Bombay High Court
Adarash Cop-Op. Hsg. Soc.Ltd., ... vs Union Of India And Ors on 29 April, 2016
Bench: Ranjit More

WP369chamber.odt

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.369 OF 2011

1. Adarsh Co-op. Housing Society Ltd.)
A Society registered under Maharashtra)
Co-operative Societies Act, 1960,)
Having its address at : CTS No.652,)
Block VI, Colaba Division,)

Captain Prakash Pethe Marg,)
Adjacent to Backbay Bus Depot, Colaba)
Mumbai - 400 005.)

2. Tarakant Sinha)
Age : 55 years ig)
Member of Adarsh CHS Ltd., residing at)
Flat No.2801, Adarsh Co-operative)
Housing Soc., Capt.Prakash Pethe Marg,)

Colaba, Mumbai - 400 005.) ... Petitioners

Vs.

1. Union of India
Through Ministry of Environment and)

Forests, Paryavaran Bhavan,)
CGO Complex, Lodh Road,)
New Delhi - 110 003.)

2. Mr. Jairam Ramesh)
Hon'ble Minister of State holding)
Independent Charge of Ministry of)
Environment and Forests,)
Union of India, New Delhi.)

3. Mr. Bharat Bhushan, Director,)
Ministry of Environment and Forests,)
Union of India, New Delhi.)

4. Dr. Nalini Bhat, Advisor and Competent)
Authority appointed by)
Ministry of Environment and Forests,)
Union of India, New Delhi.)

5. National Coastal Zone Management)

Authority, having office at Ministry of)
Environment and Forests,)
Union of India, New Delhi.)

6. Maharashtra Coastal Zone Management)
Authority, having its office at Environment)

Department, Room No.217 (Annex),)
Mantralaya, Mumbai - 400 032.)

7. State of Maharashtra)

8. Secretary, Urban Development Department)
Government of Maharashtra.) ... Respondents

Mr. Navroz Seervai, Senior Advocate a/w. Mr. Manish Desai, Mr. Saket

Petitioners.

Mone, Mr. Vishesh Kalra, Mr. Subit Chakraborti i/b. Vidhi Partners for

Mr. R. S. Apte, Senior Advocate a/w. Mr. Rui Rodrigues and Mr. Parag Vyas for Respondent No.1-UOI.

Mr. D. J. Khambata, Senior Advocate a/w. Ms S. U. Deshmukh for Respondent No.6.
Mr. Shailesh Shah, Senior Advocate a/w. Mr. B. H. Mehta, AGP for Respondents No.7 and 8-State.

Mr. Harinder Toor a/w. Ms Prachi Sawant i/b. M. V. Kini & Co. for BEST.
Mr. Sanjay Kadam with Ms Apeksha Sharma, Applicant in Chamber

Summons No.147 of 2011.

CORAM : RANJIT MORE & R.G.KETKAR, JJ.

Reserved on : 2ND DECEMBER, 2016 Pronounced on: 29TH APRIL, 2016 JUDGMENT: (PER R. G. KETKAR, J.) By administrative order dated 25.08.2015 passed by the Hon'ble the Chief Justice, this Special Bench was reconstituted for hearing of above Petition and other connected matters from the Division Benches available at Original / Appellate Side. In pursuance thereof, we have heard Mr. Navroz Seervai, learned Senior Counsel for petitioners, Mr. R. S. Apte, learned Senior Counsel for respondent No.1, Mr. Daraius Khambata, learned Senior Counsel for respondent No.6, Mr. Shailesh Shah, learned Senior Counsel for respondents No.7 and 8 and Mr. Toor, WP369chamber.odt learned Counsel for BEST at length. At the request and by consent of the parties, the Petition is taken up for final hearing.

2. This Petition is instituted by Adarsh Co-operative Housing Society Limited (for short 'Adarsh Society') and one of its members under Article 226 of the Constitution of India against respondent No.1 -

Union of India, Ministry of Environment and Forests (for short 'MOEF'), respondent No.2 - Mr. Jayram Ramesh, the then Hon'ble Minister of State holding independent charge of MOEF, respondent No.3 - Dr. Bharat Bhushan, Director, MOEF, respondent No.4 - Dr. Nalini Bhat, Advisor and Competent Authority appointed by MOEF, respondent No.5 - National Coastal Zone Management Authority (for short 'NCZMA'), respondent No.6 - Maharashtra Coastal Zone Management Authority (for short 'MCZMA'), respondent No.7 - State of Maharashtra and respondent No.8 - Secretary, Urban Development Department (for short 'UDD'), Government of Maharashtra.

3. By this Petition, petitioners have challenged -(i) recommendations made in the minutes of the 20th meeting of NCZMA convened on 11.11.2010 (exhibit-C, pages 81-85), (ii) show cause notice dated 12.11.2010 (exhibit-D, pages 89-95) issued by the respondent No.3 - Dr. Bharat Bhushan, Director MOEF, (iii) report dated 13.01.2011 (exhibit- E, pages 96-118) of respondent No.4 - Dr. Nalini Bhat, Advisor and Competent Authority appointed by MOEF, (iv) order dated 14.01.2011 (exhibit-F, pages 333-335) passed by respondent No.3 - Dr. Bharat Bhushan, Director, MOEF, and (v) order dated 16.01.2011 (exhibit-G, pages 336-337) passed by the respondent No.2-Mr. Jayram Ramesh, the then Hon'ble Minister, MOEF. The relevant and material facts, albeit topic-wise, giving rise to the filing of the present Petition, briefly stated, are as under:

WP369chamber.odt (A) Notifications, Correspondence relating to C.R.Z.

4. In exercise of powers conferred by Section 3(1) and Section 3(2)

(v) of the Environment (Protection) Act, 1986 (for short 'E.P.Act') and Rule 5(3)(d) of Environment (Protection) Rules, 1986 (for short 'E.P.Rules'), MOEF issued Notification on 19.02.1991 (for short '1991 Notification') declaring coastal stretches as Coastal Regulation Zone (for short 'CRZ') prohibiting and regulating activities under the CRZ. Paragraph 2 thereof prohibits activities enumerated in clauses (i) to (xiii) within CRZ. Paragraph 3 thereof provides for regulation of permissible activities. Paragraph 4 thereof lays down the procedure for monitoring the enforcement. Paragraph 6(2) of Annexure-I lays down norms for regulation of activities.

5. On 27.09.1996, MOEF approved Coastal Zone Management Plan (for short 'CZMP') for Maharashtra. MOEF issued Notification dated 09.07.1997 (for short '1997 Notification), amending the 1991 Notification. On 12.11.1997, Principal Secretary to Government of Maharashtra addressed a letter to the Municipal Commissioner of Municipal Corporation of Greater Mumbai (for short 'Corporation') wherein it was clarified that the total development permission cannot be stopped in CRZ area. Municipal Commissioner was requested to scrutinize the proposals as per 1991 Notification, subsequent letters dated 27.09.1997 and 1997 Notification. It was further set out therein that the development proposals within a CRZ area in which investment exceeds rupees five crores should only be referred to State Government for clearance and other proposals should be cleared by the Corporation as per the approval of the Government of India, MOEF Notification and letter.

6. On 08.09.1998, MOEF issued letter clarifying the expression WP369chamber.odt "Existing Authorized Buildings". In exercise of powers conferred by sub-sections (1) and (3) of Section 3 of the E.P.Act, the Central Government issued order on 26.11.1998 constituting MCZMA consisting of various officials for a period of 2 years with effect from date of publication of that order in the Official Gazette. The Secretaries of Department of Environment and UDD, Government of Maharashtra, among others were the members of the MCZMA. On 19.01.2000, MOEF approved the revised CZMP of Greater Mumbai. By order dated 04.01.2002, the Central Government reconstituted MCZMA consisting of various officials for a period of 3 years with effect from the date of publication of that order in the Official Gazette.

ig The Principal Secretaries of Department of Environment and UDD, among others were the members of MCZMA.

7. To the same effect, orders were passed on 02.09.2005 and 31.12.2008 reconstituting MCZMA with effect from the date of publication of that order in the Official Gazette for a period of three years. Principal Secretary / Secretary, Environment Department and Principal Secretary / Secretary, UDD, Government of Maharashtra, among others were members.

8. In the meantime, in exercise of the powers conferred by Section 3(1) and 3(2)(v) of the E.P. Act read with Rule 5(3) and (4) of the E.P.

Rules, the Central Government issued Notification on 22.04.2003 (for short "2003 Notification") as it was of the opinion that the 1991 Notification should be amended with a view to preventing further ecological damages. On 06.01.2011, CRZ Notification was published (for short "2011 Notification").

WP369chamber.odt B) Relevant Development Control Regulations and Notifications

9. In 1967, the Development Control Rules for Greater Bombay were sanctioned by the State Government (for short '1967 DCR') and FSI as far as land bearing CTS No.652, Block VI, Colaba Division, Captain Prakash Pethe Marg, adjacent to Backbay Bus Depot, Colaba, Mumbai - 400 005 (for short 'subject plot') was 3.5. On 10.06.1977, Notification was issued by the Bombay Metropolitan Region Development Authority (for short 'BMRDA') restricting the permissible FSI in the municipal limits of Corporation to 1.33. The said Notification was to have effect for a period of two years from the date of its issue.

On 05.10.1989, BMRDA issued Notification restricting the permissible FSI in the municipal limits of Corporation to 1.33. The said Notification was to have effect and be in force until 10.10.1991. By Notification dated 20.07.1990, the State Government sanctioned separately that part of the draft plan of 'A' Ward as shown in Schedule II annexed thereto, subject to the modifications specified in the Schedule I thereto annexed, which shall be final Development Plan for the 'A' Ward and fixed 01.09.1990 to be the date on which the final Development Plan of 'A' Ward of the Island City (excluding the said excluded part of the draft Plan of 'A' Ward as shown in Schedule II) was to come into force.

10. On 20.02.1991, the final development plan as also the Development Control Regulations for Grater Mumbai, 1991 were sanctioned (for short '1991 DCR') and they were brought in force with effect from 25.03.1991. On 10.04.2002, UDD of Government of Maharashtra in exercise of powers conferred under sub-section (2) of Section 37 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'M.R.&T.P. Act') sanctioned the proposed reduction of Captain Prakash Pethe Marg from 60.97 mtrs to 18.40 mtrs and the area so deleted was included partly in residential zone (marked as A-B-C-D, WP369chamber.odt subject plot), partly included in Parade Ground (marked as G-H-I-J), partly included in Helipad and Garden area (marked as E-F-G-H) and partly included in BEST Depot (marked as C-D-E-F). In exercise of powers vested under Section 50(1) of the M.R.&T.P. Act, Government of Maharashtra issued Notification dated 03.03.2006 sanctioning the proposal of deletion of reservation of the Bus Depot on land adjacent to plot No.87-C of B.B.R.Block No.6 admeasuring about 2661,68 sq.mtrs.

and including the same in the residential zone subject to certain conditions.

C. CORRESPONDENCE

11. On 03.08.2000, Adarsh Society addressed a letter to the Hon'ble Chief Minister of Maharashtra, who was at the relevant time also the Urban Development Minister, for deletion of the proposed road in military area. On 05.10.2002, Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra addressed a letter to the Secretary, MOEF requesting the latter to issue NOC for development of subject plot. On 02.12.2002, Dr. A. Senthil Vel, Joint Director of MOEF addressed a letter to Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra. On 04.01.2003, Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra addressed a letter to the Joint Director of MOEF enclosing therewith the documents sought for by letter dated 02.12.2002. On 11.03.2003, Dr. A. Senthil Vel, Joint Director, MOEF addressed a communication to Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra. On 15.03.2003, Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra addressed a communication to the Chief Engineer (Development Plan) of Corporation.

WP369chamber.odt D) Allotment of land and permissions from the Planning Authority:

12. On 18.01.2003, Government of Maharashtra issued Letter of Intent (LOI) proposing to allot the subject plot on lease or on the basis of the occupancy rights on terms and conditions to be decided by the Government in due course. On 09.07.2004, the Government allotted land to Adarsh Society on payment of Rs.10,19,19,652/- subject to conditions. Possession was handed over to the petitioners on 04.10.2004. On 05.08.2005, Revenue and Forests Department of Government of Maharashtra sanctioned use of FSI of 2669.5 sq.mtrs. of plot in use of BEST to Adarsh Society on payment of premium of Rs.6,14,02,640/-. On 06.09.2005, commencement certificate was issued by Mumbai Metropolitan Region Development Authority (for short 'MMRDA') upto the plinth level. On 23.09.2005, Intimation of Disapproval (IOD) was issued by the Corporation to the Adarsh Society.

