

BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL
WESTERN ZONE BENCH, PUNE

ORIGINAL APPLICATION NO. 28 OF 2023 (WZ)

Santosh Daundkar ... Applicant

versus

SEIAA, Environment Department
Government of Maharashtra & Ors. ... Respondents

LIMITED PRELIMINARY AFFIDAVIT IN REPLY
ON BEHALF OF RESPONDENT NO.11

I, **Preeti Chheda**, an adult and Indian Inhabitant, authorised signatory of the Respondent No.11 and having my office address at Raheja Tower, Plot No.C-30, Block 'G', Bandra Kurla Complex, Bandra (East), Mumbai 400051, do hereby solemnly affirm and state as under:-

1. I say that I am the authorized representative of Respondent No. 11. I say that I have read and familiarized myself with the papers and proceedings in the captioned matter. I am conversant with the facts and circumstances of the present case and am able and competent to depose to the same from facts to my personal knowledge and records maintained by Respondent No.11.
2. I say that I have perused a copy of the captioned Application filed by the Applicant abovenamed and am filing this Affidavit-in-Reply in response to the captioned Application



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inter-alia raising preliminary objections and opposing the grant of any interim/ ad-interim reliefs in favour of the Applicant as prayed for in the captioned Application and to place on record the true and correct facts of the matter. This Affidavit is not a detailed response to the OA. I crave leave to file a further detailed Affidavit(s) as may be required and/ or as I may be advised.

3. At the outset, I deny each and every allegation, contention and insinuation made by the Applicant in the captioned Application along with all Exhibits and documents referred to therein, which is contrary to and/ or inconsistent with what is set out herein, and nothing contained therein is or should be deemed to be admitted by Respondent No.11 for want of specific traverse or otherwise.
4. At the further outset and without prejudice, I say and submit that the captioned Application is not maintainable, grossly misconceived and ought to be dismissed in *limine* with costs for the following reasons each of which are taken without prejudice and in the alternative to one another.
5. **This Hon'ble Tribunal lacks subject-matter jurisdiction to adjudicate upon the present dispute:**
 - 5.1 I say and submit that this Hon'ble Tribunal does not have the subject-matter jurisdiction to adjudicate upon the



present dispute. I say and submit that the Applicant is inter-alia required to satisfy the two-pronged test set out in Section 14 of the National Green Tribunal Act, 2010 in order for this Hon'ble Tribunal to exercise jurisdiction. Under Section 14 of the Act, the Applicant is required to show that there are substantial questions relating to environment which arise in the present matter and that such questions arise out of the implementation of the enactments specified in Schedule I to the said Act.

5.2 At the outset, I say and submit that the Applicant has failed to raise any substantial questions relating to environment which merit adjudication by this Hon'ble Tribunal. In any case, I say and submit that a perusal of the captioned Application clearly demonstrates that the present disputes/questions relating to environment in fact relate to the implementation of the provisions of the Development Control Regulations, 1991 and/ or the Development Control & Promotion Regulations for Greater Mumbai, 2034 in relation to the development of real estate projects. I say and submit that the Development Control Regulations are referable to Section 22(m) of the Maharashtra Regional and Town Planning Act, 1966. I further say and submit that under the MRTP Act, 1966, any matter concerning/ relating to the implementation of the provisions of the Development Control Regulations, 1991 and/ or the Development Control



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& Promotion Regulations, 2034 falls within the exclusive domain of the jurisdictional planning authority.

5.3 I say and submit that admittedly, the Development Control Regulations, 1991 and/ or the Development Control & Promotion Regulations, 2034 and/ or the MRTP Act, 1966 are not the enactments which are specified in Schedule I to the said Act. I say and submit that the Applicant has wholly failed to establish as to how this Hon'ble Tribunal has the subject-matter jurisdiction relating to the implementation of the provisions of the Development Control Regulations, 1991 and/ or the Development Control & Promotion Regulations, 2034 and/ or the MRTP Act, 1966. On this ground alone, I say and submit that this Hon'ble Tribunal does not have subject-matter jurisdiction to adjudicate upon the present dispute.

6. **OA is barred by limitation and suffers from delay and laches:**

6.1 At the further outset and without prejudice to the above, I say and submit that the captioned Application is barred by limitation and ought not to be entertained by this Hon'ble Tribunal.

