai.

Dispute between the parties, settlement thereof and Part I of the order dated 25-7-2013[2]

2. This appeal was initially heard by a Bench of G.S. Singhvi and H.L. Gokhale, JJ. Mr Harish Salve and Mr R.P. Bhatt, both learned Senior Counsel appeared for the appellants, and Mr F.S. Nariman, learned Senior Counsel appeared for the respondent.

3. The appellants wanted to restrict the PPL up to four floors only, but before the issuance of the restrictive circular dated 22-6-2011, in this behalf, the respondents had already consumed higher FSI (floor space index) on the basis of the commencement certificates issued earlier. In view of the discussion in the Court however, a settlement was arrived at between the

appellants and the respondents on the controversy concerning the PPL. Before passing the order on the settlement, the Bench noted the backdrop of the facts and circumstances of the case in paras 2 to 5 in Part I of the order passed on 25-7-2013[2] (*per* Singhvi, J. as he then was). These paragraphs read as follows: (SCC pp. 576-78, paras 2-5)

> "*2*. The plans submitted by Respondent 1 for construction of Wings A, B and C of the building were sanctioned by the competent authority of the Municipal Corporation of Greater Mumbai (for short 'the Corporation') and intimation of disapproval was issued on 15-2-2006. After the Ministry of Environment and Forests, Government of India granted clearance for the construction of commercial building, the competent authority issued commencement certificated dated 13-9-2006. The Joint Commissioner of Police (Traffic) issued NOC dated 11-12-2009 for the development of a multi-storeyed public parking lot and vide Letter dated 2-6-2010, the State Government granted in-principle approval under Clause 33(24) of the Development Control Regulations (DCR) for Greater Mumbai, 1991 for construction of a

multi-storeyed public parking lot. Thereafter, the competent authority issued the letter of intent dated 27-7-2010.

3. During the construction of the building, the Urban Development Department of the State Government sent letter dated 4-3-2011 to the Municipal Commissioner requiring him to submit a proposal for amendment of Clause 33(24) of DCR for limiting the height of parking towers to 4 floors and also for revocation of all sanctioned proposals where the commencement certificates had not been issued. In view of that letter, the Corporation issued circular dated 22-6-2011 prescribing certain conditions under sub-clause (*iv*) of DCR 33(24) and clarified that all proposals for public parking lots shall be considered subject to those conditions. The new conditions sought to limit the height of public parking to ground plus 4 upper floors and 2 basements.

4. As a sequel to the above changes, the Corporation issued notice dated 29-11-2011 to Respondent 1 under Section 51 of the Maharashtra Regional and Town Planning Act, 1966 requiring it to show cause as to why the commencement certificate may not be revoked. Respondent 1 submitted a detailed reply dated 14-12-2011 and pleaded that the amended DCR 33(24) cannot be made applicable to its buildings because substantial construction had already been made at a cost of Rs 167 crores. Thereafter, the Executive Engineer concerned issued stop-work notice dated 22-12-2011 and directed Respondent 1 to restrict the work of public parking to 4 floors instead of 13 floors. After about six months,

the Additional Municipal Commissioner passed an order dated 27-4-2012, the relevant portion of which is extracted below:

> 'As there is a substantial construction on the core part of the plot, PPL done in this part shall be allowed to the extent of already executed construction as per report dated 27-12-2011. In the remaining portion of the plot, where there is no substantial construction, PPL shall be limited to G + 4, the developer is to be asked to modify his plans in consonance with modified DCR.'

5. The respondent challenged the stop-work notice and the order of the Additional Municipal Commissioner in Writ Petition No. 143 of 2012, which was allowed[1] by the High Court in the following terms: (Mah LJ p. 94, para 18)

> '*18*. In the facts of this case, the admitted position as accepted in the order of the Additional Municipal Commissioner indicates

that the work of development had substantially progressed by the time a notice to show cause was issued under Section 51 of the MR and TP Act, 1966. The impugned order passed by the Additional Municipal Commissioner restricting the petitioners to a height of a ground floor and four upper floors in deviation of the permission granted earlier is thereafter contrary to law. Hence, the impugned order would have to be quashed and set aside and is accordingly set aside. The stop-work notice which has been issued to the petitioners on the basis of the notice to show cause dated 29-11-2011 is to that extent quashed and set aside. Rule is made absolute in these terms. There shall be no order as to costs.'"

4. The abovereferred memorandum of settlement arrived at between the parties contained Clauses 1 and 2 (*a* to *e*) and an annexure thereto with respect to the modus operandi in that behalf. Clauses 2(*a*) and (*b*) thereof are relevant for our purpose. They read as follows:

"2. In view of the peculiar facts and circumstances of the present case and without establishing any precedent, it is agreed between the petitioners herein and Respondent 1 (Kohinoor CTNL) as follows:

(*a*) In public interest, *public parking lot (PPL) will no longer be on ground + 13 upper floors* as initially approved under amended approval dated 21-9-2011 in Wing C of the development of composite building on Final Plot No. 46, *but on the ground + 4 upper floors in Wing C as well as in three level basement below Wings A, B and C i.e. entire basement*, and the captive parking shall be from 5th to 13th, upper floors in Wing C.

(*b*) It is also agreed that in the present case of FP No. 46, the PPL will be managed and operated by Petitioner 1 (MCGM) or its nominee(s) and common ingress and egress through the common entry/exit shall be provided in Wing C for PPL as well as captive parking for Municipal Corporation of Greater Mumbai and

Respondent 1 (Kohinoor CTNL). The modus operandi in that behalf is detailed in the annexure hereto."

(emphasis supplied)

5. Since the signed memorandum of settlement was filed in the Court, the Court passed the following operative order in para 9 of Part I of the said order dated 25-7-2013[2]:

"9. Accordingly, the memorandum of settlement signed by the representatives of the parties and their advocates on 18-4-2013

together with the annexure are taken on record. We note that this settlement is arrived at on the backdrop of the facts and circumstances of this case. *We clarify that we have not in any way held the Municipal Circular dated 22-6-2011 to be bad in law*. We direct that the parties shall strictly abide by the terms of settlement."

(emphasis supplied)

6. The settlement has brought about the change as desired by the appellants, while taking care of the interest of the respondents. The complex is going to be on the land which earlier belonged to Kohinoor Textile Mill at Dadar, Mumbai. Wing A is to consist of 3 basements + ground to 5 floors, and Wing B is to consist of 3 basements + ground to 48 floors with a total height of 195.90 m. Wing C was to be in two parts as originally proposed. Ground + 14 floors thereof, were to be meant for PPL, and 15 to 30 floors were to be kept for residential purposes. Under the Municipal Circular dated 22-6-2011 prescribing conditions under clause (*iv*) of DCR 33(24), the public parking building was to be confined only to ground + 4 upper floors. The settlement accepts this position, and now as per the settlement, public parking is going to be provided in the ground + 4 upper floors in Wing C and also in the three level basements below Wings A, B and C. The private parking shall be from 5th to 13th floors of Wing C.

Part II of the order dated 25-7-2013[2] framing four issues

7. Although the dispute between the parties was with respect to the height of the building consisting of the PPL, it was felt that the appellants had not applied their mind to some of the issues which, in fact, did arise in the matter of the grant of permission to this complex on the said Plot No. 46 in the heart of Mumbai City. It was noticed that as per the approved plan, the recreational space available at the ground level was reduced to only 7.7% of the area of the plot, as against the required minimum of 15% (where the area of the plot was between 1001 sq m to 2500 sq m as per DCR 23). In view of the reduction in the recreational area at the ground level, it was observed in para 13 of the said order as follows: (SCC p. 580)

"… We may add that since the petitioners and the respondents have arrived at a settlement, we do not propose to go into this issue with respect to the construction of the respondent. *We are, however, surprised that the Municipal Corporation did not look into the reduction in the recreational area at the ground level very seriously, probably because the rule permits recreational space on the podium. If this is treated as a*

correct interpretation, then it is quite possible that the recreational area left at the ground level could simply be zero. It may leave no space on the ground floor for the residents/occupants of the apartments constructed in the particular building, and that will have serious adverse impact on the right to life not only of the residents/occupants of the apartments but also of the people in the adjoining areas because all of them will have to only fall back on the public parks or playgrounds and gardens for their minimum recreational requirements…."

(emphasis supplied)

It was, therefore, felt that it was necessary to examine the correlation between DCR 23, which provides for minimum recreational/amenity open spaces, and DCR 38(34) concerning the podium.

8. Secondly, it was noted that in the present matter a higher FSI has been given in lieu of making a provision for public parking, leading to a high-rise building. Such high-rise constructions bring along with them more population and more vehicles on the adjoining narrow roads and into an already congested area, and that aspect did not appear to have been examined by the appellant Municipal Corporation. In the instant case, the approved complex is bounded on four sides by four roads, and these roads are not, at all, wide. The height of the complex is going to be quite disproportionate to the width of these roads, but that has been permitted amongst other reasons in view of making a provision for public parking. Under DCR 31(1), the height of the building has to be in proportion to the width of the road which is adjoining a building, but the proviso to that DCR makes another exception to this rule with respect to construction schemes under DCRs 33(7), 33(8) and 33(9). DCR 33(7) is regarding reconstruction or redevelopment of cessed buildings in the island city, by cooperative housing societies, or of old buildings belonging to the Municipal Corporation or the Police Department, and it grants FSI of 2.5 plus incentive FSI as specified in Appendix III, whichever is more. DCR 33(8) is regarding construction for housing the dishoused, by the Municipal Corporation. DCR 33(9) is regarding reconstruction or redevelopment of cessed buildings or urban renewal schemes on extensive areas, where the FSI is 4. These constructions also add to the population and the vehicles in that very area. A question therefore arose as to whether these exemptions are justified, valid and legal?