13. On 22.12.2005, Chief, City and Area Planning Department of MMRDA addressed a communication to the Principal Secretary, Revenue and Forests Department, Government of

Maharashtra soliciting the decision of the Government on the points set out therein as regards construction of residential building of Adarsh Society on the subject plot. On 11.06.2007, in pursuance of IOD issued by the Corporation, MMRDA issued commencement certificate for construction of building on the subject plot. The Commencement Certificate was renewed on 22.01.2008 and 04.08.2010 for various stages of construction. On 21.04.2010, No Objection Certificate was issued by the Chief Fire Officer (CFO) of the Corporation. On 16.09.2010, MMRDA issued occupation certificate. In pursuance of various permissions, Adarsh Society has constructed building consisting of stilt plus two level WP369chamber.odt podium plus 28 upper floors with built up area of 8401 sq.mtrs. on the subject plot.

E) Show Cause Notices, Replies and the Impugned Orders:

14. On 03.11.2009, direction was issued by MCZMA to Adarsh Society under Section 5 of the E.P. Act calling upon it to submit the necessary documents of permission / clearance obtained from different statutory authorities including MCZMA within 15 days of the receipt of the said direction, failing which, it will have no option but to initiate appropriate legal action against Adarsh Society under the provisions of the E.P. Act. The said direction was issued on the basis of the complaint received from Shri Simprit Singh of National Alliance of People's Movements (NAPM).

15. On 17.12.2009, Adarsh Society gave reply denying the contents of the complaint. It was asserted that it had obtained all necessary approvals from High Rise Committee, MMRDA, BMC and CFO. In this connection, it was intimated that approval includes an approval from the Government of India, MOEF, New Delhi and Government of Maharashtra, UDD concerning to CRZ. Copies of the approval dated 11.03.2003 of MOEF, Government of India and communication dated 15.03.2003 of UDD, Government of Maharashtra were enclosed. It was further set out that in case the copies of the other approvals from MMRDA, BMC and CFO are required, they will be supplied immediately on demand.

16. On 25.10.2010, report appeared in Times of India to the effect that Adarsh Society did not have CRZ clearance. On 27.10.2010, Environment Department of Government of Maharashtra submitted interim report to the Director, MOEF as regards violation of CRZ WP369chamber.odt Regulations by Adarsh Society. On 30.10.2010, MMRDA revoked the Occupation Certificate issued by it on 16.09.2010. On 02.11.2010, Bombay Electric Supply and Transport (BEST) disconnected electricity supply on the basis of notice dated 31.10.2010. On 02.11.2010, Corporation issued notice for disconnection of water supply and the same was disconnected on 03.11.2010. MCZMA convened its 66 th meeting on 03.11.2010 for discussion of the violation of CRZ norms by Adarsh Society, MCZMA concluded the violations committed by the Adarsh Society and decided to refer the case of CRZ violation to MOEF for further action. On 11.11.2010, meeting of NCZMA was convened where violations of CRZ Notification by Adarsh Society was taken up at Agenda No.4 as an item under "Any other item with the permission of Chairman" and it was decided that Adarsh Society did not have CRZ clearance and recommended removal of building constructed on the subject plot by Adarsh Society.

17. On 12.11.2010, MOEF issued notice under Section 5 of the E.P.

Act to the Adarsh Society to show cause within 15 days "as to why the unauthorized structure erected by the Adarsh Society should not be removed forthwith in its entirety". On 24.11.2010, Adarsh Society, through its Advocate, submitted interim reply and sought four weeks extension to file a detailed reply together with supporting documents. On 15.12.2010, a detailed reply was filed by Adarsh Society through its Advocate. On 04.01.2011, respondent No.4 - Dr. Nalini Bhat, Advisor and Competent Authority, appointed by MOEF, gave hearing. On 10.01.2011, Adarsh Society filed written submissions. On 13.01.2011, respondent No.4 - Dr. Nalini Bhat submitted report recommending removal of the building of Adarsh Society in its entirety. On 14.01.2011, order was issued by the respondent No.3 - Mr. Bharat Bhushan, Director, MOEF directing demolition of building of Adarsh WP369chamber.odt Society on the basis of report dated 13.01.2011 of respondent No.4 - Dr. Nalini Bhat. On 16.01.2011, respondent No.2 - Mr. Jayram Ramesh, the then Hon'ble Minister of State for Environment ordered demolition of building. Thus, the petitioners have challenged the aforesaid actions / decisions by way of present Petition instituted under Article 226 of the Constitution of India.

18. The petitioners have inter alia challenged the decisions / actions principally on the following grounds:

a. The impugned actions / orders are clearly premeditated and predetermined based on perceptions and whims and fancies of the officers and the minister and are not objective. The actions and the decisions impugned clearly amount to being unreasonable, arbitrary and capricious.

b. The respondents have to take into consideration relevant factors and cannot take into consideration irrelevant and extraneous factors. The impugned actions / orders are vitiated on these grounds.

c. The impugned order is based on the report dated 13.01.2011 made by the respondent No.4 - Dr. Nalini Bhat. The said report was not furnished to the petitioners, which amounts to a complete denial of opportunity to controvert / disapprove the facts, contentions and conclusions in the report.

d. The report of the respondent No.4 is solely based upon the minutes of the meeting of NCZMA dated 11.11.2010 and the purported statements of Shri T. C. Benjamin, Principal Secretary, UDD, Government of Maharashtra and Shri Kunte, Principal Secretary, Revenue and Forests Department, Government of Maharashtra. The purported statements were not made or recorded in the presence of the petitioners and the reliance on the statements without giving opportunity WP369chamber.odt of cross-examination amounts to breach of principles of natural justice.

e. Impugned orders proceeded on the premise that petitioners have not obtained environmental clearance from the appropriate authority, which is contrary to the material on record.

f. Impugned orders proceeded on the premise that petitioners have exceeded permissible FSI of 1.33 and that petitioners cannot utilize FSI of BEST plot while carrying out construction over the subject plot, which is also contrary to the material on record.

g. Before considering the three options by respondent No.2 and passing the impugned order, petitioners were not heard. The order was passed by the respondent No.2, who was not a part of the panel.

h. Every facet of principles of natural justice is violated by the respondents.

19. On behalf of the respondent No.1 - Union of India, Mr. Thirunavukarasu, Deputy Director, MOEF has made affidavit dated 24.03.2011. In substance, it is contended that the communications dated 11.03.2003 and 15.03.2003, individually and / or collectively, do not constitute clearance under CRZ Notification. Under CRZ Notification, construction of residential building in CRZ-II Zone requires prior approval from MOEF. The recommendations of MCZMA were not obtained. As against permissible FSI of 1.33, petitioners have consumed FSI of 1.77 by loading additional FSI from the adjoining BEST plot, which is not amalgamated.

20. On behalf of respondent No.6 MCZMA, Shri Bhagwantrao N. Patil, Principal Secretary, MCZMA has made affidavit dated 21.06.2011. In substance, it is contended that the State level planning authorities can process the building proposals only after MCZMA gives its WP369chamber.odt recommendations. The clearance of MOEF was required in respect of the activities with investment exceeding Rs.5 crores excepting those activities which are to be regulated by the concerned authorities at the State / Union Territory level in accordance with the provisions of paragraph 6, sub-paragraph (2) of Annexure I of the 1991 Notification. The Central Government issued 2003 Notification withdrawing powers from the State Government. The letters dated 11.03.2003 and 15.03.2003 do not constitute clearance. Thus, the building in question is constructed without clearance of MOEF.

21. On behalf of respondents No.7 and 8, Shri Sanjay R. Kurve, Deputy Director of Town Planning has made affidavit dated 14.07.2011. In substance, it is contended that the letter dated 15.03.2003 of UDD does not amount to grant of NOC under the CRZ Regulations. In fact, that letter misinterpreted and misconstrued the letter dated 11.03.2003 issued by MOEF. In view of the Notification dated 04.01.2002, all projects require the recommendations of the MCZMA before environmental clearance could be given either by MOEF or by the concerned State Government agency. Reliance was also placed on clause 7 of the Letter of Intent dated 18.01.2003, which required Adarsh Society to obtain prior permission from MOEF for undertaking the construction. Even in the allotment letter dated 09.07.2004, condition was stipulated to the effect that prior permission of MOEF should be taken before any construction activity is carried out.

22. Petitioner No.2 Taraknath Sinha has made affidavit-in-rejoinder dated 05.04.2011 in reply to the affidavit-in-reply of Shri E. Thirunavukarasu, Deputy Director, MOEF. Dr. Bharat Bhushan, Director, MOEF has made affidavit-in-surrejoinder dated 11.04.2011 in reply to the affidavit-in-rejoinder dated 05.04.2011 of Mr. Taraknath Sinha.

WP369chamber.odt SUBMISSIONS OF THE PETITIONERS

23. In support of this Petition, Mr. Seervai submitted that the subject plot is situate in CRZ-II. The said fact is not disputed by any of the respondents. Nobody says that the subject plot is in CRZ-I. He submitted that 1991 Notification casts a responsibility on the local authorities at the State level only to regulate the building and construction activity with an investment exceeding Rs.5 crores. 1991 Notification further necessitated the regulation in accordance with the norms provided in paragraph 6(2) of Annexure-I. However, by virtue of paragraph 3(2), clearance from MOEF was necessary, inter alia, for activities with investment exceeding Rs.5 crores. The 1997 Notification restricted the requirement of clearance by MOEF in paragraph 3(2)(iv) only to activities with investment exceeding Rs.5 crores and which are not regulated by the concerned authorities at State / Union Territory level in accordance with paragraph 6(2) of Annexure-I of the 1997 Notification.

24. He submitted that the activities which were to be regulated by the concerned authorities at the State / Union Territory level as per paragraph 6(2) of Annexure I of the 1997 Notification did not require clearance from MOEF. Paragraph 6(2) provides that the development or construction activities within the State will be regulated by the concerned authorities at the State / Union Territory level. Thus, by virtue of 1997 Notification, the MMRDA being the Special Planning Authority for the area in which the building of the petitioners stands is the concerned Regulating Authority and / or concerned authority within the meaning of paragraph 3(2)(iv) and paragraph 6(2) of the 1997 Notification. Thus, the development / construction of petitioners' building being regulated by MMRDA did not require clearance as per paragraph 3(2)(iv) read with 6(2) of the 1997 Notification.

WP369chamber.odt

25. Mr. Seervai further submitted that while issuing Notifications from the year 1991 to 2011, MOEF has categorically carved out prohibited activities in different paragraphs under the Notifications. The expression "clearance" will not encompass or include the expression "prohibition" as these words are used to express different things and cannot be treated synonymous. MOEF has also used the expression "regulation" for those activities which are neither prohibited, nor required clearance. Thus, by using 3 different phrases, MOEF intended to give different meanings to these 3 phrases. In other words, it is not the intention of the MOEF to include the word "clearance" within the expression "regulation". He invited our attention to the meaning of the words "regulate" and "clearance" from - (i) Concise Oxford English Dictionary, 11th Edition, Revised and (ii) Collins Dictionary of English Language, 2nd Edition.

26. Mr. Seervai submitted that in the 1991 Notification, expressions "clearance" and "regulation" are used. When the subordinate legislation uses two different expressions, namely, clearance and regulation, obviously, they cannot mean the same thing. He submitted that the concept of regulation and clearance are two different concepts. In short, he submitted that the 1997 Notification does not require approval or clearance from MOEF or the agencies entrusted to clear such projects, as the case may be. Under the 1997 Notification, what is required is the Regulation by such authorities at the State or Union Territory level, as the case may be, under the relevant provisions of law governing such Regulation namely, Mumbai Municipal Corporation Act, 1888, M.R.&T.P. Act, MMRDA Act, Maharashtra Land Revenue Code, 1966 (for short 'MLRC'). Such regulation would include inter alia

the grant of permission for development, construction such as IOD, CC, OC, etc. from the Planning Authorities.

WP369chamber.odt

27. He alternatively submitted that assuming that environmental clearance is required for carrying out construction activities in the subject plot which admittedly falls in CRZ-II, the said clearance is obtained from both the MOEF and UDD.