6.2 I say that a perusal of the prayer sought in the captioned Application demonstrates that the Applicant is purportedly



seeking application of the Order dated 13th September 2022 passed by this Hon'ble Tribunal to the real estate project developed/ being developed by Respondent No. 11. I say and submit that without prejudice to anything stated by me herein, admittedly, the cause of action, if any, entitling the Applicant to seek such relief accrued to the Applicant on the date of the passing of the said Order dated 13th September 2022.

- 6.3 I say and submit that under Section 14(3) of the NGT Act, 2010, the limitation period for filing the present Application is a period of 6 (six) months from the date on which the cause of action first arose. I say and submit that the said period of 6 (six) months commenced on 8th May 2018 i.e. when Regulation 27 of DCPR 2034 came into force and expired in or around 8th November 2018. Assuming without admitting that the Applicant's cause of action arose on 13th September 2022, the 6 (six) month period expired on or around 13th March 2023 and admittedly, the Applicant filed the present Application only in or around May, 2023, i.e., beyond the applicable limitation period prescribed in Section 14(3) of the NGT Act, 2010. I say and submit that on this ground alone, the captioned Application is barred by limitation and ought not to be entertained by this Hon'ble Tribunal.



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- 6.4 Without prejudice to the above and in any case, the OA in effect, seeks to challenge Regulation 27 of DCPR 2034. The said regulation was brought into effect on 8th May 2018. The OA is thus hopelessly barred by the law of limitation.
- 6.5 Even otherwise, I say and submit that the OA also suffers from gross delay and laches for the reasons more particularly set out hereinbelow and ought to be dismissed on this ground. I say that this Respondent with respect to its development project, has received occupation cum building completion certificate from the MCGM with respect to the commercial building upto the 40th floor out of 42 floors and is almost near completion. This Respondent has leased/licensed/agreed to lease most of the units. Many of the lessees/licensees are already using, occupying and have already commenced their business operations from these premises. This Respondent has incurred costs over Rs.2000 crores in respect of the project till date. I therefore say and submit that there is gross delay and laches on part of the Applicant and that the same disentitles the Applicant to any reliefs whatsoever.

7. **No cause of action qua Respondent No.11:**

- 7.1 At the further outset, it may be noted that the OA does not disclose any cause of action against Respondent No. 11 or any offence/violation of any nature whatsoever committed



by Respondent No. 11, that would warrant exercise of jurisdiction by this Hon'ble Tribunal. In the entire OA, the purported 'cause of action' (if it can even be called that) qua Respondent No. 11, may be found at page 25 of the OA where at Serial No.11 of the Table, it is mentioned "*RG has been placed on the 9th floor for plantation*". Apart from this solitary, bald sentence, the OA does not talk about or refer to Respondent No.11 at all. The OA is totally devoid of any substance and material that disclose any purported violation of any provision of law by Respondent No.11.

7.2 It is settled law that jurisdiction cannot be exercised on mere whims or suspicions, but, require cogent data and material to be placed before it. The present OA is a fishing enquiry conducted by the Applicant in the hope of unearthing some material qua Respondent No. 11. If the Applicant had any substantive cause of action with respect to Respondent No. 11, there is no reason why the same would not find place in the OA. The very fact that the only purported allegation qua Respondent No. 11 is the solitary and unsubstantiated averment reproduced above, is itself demonstrative that there is no cause of action against Respondent No. 11, no case is made out to pass any orders against Respondent No. 11, and, no case is made out for this Hon'ble Tribunal to exercise jurisdiction qua Respondent No. 11. The OA is replete with vague allegations and extremely academic and



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hypothetical grounds that ought not to be entertained by this Hon'ble Tribunal.

- 7.3 It is respectfully submitted that the Applicant is inviting this Hon'ble Tribunal to exercise its jurisdiction in an unheard of manner viz. make vague cryptic allegations against Respondent No. 11. It is respectfully submitted that for the sole reason that the OA does not disclose any purported violations committed by Respondent No. 11, the OA is wholly misconceived and not maintainable qua Respondent No. 11 and ought to be dismissed *in limine*.