9. Thirdly, the impact of construction of high-rise buildings in the thickly populated areas on the traffic in the city was also discussed during the consideration of the SLP. The Court noted in para 14 of the order, that although additional space for public parking was being provided, simultaneously higher FSI was also being granted to the

developer, on that count. Consequently, such high-rise buildings would add more number of vehicles on the adjoining streets. This required examination of the impact of additional FSI on the traffic situation, particularly in the island city of Greater Mumbai.

10. Lastly, considering that the height of the complex was going up to 198.50 m, it was decided to look into the issue of hazards due to fire which the occupants of such towers could face. It was noted that there were

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provisions with respect to the space to be kept around such buildings for the movement of fire engines within the compound of such buildings, but these provisions are not uniform. The fire engines, with their ladders, available with the Municipal Corporation, do not reportedly reach anywhere beyond 14th floor. It was also noted that recently the Secretariat Building of the State of Maharashtra (known as the "Mantralaya") was engulfed with fire. The building is only six storeys, and yet it took quite a few days to control the fire, and in that exercise a few lives were unfortunately lost. Therefore, the issue of safety of the occupants of such high-rise buildings, that of the residents in the neighbourhood, and the firemen, required urgent consideration.

11. Therefore, in Part II of its order dated 25-7-2013[2], the Bench framed four issues for further consideration. These issues read as follows: (SCC pp. 581-82, para 17)

> "*17.1.* (*i*) What should be the correlation between DCR 23 and DCR 38(34) regarding the recreational area? Is it permissible to reduce the minimum recreational area provided under DCR 23 on any ground?
>
> *17.2.* (*ii*) Whether the exemption from DCR 31(1) under DCRs 33 (7), 33(8), and 33(9) is justified, valid and legal particularly in the island city of Greater Mumbai? If so, to what extent and in which context?
>
> *17.3.* (*iii*) What is the impact of the addition of FSI in the island city on the traffic situation? How can it be controlled?
>
> *17.4.* (*iv*) Whether the present mechanism for protection against the fire hazards is adequate and is being implemented effectively? If not, what should be the mechanism for enforcement with respect to the provisions concerning the fire safety?"

12. For that purpose, affidavits were sought from the following:

> "(*A*) From the Municipal Corporation:
>
> (*i*) The affidavit of the Chief Engineer, Town Planning on Issues

1 and 2.

(*ii*) The affidavit of the Chief Engineer, concerning traffic on Issue 3.

(*iii*) The affidavit of the Chief Fire Officer on Issue 4.

(*B*) From the State of Maharashtra:

(*i*) By the Secretary, Urban Development Department on Issues 1, 2 and 3 above.

(*ii*) By the Commissioner of Police (Traffic) on Issue 3 above."

13. The excessive construction at the cost of minimum recreational space, as seen in the present case, required an immediate attention to be paid to Issue (*i*). Similarly, Issue (*iv*) concerning the fire hazards also required urgent attention, and it was thought that the Court should go into the legality

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of the relevant provisions in this behalf. As against that, examination of the other two issues was taken up for the reason that the development plan for the city of Mumbai is going to be revised shortly, and certain suggestions in that behalf could be made. Issue (*ii*) arising out of exemptions to the high-rise buildings under DCRs 33(7), 33(8), 33(9) and Issue (*iii*) concerning the impact on traffic, required a detailed deliberation.

14. At this point, it is relevant to mention that a similar approach has been adopted by this Court in *MCD* v. *Uphaar Tragedy Victims Assn.*[3] That case concerned the compensation to be paid to the victims of the fire in "Uphaar" Theatre at Delhi. This Court decided the issue of compensation in para 65 of the judgment. However, the Court could not ignore that the fire had resulted in the death of 59 persons and injury to 103 persons, and therefore, this Court observed in para 66 of the said judgment: (SCC pp. 530-31)

"*66*. Normally, we would have let the matter rest there. But having regard to the special facts and circumstances of the case we propose to proceed a step further to do complete justice."

And then, the Court made a number of suggestions in para 75 of its judgment to the Government for its consideration and implementation.

15. Similarly, although a settlement is arrived at, on the controversy between the parties before the Court, considering the acute problems in the city of Mumbai with respect to shortage of recreational space, the fire hazards and high density of traffic, a further deliberation on the abovereferred four issues was felt necessary.

16. Thereafter, the matter has been heard by the present Bench. Consequent upon the above order, the necessary affidavits were filed by the officers of the appellant as well as the State of Maharashtra. A number of interveners have also assisted the Court. The interveners include (*i*) The Urban Design Research Institute ("UDRI", for short) and others, (*ii*) Maharashtra Chamber of Housing Industry, (*iii*) Practising Engineers, Architects and Town Planners Association (India), and (*iv*) Property Redevelopers Association. They have all assisted in the examination of these four issues. We will deal with their submissions in the context of the Maharashtra Regional and Town Planning Act, 1966 ("the MRTP Act", for short), and the Development Control Regulations for Greater Mumbai, 1991, framed thereunder which govern these issues.

Issue (i) concerning the reduction in the minimum recreational space from the one as required under DCR 23

17. The Development Control Regulations are referable to Section 22 (*m*) of the MRTP Act. Section 21 of the said Act requires the Planning Authority i.e. the local authority (Appellant 1 in the instant case) to prepare a development plan for the local area within its jurisdiction. Section 22 of the

Act lays down what should be the contents of a development plan, and in that behalf it provides under sub-section (*m*) that it shall contain amongst others:

> "**22. (*m*)** provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority…."

The present DCRs for Greater Mumbai, 1991 were sanctioned by the State of Maharashtra on 20-2-1991 and are enforced from 25-3-1991. The new DCRs are shortly to be formulated for the next twenty years.

DCR 23 on recreational/amenity open spaces

18. DCR 23 with which we are concerned in the first issue reads as follows:

> "**23. *Recreational/Amenity Open Spaces***.—
>
> (1) ***Open spaces in residential and commercial layouts***.—
>
> (*a*) ***Extent***.—In any layout or sub-division of vacant land in a residential and commercial zone, open spaces shall be provided as under:
>
> (*i*) Area from 1001 sq m to 2500 sq m 15%

(*ii*) Areas from 2501 sq m to 10,000 sq m 20%

(*iii*) Area above 10,000 sq m 25%

These open spaces shall be exclusive of areas of accesses/internal roads/designations or reservations, development plan roads and areas for road widening and shall as far as possible be provided in one place. Where, however, the area of the layout or sub-division is more than 5000 sq m, open spaces may be provided in more than one place, but at least one such place shall be not less than 1000 sq m in size. Such recreational spaces will not be necessary in the case of land used for educational institutions with attached independent playgrounds. Admissibility of FSI shall be as indicated in Regulation 35.

(*b*) ***Minimum area***.—No such recreational space shall measure less than 125 sq m.

(*c*) ***Minimum dimensions***.—The minimum dimension of such recreational space shall not be less than 7.5 m, and if the average width of such recreational space is less than 16.6 m, the length thereof shall not exceed 2½ times the average width.

(*d*) ***Access***.—Every plot meant for a recreational open space shall have an independent means of access, unless it is approachable directly from every building in the layout.

(*e*) ***Ownership***.—The ownership of such recreational space shall vest, by provision in a deed of conveyance, in all the property owners on account of whose holdings the recreational space is assigned.

(*f*) ***Tree growth***.—Excepting for the area covered by the structures permissible under (*g*) below, the recreational space shall be kept permanently open to the sky and accessible to all owners

and occupants as a garden or a playground, etc. and trees shall be grown as under—

(*a*) at the rate of 5 trees per 100 square metre or part thereof of the said recreational space to be grown within the entire plot.

(*b*) at the rate of 1 tree per 80 square metre or part thereof to be grown in a plot for which a sub-division or

layout is not necessary.

(*g*) ***Structures/uses permitted in recreational open spaces***.—(*i*) In a recreational open space exceeding 400 sq m in area (in one piece), elevated/underground water reservoirs, electric substations, pump houses may be built and shall not utilise more than 10% of the open space in which they are located.

(*ii*) In a recreational open space or playground of 1000 sq m or more in area (in one piece and in one place), structures for pavilions, gymnasia, club houses and other structures for the purpose of sports and recreation activities may be permitted with built-up area not exceeding 15% of the total recreational open spaces in one place. The area of the plinth of such a structure shall be restricted to 10% of the areas of the total recreational open space. The height of any such structure which may be single storey shall not exceed 8 m. A swimming pool may also be permitted in such a recreational open space and shall be free of FSI. Structures for such sports and recreation activities shall conform to the following requirements—

(*a*) The ownership of such structures and other appurtenant users shall vest, by provision in a deed of conveyance, in all the owners on account of whose cumulative holdings the recreational open space is required to be kept as recreational open space or ground viz. 'R.G.' in the layout or sub-division of the land.