28. He has taken us through the correspondence starting from 05.10.2002 and ending with 15.03.2003. He submitted that communication dated 11.03.2003 constitutes environmental clearance from MOEF. The communication dated 15.03.2003 of UDD, Government of Maharashtra constitutes clearance of the State Government for undertaking development in CRZ-II. At any rate, the communications dated 11.03.2003 and 15.03.2003 collectively constitute environmental clearance. On 05.10.2002, Deputy Secretary, UDD of Government of Maharashtra addressed a communication to the Secretary, MOEF. It was set out therein that the State Government had modified the sanctioned Development Plan of Backbay Reclamation area reducing the width of 60.97 mtr. wide road to 18.40 mtr. road and proposed to allot some land deleted from road to Adarsh Society subject to 1991 Notification. As per the CZMP for Corporation area sanctioned by MOEF vide letter dated 19.01.2000, the subject plot is situate in CRZ-II category and is situate between the existing Backbay Reclamation BEST Bus Depot and of existing road. The development is permissible as per the Development Control Regulations prevailing as on 19.02.1991. The infrastructure facilities, such as, electricity, water supply, drainage, etc. are also in existence. The subject plot is situate on the west side of the Captain Prakash Pethe Marg on which is development for residential and commercial purposes is in existence. Considering these facts, the State Government has decided to allot the subject plot to Adarsh Society for residential development. Request was, therefore, made for issuing NOC for development of the subject WP369chamber.odt plot. The documents such as application of Adarsh Society, part plan of Development Plan showing plot under reference, HTL and CRZ categorization were enclosed.

29. On 02.12.2002, Dr. A. Senthil Vel, Joint Director, MOEF acknowledged receipt of that letter and stated that the HTL and CRZ categorization of the area is not received. A request was also made to send the plot boundary superimposed on the approved revised CZMP of Grater Mumbai indicating the presence of authorized structure or road (existed prior to 19.02.1991) abutting the proposed site on the seaward side. In response to this letter, the Deputy Secretary, UDD, State of Maharashtra forwarded the desired information and necessary documents on 04.01.2003 indicating existence of structure prior to 19.02.1991 and abutting the proposed site on the seaward side.

30. Petitioners have filed additional affidavit dated 22.09.2015 made by Mr. R.C.Thakur, Secretary and Authorized Representative of the petitioners, enclosing therewith note dated 10.03.2003 of Dr. A. Senthil Vel. It is submitted that perusal of the note shows that the documents forwarded by UDD were considered. After considering these documents, the note records that as per the CZMP approved by MOEF on 19.01.2000, the subject plot is situate in CRZ-II and is located between the existing bus depot and the road. Government of Maharashtra has indicated that the proposed

development is permissible under the CRZ Notification. Government of Maharashtra have sought NOC from MOEF as there is a change in land use, that is, some portion of the road proposed in the Development Plan is being converted into residential complex. MOEF requested Government of Maharashtra (letter dated 02.12.2002 addressed by Dr. A. Senthil Vel to the Deputy Secretary, UDD) to indicate if the subject plot falls in CRZ-II area and is WP369chamber.odt located behind an authorized structure. In the same letter, a request was made to the Government of Maharashtra to send a map superimposing the subject plot on the approved revised CZMP indicating the presence of the authorized structure. A letter is received from the Government of Maharashtra (dated 04.01.2003) enclosing the plot boundary on the CZMP. As per the map, subject plot falls behind an authorized structure. The note further records that the issue pertains to changes in the land use plan in CRZ-II area on the landward side of the authorized structure. The CRZ Notification does not make any reference to the changes in land use within the CRZ-II area. Hence, MOEF have no objection to the constructions as long as the FSI for the proposed construction is as existed on 19.02.1991.

31. Relying heavily on this note, Mr. Seervai submitted that MOEF examined the proposal and was fully satisfied that the proposal is in order. He submitted that 1991 Notification read with 1997 Notification requires MOEF to ensure that the building is permitted only on the landward side of the existing road (or roads proposed in the approved CZMP of the area) or on the landward side of the existing authorized structures. Buildings permitted on the landward side of the existing and proposed roads / existing authorized structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor Space Index / Floor Area Ratio.

32. He submitted that as per letter dated 08.09.1998 of MOEF, the expression "Existing Authorized Buildings" means those buildings of a permanent nature that were existing prior to 19.02.1991 and were constructed in accordance with the building regulations and bye-laws in vogue prior to 19.02.1991, and had received necessary sanctions including commencement and occupation certificates from the WP369chamber.odt concerned local authority prior to 19.02.1991. Further, the construction of buildings, including expansion and reconstruction, should be in accordance with the FSI / FAR norms and all other Town and County Planning regulations, including maximum permissible density, height, zoning, etc. that were prevalent and in force as on 19.02.1991. The phrase building means a permanent fixed structure with a roof forming an enclosure and providing protection from the elements.

33. He submitted that it is not in dispute that the proposed construction on the subject plot was on the landward side. It is also not in dispute that on the BEST depot plot, there exists authorized building since long, and in any case, prior to 19.02.1991. The communication dated 02.12.2002 was addressed to the UDD calling upon it to submit information relating to HTL and CRZ categorization of the area as also the plot boundary superimposed on the approved revised CZMP of Greater Mumbai indicating the presence of authorized structure or road (existed prior to 19.02.1991) abutting the proposed site on the seaward side. This was precisely with a view to ensuring that the construction proposed by the petitioners meets the requirements laid down in the 1991 and 1997 Notifications.

34. Mr. Seervai submitted that the note dated 10.03.2003 reflects the following things:

(i) the subject plot falls behind the authorized structure;

(ii) MOEF has no objection to the proposed construction as long as the FSI for the proposed construction is as existed on 19.02.1991.

35. Mr. Seervai, therefore, submitted that after examining the proposal submitted by UDD, MOEF recorded its satisfaction as also WP369chamber.odt recorded that it has no objection to the proposed constructions as long as the FSI for the proposed construction is as existed on 19.02.1991. The exercise, which was required to be undertaken under the 1991 and 1997 Notifications, was undertaken and no objection was recorded in the Note dated 10.03.2003. Mr. Seervai submitted that MCZMA is delegate of MOEF. What delegate (MCZMA) can do can be done by the delegator (MOEF). Thus, MOEF gave clearance to the proposed construction.

36. Mr. Seervai submitted that by communication dated 04.01.2003, Deputy Secretary, UDD forwarded desired information and necessary documents to the Joint Director, MOEF. The MOEF, by its letter dated 11.03.2003 informed the State of Maharashtra that the MOEF had already delegated its powers to the State Government for undertaking development in CRZ-II and accorded its no objection for the proposed construction to come up on the designated land as per 1991 Notification (as amended from time to time) and the approved revised CZMP of Greater Mumbai. The relevant extract of the said letter reads thus, "This Ministry has already delegated the powers to the concerned State Government for undertaking development in Coastal Regulation Zone-II. Accordingly, the proposed construction may be taken up as per the Coastal Regulation Zone Notification 1991 (as amended from time to time) and the approved revised Coastal Zone Management Plan of Greater Mumbai."

37. In pursuance thereof, on 15.03.2003, Mr. P. V. Deshmukh, Deputy Secretary, UDD addressed a letter to the Chief Engineer (Development Plan) of Corporation setting out in detail the background. It was further set out therein that MOEF have communicated their no objection to allow the residential development since it falls within CRZ-II area which satisfied the norms of Notification dated 19.02.1991 and amendments made therein upto 21.05.2002. Now there appears, therefore, no objection to allow residential development to Adarsh Society on the land WP369chamber.odt included in residential zone as per Notification sanctioned by the Government. The copy of letter of MOEF dated 11.03.2003 was enclosed therewith for ready reference.

38. In any case, he submitted that having regard to note dated 10.03.2003, communications dated 11.03.2003 and 15.03.2003 individually and collectively constitute clearance / permission of MOEF / UDD respectively. These communications are required to be considered when they were written. The conclusion that project received NOC from CRZ point of view is inescapable. The building constructed on a subject plot has all the permissions of appropriate statutory authorities. It is only after seven years, based on newspaper reports, the proceedings were initiated against the petitioners.

39. Mr. Seervai submitted that after considering the chain of correspondence starting from 05.10.2002 and culminating into 15.03.2003, it is impossible to suggest that the communications dated 11.03.2003 of MOEF and 15.03.2003 of UDD do not constitute clearance / permission from CRZ point of view from the appropriate authorities.

40. Mr. Seervai submitted that in exercise of powers conferred by sub-sections (1) and (3) of Section 3 of the E.P. Act, the Central Government issued order on 26.11.1998 constituting MCZMA consisting of various officials for the period of 2 years with effect from date of publication of that order in the official Gazette. The said order conferred powers on MCZMA as enumerated in paragraphs II to XII. In supersession of Notification dated 26.11.1998, MCZMA was reconstituted on 04.01.2002. MCZMA was empowered to take measures enumerated in clauses II to XV. Clause VIII thereof WP369chamber.odt authorized MCZMA to examine all projects proposed in CRZ areas and give their recommendations before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under the 1991 Notification. The "examination of projects" contemplated by the said paragraph cannot and does not envisage some amorphous all encompassing enquiry in exercise of general powers available to MOEF under the E.P. Act. Order dated 04.01.2002 requires MCZMA only to examine the projects with a view to ensuring compliance of the conditions of the approved CZMP and to giving their recommendations. It is therefore, obvious that such recommendation will be given only in cases where MOEF or agencies entrusted to clear such projects, as the case may be, is required to give such approval or clearance under the applicable Notification issued under the E.P. Act.

41. He submitted that in the present case, it is admitted position that there was no change in the classification of the CRZ area. In other words, there was no change from CRZ-I to CRZ-II or from CRZ-III to CRZ-II or from CRZ-IV to CRZ-II. Paragraph II(i) is, therefore, not applicable. Mr. Seervai has invited our attention to the chart and submitted that the power to recommend for project proposals was conferred on the MCZMA only between- (i) 04.01.2002 and 03.01.2005 and (ii) 02.09.2005 and 30.09.2008, that is hardly for 6 years. This also shows that MOEF did not attach great importance on the MCZMA or its recommendations, and are, therefore, not mandatory. On the other hand, what MOEF intended was regulation of construction activities by the authorities at the State / Union Territory level in accordance with the norms laid down in paragraph 6(2) of Annexure-I of the CRZ Notification.

WP369chamber.odt

42. Mr. Seervai submitted that the contention of the respondent No.6 that MCZMA would have looked into issues such as FSI, amalgamation of plots, zoning, permissible FSI, etc. is thoroughly misconceived and the same is entirely belied by the language of order dated 04.01.2002 reconstituting the MCZMA. On the contrary, these issues are required to be considered by the appropriate regulatory authorities at the State / Union Territory level under the relevant statutory provisions. As a matter of fact, in the present case, all these issues have been considered by the Corporation, MMRDA, State Government being the appropriate regulatory authorities before issuing the IOD, CCs and OCs. The case made out by MOEF / MCZMA about 'clearance' and 'recommendation' is thoroughly misconceived and is a bogey and red-herring, trotted out as an

after-thought - 7 years after the event, as a part of the pre-

determined and pre-conceived / planned decision to hold that the construction of the building was 'illegal'. He submitted that recently this Court in NSCI judgment (PIL No. 71 of 2010) has held that clearance issued by UDD without the recommendations of MCZMA is valid and legal. He, therefore, submitted that the MCZMA recommendation is clearly a bogie put up by the respondents.

43. Mr. Seervai submitted that on 20.07.1990, Government of Maharashtra sanctioned final Development Plan under Section 31(1) of the M.R.&T.P. Act in respect of 'A' Ward where the subject plot is situate. The said Plan was brought into force with effect from 01.09.1990. The draft Development Control Regulations of 1989 (for short '1989 DCR') will be applicable and not 1967 DCR. He submitted that in the case of Suresh Estate Vs. Municipal Corporation of Greater Mumbai1, the Apex Court was dealing with property in 'C' Ward in respect of which no final Development Plan was in force at relevant time. In short, he submitted that the decision in the case of Suresh 1 (2007) 14 SCC 439 WP369chamber.odt Estate1 is not applicable. He relied upon Sections 22(a), (m) and 46 of the M.R.&T.P. Act and submitted that Development Control Regulations are integral part of the Development Plan. On coming into force of the final Development Plan in respect of 'A' ward w.e.f. 01.09.1990, 1967 DCR ceased to apply qua subject plot. In other words, he submitted that on the date when 1991 Notification was issued, 1989 DCR were applicable and not 1967 DCR. He relied upon the following decisions:

a. Nariman Point Association Vs. State of Maharashtra 2, and in particular paragraph 11 thereof.

b. D. B. Reality Limited Vs. State of Maharashtra 3, and in particular paragraphs 22 to 25.

c. M. A. Panshikar Vs. State of Maharashtra 4, and in particular paragraph 14.