8. **The Hon'ble Supreme Court of India is in seisin of the issue:**

- 8.1 Another reason for dismissing the OA *in limine*, is that the Applicant has invited this Hon'ble Tribunal to adjudicate on a matter that is directly, substantially and materially under consideration by the Hon'ble Supreme Court of India in *Sagar Devre & Anr. v. NAREDCO West Foundation & Ors.* [SLP (Civil) Diary No.11843 of 2023]. A brief background to recapitulate the events that led to the institution of the petition in *Sagar Devre* supra is appropriate.

- 8.2 In *Anil Tharthare v. Secretary, Environment Department of the State of Maharashtra & Ors.* [Appeal No.22 of 2016 (WZ)], this Hon'ble Tribunal passed the Order dated 13th



September 2022 holding that recreation ground has to be provided on the ground which should not only be open to the sky, but must also enable plantation of trees and directed that if the project proponent fails to provide recreational ground in such manner, the project may not be allowed to proceed. The said Order passed in the matter of *Anil Tharthare* supra was on the basis of the judgement of the Hon'ble Apex Court in the case of *MCGM & Ors. vs. Kohinoor CTNL Infrastructure Co. Pvt. Ltd. & Anr.*, [(2014) 4 SCC]. The Order passed by this Hon'ble Tribunal is an order passed in personam and not in rem. It is not and cannot be treated as an order / judgement in rem and be construed as general direction that in all developments that recreation ground has to be provided at ground level only.

- 8.3 Thereafter, the records indicate that this order was communicated to the Respondent No.1 SEIAA and resultantly, the SEIAA deferred numerous proposals received by it for environmental clearance.
- 8.4 Being aggrieved by the inaction of the SEIAA, NAREDCO West Foundation filed Writ Petition (Lodging) No.35671 of 2022 before the Hon'ble Bombay High Court. By the Judgment and Order dated 27th January 2023, the Hon'ble Bombay High Court, after carrying out a detailed analysis of the decision of this Hon'ble Tribunal in *Anil Tharthare*



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supra, allowed the said Writ Petition with inter-alia the following observations:

- (a) That the decision of this Hon'ble Tribunal in the case of Anil Tharthare supra and the decision of the Hon'ble Supreme Court in Kohinoor CTNL supra were rendered in the context of the mandatory provisions of Regulation 23 of the Development Control Regulations, 1991;
- (b) That the provisions of the Development Control Regulations, 1991 stand superseded/ replaced by the provisions of the Development Control & Promotion Regulations for Greater Mumbai, 2034;
- (c) That the provisions of Development Control Regulations, 1991 relating to the exact location for the provision of recreational open space have undergone a change pursuant to the Development Control & Promotion Regulations for Greater Mumbai, 2034;
- (d) That the Order dated 13th September 2022 passed by this Hon'ble Tribunal cannot be regarded as a blanket prohibition against the consideration of development approvals by the Respondent No. 1;
- (e) That Respondent No. 1 is required to take into consideration the provisions of the Development Control & Promotion Regulations for Greater



Mumbai, 2034 for granting applicable permissions and clearances; and

- (f) That Respondent No. 1 could not have deferred the grant of permissions relying upon the Order dated 13th September 2022 passed by this Hon'ble Tribunal.

8.5 It is thus clear that the Hon'ble Bombay High Court's order in *NAREDCO West* supra, has recognised and held that there is a material difference between Regulation 23 of DCR 1991 (which did not envisage provision of mandatory R.G. at any location other than mother earth as interpreted by the Hon'ble Apex Court in *Kohinoor CTNL*) and Regulation 27 of DCPR 2034 (which permits provision of R.G. at podium levels). Moreover, the Hon'ble Bombay High Court directed Respondent No.1 to consider proposals for grant of environmental clearances on its own merits by applying the provisions of DCPR 2034.

8.6 The Hon'ble Bombay High Court's order was assailed in *Sagar Devre* supra wherein by an order dated 8th May 2023, the Hon'ble Apex Court has stayed the directions contained in the Hon'ble High Court's order dated 27th January 2023 and to the best of my knowledge, such stay has continued till date.

8.7 In this backdrop, this Hon'ble Tribunal may appreciate that the order dated 27th January 2023 of the Hon'ble High Court



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has only been stayed and has not been set aside. It is settled law that an order of interim stay does not result in quashing of the impugned order and that it only means that the order will not be acted upon by the parties thereto from the date of the order of the stay.