(*b*) The proposal for construction of such structure should come as a proposal from the owner/owners/society/societies or federation of societies without any profit motive and shall be meant for the beneficial use of the owner/owners/members of such society/societies/federation of societies.

(*c*) Such structures shall not be used for any other purpose, except for recreational activities, for which a security deposit as decided by the Commissioner will have to be paid to the Corporation.

(*d*) The remaining area of the recreational open space or playground shall be kept open to sky and properly accessible to all members as a place of recreation, garden or a playground.

(*e*) The owner/owners/or society/or societies or federation of societies shall submit to the Commissioner a registered undertaking agreeing to the conditions in (*a*) to (*d*) above.

(2) ***Open spaces in industrial plots/layouts of industrial plots***.—(*a*) In any industrial plot admeasuring 10,000 sq m or more in area, 10% of the total area shall be provided as an amenity open space subject to a maximum of 2500 sq m, and

(*i*) such open space shall have proper means of access and shall be so located that it can be conveniently utilised by the person working in the industry;

(*ii*) the parking and loading and unloading spaces as required under these Regulations shall be clearly shown on the plans;

(*iii*) such open spaces shall be kept permanently open to sky and accessible to all the owners and occupants and trees shall be grown therein at the rate of 5 trees for every 100 sq m of the said open space to be grown within the entire plot or at the rate of 1 tree for every 80 sq m to be grown in a plot for which a sub-division or layout is not necessary.

(*b*) In case of sub-division of land admeasuring 8000 sq m or more in area in an industrial zone, 5% of the total area in addition to 10% in (*a*) above shall be reserved as amenity open space, which shall also serve as general parking space. When the additional amenity open space exceeds 1500 sq m the excess area may be used for construction of buildings for banks, canteens, welfare centres, offices, crèches and other common purposes considered necessary for industrial users as approved by the Commissioner."

The provision regarding the podium

19. As has been noted in para 13 of the order dated 25-7-2013[2], the appellants did not look into the issue of reduction in recreational area at the ground level very seriously, probably because the rule permits recreational space on the podium. Some of the interveners very seriously canvassed that in view of the provision concerning recreational space on the podium, the recreational/amenity open space at the ground level could legitimately be reduced. The provision regarding the podium is seen in DCR 38(34). DCR 38 lays down the requirements concerning parts of buildings. DCR 38(34) reads as follows:

"**38. (34)** ***Podium***.—(*i*) A podium may be permitted on plot admeasuring 1500 sq m or more.

(*ii*) The podium provided with ramp may be permitted in one or more level, total height not exceeding 24 m above ground level. However, podium not provided with ramp but provided with two car lifts may be permitted in one or more level, total height not exceeding 9 m above ground level.

(*iii*) The podium shall be used for the parking of vehicles.

(*iv*) The recreational space prescribed in DC Regulation 23 may be provided either at ground level or on open to sky podium.

(*v*) Podium shall not be permitted in required front open space.

(*vi*) Such podium may be extended beyond the building line in consonance with provision of DC Regulation 43(1) on one side whereas on the other side and rear side it shall be not less that 1.5 m from the plot boundary.

(*vii*) Ramps may be provided in accordance with DC Regulation 38 (18).

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(*viii*) Adequate area for drivers' rest rooms and sanitary block may be permitted on podiums by counting in FSI."

20. As far as Issue (*i*) is concerned, this Court had sought the affidavit from the Chief Engineer, Town Planning of the appellant Municipal Corporation, and from the Secretary, Urban Development Department of the State of Maharashtra. Shri Manu Kumar Srivastava, Principal Secretary to the Government of Maharashtra in the Urban Development Department has filed an affidavit affirmed on 6-9-2013. In Para 4.4 he has stated as follows:

"(4.4) I submit that in quite a few cases, the requirements of captive parking for the building can be met only by providing the same in basement or on upper parking floors or podium, which in turn requires provision of access/ramps, etc. which often makes it difficult to provide the required recreational/amenity open spaces on the ground…."

Thereafter, he has stated that it is to overcome this difficulty that the DCRs have been amended with effect from 6-1-2012 to allow recreational spaces on podium in plots admeasuring 1500 sq m or more. In his affidavit he has pointed out that in the redevelopment projects under DCR 33(7) for reconstruction of cessed buildings, and for the urban renewal schemes under DCR 33(9), and for the slum rehabilitation projects under DCR 33(10), it is permissible to reduce the

recreational/amenity open spaces to the limit prescribed in the respective Regulations. He has stated that this has been done consciously to facilitate these schemes.

21. On behalf of the appellant Municipal Corporation, Shri Rajeev Kuknur, Chief Engineer (Development Plan) has affirmed his reply on 6-9-2013. In Para 6 thereof, he has also stated that the provision for parking on podium has been made to facilitate the requirement of parking. He has, however, added "in such situation it may not be possible for the planner to provide the entire recreational/amenity space on the ground". Later in Para 7, he has pointed out that in certain other situations the amenity open spaces are permitted to be reduced. Thus, under DCR 33(1) read with Clause 6.20 of Appendix IV which applies to the redevelopment schemes for slums, the amenity space can be reduced, but still a minimum of 8% of the amenity space shall be maintained. Clause 8 of Appendix III applies the same provision to the reconstruction/redevelopment of cessed buildings under DCR 33(7). As regards the development under DCR 33(9), Clause 12.14 of Appendix III-A concerning DCR 33(9), *states that*:

> "**12.14.** Even if the recreational open space is reduced to make the project viable, a minimum of at least 10% of plot area shall be provided as recreational open space. In addition to this 10% of plot area shall be earmarked for amenity space which can be adjusted against the DP reservation if any."

22. It was canvassed on behalf of Maharashtra Chamber of Housing Industry by Mr S. Ganesh, learned Senior Counsel that DCR 38(34) clearly provides under sub-clause (*iv*) thereof, that the recreational space prescribed in DCR 23 may be provided at the ground level or on open to sky podium. In his view, this will enable the developers to provide more parking spaces

within the plots concerned since nowadays, there is a demand for even two parking spaces per flat. He submitted that, in fact, this will give a large continuous open space on the podium and in view thereof the recreational/amenity space need not be at the ground level. He submitted that even trees would be planted on the podium, and movement on the podium will be safer for elderly people as well as for the children. The areas for parking and recreation on the podium can be separately earmarked for that purpose. A few photographs of such arrangements were also brought to our notice. He submitted that in view of the necessity of having more accommodation and more parking spaces that this provision has been made, and it should be interpreted

accordingly.

23. It is very relevant to note that although Mr F.S. Nariman, learned Senior Counsel appeared for the respondent Kohinoor, stated that after the order was passed by this Court on 25-7-2013[2], he was appearing to assist the Court on the four issues framed in Part II of that order as amicus curiae. He pointed out that sub-clause (*iv*) of DCR 38 (34) lays down that the recreational space "*may be provided*" either at the ground level or on open to sky podium. As against that the recreational/amenity open space contemplated under DCR 23 was mandatory. Clause (1)(*a*) of DCR 23 speaks of "*vacant land*" and the open spaces as far as possible "*shall be provided*" at one place. He, therefore, submitted that whereas the provision under DCR 23 is mandatory, the one under DCR 38(34) is discretionary, and it cannot prevail over DCR 23.

24. Similarly, though the learned Senior Counsel Mr Harish N. Salve, appeared for the Municipal Corporation, until the passing of the order dated 25-7-2013[2], as far as the issue of recreational spaces on podium is concerned, he submitted a separate note to assist the Court. He pointed out that as sub-clause (*iii*) of DCR 38(34) states, the podium shall be used for parking of vehicles. Sub-clause (*iv*) gives a further option to provide recreational space on the podium, but it links this recreational space on the podium to the recreational space prescribed in DCR 23, by stating that the recreational space under DCR 23, may be provided at the ground level, or on the open to sky podium. In his submission, if read as an alternative to the minimum recreational space on the ground floor, this provision will lead to the serious erosion of recreational space at the ground level, affecting the minimum necessities of life, and will therefore lead to violation of the right to life, and will have to be held as bad in law, as against the guarantee provided under Article 21 of the Constitution of India. As against that in his submission sub-clause (*iv*) can survive only if this sub-clause is read down as inapplicable and not excluding the recreational space provided under DCR 23. In other words, it makes an additional provision for recreational space, over and above the one at the ground level, and does not in any way reduce

the same. This is because the podium is basically meant to provide parking, as stated in sub-clause (*iii*). Any recreational space provided on the podium is entirely discretionary, and that being so it cannot be read to lead to a reduction in the mandatory provision under sub-clause

(*iii*).