44. He submitted that in exercise of powers conferred under sub- section (2) of Section 37 of the M.R.&T.P. Act, UDD of Government of Maharashtra issued Notification dated 10.04.2002 sanctioning the proposed reduction of Captain Prakash Pethe Marg from 60.97 mtrs. to 18.40 mtrs. and the area so deleted was included partly in residential zone (marked as A-B-C-D, subject plot).

45. Mr. Seervai submitted that the BEST plot was allotted by memorandum dated 05.08.2005. The subject plot and the BEST plot are owned by the Government of Maharashtra. Thus, it was a single plot.

There was no sub-division of plot, and therefore, there was no question of amalgamation of plots. No provision / resolution / circular / DCR is referred that requires amalgamation of plot for consumption of FSI. The authorities below, however, erroneously held that no MOEF clearance was taken for amalgamating BEST plot admeasuring 2669 sq.mtrs. and 2 2003 (5) Bom.C.R. 273 3 WP No.366 of 2014 and other companion Petitions decided by Mohit S.

Shah, CJ and M. S. Sanklecha, J. on 05.02.2015.

4 2002 (5) Bom.C.R.318

there was breach of condition No.2 of memorandum dated 05.08.2005. In exercise of powers vested under Section 50(1) of the M.R.&T.P. Act, Government of Maharashtra issued Notification dated 03.03.2006 sanctioning the deletion of the reservation of the bus depot on the land adjacent to plot No.87-C of B.B.R.Block No.6 admeasuring about 2661.68 sq.mtrs. and including the same in the residential zone subject to certain conditions.

46. The permissible FSI was 1.33 subject to exemptions. MMRDA rightly applied 1989 DCR. He submitted that in the affidavit dated 13.01.2011 made in Writ Petition No.2407 of 2010, by Mr. Pradeep Murlidhar Yadav, Senior Planner in the Town and Country Planning Division of MMRDA, it is specifically averred that permissible FSI on the subject plot as per 1967 DCR is 3.5 and as per 1989 DCR, the permissible FSI is 1.33. As the FSI is the governing factor in determining the intensity of the overall development and considering the spirit of CRZ Regulation issued in 1991, MMRDA restricted the FSI to 1.33 using the stringent of two Development Control Regulations. Mr. Seervai submitted that notifications dated 10.06.1977 and 05.10.1989 are wholly irrelevant. Nobody other than MMRDA can speak with authority about the applicability of Development Control Regulations. Mr. Seervai submitted that the building does not exceed the permissible FSI, and therefore, there is no FSI violation.

47. Mr. Seervai submitted that every facet of the principles of natural justice is violated in the present case. MCZMA convened its 66 th meeting on 03.11.2010. Perusal of the minutes of this meeting shows that the proposed demolition order was drafted by the Environment Department. However, as per the opinion of the Law Officer, before issuing the proposed demolition order, it was necessary that the WP369chamber.odt Environment Department requests UDD to provide a detailed report on CRZ permission and development permission from the concerned authorities. He submitted that MCZMA had already made up its mind.

48. Mr. Seervai submitted that NCZMA convened its 20 th meeting on 11.11.2010. In that meeting Ms Valsa Nair, respondent No.3 - Dr. Bharat Bhushan, respondent No.4 - Dr. Nalini Bhat and Dr. A. Senthil Vel of MOEF were present. Petitioners were not aware that respondent No.3, respondent No.4, Dr. A. Senthil Vel and Mr. Thirunavukarasu were participating in this meeting. These officers have made up their mind and were disqualified to attend the subsequent proceedings. In support of this proposition, he relied upon the following decisions:

a. Oryx Fisheries (P) Ltd. Vs. Union of India 5; & b. Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant 6;

49. He submitted that from perusal of the order dated 14.01.2011, bias is writ large. He submitted that Dr. Bharat Bhushan could not have issued show cause notice. He could not have proposed draft order and further could not have passed the final order on 14.01.2011. Dr. Nalini Bhat could not have submitted report as she had participated in the meting of NCZMA convened on 11.11.2010. These officers had made up their mind and hearing given by Dr. Nalini Bhat was an empty ritual. Respondent No.3 - Dr. Bharat Bhushan, respondent No.4 - Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. Thirunavukarasu, all these officers, acted at the behest of the respondent No.2. The impugned show cause notice / report / orders are at the behest of the respondent No.2. The wording of show cause notice dated 12.11.2010 shows that respondent No.3 had made up his mind. When the quasi-judicial authority acts at the behest of some other authority, its order is vitiated. In support of this 5 (2001) 13 SCC 427 6 (2001) 1 SCC 182 WP369chamber.odt proposition, he relied upon C.I.T. Vs. Green World Corporation7, and in particular paragraphs 53 and 55 to 57. In the present case, Dr. Bharat Bhushan acted at the behest of the respondent No.2 Minister.

50. Mr. Seervai submitted that apart from Dr. Nalini Bhat being disqualified as having attended NCZMA meeting on 11.11.2010, presence of other three members, namely, Dr. Bharat Bhushan, Dr. A.

Senthil Vel and Mr. Thirunavukarasu renders the hearing bad. They had prejudged the issue, and therefore, their action is vitiated. In support of this proposition, he relied upon Institute of Chartered Accountant Vs. L. K. Ratna8, and in particular paragraphs 24, 25 and 28. The show cause notice, so called hearing, report and order are vitiated by presence of Dr. Bharat Bhushan, Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. Thirunavukarasu in NCZMA meeting convened on 11.11.2010. In support of this proposition, he relied upon A. K. Kraipak Vs. Union of India9, and in particular paragraphs 15 to 21 and Rattanlal Sharma Vs. Managing Committee, Dr. Hariram (Co-Edn.) H. L. School 10, and in particular paragraphs 7 to 12.

51. Petitioners have also challenged the order dated 14.01.2011 passed by the respondent No.3 - Dr. Bharat Bhushan. Mr. Seervai submitted that by order dated 30.09.2009, respondent No.4 - Dr. Nalini Bhat was authorized to hear the petitioners. The order shows that respondent No.3 - Dr. Bharat Bhushan, Mr. Thirunavukarasu and Dr. A. Senthil Vel were to assist respondent No.4 during the course of hearing. Though respondent No.4 - Dr. Nalini Bhat heard the petitioners, the order is passed by the respondent No.3 - Dr. Bharat Bhushan. The principle that "he who hears must decide" is flagrantly violated.

7 (2009) 7 SCC 69
8 (1986) 4 SCC 537
9 (1969) 2 SCC 262
10 AIR 1993 SC 2155

WP369chamber.odt

Statutorily, only one person was authorized to hear the petitioners. The other three persons did not afford hearing. Only respondent No.4-Dr.

Nalini Bhat could have passed the order. On this ground alone, the order dated 14.01.2011 passed by the respondent No.3 - Dr. Bharat Bhushan is liable to be quashed and set aside.

52. Mr. Seervai submitted that in the affidavit of Dr. Bharat Bhushan, he denied that he was not part of the panel. In other words, he was part of the panel, who heard petitioners on 04.01.2011. If he is part of the panel to hear, it is contrary to notification dated 30.09.2009. The proceedings before respondent No.4 - Dr. Nalini Bhat were of quasi-

judicial nature. If Dr. Bharat Bhushan claims to have heard petitioners, he had no authority to hear the petitioners. He relied upon the following decisions:

a. Automotive Tyre Manufacturer's Association Vs. Designated Authority11, and in particular paragraphs 6, 20, 22, 79, 83 and 84;

b. Gullapalli Nageswararao Vs. Andhra Pradesh State Transport Corporation12, and in particular paragraphs 30 and 31.

53. Mr. Seervai submitted that on 04.01.2011, respondent No.4 - Dr. Nalini Bhat heard the petitioners. On 10.01.2011, petitioners filed written submissions. On 13.01.2011, respondent No.4 - Dr. Nalini Bhat submitted the report recommending removal of the entire building. The said report was not given to the petitioners. No chance was given to the petitioners to deal with the said report. Show cause notice dated 12.11.2010 relies upon the minutes of the NCZMA meeting held on 11.11.2010. The minutes record that the statements of 3 witnesses namely Ms Valsa Nair, Chairman, MCZMA, Mr. T. C. Benjamin, Member Secretary, UDD and Mr. Sitaram Kunte, Principal Secretary, Revenue Department were relied in the meeting. In fact, the statements 11 (2011) 2 SCC 258 12 AIR 1959 SC 308 WP369chamber.odt are extensively relied without giving any opportunity to cross-examine these three persons. In support of these submissions, he relied upon the following decisions:

a. Meenglas Tea Estate Vs. Workmen 13, and in particular paragraph 4;

b. Bareilly Electricity Supply Vs. Workmen 14, and in particular paragraph 14;

c. Kishan Chand Chelaram Vs. Commissioner of I.T.15, and in particular paragraph 6;

d. A. K. Roy Vs. Union of India 16, and in particular paragraph 96;

e. New India Assurance Company Limited Vs. Nusli Neville Wadia17, and in particular paragraphs 45 to 47; f. State of U.P. Vs. Saroj Kumar Sinha 18, and in particular paragraphs 31, 32, 34, 35 and 38;

g. Dhakeswari Cotton Mills Limited Vs. C.I.T.19, and in particular paragraphs 9 and 10.

54. Mr. Seervai submitted that Dr. Bharat Bhushan and Dr. A. Senthil Vel were present at the time of hearing and somebody in the department, who was admittedly not present, prepared the draft demolition order. Orders / actions / minutes of meetings are vitiated, both, procedurally and substantively. Record unmistakably shows that four officers namely, respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu openly acted on the dictates of respondent No.2. Mr. Seervai submitted that the actions are also substantively ultra vires as respondent No.3 Dr. Bharat Bhushan and respondent No.4 Dr. Nalini Bhat clearly abdicated their 13 AIR 1963 SC 1719 14 1971 (2) SCC 617 15 1980 (Supp) SCC 660 16 (1982) 1 SCC 271 17 (2008) 3 SCC 279 18 (2010) 2 SCC 772 19 AIR 1955 SC 65 WP369chamber.odt functions and powers and acted on the dictates of respondent No.2. They fettered their discretion at the behest of the respondent No.2. The draft demolition order was prepared prior to 03.11.2010 as is evident from the minutes of MCZMA meeting dated 03.11.2010. The order dated 16.01.2011 records that there were three options available. However, these three options were not recorded / noted in the show cause notice / report / minutes of either MCZMA or NCZMA. Respondent No.2 came to the conclusion that only one option, namely, removal of entire structure was available. Respondent No.2 predetermined only one option. This is evident from email sent by respondent No.2 to Mr. Mauskar to prepare action papers of Adarsh Society for him. The order dated 14.01.2011 passed by respondent No.3 Dr. Bharat Bhushan was at the behest of respondent No.2 though it was signed by him. Mr. Seervai relied upon the decision of the Apex Court in Union of India Vs. Sanjay Jethi20, and in particular paragraphs 16, 33.5 to 36, 39, 41 to 43, 47 and 48.

55. Mr. Seervai submitted that the authorities have to act and take independent decision. They cannot act at the behest of others. It also amounts to abdication of power and duty and fettering of decision to that of other. Respondent No.3 Dr. Bharat Bhushan could not have passed the order though in the affidavit he said that he had passed the order. Even if it is legal, it is the order of the Minister. Respondent No.2 Minister did not hear the petitioners. Mr. Seervai relied upon the following decisions:

a. Anirudhasinhji Karansinhji Jadeja Vs. State of Gujarat 21, and in particular paragraphs 11 to 15; and b. Tarlochand Dev Sharma Vs. State of Punjab 22, and in particular paragraphs 12, 13, 15 and 16;

20 (2013) 16 SCC 116
21 (1995) 5 SCC 302
22 (2001) 6 SCC 260

c. SACI Allied Products Limited Vs. CCE 23, and in particular paragraphs 16 to 18;

d. CCE Vs. Shital International24, and in particular paragraph

19. e. Dharampal Satypal Limited Vs. Deputy Commissioner of Central Excise25, and in particular paragraphs 37 to 42 .