8.8 It is therefore respectfully submitted that (a) the *dicta* decided in the impugned judgment remains operative and is binding until the judgment itself is set aside by the superior court, (b) mere passing of an interim order staying the portion of the interim order does not wipe out its existence and its authority or precedential value is not undermined, (c) unless the decision is actually set aside, it remains effective as a precedent.

8.9 In any case, I submit that Regulation 27 of DCPR 2034 continues to remain on the statute book and is valid and has not been set aside by any competent Court of Law and therefore, the prayers sought in the OA cannot and ought not to be granted.

8.10 Furthermore, it may be appreciated that the OA essentially invites this Hon'ble Tribunal to pass broad sweeping orders, with respect to points of law and issues that the Hon'ble Supreme Court of India is already in seisin of in *Sugar Devre* supra. It is a settled proposition of law that tribunals in the nature of this Hon'ble Tribunal ought not pass orders



and hear matters that are already under consideration of the constitutional courts. A past instance of the Hon'ble National Green Tribunal, Principal Bench proceeding to hear and pass orders in a matter of which the High Court was in seisin, was deprecated by the Hon'ble Supreme Court of India. I crave leave to refer and rely upon the same at the time of arguments.

8.11 It is an equally settled principle of law that subordinate courts ought not continue with proceedings before it when a higher court / authority is seized of the matter. I crave leave to refer to and rely upon the relevant authorities in this regard.

8.12 The OA invites this Hon'ble Tribunal to transgress its jurisdiction and to cross all established norms of judicial propriety. I respectfully submit that this should not be countenanced.

9. **The construction of this Respondent's project being a subject matter of the captioned Application, is governed inter-alia by Regulation 27 of DCPR 2034 and not Regulation 23 of the DCR 1991:**

9.1 It is respectfully submitted that Regulation 27 of the DCPR 2034 governs the provision of LOS/ R.G. Area for construction, which is presently in force and is vires and



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valid and has not been set aside by any competent Court of Law.

- 9.2 The first para of Note 2 to Regulation 27 of DCPR 2034 *inter-alia* permits the provision of 60% of the required LOS / R.G. Area on mother earth and the balance 40% of the required LOS / R.G. Area on podium area extending beyond the building line. The second para of Note 2 to Regulation 27 of the DCPR 2034 also permits the provision of the LOS / R.G. Area on the topmost podium / open to sky subject to the conditions set out therein. Note 2 of Regulation 27 of DCPR 2034 is reproduced hereinbelow for ready reference,-

"2. The minimum 60% of the required LOS shall be provided exclusively on the ground and at least 50% of this shall be provided on mother earth to facilitate the percolation of water and balance 40% of required LOS may be provided on podium area extending beyond the building line. The LOS on mother earth shall not be paved and all LOS shall be accessible to all the occupants of the plot/layout. Rest of the compound pavement other than stated above shall be paved with perforated paving having adequate strength, in order to facilitate percolation of rain water into the ground.

The entire LOS may be provided on top most podium / open to sky subject to condition that 1.5 m. unpaved



distance shall be kept for planting of trees and thereafter marginal open space required as per these Regulations 47(1) for the maneuvering of fire fighting engine (& other equipment's) on site from where light & ventilation is derived shall be provided on two sides. The area of said 1.5 m. wide strip shall not be counted in required LOS. If LOS is proposed on podium, then no parking shall be allowed on the same and rain water harvesting shall be provided on podium."

9.3 The latest amended plan approval dated 23rd March 2023 approved by the MCGM sets out that the net plot area of the land on which this Respondent is undertaking development of its project is 11,233.79 square meters and the required R.G. Area is 2,808.45 square meters (i.e. 25% of 11,233.79 square meters). This Respondent has however proposed 2,830.42 square metres of R.G. Area (that is more than the required R.G. Area) on the topmost podium/open to sky as permissible under Regulation 27 of the DCPR 2034. This Respondent craves leave to refer to and rely upon the Amended Plan Approval and other approvals in this regard.

9.4 Thus, this Respondent has in accordance with and as permissible under Regulation 27 of DCPR 2034, proposed to provide the required LOS/R.G. Area. Thus, there is no alleged violation by this Respondent as alleged by the Applicant.