25. UDRI was represented by learned Senior Counsel Mr Shyam Divan. He pointed out that DCR 23 providing for recreational space at the ground level existed since the inception of DCR in 1991, and even prior thereto since 1967. It was always contemplated that the recreational space will be at the ground level, and not at an elevated level within buildings. This is clear from the provision with respect to the trees and playgrounds contained in DCR 23. Besides, he pointed out that sub-clause (*iii*) of DCR 38(34) clearly provides that "*podium shall be used for the parking of vehicles*", meaning thereby that it is essentially to be used for parking purposes. That apart, he submitted that there is clearly a risk involved in providing both parking as well as recreational space on the podium. DCR 38(34)(*iv*) has been introduced by way of an amendment only from 6-1-2012, and it does not contain a non obstante clause that the provision is notwithstanding the mandatory requirement under DCR 23. It cannot, therefore, be read in derogation of the main provision under DCR 23.

26. Mr Divan then brought to our notice the harsh reality of the open spaces becoming smaller and smaller in the city of Mumbai. He placed the following hard statistics for our consideration. Greater Mumbai has just 1.91 sq m of open space per person. Of this, less than 0.88 sq m per person is accessible for recreational purpose. This is woefully inadequate as compared to the norms of 3 sq m per capita as prescribed by the National Building Code of India, 2005 and of 11 sq m per capita recommended by the Urban Development Plans Formulation and Implementation Guidelines (1996) of the Ministry of Urban Affairs, Government of India. He pointed out that pouring of too much of cement and concrete is not conducive to good human living, and will ultimately affect meaningful "life" within the meaning of Article 21 of the Constitution. Recreational spaces are intended to ensure that there are green "breathing spaces" between buildings and properties in the built-up environment. Trees and the land around them at the ground level are necessary for controlling the air pollution from the point of view of health of human beings as well. The shifting of recreational space from the ground to podiums will result in higher level of concretisation, diminishing green cover, and buildings being too close to each other, leading to increased city temperature.

27. Having noted these submissions, it is seen that a podium is permissible only on plots admeasuring 1500 sq m or more. So this provision is not applicable to plots smaller than 1500 sq m. As can be seen from DCR 23(1)(*a*), it speaks of a layout or sub-division of "vacant land" and open spaces. The open spaces "shall as far as possible" be provided in one place. If a layout or sub-division is more than 5000 sq

m, open space can be provided in more than one place, but at least one such place "shall be of not less than

1000 sq m". These provisions clearly show that they are mandatory. Besides, under sub-clause (*f*) of DCR 23 there is a requirement of keeping the recreational open space permanently open to the sky and trees are to be grown in that space as laid down i.e. five trees per hundred square metres of the recreational space within the plot. DCR 2 (64) defines "*open space*" to mean an area forming an integral part of a site left open to the sky. A "*site*" is defined under DCR 2(83) to mean a parcel or piece of land enclosed by definite boundaries. These DCRs when read together, very much make it clear that the recreational/amenity space has to be on the land i.e. on ground level and it has got to be 15%, 20% or 25% of the area depending upon its size.

28. As rightly pointed out by the learned Senior Counsel Mr Nariman and Mr Salve, the requirement of recreational space on the podium under DCR 38(34)(*iv*) is discretionary. Besides, as the abovereferred sub-clause (*iii*) lays down, podium shall be basically used for parking. Besides, sub-clause (*iv*) does not contain a non obstante clause to override the requirement under DCR 23 making it mandatory to provide recreational space on the ground floor. That being so, the provision under DCR 38(34) cannot be read in derogation of the requirement under DCR 23 or else it will result into serious erosion in the basic requirements for a good life affecting the guarantee of right to life, under Article 21 of the Constitution of India. We have therefore to read down sub-clause (*iv*) of DCR 38(34) as inapplicable and not excluding the mandatory provision under DCR 23.

29. It is also relevant to note that the development schemes under DCRs 33(7), 33(9) and 33(10) provide for lesser recreational area/amenity spaces. Thus, under DCRs 33(7) and 33(10) reduction in the amenity open space is permitted to make the project viable, but still minimum 8% of the project area is required to be maintained as amenity open space. Similarly, for the schemes under DCR 33(9) minimum 10% of the plot area is required to be retained as recreational space. In other properties, where there are no such constraints to make the development schemes of rehabilitation or reconstruction of old buildings or slums viable, there is no reason why the amenity open space at the ground level should be read as permissible, to be reduced. The only ground being given is to provide more parking and more

accommodation, meaning thereby more construction, concretisation and financial expediency. Such a purpose cannot be read into the provisions as they presently exist, nor is it desirable to do so from the point of view of the requirement of minimum open spaces at the ground level.

30. Besides, as pointed out by Mr Divan, the requirement of having trees and open land around them is necessary from an environmental point of view, since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level. It must be noted that the right to a clean and

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healthy environment is within the ambit of Article 21, as has been noted in *Amarnath Shrine, In re*[4] in the following words: (SCC p. 258, para 12)

> "*12*. The scheme under the Indian Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment."

The right to a clean and pollution free environment, is also a right under our common law jurisprudence, as has been held by this Court in *Vellore Citizens' Welfare Forum* v. *Union of India*[5] where this Court held: (SCC p. 660, para 16)

> "*16*. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment."

31. In the same judgment the Court emphasised the importance of sustainable development, and the need for a balance between development and ecological considerations, in the following words: (*Vellore Citizens' Welfare forum case*[5], SCC pp. 657-58, para 10)

> "*10*. The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer … 'Sustainable Development' as defined by the Brundtland Report means 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'. We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists."

32. Therefore, after reflecting upon the legal position, we are clearly of the opinion that having 15%, 20% or 25% of the area (depending upon the size of the layout) as the recreational/amenity area at the ground level is a minimum requirement, and it will have to be read as such. We therefore, answer Issue (*i*) by holding that it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreational area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area.

Issue (iv) with respect to the protection against fire hazards

33. As stated earlier, this issue was decided to be gone into considering that the main building in the present complex is going to be of 48 storeys. This issue was decided to be gone into also in the backdrop of the recent fire that engulfed the six-storeyed Secretariat building of Maharashtra, in Mumbai. It took a few days to extinguish the fire which resulted into a loss of

lives. This Court sought the affidavit of the Chief Fire Officer of the appellant Municipal Corporation on this issue. Shri Suhas Vishnu Joshi, Chief Fire Officer, Mumbai Fire Brigade, has affirmed his reply on 15-9-2013. In Para 3 of his affidavit, he has stated that the Fire Brigade of the appellant Municipal Corporation has got special appliances such as aerial ladder platform which can reach up to the height of 70 m, and the Department is in the process of procuring special appliances which can reach up to the height of 90 m. In Para 4, he has accepted that in high-rise buildings above 90 m, the fire-fighting operations cannot be carried out from outside the building alone. They are also to be fought from inside the building with the help of fire safety and protection measures/installations provided in the high-rise buildings as per the building bye-laws. He has pointed out the passive safety measures as well as active fire safety measures necessary for the high-rise buildings in his affidavit. Amongst the fire safety measures, he has pointed out that the width of the access road and the open space for manoeuvrability of fire appliances has to be adequate.

34. It is also pointed out in this affidavit of the Chief Fire Officer that there is a State Act known as the Maharashtra Fire Prevention and Life Safety Measures Act, 2006 under which the developers/society in charge of the building have to maintain the fire prevention and life safety measures in good repair and efficient condition at all times. In

Para 7 of his affidavit he has stated that for any high-rise and special type of buildings, no-objection certificate from the Chief Fire Officer is required at two stages viz. prior to the construction of the building and after the compliance of the requirement. Besides, for buildings having a height above 70 m, there is a High-Rise Technical Committee under the Chairmanship of a retired Hon'ble High Court Judge with other experts and the proposal for high-rise buildings has to be cleared by this Committee.

35. As far as the manoeuvrability of the fire appliances is concerned, fire protection requirements under DCR 43 become relevant. This DCR 43 is split in two parts (*1*) General, and (*2*) Exits for every building. It reads as follows:

> "**43. *Fire Protection Requirements***.—
>
> (1) ***General***.—The planning design and construction of any building shall be such as to ensure safety from fire. For this purpose, unless otherwise specified in these Regulations, the provisions of Part IV; fire protection chapter, National Building Code, shall apply.
>
> For multi-storeyed, high-rise and special buildings, additional provisions relating to fire protection contained in Appendix VIII shall also apply—
>
> (A) For proposal under Regulations 33(7) and 33(10), in case of rehabilitation/composite building on plots exceeding 600 sq m and having height more than 24 m, at least, one side other than the roadside, shall have clear open space of 6 m at ground level, accessible from the roadside:

> Provided, if the building abuts another road of 6 m or more this condition shall not be insisted upon:
>
> Provided further that in case of redevelopment proposals under DCR 33(7), for plot size up to 600 sq m, 1.5 m open space will be deemed to be adequate.
>
> (B) For the proposal other than (A) above:
>
> (*a*) Buildings having height more than 24 m up to 70 m, at least one side, accessible from roadside, shall have clear open space of 9 m at ground level:
>
> Provided, however, if podium is proposed it shall not extend 3 m beyond building line so as to have clear open

space of 6 m beyond podium:

Provided, further, where podium is accessible to fire appliance by a ramp, then above restriction shall not apply.

(*b*) Buildings having height more than 70 m, at least two sides, accessible from roadside, shall have clear open space of 9 m at ground level:

Provided, however, if podium is proposed it shall not extend 3 m beyond building line so as to have clear open space 6 m beyond podium. No ramps for the podium shall be provided in these side open spaces.