56. Mr. Seervai submitted that the contention advanced on behalf of MOEF that the decision in the present case is institutional decision is contrary to the material on record, namely, order dated 30.09.2009 as also affidavit of respondent No.3 Dr. Bharat Bhushan. He submitted that the note below office order dated 30.09.2009 cannot be used as enabling respondent No.2 to pass order. The note cannot be torn out of context. It is the case of the respondents that respondent No.3 Dr. Bharat Bhushan submitted the draft order for approval of the respondent No.2 and thereafter he passed final order on 14.01.2011. Mr. Seervai submitted that respondent No.3 Dr. Bharat Bhushan was exercising quasi judicial power, and therefore, it amounts to subversion of quasi judicial function. In support of this submission, he relied upon -

a) Union of India Vs. E. K. Andrews26, and in particular paragraphs 2, 5, 7, 9 to 12 and 15;

b) Ossein and Gelatine Mfgrs. Assocn. of India Vs. Modi Alkalies and Chemicals Limited 27, and in particular paragraph 5 thereof; and

c) Gullapalli Nageswararao12, and in particular paragraph 6 thereof.

57. Mr. Seervai submitted that order of MOEF is only on two issues and it is impermissible to go into other issues. Judicial review under Article 226 is proceedings either of administrative or quasi-judicial 23 (2005) 7 SCC 159 24 (2011) 1 SCC 109 25 (2015) 8 SCC 519 26 1996 (2) ILR 118 (Kerala) 27 AIR 1990 SC 1744 WP369chamber.odt nature. Order cannot travel beyond the show cause notice. Jurisprudentially, a person has to deal with the show cause notice alone.

Courts have consistently held that it is impermissible for the adjudicating authority to travel beyond the show cause notice. If the order travels beyond the show cause notice, it is bad in law as it is in violation of principles of ad alteram partem. In support of this submission, he relied upon decision of Mohinder Singh Gill Vs. Chief Election Commissioner28. The said decision is followed in the following decisions:

Deepak Babaria Vs. State of Gujarat 29, and in particular a.

paragraphs 62 to 65, 69 and 70;

b. Rashmi Metaliks Limited Vs. Kolkata Metropolitan Development Authority30, and in particular paragraph 15; c. All India Railway Recruitment Board Vs. K. Shyamkumar 31, and in particular paragraphs 44 and 45 thereof; d. Dharampal Satyapal Limited25.

58. Mr. Seervai submitted that on 03.11.2009, show cause notice was issued by MCZMA. This was replied by the petitioners on 17.12.2009 by forwarding all the relevant documents and clearance. After satisfying itself, MCZMA dropped the show cause notice.

59. Mr. Seervai submitted that Notifications dated 10.06.1977 and 05.10.1989 issued by MMRDA under Section 13(1) of BMRDA are not relevant. Section 13 has nothing to do with limiting FSI. Section 13 talks of "undertaking any development within the Metropolitan Region of the type". "Development of the type" has to be notified by the MMRDA. He submitted that Section 13 does not apply to area where MMRDA itself is a planning authority. In any case, MMRDA in its 28 (1978) 1 SCC 405 29 (2014) 3 SCC 502 30 (2013) 10 SCC 95 31 (2010) 6 SCC 614 WP369chamber.odt affidavit made in Writ Petition No.2407 of 2010 has gone on record in asserting that the building of the petitioners is authorized. For all these reasons, he submitted that the Petition deserves to be allowed and the impugned show cause notice / recommendations made in the minutes of the meeting / report / orders dated 14.01.2011 and 16.01.2011 deserve to be quashed and set aside and the Petition deserves to be allowed.

SUBMISSIONS OF THE RESPONDENTS

60. On the other hand, Mr. Khambata, appearing for respondent No.6, MCZMA supported the impugned actions and orders. He submitted that in the present case, petitioners have not obtained recommendations of MCZMA, which is a mandatory requirement as per order dated 04.01.2002 issued by MOEF. He submitted that the findings recorded in the impugned orders are not vitiated. Rather, they are borne out by record. The petitioners have constructed the building with brazen illegalities and in fragrant violation of CRZ Notification. Having regard to the conduct of the petitioners, even if it is assumed that there is violation of principles of natural justice, this is not a fit case for invocation of extra ordinary powers under Article 226 of the Constitution of India. It is also necessary to examine the role of bureaucrats and abuse and misuse of power by these bureaucrats. The conduct of the petitioners is brazen, adamant and their attitude is defiant. Petitioners have to plead and prove prejudice. The present Petition raises serious environmental issues. When there is no clearance, the illegality cannot be condoned as the officers of State Government had turned blind eye or acted in connivance.

61. Mr. Khambata submitted that the questions that fall for consideration are - (i) whether the communications dated 11.03.2003 and 15.03.2003 collectively constitute clearance; (ii) what is the effect WP369chamber.odt of not obtaining recommendations of MCZMA and (iii) whether there are FSI violations. He submitted that on behalf of the petitioners, it was contended that it is not for the petitioners to show which DCR are applicable. However, in the Petition, it is asserted that 1967 DCR are applicable and that judgment of the Apex Court in Suresh Estate1 is applicable. During the course of argument, petitioners conceded that the plain language of communication dated 11.03.2003 does not amount to clearance but communications dated 11.03.2003 and 15.03.2003 collectively constitute clearance. Petitioners contended that issue of FSI violations does not arise. However, the impugned orders are based on two grounds namely, (i) not obtaining clearance of the appropriate authority and (ii) FSI violations.

62. Mr. Khambata submitted that recommendations of MCZMA are mandatory. Admittedly, in the present case, recommendations of MCZMA are not obtained. He submitted that on 27.09.1996, CZMP for Maharashtra was approved by MOEF. As per paragraph 2A(i), all the relevant provisions of 1991 Notification as amended in 1994 were incorporated in CZMP. Paragraph 2A(xi) provides that Government of Maharashtra or any other Authority so designated shall be responsible for monitoring and enforcement of provisions of CRZ Notifications and CZMP. He further submitted that before utilizing FSI of BEST plot admeasuring 2669 sq.mtrs., petitioners did not fulfill the conditions. The area of staircase, lift, lobbies together is about 2814 sq.mtrs. and to that extent, petitioners have consumed excess FSI. 1967 DCR contemplate inclusion of areas of lift room, staircase, lobby while computing FSI. As against this, these areas are exempted under 1991 DCR.

63. Mr. Khambata submitted that 1991 Notification does not create any dichotomy between regulation on one hand and clearance on the WP369chamber.odt other. He submitted that a purposive interpretation of the 1991 Notification requires that 'regulation' and 'clearance' should be treated at par and interchangeable. Any interpretation giving them different meanings and scopes would undermine the effect of the CRZ Notification and the regulation of the activities in the CRZ. A plain reading of paragraph 3 of the 1991 Notification indicates that the CRZ Notification itself treats the environmental clearance as one of the aspects of regulation.

64. He submitted that the expression "regulation" is used in the CRZ Notification in its natural and wide sense and encompasses and was intended to encompass amongst other things, clearance. He submitted that in any event, in law, the term "regulation" has a very wide meaning and includes even a prohibition. "... in the absence of restrictive words the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control." In fact in statutes which are meant to subserve a public purpose such as environmental and conservational laws, the correct rule of interpretation is to give a wider meaning to the term 'regulation'. By the 1991 Notification, as originally issued, regulation of certain activities was vested exclusively in the MOEF and for other activities such as those set out in paragraph 3(3)(ii) by "the State Government, Union Territory Administration or the local authority as the case may be ...". These State/Union Territory level authorities are vested with the full sweep of regulatory powers including to give clearances and to prohibit activities that are in violation of the CRZ Notification.

65. Mr. Khambata further submitted that 'clearance' and 'regulation' are interchangeable. The regulation is a wider expression, which includes clearance as also prohibition. In the alternative, if the clearance WP369chamber.odt and regulation are to be given different meanings, regulation has a wider meaning and will include clearance. The Court has to give purposive interpretation and hold that clearance and regulation are same. In support of these submissions, he relied upon the following decisions:

a. State of T.N. Vs. M/s. Hindstone32, and in particular paragraph 10 to contend that regulation under CRZ Notification will include clearance as also prohibition.

b. K. Ramnathan Vs. State of T.N.33, and in particular paragraphs 18 and 19.

66. Mr. Khambata submitted that reliance placed by the petitioners on the note dated 10.03.2003 prepared by Dr. A. Senthil Vel to contend that it constitutes NOC is wholly misconceived. He submitted that note dated 10.03.2003 is not a decision and is only a view point of the concerned officer. In support of this proposition, he relied upon the following decisions:

a. Sethi Auto Services Station Vs. DDA34, and in particular paragraphs 14, 17 and 22;

b. State of Uttaranchal Vs. Sunil Kumar Vaish 35, and in particular paragraph 24.

67. Mr. Khambata submitted that to read the word "regulated" appearing in paragraph 3(3)(ii) as limited to the mere clerical activity of determining whether a project is to the landward or seaward side of an authorized existing structure or road is to deliberately trivialize the regulatory role and to do violence to the plain language of the CRZ Notification. It is a mis-characterization of the State / Local Authority's CRZ regulatory function under the CRZ Notification (a similar attempt to trivialize the MCZMA's CRZ recommendation was also attempted) to divert attention from serious environmental issues that would have 32 AIR 1981 SC 711 33 AIR 1985 SC 660 34 (2009) 1 SCC 180 35 (2011) 8 SCC 670 WP369chamber.odt arisen during such consideration of an application from the Adarsh Society for CRZ clearance including the FSI violation and violations of conditions in the Letter of Intent dated 18.01.2003, the final Letter of Allotment dated 09.07.2004, the Memorandum dated 05.08.2005 for use of FSI of the adjoining BEST plot and the creation of the Adarsh plot from a road reservation and its inclusion in the residential zone.

68. Mr. Khambata submitted that therefore, the argument that the MCZMA recommendation is only in respect of those projects that required clearance and not those that were merely to be regulated is misconceived. In other words, he submitted that the contention advanced by the petitioners that neither the environmental clearance of MOEF nor the agencies entrusted to clear such projects at the State / Union Territory level is required and that the recommendations of the MCZMA are not necessary is devoid of substance and is liable to be rejected. Mr. Khambata has taken us through the Chart showing the Competent Regulatory Authority for CRZ-II for the different periods.

69. Mr. Khambata submitted that communications dated 05.10.2002, 04.01.2003 and 15.03.2003, copies whereof were not sent to MCZMA.

The contention of the petitioners that communication dated 15.03.2003 constitutes clearance by the State Level Authority is completely false. The said letter is entirely based upon the communication dated 11.03.2003 of MOEF. Petitioners conceded that plain language of communication dated 11.03.2003 of MOEF does not constitute clearance. If that be so, petitioners cannot contend that communication dated 15.03.2003 of Mr. P. V. Deshmukh, Deputy Secretary of UDD constitutes clearance by the State Government. He further submitted that the communications dated 11.03.2003 and 15.03.2003 collectively do not constitute clearance. The said communications are behind the WP369chamber.odt back of MCZMA.

70. Mr. Khambata invited our attention to affidavit dated 17.02.2011 of Mr. P. V. Deshmukh. He also invited out attention to further affidavit dated 13.06.2011 made by Mr. P. V. Deshmukh before

Justice J. A. Patil's Commission of Inquiry. Mr. Khambata also invited our attention to the cross-examination of Mr. Deshmukh.

71. Mr. Khambata submitted that considering the evidence of Mr. Deshmukh before Justice J. A. Patil's Commission, it cannot be said that the communication dated 11.03.2003 of MOEF can be construed as clearance. Equally, communication dated 15.03.2003 of Deputy Secretary, UDD also cannot be construed as a clearance of State Government. The communications dated 11.03.2003 and 15.03.2003 collectively also did not constitute clearance under CRZ Notifications.

72. Mr. Khambata submitted that the copy of the communication dated 15.03.2003 was earmarked to Adarsh Society. On the same day, Chief Promoter of Adarsh Society addressed a letter to the Collector of Mumbai enclosing therewith communication dated 11.03.2003 of MOEF and 15.03.2003 of UDD.

73. Mr. Khambata submitted that on 18.01.2003, LOI was issued by Revenue and Forests Department of State of Maharashtra intending to allot occupancy rights in respect of plot No.87-C in BBR Block No.6 admeasuring 3758.82 sq.mtrs (subject plot) on lease subject to the terms and conditions to be decided by the Government in due course. Clause 7 thereof required obtaining prior clearance of MOEF before carrying out construction as a subject plot is in CRZ-II. On 09.07.2004, subject plot was allotted to the petitioners subject to conditions. By condition WP369chamber.odt No.2, petitioners were required to obtain prior permission of MOEF as also MMRDA being the Special Planning Authority and Corporation before carrying out construction as a subject plot falls in CRZ. He submitted that petitioners were expressly put on notice to obtain clearance from MOEF before carrying out construction. At no stage, petitioners objected to these conditions on the ground that they had already obtained clearance from the appropriate authority.