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10. Regulation 27 of DCPR 2034 is in full force and effect. The OA challenges Regulation 27 of DCPR 2034, which is impermissible:

10.1 Through vague statements and loose drafting, the OA attempts to obfuscate the Applicant's real challenge i.e. to Regulation 27 of DCPR 2034. It is respectfully submitted that Regulation 27 of DCPR 2034 permits provision of the mandatory R.G. in the manner as stated therein. The said regulation and DCPR 2034 itself, are in full force and effect and have not been set aside by any competent Court of Law. Inasmuch as the OA prays for demolition of portions of podium on which R.G. is provided (which is permissible in Regulation 27 of DCPR 2034), it is clear that the OA is really a challenge to Regulation 27 of DCPR 2034.

10.2 This Respondent's development and provision of Recreation Ground is in compliance of Regulation 27 of DCPR 2034. The said regulation is in full force and effect and is binding law and is duly complied with by this Respondent.

10.3 Thus, the challenge in the OA viz. to Regulation 27 of DCPR 2034, is not maintainable before this Hon'ble Tribunal. It is settled law that this Hon'ble Tribunal does not have jurisdiction to adjudicate upon the vires of any



statutory provisions or of any subordinate legislation and I crave leave to refer to and rely upon the authorities in this regard. It is equally settled that the DCR 1991/DCPR 2034 are framed by the State in exercise of its powers under Section 22(m) MRTP Act, 1966 and form part of the 'Development Plan' and hence are not amenable to judicial review. The issues emanating from regulations of DCR 1991/DCPR 2034 and their implementation, cannot be considered or adjudicated by this Hon'ble Tribunal.

11. **Prayers in the OA cannot be granted since it is contrary to the judgment of the Hon'ble Bombay High Court:**

- 11.1 At para 4 of the OA, the Applicant has admitted that he seeks general directions to apply the order dated 13th September 2022 passed by this Hon'ble Tribunal in *Anil Tharthare* supra inter-alia to the case of the Respondent No. 11. However in *NAREDCO West* supra, the Hon'ble Bombay High Court has held that *Anil Tharthare* supra was evidently a case considering DCR 1991 and not DCPR 2034. It has also held at para 25 that,-

“The judgment and order dated 13 September 2022 of NGT in case of Anil Tharthare vs. The Secretary, Environment Dept. State of Maharashtra & Ors. cannot be construed to mean a blanket prohibition



*to consider the proposals of the projects governed by
DCPR 2034 or UDCPR”*

- 11.2 As mentioned above, the order dated 27th January 2023 of the Hon'ble Bombay High Court has only been stayed and has not been set aside and the ratio and observations thereof continue in force. Therefore, inasmuch as the OA seeks application of an order (that the High Court found applicable only to DCR 1991) even to projects that are being developed under DCPR 2034, the same is not maintainable and such prayers cannot be granted by this Hon'ble Tribunal.
12. For the above reasons, I reiterate that the OA is not maintainable against this Respondent and ought not to be entertained by this Hon'ble Tribunal and ought to be dismissed with exemplary costs. The OA is a roving and fishing expedition that should not be permitted or countenanced. Respondent No. 11 is undertaking construction and development on its land in full compliance of all applicable laws and the approvals and sanctions accorded to it till date. Respondent No. 11 has invested enormous monies into the acquisition and development of the project and has created numerous third-party rights, all of whom would be vitally and drastically affected in case any reliefs are granted to the Applicant.



Solemnly affirmed at Mumbai)
this 19 day of March, 2024)

+ *Prati v chudra*

19 MAR 2024

Before me,

BEFORE ME

M/s. Wadia Ghandy & Co.

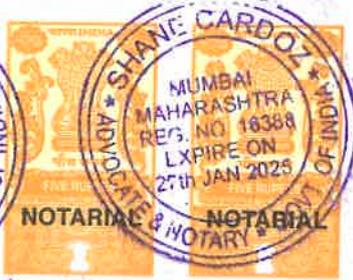
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Advocates for Respondent No.11

Notary Register Serial No.	1523/24
Date:	19 MAR 2024

ORIGINAL SEEN & VERIFIED						
AADHA	PAN	ELECTION ID	DRNG. LICENSE	PASSPORT	POA	RESOLUTION
D 5840 2914 8248						



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TRIBUNAL WESTERN ZONE BENCH, PUNE
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... Respondents

**LIMITED PRELIMINARY AFFIDAVIT IN
REPLY ON BEHALF OF RESPONDENT NO.11**

Dated this 19th day of March 2024



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