Provided further, where podium is accessible to fire appliance by a ramp then above restriction shall not apply.

(*c*) Courtyard/ramp/podium accessible to fire appliance shall be capable of taking the load up to 48 tonnes.

(*d*) These open spaces shall be free from any obstruction and shall be motorable.

(2) ***Exits***.—Every building meant for human occupancy shall be provided with exits sufficient to permit safe escape of its occupants in case of fire or other emergency for which the exits shall conform to the following—

(*i*) ***Types***.—Exits should be horizontal or vertical. A horizontal exit may be a doorway, a corridor, a passage way to an internal or external stairway or to an adjoining building, a ramp, a verandah, or a terrace which has access to the street or to the roof of a building. A vertical exit may be a staircase or a ramp, but not a lift.

(*ii*) ***General requirements***.—Exits from all the parts of the building, except those not accessible for general public use, shall—

(*a*) provide continuous egress to the exterior of the building or to an exterior open space leading to the street;

(*b*) be so arranged that, except in a residential building, they can be reached without having to cross another occupied unit;

(*c*) be free of obstruction;

(*d*) be adequately illuminated;

(*e*) be clearly visible, with the routes reaching them clearly marked and signs posted to guide any person to the floor concerned;

(*f*) be fitted, if necessary, with fire-fighting equipment suitably located but not as to obstruct the passage, clearly marked and with its location clearly indicated on both sides of the exit way;

(*g*) be fitted with a fire alarm device, if it is either a multi-storeyed, high-rise or a special building so as to ensure its prompt evacuation;

(*h*) remain unaffected by any alteration of any part of the building so far as their number, width, capacity and protection thereof is concerned;

(*i*) be so located that the travel distance on the floor does not exceed the following limits—

(*i*) Residential, educational, institutional and hazardous occupancies: 22.5 m.

(*ii*) Assembly, business, mercantile, industrial and storage buildings: 30 m.

Note.—The travel distance to an exit from the dead end of a corridor shall not exceed half the distance specified above. When more than one exit is required on a floor, the exits shall be as remote from each other as possible:

Provided that, subject to the provision under DC Regulation 44(5)(*a*) for all multi-storeyed high-rise and special buildings, a minimum of two enclosed type staircases shall be provided, at least one of them opening directly to the exterior, to an interior, open space or to any open place of safety.

(*iii*) ***Number and width of Exits***.—The width of an exit, stairway/corridor and exit door to be provided at each floor in occupancies of various types shall be as shown in Columns 3 and 5 of Table 21 hereunder. Their number shall be calculated by applying to every 100 sq m of the plinth or covered area of the occupancy, the relevant multiplier in Columns 4 and 6 of the said Table, fractions being rounded off upward to the nearest whole number."

36. Now, what is seen here is that under Clause 1(B) of DCR 43, for buildings having heights of more than 24 m up to 70 m, at least one

side accessible from roadside shall have clear open space of 9 m at ground level. For buildings which have a height of more than 70 m, at least two sides accessible from roadsides, shall have a clear open space of 9 m at ground level. In both these cases where podium is proposed, it shall not extend 3 m beyond the building line so as to leave clear open space of 6 m beyond podium. Similarly, Clause 1(A) lays down that in case of the proposals under DCR 33(7) (which are for the cessed building) and those under DCR 33(10)

(which are for the slum rehabilitation), if the plot of the building exceeds 600 sq m and the building is having height of more than 24 m, at least one side other than the roadside shall have a clear open space of 6 m at ground level accessible from the roadside. The first proviso to Clause 1(A) makes an exception if the building abuts another road of 6 m or more. In that case this condition is not insisted upon. Thus, as can be seen, a minimum access of 6 m to every building from two sides is insisted i.e. from a roadside and from one side within the property, or from two roadsides so that the fire engine can approach the building at least from two sides. The second proviso under Clause 1(A) however states that if the redevelopment proposal is under DCR 33(7) i.e. for reconstruction or redevelopment of cessed buildings on plots of size up to 600 sq m, only 1.5 m side open space will be deemed to be adequate. This will mean a space of just about 5 ft or so, through which a fire engine can certainly not enter.

37. We asked Mr R.P. Bhatt, learned Senior Counsel appearing for the Municipal Corporation as to what would be the height of these buildings on plots up to 600 sq m, and his answer was that it will depend on the number of flats for the families to be accommodated in such buildings, and it may as well go up to 20 floors.

38. Mr Ganesh, learned Senior Counsel appearing for the Maharashtra Chamber of Housing Industry defended the existing provision on the ground of economic viability of such projects, and submitted that for such projects under DCR 33(7), the side space inside the property will have to be reduced on that count. He submitted that some of these plots are very small and are in congested areas, and that these redevelopment schemes are carried out by private developers. Additional construction is required to be carried out to provide minimum accommodation to the existing occupants as well as for the newly entering occupants who pay higher amounts to buy the additional flats. He referred to and relied upon a judgment of a Bench

of two Judges of this Court in *Jayant Achyut Sathe* v. *Joseph Bain D'Souza*[6] wherein the challenge to the 1.5 m open space (i.e. about 5 ft) in the schemes under DCR 33(7) came to be rejected.

39. On the other hand, Mr Nariman pointed out that although the ladders/snorkels which the Fire Department has are supposed to go up to the height of 70 m, the maximum reach of the snorkel depends on various factors such as wind velocity, availability of space, and tilt and angle of the approach. Thus, the reach is always less than the theoretical maximum height. Besides, there are 33 fire brigade stations in Greater Mumbai, 15 in the city, 12 in western suburbs and 6 in eastern suburbs. None of these stations have sufficient equipment (snorkels) in their stations since they are in limited numbers.

40. It was also pointed out by Mr Nariman that as far as the internal arrangement in the multi-storeyed buildings is concerned, a refuge floor is required to be provided above every 7 floors for buildings crossing the height

of 24 m. However, these refuge floors are very often not properly maintained, are not kept vacant, and are used for other purposes. The consequence is that the effectiveness of the fire protection from within the building remains in peril. He further pointed out that the Fire Brigade is supposed to check installations such as sprinklers and other fire-fighting equipment's as provided under Appendix VIII inside the buildings periodically, but the Department is understandably overworked, and therefore not in a position to effectively cover all the buildings in the city.

41. Mr Shyam Divan, learned Senior Counsel appearing for UDRI pointed out that the present fire protection requirements contained in DCR 43(1) if strictly complied with, could be considered as adequate for mid-rise buildings and structures up to 13 storeys. However, when it comes to the high-rise buildings, the fire safety requirements are primarily compromised by relaxation in the access under DCR 17 and the side open/setback spaces between the buildings under DCR 28. He submitted that the provision contained in the second proviso of DCR 43 (1)(A) could not be justified.

42. As far as the schemes under DCR 33(7) are concerned, Mr Shyam Divan, learned Senior Counsel appearing for UDRI has pointed out that there is already a criticism with respect to these schemes viz. that they are working more for the developers and for the private new entrants who buy the flats at higher cost, than for providing the

accommodation to the existing occupants. The State Government is also raising its hands on the ground of financial difficulties to take up such schemes. Consequently, the inability of fire engines to go into such plots, and thereby permanently denying the occupants adequate fire protection is not the concern of either of them. Protection of the environment and human life are constitutional mandates, and even if the developers and the public authorities choose to ignore these essentials, this Court cannot.

Adequate access for the fire engines as an essential requirement

43. Having noted the submissions of all the counsel in this behalf, what we find is that whereas the provisions for the mid-rise buildings up to 13 floors are somewhat adequate, those beyond are required to be strictly implemented from within as well. The provisions for the refuge floor and various requirements from within have to be strictly scrutinised and insisted upon. That apart the second proviso to DCR 43 (1)(A) cannot stand scrutiny of minimum safety requirement. If the access of 6 m is required from at least one side within the property for the fire engine to enter and move inside, we fail to see as to how in redevelopment proposals under DCR 33(7) where the plot size is up to 600 sq m, open space of 1.5 m can be said to be adequate. As fairly pointed out by Mr Bhatt, the buildings on such plots can also go up to 20 floors, depending upon the number of flats for the occupants to be provided for. If that is so, it is necessary to have an open space of the width of 6 m within the property for the fire engine to enter the property at least from one side which is so provided for every other building.

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44. It is true that in *Jayant Achyut Sathe*[6] the challenge to the five feet open space in the schemes under DCR 33(7), came to be rejected. However, as can be seen from para 49 of the judgment, it was principally rejected on the ground that the challenge was hopelessly delayed since this provision restricting the open spaces in these schemes had been in existence since 1984. The question of fire engines not being able to go inside such plots, was raised in the Bombay High Court, but this Court has not gone into that aspect in the said judgment. We are looking into the issue of the side space on the backdrop of the failure of the Fire Brigade to quickly extinguish the fire even in the six-storeyed Secretariat Building in Mumbai, which has sufficient side spaces on all sides. Not providing a minimum space of 6

m which makes room for the fire engine to access the building amounts to violation of the right to life and equality of the residents of these buildings, by not providing the same standard of safety to them which is available to residents of all other buildings. It is true that some of these plots under the DCR 33(7) schemes are small plots and are in congested areas. But if that is so, nothing prevents the State Government from taking over such schemes for which it can finance from the overall cess collection. In such cases, it may have to accommodate only the existing occupants. This can also be achieved by calling upon such occupants to partly contribute towards the construction cost. But human life cannot be made to suffer only on the ground that in the redevelopment scheme sufficient access cannot be provided for the fire engine to enter within the plot even from one side.