74. On 05.08.2005, petitioners claimed that they were allotted BEST plot admeasuring 2669.68 sq.mtrs. adjacent to the subject plot as also were permitted to utilize FSI of that plot. Clause 2 thereof laid down that as the investment of project exceeds Rs.5 crore, permission of MOEF for utilizing FSI of BEST plot is necessary. Clause 4 thereof required compliance of the conditions laid down therein before utilizing the FSI of BEST plot. In short, he submitted that permission of MOEF was a condition precedent for utilizing FSI of BEST plot over the subject plot. He submitted that clause VIII of order dated 04.01.2002 requires MCZMA to examine all projects proposed in CRZ areas and give their recommendations before the project proposals are referred to the Central Government or agencies who have been entrusted to clear such projects under CRZ Notification of 1991. Had the proposal been referred to MCZMA for its recommendation, it would have examined these aspects before giving recommendations. As on 05.08.2005, the power for giving clearance by the State Government was withdrawn by the 2003 Notification. The power was restored to MOEF.

75. Mr. Khambata submitted that by Notification dated 03.03.2006 issued under Section 50 of M.R. & T.P. Act, the Government sanctioned deletion of land admeasuring 2669.68 sq.mtrs., which was reserved for BEST depot and included the same in the residential zone without WP369chamber.odt obtaining sanction of MCZMA or MOEF. In other words, change of reservation from BEST depot to residential by exercising power under Section 50 of M.R.&T.P. Act in respect of the BEST plot

admeasuring 2669.68 sq.mtrs. was without the sanction of MCZMA. He submitted that by order dated 26.11.1998, MCZMA was constituted. MCZMA has the power to take measures for protecting and improving the quality of coastal environment and preventing, controlling and abating environmental pollution in coastal areas of the State of Maharashtra,which included examination of proposals for changes / modification in classification of CRZ areas and also will ensure compliance of all specific conditions that are laid down in the approved CZMP. He submitted that on 10.04.2002, Notification was issued by UDD under Section 37 of the M.R.& T.P. Act for reducing width of Captain Prakash Pethe Marg from 60.97 mtrs. to 18.40 mtrs and inclusion of the area so deleted, partly in residential zone (marked as A- B-C-D - subject plot). In other words, residential plot was carved out from the area, which was reserved as a DP Road in the Development Plan. The said modification was carried out without the sanction of MCZMA.

76. Mr. Khambata submitted that petitioners contended that MCZMA had issued notice on 03.11.2009. This was replied by the petitioners on 17.12.2009. MCZMA was satisfied with the explanation given by the petitioners and the show cause notice was dropped. He submitted that the show cause notice was not dropped by MCZMA as is evident from paragraph 12 of the affidavit dated 21.06.2011 made by Mr. Bhagwantrao N. Patil, Member Secretary of MCZMA. He submitted that the 66th meeting of MCZMA was held on 03.11.2010 and the minutes were confirmed on 09.11.2010. He therefore, denied that respondents and in particular MCZMA had suppressed the minutes of WP369chamber.odt the meeting held on 09.11.2010.

77. Mr. Khambata submitted that MCZMA has been appointed as an authority under Section 3 of the E.P.Act and is not a part, department / delegate of MOEF. MOEF has constituted MCZMA to discharge duties and functions as stated in the Notification. Section 24 of the E.P.Act has overriding effect. MCZMA has to examine all the projects and give the recommendations. UDD had kept MCZMA out. Not a single letter was sent to MCZMA. MCZMA consists of experts whose recommendations are necessary before the project is submitted to the Central Government or other agencies. It is so to protect the citizens. In other words, he submitted that recommendations of MCZMA are mandatory and are condition precedent. In support of these submissions, he relied upon the following decisions:

a. V. M. Kurian Vs. State of Kerala 36, and in particular paragraphs 7 & 8;

b. Dinkar Anna Patil Vs. State of Maharashtra 37, and in particular paragraphs 8 and 18; and c. State of U.P. Vs. Manbodhan Lal38, and in particular paragraph 7.

78. Mr. Khambata submitted that in the present case, the relevant DCR applicable is DCR of 1967. He relied upon the decision of the Apex Court in the case of Suresh Estate1, and in particular paragraphs 4, 17, 24 and 26 as also TCI Industries Limited Vs. State of Maharashtra39, and in particular paragraph 20 and Official Trustee, State of Maharashtra Vs. MHADA40.

36 (2001) 4 SCC 215
37 AIR 1999 SC 152
38 AIR 1957 SC 918
39 (2014) 3 Bom.C.R. 210

79. Mr. Khambata submitted that Dr. Nalini Bhat heard the petitioners on 04.01.2011. After the hearing, petitioners were handed over a questionnaire containing 13 questions. The petitioners gave written submissions on 10.01.2011. He invited out attention to the response of the petitioners to questions 1 to 13. Question No.11 was whether permission from MMRDA for the building exceeding FSI of 1.33 as per the Notification of BMRA Act 1974, dated 10.06.1977, extended on 05.10.1989 which had validity upto 10.10.1991 was obtained or not. The petitioners replied this by stating that as per the approved plans, FSI consumed is only 1.32. As per the above referred notification, MMRDA can allow FSI exceeding 1.33, upto cap of 3.5 which is permissible as per DCRs of 1967. Thus, the upper limit of FSI is not altered but only prior permission from MMRDA is envisaged.

Hence, even if its assumed that FSI exceeds 1.33, due to adopting different methodology of computation of FSI, the 28 storied building as constructed on site is approved by MMRDA. Hence, the FSI as per any methodology of computations of the constructed building is as per DCRs of 1967, until it is within limit of 3.5, as the condition of approval from MMRDA is satisfied. Mr. Khambata submitted that petitioners nowhere pleaded that MMRDA has given approval under Notifications dated 10.06.1977 and 05.10.1989 for construction beyond FSI of 1.33 and within 3.5 FSI. He invited our attention to paragraph 17 of the affidavit dated 24.03.2011 made by Mr. Thirunavukarasu, Deputy Director, MOEF. He submitted that petitioners have not obtained special permission of MMRDA for exceeding 1.33 FSI.

80. Mr. Khambata submitted that by Notification dated 15.06.1983, State of Maharashtra appointed MMRDA (the then BMRDA) as the Special Planning Authority under Section 40(1)(c) of the MR&TP Act in respect of the notified area of Back Bay Reclamation Scheme (BBRS) WP369chamber.odt Blocks III-VI. MMRDA became the Planning Authority under Section 2(19) of M.R.&T.P. Act for that notified area. He submitted that Corporation as also MMRDA undertook preparation of the Development Plan. As far as Corporation is concerned, on 18.05.1983, notice was published by Corporation under Section 25 of the M.R.&T.P. Act inviting the objections / suggestions in respect of the revised draft Development Plan for the 'A to G' Wards. The said notice was published in the Gazette on 26.05.1983. On 30.03.1985, Corporation submitted draft Development Plan under Section 30(1) of the M.R.&T.P. Act to the State Government for sanction. At that time, Development Control Regulations were not submitted to the State Government for sanction.

On 20.07.1990, the draft Development Plan submitted by the Corporation in respect of 'A' Ward was sanctioned by the Government of Maharashtra. In this Plan, subject plot was not shown but it showed Captain Prakash Pethe Marg as 60.97 mtr. road. He further submitted that no building bye-laws / regulations were sanctioned by the State Government along with this Plan. On 30.04.1985, Corporation submitted revised building bye-laws and Development Control Rules to the Government of Maharashtra under Section 30(1) of the M.R.&T.P. Act. On 14.12.1989, Government

of Maharashtra by a Notification under Section 31(1) of the M.R.&T.P. Act published the revised Draft Plan, Building Bye-laws and Development Control Rules for Greater Mumbai and invited objections and suggestions in respect thereof. On 20.02.1991, DC Regulations of 1991 were sanctioned, which came into force with effect from 25.03.1991. Mr. Khambata submitted that thus on 19.02.1991 being the date of CRZ Notification, the final DC Regulations of 1967 were in force.

81. As far as MMRDA is concerned, on 01.03.1985, it declared its intention to prepare the Development Plan for Blocks III-VI of the WP369chamber.odt BBRS. On 04.05.1990, MMRDA notified the draft Development Plan for Blocks III-VI of BBRS and invited objections and suggestions under Section 26 of the M.R.&T.P. Act. On 08.10.1991, after following the procedure under Section 28, MMRDA submitted the draft Development Plan to the State Government. On 03.03.1993, Government of Maharashtra returned the said Draft Development Plan to MMRDA with a direction to resubmit the plan after incorporating certain modifications.

On 21st and 22nd July, 1994, MMRDA published further notices inviting objections and suggestions. On 23.09.1994, the revised Draft Development Plan for Blocks III-VI of BBRS was re-submitted by MMRDA under Section 30(1) for sanction.

ig On 03.06.2000 and 17.06.2001, Government of Maharashtra sanctioned the Development Plan prepared by MMRDA for Blocks III-VI of BBRA under Section

31. The Notifications had recital declaring that Corporation had ceased to be Planning Authority for Blocks III-VI of BBRA on 15.06.1983. The Development Plan came into force with effect from 24.07.2000.

82. Mr. Khambata submitted that nobody has disputed that Corporation had submitted draft Development Plan on 30.03.1985 under Section 30(1) of the M.R.&T.P. Act to the State Government for sanction. At that time, draft DCR of 1989 were not submitted along with the draft Development Plan. No final DCRs were sanctioned along with sanction of draft Development Plan on 20.07.1990. In short, he submitted that as on 19.02.1991 being the date of CRZ Notification, final DCR of 1967 were in force. The decision of the Apex Court in the case of Suresh Estate1 will apply. He further submitted that there cannot be two Planning Authorities for the same area. In support of this proposition, he relied upon the Division Bench judgment of this Court in the case of Vyankatesh Y. Shinde Vs. State of Maharashtra 41, and in particular paragraph 6 thereof. He also relied upon the decision of 41 2010 (5) Bom.C.R.815 WP369chamber.odt Nariman Point Association2, and in particular paragraph 3 thereof.

83. Mr. Khambata submitted that the decision in Suresh Estate's case1 was considered by the Division Bench of this Court in TCI Industries Limited39. In particular, he relied upon paragraphs 5, 21, 29 and 30 of that decision.

84. Mr. Khambata submitted that on 10.04.2002, the Government of Maharashtra issued Notification sanctioning reduction of the width of Captain Prakash Pethe Marg from 60.97 mtrs. to 18.40 mtrs. and the area so deleted was proposed to be included partly in residential zone, partly in

parade ground and partly in helipad and garden area and partly in BEST depot as shown in the accompanying plan. The area so included in the residential zone and marked as 'A-B-C-D' (subject plot) was the plot created for the first time for allotting it to Adarsh Society. He invited our attention to PR Card of the subject plot. In column 10, name of person in beneficial ownership was to the following effect:

(A) Government of Maharashtra (B) Adarsh Co-operative Housing Society Limited (subject plot)

85. As far as the PR Card of the BEST plot is concerned, in column No.10, Government of Maharashtra is shown as the person in beneficial ownership. In short, he submitted that the name of Adarsh Society was not recorded in column No.10 of PR Card of the BEST plot, and therefore, it cannot be said that BEST plot was allotted to the petitioners. Petitioners were allowed to utilize FSI of the BEST plot.

86. Mr. Khambata submitted that on 05.08.2005, Government of Maharashtra issued memorandum permitting additional FSI of 2669.68 sq.mtrs. to be utilized by loading from adjacent BEST plot subject to WP369chamber.odt conditions. Clause A(1) provided that as the land comes under classification of CRZ and the same has been designated as BEST depot vide notification dated 10.04.2002 of UDD, Government of Maharashtra, unless the amendment is made as residential zone in it by changing the designation of "BEST Depot" on the said land, the FSI of the said land cannot be used on the adjacent plot (subject plot) sanctioned to Adarsh Society. Clause A(2) provided that as the said land comes in CRZ, construction on it, will be permissible subject to the terms and conditions of DCR existing as on 19.02.1991. Similarly, if the cost of the project is more than Rs.5 crores, it will be necessary for the Society to obtain permission of MOEF. Clause A(4) provided that after the fulfillment of the above conditions, FSI of BEST plot can be utilized over the subject plot.

87. Mr. Khambata submitted that Adarsh Society has neither applied nor obtained MOEF permission. Despite that, MMRDA sanctioned plans on the basis of utilization of a total built up area of 8401 mtrs., which includes FSI of 3315.57 sq.mtrs. from the BEST plot. He submitted that BEST plot was not amalgamated with the subject plot. In fact, by memorandum dated 05.08.2005, petitioners were permitted to use FSI of the BEST plot subject to the prior permission of MOEF as also MMRDA. As the subject plot and BEST plot are two separate plots, FSI of one plot namely BEST plot cannot be utilized on the another plot namely, the subject plot. As there was no amalgamation of two plots, FSI of BEST plot cannot be utilized. It is not the case of the petitioners that there is order of amalgamation of two plots. The BEST plot and the subject plot are two separate plots with two separate Cadestral Survey Number. Property cards bear this fact out.

88. Mr. Khambata submitted that before changing the reservation of WP369chamber.odt the subject plot from DP Road to residential zone, prior permission of MCZMA was not obtained. He submitted that before changing the reservation, permission of MCZMA was a condition precedent. In support of these submissions, he relied upon the decision of this Court in the case of Sneh Mandal CHSL Vs. Union of India42, and in particular paragraphs 8, 18 and 21. He submitted that area in the DP Road was converted into partly in residential zone among others. MCZMA could have

gone into following aspects:

1) User of FSI of BEST plot in the subject plot;

2) Which DCR is applicable for carrying our development over the subject plot as also what FSI is permissible;

3) Use of FSI as per memorandum dated 05.08.2005 and notification dated 03.03.2006;

4) Change of zoning;

5) Valid permission of the State Government;

6) Whether Section 50 can be applied for utilization of FSI of BEST plot over the subject plot.

89. In short, he submitted that the recommendations of the MCZMA is not a clerical job and has to consider serious aspects as the matter pertains to environmental issues.

90. Mr. Khambata also relied upon the following decisions to submit that if the Court comes to the conclusion that the building constructed by Adarsh Society is illegal, what should be the approach of the Court:

a. MI Builders Private Limited Vs. Radhey Shyam Sahu 43, and in particular paragraph 82;

b. Shanti Sports Club Vs. Union of India 44, , and in particular paragraphs 74 and 75; & 42 AIR 2000 Bombay 121 43 AIR 1999 SC 2468 44 (2009) 15 SCC 705 WP369chamber.odt c. Esha Ekta Apartments CHSL Vs. Municipal Corporation of Mumbai45, , and in particular paragraphs 46 and 56.

91. Mr. Khambata submitted that petitioners did not pray to regularize the illegal construction. The attitude of the petitioners is totally defiant. They did not point out which DCR is applicable. Mr. Khambata also extensively dealt with the contentions advanced by the petitioners as regards breach of the principles of natural justice. He submitted that assuming for the sake of argument, without conceding, that petitioners argument that there is infirmity in the procedure has substance, one has to consider the consequences of breach of principles of natural justice. He submitted that rules of natural justice are not rigid and depend upon the facts and circumstances of each case. Court has to consider whether the petitioners were given fair and reasonable opportunity to put up their case. Whether the petitioners suffered any prejudice in view of some irregularity committed during the course of the proceedings. The Court has also to consider that petitioners have invoked extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India. Petitioners have not shown clearance of MOEF or State level authorities. Petitioners have also not shown that

they have obtained recommendations from MCZMA. Petitioners have also not complied conditions of LOI dated 18.01.2003, allotment letter dated 09.07.2004, memorandum dated 05.08.2005. They have exceeded permissible FSI.

92. In support of his submissions, he relied upon the following decisions:

a. S. L. Kapoor Vs. Jagmohan46, and in particular paragraphs 16 and 17;

45 (2013) 5 SCC 257
46 AIR 1981 SC 136

b. Managing Director, ECIL Vs. B. Karunakaran47, at page 1092 sub-paragraph (v);

c. State Bank of Patiala Vs. S. K. Sharma 48, and in particular paragraphs 28 and 33 (5);

d. Haryana Financial Corporation Vs. Kailas Chandra Ahuja 49, and in particular paragraph 21 and submitted that petitioners have to plead and prove the prejudice;

e. SBI Vs. Bidyut Kumar Mitra50, and in particular paragraph 40; and f. Union of India Vs. Alok Kumar51, and in particular paragraphs 85 to 90.

93. Mr. Khambata invited our attention to paragraph 9 of the Petition of natural justice.

raising grounds, and in particular grounds relating to denial of principles He submitted that petitioners neither pleaded prejudice nor proved the prejudice. For example, petitioners strenuously contended that report prepared by Dr. Nalini Bhat was not given to them. Even after getting the report, petitioners have not pleaded what prejudice was caused to them by not supplying the report. Had the report been given to them in advance, they would have established obtaining clearance as also case of utilizing permissible FSI. No such attempt is made by the petitioners. In ground (u), petitioners merely asserted as under:

"u) The petitioners state that at the behest of certain vested interest certain reports/documents have been highlighted by the media engineering a situation creating a bias in the mind of the general public as well as the respondents. The petitioners state that the petitioner has not been given a proper opportunity of hearing and place on record certain facts / documents / permissions to any of the governmental authorities till date and an adverse action has been taken against the petitioner causing serious prejudice to the livelihood of the members of the petitioner."

47 AIR 1994 SC 1074
48 (1996) 3 SCC 364
49 (2008) 9 SCC 31
50 (2011) 2 SCC 316
51 (2010) 5 SCC 349

94. Mr. Khambata submitted that petitioners have not obtained clearance either from MOEF or from State level authorities. They have also not obtained recommendations of MCZMA. In fact, they have utilized FSI of BEST plot without complying the conditions. He has given us the details of FSI and built up area calculations for Adarsh Society as per DC Regulations of 1991 based on the sanction plan dated 16.09.2010 at page 80 of the Writ Petition.

95. He has taken us through paragraphs 6.7 and 6.8. In paragraph 6.8, petitioners asserted that MOEF also retained the powers, which were exercisable by MCZMA. ig In fact, MOEF applied its mind to CZMP of Greater Mumbai as is clear from its letter dated 02.12.2002. MOEF itself noted that it had already delegated the power to the concerned State Government for undertaking the development. However, no mention was made by MOEF about the notification dated 04.01.2002 or that there was any need for referring the proposal to MCZMA. In fact, MOEF itself exercised those powers, which were exercisable by the MCZMA and left it to the discretion of the State Authorities to finally regulate and approve the construction as per CRZ 1991 Notification. Mr. Khambata also took us through the grounds (iii),

(iv), (v), (vi) and (vii) relating to the environmental clearance.

96. Mr. Khambata submitted that if the area of staircase, lift lobby as per Rule 51(vi) of 1967 DC Rules is included without considering FSI of BEST plot, the petitioners have utilized FSI to the tune of 2.932 as against permissible FSI of 1.33. In other words, there is gross violations by utilizing excess FSI. He, therefore, submitted that this is not the fit case for invocation of extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India. In support of this submission, he relied upon the following decisions:

WP369chamber.odt a. State of Bombay Vs. Morarji Cooverji 52 at page 331; b. State of Maharashtra Vs. Prabhu53, and in particular paragraph 4;

c. M.P. Mittal Vs. State of Haryana 54, and in particular paragraph 5.

97. He further submitted that the submission advanced by the petitioners that order cannot travel beyond the show cause notice and cannot be supported by additional grounds is wholly misconceived where larger public interest is involved. He relied upon the decision in the case of All India Railway Recruitment Board 31, and in particular paragraphs 44 and 45 thereof to contend that

the principle laid down in Mohinder Singh Gill's case28 is not applicable where larger public interest is involved and in such situation, the additional grounds can be looked into to examine the validity of the impugned actions in the present case. He submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India.

98. Mr. Apte, while supporting the MOEF and its officials, submitted that in the meeting of NCZMA held on 11.11.2010, prima facie view about violation of CRZ Notification was expressed. This was followed by notice dated 12.11.2010 calling upon the petitioners to show cause as to why the unauthorized structure erected by Adarsh Society be not removed forthwith in entirety. Petitioners gave interim reply on 24.11.2010. He submitted that in the reply, no allegations were made about violations of principles of natural justice or that issue was prejudged. He has taken us through correspondence as regards inspection of the documents. On 15.12.2010, petitioners gave a detailed reply. Even in this reply, no allegations that show cause notice 52 1958 (61) Bom.L.R. 318 53 (1994) 2 SCC 481 54 (1984) 4 SCC 371 WP369chamber.odt prejudged the issue were made. On 10.01.2011, petitioners gave detailed written submissions in Annexure-I. In paragraph 1, petitioners submitted that panel consisting of Dr. Nalini Bhat, Advisor, Dr. Bharat Bhushan, Director (Scientific IA), Dr. A. Senthil Vel (IA-III), Mr. E.

Thirunavukkarasu, (IA-III) heard Adarsh Society on 04.01.2011. Petitioners also contended that use of FSI was within the limits permitted by DCR, 1967. Even in Petition, petitioners specifically contended that 1967 DCR are applicable.

99. He has taken us through paragraphs 1(e), (f), (g), (h), (k) and (v) of the written submissions relating to clearance obtained by petitioners under 1991 Notification. Petitioners raised general objections to NCZMA recommendation / decision. In paragraphs 4, 6 and 7, petitioners contended that by memorandum dated 05.08.2005, BEST plot belonging to the State of Maharashtra was allotted on occupancy basis to Adarsh Society against payment of amount of Rs.6,14,02,640/-.

In short, he submitted that in the detailed reply also, no allegations of violation of principles of natural justice were leveled. He further submitted that petitioners were given inspection of all the documents which was sought by the petitioners. It is, therefore, not open to the petitioners to contend that relevant documents were not either given or shown to them. He has also taken us through the petitioners' response to the questionnaire.

100. Mr. Apte submitted that Section 5 of the E.P.Act does not provide for personal hearing. Despite that, hearing was given to the petitioners by the panel consisting of four persons. He submitted that in the present case, institutional decision is taken. He submitted that on 04.01.2011, submission was put up by Mr. E. Thirunavukkarasu, Deputy Director (IA-III) before respondent No.2 - Mr. Jayram Ramesh proposing that the WP369chamber.odt hearing to the petitioner be conducted by respondent No.4 - Dr. Nalini Bhat, Advisor and the respondent No.3 - Dr. Bharat Bhushan, Director (Scientific IA), Dr. A. Senthil Vel (IA-III) and Mr. E. Thirunavukkarasu, (IA-III) will assist her. The same was approved by respondent No.2. He submitted that after hearing, respondent No.4 prepared report. Respondent No.3 Dr. Bharat Bhushan submitted proposal for obtaining approval of respondent No.2 on 14.01.2011. He has also invited our attention to the chart showing hierarchy in

the MOEF as also office order dated 30.09.2009. He submitted that cases involving policy implications or other sensitivities are required to be brought to the notice of Hon'ble Minister of MOEF. In short, he submitted that the decision taken in the present case is institutional decision and approved by the respondent No.2.

101. In support of these submissions, he relied upon the following decisions:

a. Union of India Vs. Jyoti Prakash55, and in particular paragraph 25;

b. Ossein and Gelatine Mfgrs. Assocn. of India 27, and in particular paragraphs 5 and 6;

c. Indore Textiles Mill Limited Vs. Union of India 56, and in particular paragraphs 7 to 12;

d. Raghava Menon Vs. I. G. of Police 57, and in particular paragraph 3;

e. Trimbakpati Vs. B.H.S. and I. Edn. 58, and in particular paragraphs 15 and 17;

f. Gen. Manager E. Rly. Vs. Jawala Prosad 59, and in particular paragraphs 7 to 9;

g. S. Kapoor Singh Vs. Union of India 60, and in particular 55 AIR 1971 SC 1093 56 AIR 1983 MP 65 57 AIR 1961 Kerala 299 58 AIR 1973 Allahabad 1 (FB) 59 AIR 1970 SC 1095 60 AIR 1960 SC 493 WP369chamber.odt paragraphs 21 to 23;

h. A. Sanjeevi Naidu Vs. State of Madras 61, and in particular paragraph 12;

i. Dharampal Satypal Limited25, and in particular paragraphs 38 to 40;

j. Kesava Mills Company Limited Vs. Union of India 62, and in particular paragraphs 17, 19, 20 and 21;

k. Gullapalli Nageswarrao12, and in particular paragraph 10;

102. Mr. Apte submitted that respondent No.4 - Dr. Nalini Bhat gave hearing. Respondent No.3 - Dr. Bharat Bhushan was present to assist her. After obtaining approval from respondent No.2, he passed order on 14.01.2011. He further submitted that petitioners have not pleaded bias in replies to the show cause notices as also in the written submissions.