45. We are, therefore, of the view that the second proviso to DCR 43 (1)(A) is discriminatory as against the occupants of the plots up to the size of 600 sq m and therefore violative of Article 14 of the Constitution of India. The provision is likely to lead to a hazardous situation, affecting the life of the occupants, and therefore violative of Article 21 of the Constitution. We, therefore, hold the provision to be bad in law. If the fire is to be extinguished at the earliest the fire engine must be able to reach the spot of fire, without any delay. Manoeuvrability of the fire engine is, therefore, of utmost importance. As such, most of the city roads are very narrow. On top of that if there is no adequate space for the fire engine to enter the property, the situation will become worse. We are clearly of the view that even for redevelopment proposals of plots up to the size of 600 sq m under DCR 33(7), an open space of the width of 6 m within the property which is accessible from the road on one side, will have to be maintained unless the building abuts roads of 6 m or more on two sides, or another appropriate access of 6 m to the building is available apart from the abutting road. This will be subject to the decision of the Chief Fire Officer in writing. Besides, we also feel that it is necessary to direct that the Fire Department must insist from the developer/society of all the buildings, to certify at least once in six months that the access to the building, the internal exits and the internal fire-fighting arrangements are maintained as per the expectations under the DCR, the norms of the Fire Department, and must check them periodically, on its own.

The decision on Issues (i) and (iv) to apply prospectively

46. Although, for the reasons stated above, we are of the view that the provision under DCR 38(34) cannot be read in derogation to the one under DCR 23 with respect to the recreational area, and also that the second proviso to DCR 43(1)(A) on fire protection requirements is hazardous and discriminatory against the occupants of the schemes under DCR 33(7), we do note the submission by the intervening Practising Engineers, Architects, and Town Planners Association that any such declaration/changes be implemented with prospective effect, namely, where the commencement certificate (CC) has yet not been granted.

Issue (ii) regarding height of the buildings vis-à-vis the width of the adjoining road, and Issue (iii) on the impact of additional FSI on the traffic situation

47. As far as Issues (*ii*) and (*iii*) are concerned, though they are, in a way, independent issues, they are interrelated also, and therefore, we will deal with them together. These are issues requiring wider consideration and consultation amongst planners, and as far as these issues are concerned, this Court will confine itself to making certain recommendations for consideration of the planners. This is because this Court is conscious of the fact that the new development plan for the city of Mumbai is in the process of being drafted. It is for the planners to examine these issues. However, since these issues have arisen in the context of the present matter, this Court has invited the response from the appellant Municipal Corporation as well as the State Government. The interveners concerned have also made their submissions. We shall look into the submissions in this behalf and make certain suggestions for consideration in the light thereof.

Issue (ii): Height of buildings vis-à-vis width of the roads

48. DCR 31(1) lays down that the height of a building shall not exceed one-and-a-half times the total of the width of the street on which it abuts. Issue 2 is framed in the backdrop of the fact that in the present case, a tower of the height of 195.90 m is being constructed. This tower is bounded by four roads and the height of the tower is disproportionately high, as against the width of the adjoining roads. The first proviso to DCR 31(1) lays down that this restriction shall not be applicable for the construction of buildings undertaken under DCRs 33(7), 33(8) and 33(9). Though, these DCRs are for the housing redevelopment schemes they also add to the population in the particular area as well as the vehicles. It is from this point of view that the question has been framed as to whether these exemptions are justified, valid or legal?

49. DCR 31(1) reads as follows:

"**31.** ***Heights of buildings***.—

(1) ***Height vis-à-vis the road width***.—The height of a

building shall not exceed one-and-a-half times the total of the width of the street on which it abuts and the required front open space. The restrictions of

height of the building spelt out in Regulation 31(1) shall however, cease to apply in case where the plot fronts on road having width more than 18.00 m and where front marginal open space of 12 m minimum is observed, provided that open spaces as on other sides are made available as required from the fire safety point of view. For this purpose, the width of the street, may be the prescribed width of the street, provided the height of the building does not exceed twice the sum of the width of the existing street and the width of the prescribed and required open space between the existing street and the building. The latter width shall be calculated by dividing the area of land between the street and the building by the length of the front face of the building.

Explanations.—

(*i*) '**Prescribed width**' here means the width prescribed in the development plan or the width resulting from the prescription of a regular line of the street under the Mumbai Municipal Corporation Act, 1888, whichever is larger.

(*ii*) If a building abuts two or more streets of different widths, it shall be deemed for the purpose of this regulation to abut the wider street; the height of the building shall be regulated by the width of that street and may be continued to this height to a depth of 24 m along the narrower street, subject to conformity with Regulation 28:

Provided however, that restrictions on height spelt out in this regulation shall not be applicable for reconstruction and redevelopment of old buildings undertaken under Regulations 33 (7), 33(8) and 33(9) of these Regulations, which are not affected by Coastal Regulations Zone Notification dated 19-2-1991, issued by the Ministry of Environment and Forests, Government of India, and orders issued from time to time:

Provided however that restrictions on height spelt out in this regulation shall not be applicable for construction of buildings undertaken under Regulations 33(10) and 33(14) of these Regulations for implementation of Slum Rehabilitation Scheme."

50. As far as this issue is concerned, response was sought from the Secretary, Urban Development Department, of the State of

Maharashtra, and the Chief Engineer, Town Planning of the appellant. Shri Manu Kumar Srivastava, Principal Secretary, Urban Development Department, Government of Maharashtra has explained these exemptions in his affidavit. He has pointed out that these schemes under DCRs 33(7), 33(8) and 33(9) seek to achieve free of cost in situ rehabilitation of the occupants living in old and dilapidated buildings. Therefore, to make the scheme viable, incentive FSI is granted, which the developer uses to construct what is called as a "sale component" that is sold in the open market to recover the cost incurred by him for constructing the tenements for rehabilitation of the existing tenants. Therefore, the restriction on the height of these buildings vis-à-vis the width of the road, is required to be relaxed.

51. Shri Rajiv Kuknur, Chief Engineer, Development (Development Plan) in his affidavit on this issue on behalf of the appellants, reiterated that the exemptions under these DCRs are for accommodating existing tenants which is done with the participation of private developers. Mr Ganesh,

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appearing for the Maharashtra Chamber of Housing Industry, has similarly justified granting higher FSI and construction of the high-rise buildings on that footing.

52. The State Government was represented by the learned Senior Counsel, Mr Shekhar Naphade. He pointed that the city was suffering from some basic constraints viz. on the one hand, the population was increasing, particularly in the suburbs, and on the other hand, the land resources were very limited. There was also the floating population moving from the northern suburbs to the city everyday and returning back by the evening. He submitted that one has to take into consideration the practical realities. At the time when the development plan was prepared in 1991, the appellant Municipal Corporation found that it could not acquire land for various public projects such as gardens and playgrounds and therefore, the concept of Transferred Development Rights (TDR) was introduced, whereunder the landowner surrenders the land required for gardens or playgrounds and gets the TDR in lieu thereof. He pointed out that the population density in Mumbai was very high. It was 270 persons per hectare as against 106 of New York, 83 of Singapore and 64 of Hongkong. The Corporation had to adjust the competing interests and therefore, at appropriate places the high-rise buildings had to be permitted.

53. Mr Shyam Divan, on the other hand, submitted that these tall

structures have affected access to natural light and ventilation and have created a number of health problems. In his submission, there should not be a blanket exemption for projects involving additional FSI from the height restrictions under DCR 31. There should be accountability on the part of the authority and the project developer to whom relaxation is granted. He submitted that some of these buildings which were reconstructed with high FSI under DCRs 33(7), 33(8) and 33(9), had been reduced to vertical slums. The developers do not bother to look into the maintenance of these schemes, the construction is poor and a large number of the occupants for whom these houses are constructed, sell them and the purpose of having the scheme, gets defeated.

Issue (iii) concerning impact of FSI on the traffic situation

54. As far as Issue 3 viz. impact of FSI on the traffic situation is concerned, Shri Manu Kumar Srivastava, has pointed that as per the census of 2011, 30.82 lakh people were staying in the island city. Due to the accelerated economic growth, there is a spurt in the vehicles of the occupants, as well as, those entering the island city. In Para 6.3, he has placed on record the steps taken by the State Government in this behalf. This Para 6.3 reads as follows:

> "*6.3* … * * *
>
> (*i*) Revising the captive parking requirements upwards for various categories of buildings.

> (*ii*) Introducing instruments like Regulation 33(24) for creating public parking lots.
>
> (*iii*) Taking up construction of mass rapid transit systems like Metro Rail, Mono Rail, etc. so as to wean people away from the use of personalised means of transport."

In Para 6.4 he has referred to the suggestions made by a High-Powered Committee regarding traffic management and that steps were being taken according to those recommendations. In Para 7 of his affidavit, he has stated that the draft development plan for the period 2014-2034 is under preparation, wherein many of these difficulties will be taken care of.

55. Shri R.C. Dixit, Chief Engineer, Roads and Traffic of the appellant Municipal Corporation has filed his affidavit on Issue 3. He has pointed out that the number of vehicles in Greater Mumbai has increased from 3.08 lakhs from 1981 to 19.38 lakhs in 2011, and the population has

increased during this period from 82.43 lakhs to 124.78 lakhs. Out of this population, that of the island city is 31.06 lakhs. He has pointed out in Para 16 of his affidavit that the State Government has constituted a High-Powered Committee on 6-6-2012 to suggest corrective and remedial measures. It has also to prepare an action plan for recommendations up to 2016-2017. In Para 18, he has referred to various recommendations made by the High-Powered Committee and that the same are being followed.

56. Shri Vivek Phansalkar, Commissioner of Police, Traffic, Mumbai, has stated in Para 9 of his reply that as per information of the State Transport Department, on an average 450 new vehicles were being added to the road network every day. The vehicular population by January 2013 was nearly 21 lakhs. He has stated that Mumbai continues to have a high usage of public transport, yet there is a relatively sharp increase in use of cars in the last decade which has pushed Mumbai into a situation of a gridlock. Increasing vehicles on the roads have led to bottlenecks for traffic movement. In Para 13 he has stated that no definite findings can be arrived at without a comprehensive study of the impact of additional FSI in the island city of Mumbai on traffic density. He has however, accepted that periodical increase in FSI would result in more construction which, in turn, could lead to the higher tenement density, indicating an increase in traffic. In Para 14, he has suggested various measures to control the traffic congestion.

57. UDRI has made various suggestions. Its trustees include Mr Charles Correa, an eminent architect and town planner; Shri Dipak Parekh, an eminent economist; Shri D.M. Sukhtankar, retired Municipal Commissioner and former Secretary to the Government of Maharashtra and others. This institute has made a detailed study of the problems of the city. With respect to Issue 2, this institute has submitted as noted above, that there should not be a blanket relaxation for the high-rise buildings, and it should be examined locality wise. Absence of any check in this behalf, has resulted into very tall buildings with no open spaces on extremely narrow streets. It is often seen that whereas the ordinary FSI is 1.33, the minimum FSI available to the

schemes under DCRs 33(7), 33(8) and 33(9) is 2.5, and there is no upper limit. No assessment is made of the sustainable carrying capacity of the areas in which these projects are implemented. There is no transport impact assessment on the neighbourhood in such projects. A locality wise approach is therefore required.

58. In its submissions on the issues at hand, UDRI pointed out that whereas the total open space in Mumbai is 3.8%, if we compare it with another crowded area viz. Manhattan in US, there the public open space for recreation is 13.1%. The National Building Code (of India) requires 3 sq m per capita by way of open space. However, Greater Mumbai has just 1.91 sq m of open space per person, and of this less than 0.88 sq m per person is accessible for recreation. Each Manhattan resident occupies 11 times as much floor space as a Mumbai resident. Doubling or trebling Mumbai's FSI will only make it two or three times denser than Manhattan in regard to the number of people on the ground. Consequently, the open space available per person will become even less.

59. Since the project of respondent Kohinoor is going to be at a busy road junction near Shivaji Park in the Dadar area of Mumbai, it is pointed out by UDRI that Dadar, Mahim, and Matunga areas, are essentially residential areas. Various housing colonies were laid out, as per the Town Planning Scheme, such as Dadar Parsi Colony and Hindu Colony, etc. In fact, Mr Divan pointed out that the entire area around Shivaji Park was laid out systematically as per the norms, for a specified population, and it is like a heritage area. Requisite provisions for gardens, schools, roads, footpaths and playgrounds, etc. have been made for a certain density of population. Now with the reconstruction schemes being proposed, suddenly tall buildings are coming up even near the school buildings, and adding further to the density and pressure on the existing infrastructure. The roads having been laid out much earlier, and being in proper proportion to the height of the adjoining buildings, these new tall buildings coming up in the very area are causing congestion and greater traffic. This is affecting the life of the people around and even the school-going children, with increased traffic and parking on the roads. The roads which were adequate at one point of time, are now being found to be narrow. Plot No. 46, with which we are concerned, in the present matter, had a textile mill earlier, and now a huge commercial complex has been approved on it. But for this construction, there were no such large commercial complexes in this entire area. Earlier only those commercial activities were permitted which were necessary for the use of the residents. This huge commercial complex is going to add tremendous pressure on the traffic in the area and at an already busy junction.

Suggestions on Issues (ii) and (iii) for consideration when the New Development Plan is drafted

60. We have noted the submissions on both these issues, and what we find is that the exemptions from DCR 31(1) for schemes under DCRs 33(7),

33(8) and 33(9), though apparently meant for laudable purpose, are very often resulting into extreme crowding, and traffic congestion. It is necessary that while granting exemptions from DCR 31(1), there must be a scheme-wise approach, and there ought to be a proper supervision of the construction. These development schemes and the additional FSI thereunder, should be examined locality wise. The impact of such high-rise buildings on the adjoining locality as well as on the traffic, is required to be examined before granting such permission.

61. In our view, there is a need to restrict the additional pressure on existing infrastructure so that it does not affect the quality of life. The existing social infrastructure like educational institutions, open spaces, hospitals, etc. and physical infrastructure like water supply and drainage is already overburdened. Therefore, wherever possible, the State Government, the Planning Authority, and the committee entrusted with drafting of the new plan should consider contribution by the existing occupants themselves to a good extent towards the construction cost, or the State should contribute through its agencies or from the amount of cess collected. This will result into curtailing the number of additional entrants and will not add to the density of the population. This approach should particularly be examined where the plots are small or are in congested areas, and particularly where the proposal is under DCR 33(7). The new development plan is to be prepared shortly, and while preparing the plan these aspects concerning restrictions on blanket exemptions, contribution by the existing occupants to the reconstruction schemes, locality wise consideration and impact of additional FSI on traffic, ought to be gone into. In areas where the old town planning schemes have prescribed a uniform layout, one can accept some buildings going up to a certain extent, if necessary, to accommodate the existing occupants in a reconstruction scheme. However, it should not result into a plethora of steeply rising buildings, to accommodate outsiders to the building, adding to the population and traffic, and disturbing the existing order of the layout completely.

Reconstitution of the Technical Committee for High-Rise Buildings

62. It has been pointed out on behalf of the Municipal Corporation that subsequent to a PIL in the Bombay High Court in the case of Tardeo Haji Ali Residents Welfare Association, the State Government has constituted a "Technical Committee for High-Rise Buildings" (i.e.

buildings exceeding 70 m in height):

62.1. As per the note submitted by the learned Senior Counsel for the Municipal Corporation, the terms of reference of the Committee are as follows:

"(*1*) The Committee shall be of advisory nature and it will advise the Municipal Commissioner regarding the feasibility of the development proposals that might be referred to it by the Commissioner.

(*2*) It will be open for the Commissioner to overrule the recommendations of the Committee, after giving a proper and reasonable

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justification in writing. Such powers will not be delegated to any subordinate officer.

(*3*) In specific cases, if the Chairman desires, any expert from other fields may be invited for the meeting of the Committee."

62.2. The note points out

(*1*) The building proposals which are to be referred to the Committee.

(*2*) The procedure to be followed by the Committee.

(*3*) The points to be considered by the Committee viz.

(*a*) ***Architectural points***:

(*1*) Clear width of access available.

(*2*) Location, width and number of staircase.

(*3*) Natural ventilation to staircase and common lobby.

(*4*) Whether benefit of DC Rule 33(24) is availed?

(*5*) The minimum net plot size for high-rise proposal is prescribed as 1000 sq m and 850 sq m for proposals under DCR 33(7).

(*6*) Depth and numbers of the basement.

(*7*) Area and location of the refuge floors.

(*8*) Open spaces, podiums, etc.

(*9*) Two-wheeler and four-wheeler parking provisions in the building.

(*10*) Width of common lobby and ventilation.

(*b*) ***Structural and geotechnical points***:

(*1*) Soil report indicating soil strata, depth of the hard rock,

etc.

(*2*) Type of foundation i.e. pile foundation or raft foundation or open foundation.

(*3*) Design base report (DBR) for the proposal.

(*4*) Various type of tests carried on site i.e. wind tunnel test.

(*5*) Gust factor and deflection.

(*6*) Details of the rock anchors, if any provided for basement.

(*7*) Details of the soil retaining methods.

(*c*) ***Environmental points***:

(*1*) Shadow analysis.

(*2*) Wind analysis.

(*3*) Heat analysis.

(*4*) Traffic study and traffic management.

(*5*) Ecological study (tree plantation, green area, etc.).

(*6*) Disaster management plan.

(*7*) Total water requirement.

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(*8*) Total waste water sewage generated and disposal (design of sewerage treatment plant).

(*9*) Effect of the construction material on environment.

(*10*) Rain water harvesting and storm water management.

(*11*) Air environment in construction and operation phase.

(*12*) Solid waste management.

(*13*) Energy conservation techniques.

(*d*) ***The point of view of the CFO***:

(*1*) Height of first refuge floor from ground floor and also height of subsequent refuge floors.

(*2*) Location of refuge area.

(*3*) Whether refuge area is cantilevered.

(*4*) Clear open space along with turning radius for movement of fire tender around the building.

(*5*) Width and gradient of ramp (one-way or two-way) leading to podium.

(*6*) Alternate provision for fighting the fire from ground.

(*7*) Driveway for fire tender movement on paved RG.

(*8*) Height of underpass in case fire tender moving below building.

(*9*) Podium line should be flush with building line on refuge facing area.

(*10*) Number of staircase and width of staircase.

(*11*) Distance between two staircases, through common lobbies/passages.

(*12*) Natural ventilation through sidewalls of basements.

(*13*) Compartmentalisation of the basements.

63. The first Committee was appointed by a resolution of the Urban Development Department dated 28-7-2004. The composition of the Committee has changed from time to time. We are informed that the term of the existing Committee, which is the third Committee, has expired. The Committee consists of six members and is headed by a retired Judge of the Bombay High Court, as the Chairman. It has two ex-officio members, namely, the Chief Engineer (Development Plan) of the appellant who is also the Member-Secretary, and the Chief Fire Officer of the appellant. There are three expert members. Following are the present expert members:

"(*1*) Prof. R. S. Jangid, Deptt. of Civil Engineering, IIT Bombay, as a Structural Engineering Expert.

(*2*) Prof. Abhay Bambole, Professor and Head of the Structural Engineering Department, VJIT, Matunga, as the Soil and Geotech Expert.

(*3*) Dr Rakesh Kumar, Director and Gr. Scientist and Head, NEERI Regional Centre as the Environmental Expert."

64. It has been suggested that we appoint a new committee, though the State Government has expressed its willingness to extend the term of the present committee. Mr Nariman has, in fact, suggested that the Committee should consist of members who will play a proactive role. Mr Divan submitted that it should be a development plan oversight committee, and it should at least look into the grievances with respect to the schemes under DCRs 33(7), 33(8), 33(9), and 33(10). Mr Joaquim Reis, learned Senior Counsel instructing Dr Abhishek Singhvi, learned Senior Counsel appearing for the Property Redevelopers Association, suggested inclusion of an architect in the committee.

65. Considering that the architectural points as mentioned in the

Municipal note, are also to be gone into by the Committee, the suggestion is quite apt. He suggested the inclusion of eminent architect Mr Charles Correa, who is associated with UDRI (and which is represented by Mr Divan). We are, however, not including his name only for the reason that we are informed that he is a very busy architect, though the Committee should certainly consult him whenever necessary. In his place, we include Shri Pankaj Joshi, Architect, Urban Researcher, and consultant to the appellant Municipal Corporation, whose name is suggested by Mr Divan. Thus, the assistance of an architect will also be available to the Committee. Having taken the consensus of the counsel appearing in the matter, we are effecting one more change in the Committee. We appoint Hon'ble Mr Justice P.S. Patankar, former Judge of the Bombay High Court, to be the Chairman of the Committee.

66. *The Committee will now consist of the following*:

(*1*)	Chairman	Mr Justice P.S Patankar, former Judge of the High Court of Bombay
(*2*)	Member-Secretary	Chief Engineer (Development Plan) of Municipal Corporation of Greater Mumbai (MCGM)
(*3*)	Member (Structural Engineering Expert)	Prof., Department of Civil Engineering, IIT Bombay, Powai (presently Professor R.S Jangid or any other professor, with the required qualifications, nominated by the Director, IIT Powai)
(*4*)	Member (Soil, Mech. Geo Tech. Expert)	Prof. and Head of the Structural Engineering Department, VJTI, Matunga (presently Prof. Abhay Bambole or any other professor, with the required qualifications, nominated by the Principal, VJTI)
(*5*)	Member (Environmental Expert)	Director, Gr. Scientist and Head, NEERI Regional Centre (presently Dr Rakesh Kumar)
(*6*)	Ex-officio member	Chief Fire Officer of MCGM
(*7*)	Member (Architect and Urban Researcher)	Mr Pankaj Joshi (Architect, Urban Researcher, and Consultant to MCGM)

67. *The additional terms of reference for the Committee*:

67.1. As of now, all new building proposals where the height of the building exceeds 70 m is referred to the Committee. A scrutiny fee for Rs 50,000 per proposal is collected at the time of submission of the proposal. We have already referred to the existing terms of reference. In view of the discussion in this matter, in our view, it is desirable that the Committee be requested to look into two additional aspects which are as follows:

67.2. The Committee will also look into the grievances regarding construction and technical requirements of the development schemes under DCRs 33(7), 33(8), 33(9) and 33(10), whenever brought to the notice of the Committee by persons concerned.

67.3. The Committee may as well make recommendations to the State Government with respect to the new development plan which is under drafting.

68. The Committee will have to spend good time for this work. The honorarium paid to the Chairman is presently fixed at Rs 15,000 per month, and it was fixed much earlier. Now we are widening the terms of reference. Therefore, we direct that the appellant Municipal Corporation will pay an honorarium of Rs 50,000 per month to the Chairman. The other members will be provided with the conveyance charges and attendance charges to attend the meetings and for site inspections, as per the municipal rules. The Municipal Corporation will make available an appropriate room in its headquarters and secretarial staff for the working of the Committee.

69. The State Government shall issue necessary notification reconstituting the Committee, its terms of reference, and other aspects, such as honorarium, etc. within four weeks hereafter.

70. Before we conclude, we record our appreciation for all the learned counsel who have assisted us in deciding the issues, and particularly the Senior Counsel Mr Nariman and Mr Salve, who appeared for the respondents and the appellants respectively, at the stage of the earlier order which was passed on 25-7-2013, but assisted the Court in deciding the four issues.

71. *In the circumstances we pass the following order*:

71.1. The memorandum of settlement dated 18-4-2013, concerning the public parking lot (PPL) arrived at between the appellant Municipal Corporation of Greater Mumbai and the respondents was taken on

record, as noted in Part I order dated 25-7-2013[2], in the facts and circumstances of the present case. Both the parties shall act strictly in accordance with the same. It is clarified that as held in the said order, the Municipal Circular dated 22-6-2011 is not in any way held to be bad in law.

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71.2. The four additional issues framed in Part II of the above order dated 25-7-2013[2] are decided as follows:

71.2.1. ***Issue (i)*** — The minimum recreational space as laid down under Development Control Regulation (DCR) 23, cannot be reduced on the basis of DCR 38(34). The recreational space, if any, provided on the podium as per DCR 38(34)(*iv*), shall be in addition to that provided as per DCR 23.

71.2.2. ***Issues (ii) and (iii)*** — The Government of Maharashtra, the Development Plan Drafting Committee, and the appellant Municipal Corporation shall consider the suggestions as contained in paras 60 and 61 above, while framing the Development Plan for Greater Mumbai.

71.2.3. *Issue (iv)* — The second proviso to DCR 43(1)(A), concerning fire protection requirements, is held to be bad in law. We hold that even for the reconstruction proposals of plots up to the size of 600 sq m under DCR 33(7), open space of the width of 6 m at least on one side at ground level within the plot, accessible from the roadside will have to be maintained for the manoeuvrability of a fire engine, unless the building abuts two roads of 6 m or more on two sides, or another access of 6 m to the building is available, apart from the road abutting the building.

71.3. The decision as contained in paras 71.2.1 and 71.2.3 above, will apply to those constructions where plans are still not approved, or where the commencement certificate (CC) has not yet been issued. All authorities concerned are directed to ensure strict compliance accordingly.

71.4. The Government of Maharashtra shall issue the necessary notification within four weeks of this order, reconstituting the "Technical Committee for the High-Rise Buildings", as directed in paras 64 to 66, including the additional terms of reference, as mentioned in para 67 above. The appellant is directed to render assistance and provide the required honorarium, as mentioned in para 68 above.

71.5. In view of the settlement arrived at between the parties, as well as Part I order dated 25-7-2013[2] mentioned in para 71.1, and the

determination on the four additional issues as in para 71.2 above, no further order is required on this appeal, and the appeal stands disposed of accordingly.

71.6. The parties will bear their own costs.

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† Arising out of SLP (C) No. 33402 of 2012. From the Judgment and Order dated 9-7-2012 of the High Court of Judicature of Bombay in WP No. 143 of 2012

[1] *Kohinoor CTNL Infrastructure Co. (P) Ltd.* v. *Municipal Corpn. of Greater Mumbai*, (2013) 1 Mah LJ 88 : (2013) 3 Bom CR 410

[2] *Municipal Corpn. of Greater Mumbai* v. *Kohinoor CTNL Infrastructure Co. (P) Ltd.*, (2014) 4 SCC 574

[3] (2011) 14 SCC 481 : (2013) 1 SCC (Civ) 897 : (2013) 2 SCC (Cri) 555 : (2013) 1 SCC (L&S) 305 : AIR 2012 SC 100

[4] (2013) 3 SCC 247 : (2012) 12 Scale 307

[5] (1996) 5 SCC 647

[6] *Jayant Achyut Sathe* v. *Joseph Bain D'Souza*, (2008) 13 SCC 547