Even in the Petition, petitioners have not pleaded bias. In any case, he stoutly refuted plea of bias. He relied upon the following decisions:

a. State of Punjab Vs. V. K. Khanna 63, and in particular paragraphs 5 and 11;

b. Kumaon Mandal Vikas Nigam, and in particular paragraphs 10 and 25 to 32;

c. Tata Cellular Vs. Union of India64, and in particular paragraphs 129, 131-148;

d. International Airports Authority of India Vs. K. D. Bali 65, and in particular paragraphs 5 and 6;

e. Susme Builders Private Limited Vs. CEO, SRA66, and in particular paragraphs 29, 31 and 57;

f. Metropolitan Properties Company (F.G.C.) Limited Vs. Lannon67, and in particular paragraph 116;

61 AIR 1970 SC 1102
62 AIR 1973 SC 389
63 AIR 2001 SC 343
64 AIR 1996 SC 11
65 AIR 1988 SC 1099
66 2012 (114) Bombay Law Reporter 3190
67 1969 Queen's Bench 577

g. All India Institute of Medical Sciences Vs. Kausal K. Verma 68, and in particular paragraphs 23 and 29;

103. Mr. Apte submitted that respondents have not violated any facet of principles of natural justice. The decision was not predetermined or prejudged. Officers were also not biased. In fact, no such case is made out earlier and for the first time, during the course of arguments, case as regards bias was developed. He, therefore, submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India.

104. We have also heard Ms Kiran Bhagalia appearing for MMRDA and Mr. Toor appearing for BEST, though it is not party in this Petition as the learned Counsel appearing for the parties agreed that the decision rendered in this case will also govern fate of Writ Petition No.2407 of 2010. Ms Bhagalia stated that she will not make submissions in the present case as MMRDA is not party. Mr. Toor has invited our attention to paragraphs 1 and 47 of Writ petition No.2407 of 2010. In that Petition, petitioners have challenged the consequential action of BEST in disconnecting electricity supply. In paragraph 47, petitioners referred to letter dated 02.11.2005 wherein request was made for utilizing FSI of BEST plot and referred to Notification dated 03.03.2006 issued under Section 50 of the M.R.&T.P. Act sanctioning use of additional FSI of BEST plot. He has invited our attention to order dated 23.12.2010 passed by the Division Bench of this Court in Writ Petition No.2407 of 2010 and companion Writ Petitions and in particular paragraphs 6, 8(D), 9 and 11. He has also invited

our attention to two affidavits made by BEST; first affidavit dealing with disconnection of electricity supply and second affidavit dealing with deletion of reservation as also additional affidavit in reply made on behalf of the BEST. In the additional 68 220 (2015) DLT 446 (Delhi High Court) WP369chamber.odt affidavit, it is asserted that area admeasuring 2669.68 sq.mtrs. of Captain Prakash Pethe Marg fronting the ingress and egress to the BEST depot has been consistently used by BEST for access on and from 11.10.1976, and consequently, BEST has been exercising easementary right of way over the said area. Reference is also made to the correspondence exchanged between BEST and UDD of Government of Maharashtra. On 17.05.2000, request was made on behalf of the BEST for designating the bus depot plot from "Bus Depot" to "BEST Bus Depot and Housing" to enable BEST to make use of the said bus depot plot also for its officers' quarters. This was replied by the Under Secretary, UDD on 29.11.2003 wherein it was stated that bus depot land is included in CRZ-II and existing road from sea side is affected by high tide level and that, there is no existing building adjacent to plot No.87-

C. The said letter also stated that as per clarification dated 08.09.1998 given by MOEF, any construction affecting high tide level would not be permissible and therefore, request made by Assistant General Manager (Civil), BEST cannot be acceded to.

105. On 14.07.2004, Under Secretary, UDD addressed a letter to the General Manager, BEST to attend the meeting on 14.07.2004 at 5.30 p.m. with relevant documents at Mantralaya under the Chairmanship of Hon'ble Minister of State, UDD as regards granting of additional FSI to Adarsh Society. On 19.08.2004, General Manager, BEST addressed a letter to the Principal Secretary, UDD enclosing therewith a brief note regarding discussions that took place in the meeting of 14.07.2004. In that note, it was suggested that the reservation over 2669.68 sq.mtrs will have to be deleted by following procedure under Section 37 of the M.R.&T.P. Act. By letter dated 30.10.2004, opinion from BEST as regards utilization of FSI of bus depot by Adarsh Society was sought. Thereafter, meeting was held on 15.12.2004 when Assistant General WP369chamber.odt Manager (Civil) BEST attended the meeting. He submitted the internal note dated 29.12.2004 to the General Manager, BEST. In that note, again reference was made for following procedure under Section 37 of the M.R.&T.P. Act. It was further clarified that BEST Undertaking will not grant NOC for dereservation of land as suggested by Shri Ramanand Tiwari, Principal Secretary, UDD.

106. Mr. Toor invited our attention to the communication dated 12.01.2005 addressed by Assistant General Manager (Civil) to the Additional Secretary, UDD setting out therein that the BEST bus depot has been commissioned and is in operation since 1976. The land under reference is used as ingress and egress of the buses as and by way of approach road and the same will be required as an approach road for Backbay Bus Depot. Taking into consideration this fact, the existing 44.40 mtr. wide road may be maintained as an approach road by keeping the interest of the BEST intact and take appropriate decision in accordance with law. In short, Mr. Toor submitted that this was not the no objection given by BEST.

107. Mr. Toor invited our attention to Section 50 of the M.R.&T.P. Act as also notification dated 03.03.2006 issued thereunder. Section 2(3) defines the expression 'appropriate authority' to mean any public authority on whose behalf land is designated for public purpose in any plan or scheme

and which it is authorized to acquire. In the present case, the land is designated for BEST bus depot and consequently, BEST is the appropriate authority. He submitted that as per sub-section (1) of Section 50, appropriate authority has to satisfy itself that the land so reserved is not or no longer required for public purpose for which it is designated or reserved or allocated in the development plan. It is only on arriving at such satisfaction, the appropriate authority has to request WP369chamber.odt the planning authority (in the present case MMRDA) to sanction the deletion or the State Government to sanction the deletion. In other words, appropriate authority has to make application to the State Government for deletion of reservation after arriving at its satisfaction.

In the first place, BEST has not made any application as contemplated by sub-section (1) of Section 50. Secondly, under sub-section (3), upon release of land from such designation or reservation, it becomes available to the owner for the purpose of development. Even according to the petitioners, State Government is the owner. Even if it is released from reservation, it shall become available to the State Government, it being the owner and not to the Adarsh Society. He, therefore, submitted that the Notification dated 03.03.2006 issued under Section 50 is null and void ab initio. If the exercise of power under Section 50 is only null and void, development permission has no legal efficacy. The Notification dated 03.03.2006 is null and void. He submitted that the communication dated 12.01.2005 addressed by AGM cannot be treated as NOC. The NOC as contemplated has to be of BEST committee. The State Government, therefore, could not have issued notification dated 03.03.2006 on the basis of the communication dated 12.01.2005 addressed by Assistant General Manager.

108. In support of this submission he relied upon the decision of Manohar Joshi Vs. State of Maharashtra69, and in particular paragraphs 106, 107 and 199. In paragraph 199, it was observed that if the deletion of reservation under Section 50 is at the instance of the appropriate authority, only when it does not want the land for the designated purpose.

109. Mr. Toor also relied upon Subhash V. Khaire Vs. State of 69 (2012) 3 SCC 619 WP369chamber.odt Maharashtra70, and in particular paragraph 17 thereof, to contend that the notification dated 03.03.2006 is illegal, null and void ab initio. It cannot be an order / notification issued in exercise of powers under Section 50 of the M.R.&T.P. Act. Mr. Toor also relied upon Deepak Kumar Mukherji Vs. Kolkata Municipal Corporation 71, and in particular paragraphs 8, 9 and 29, to contend that if notification under Section 50 is void ab initio, the consequence is to order demolition of a portion which utilized FSI of BEST plot. Mr. Toor also relied upon the decision in Kishore Samrite Vs. State of Uttar Pradesh 72, and in particular paragraphs 34 to 38 to contend that this is not a fit case for invocation of powers under Article 226 of the Constitution of India.

110. Mr. Shailesh Shah appearing on behalf of the State Government submitted that this Petition raises as many as four issues namely, (1) whether CRZ clearance is necessary; and if yes, (2) whether petitioners have obtained such clearance; (3) whether the petitioners have exceeded permissible FSI; and (4) whether there is breach of principles of natural justice. He submitted that petitioners contend that the communications dated 11.03.2003 and 15.03.2003 collectively constitute NOC. Communication dated 15.03.2003 is based on interpretation of communication dated 11.03.2003. Communication dated 11.03.2003 of MOEF addressed to Mr. P. V. Deshmukh states that MOEF

delegated powers to the State Government as per CRZ Notification. By no stretch of imagination, it can be construed as NOC of MOEF. Interpretation of communication dated 11.03.2003 made by Mr. P. V. Deshmukh is impermissible interpretation, and is not binding on the State Government. Even if the Court comes to the conclusion that communication dated 11.03.2003 constitutes NOC, however, no 70 2006 (6) Bom.C.R. 418 71 (2013) 5 SCC 336 72 (2013) 2 SCC 398 WP369chamber.odt recommendations of MCZMA were obtained. In fact Clause VIII of order dated 04.01.2002 requires prior recommendations of MCZMA and the said requirement is mandatory. Petitioners have not obtained recommendations of either MCZMA or Environment Department of the State Government. He has invited our attention to the affidavit of Mr. T. C. Benjamin, Principal Secretary-1, UDD dated 19.01.2011 made in Writ Petition No.2407 of 2010 and in particular paragraph 10 thereof. In paragraph 10, it is asserted that petitioners ought to have obtained NOC from the Environment Department for carrying out any construction activity as the subject plot is situate in CRZ-II. Petitioners did not even make an application for obtaining NOC from the Environment Department. In paragraph 3(b), it is provided that approval of the Environment Department was required to be obtained.

111. Mr. Shah also invited our attention to affidavit dated 14.07.2011 of Mr. Sanjay R. Kurve, Deputy Director of Town Planning in this Petition, and in particular paragraphs 5, 15 and 16 thereof. He submitted that as per Clause VIII of order dated 04.01.2002, recommendations of MCZMA were required to be obtained. The said recommendations were required to be placed before the Environment Department upto 21.04.2003, as from 08.07.1997 to 21.04.2003, the clearance was to be granted by the State Level Authorities. He submitted that the petitioners' contention that they cannot be blamed, if at all Mr. Deshmukh committed mistakes, is totally unacceptable. Communications dated 11.03.2003 and 15.03.2003 individually or collectively does / do not constitute clearance either of MOEF or the State Government.

112. Mr. Shah submitted that Clause II of the allotment letter specifically laid down that as the subject plot is in CRZ area, before carrying out construction, permission of MOEF as also MMRDA, being WP369chamber.odt the Special Planning Authority and the Corporation shall be obtained. Clause 2 of the memorandum dated 05.08.2005 permitting the petitioners to utilize additional FSI of BEST plot also required petitioners to obtain prior permission of MOEF. The petitioners did not protest on the ground that they had already obtained clearance as per communications dated 11.03.2003 and 15.03.2003. In fact petitioners were put to notice that before carrying out construction, they will have to obtain prior permission of MOEF.

113. Mr. Shah has also taken us through the correspondence exchanged between Adarsh Society and the State Government, which culminated in issuance of memorandum dated 05.08.2005. He submitted that perusal of correspondence will clearly show that under that memorandum, petitioners were allowed to utilize additional FSI of BEST plot and the BEST plot was not allotted to them. He has also invited our attention to the Notification dated 03.03.2006 issued under Section 50 of the M.R.&T.P. Act and submitted that the use of additional FSI was subject to obtaining approval of MOEF, MMRDA and Corporation. The petitioners were allowed to utilize additional FSI subject to fulfillment of these conditions. If there was no compliance of the conditions laid down in Memorandum dated 05.08.2005, the petitioners could not have utilized additional FSI of BEST

plot.

114. Mr. Shah submitted that even if it is assumed for the time being that by memorandum dated 05.08.2005, petitioners were allotted BEST plot, still, they cannot utilize FSI of BEST plot on the subject plot. He relied upon Section 2(13-A) and 2(21) of M.R.&T.P. Act which define the expressions 'Floor Space Index' and 'Plot' respectively. He submitted that FSI of a particular plot has to be used in that plot only. In other words, FSI of BEST plot has to be utilized in BEST plot, WP369chamber.odt otherwise, it will amount to Transferable Development Rights (TDR). Admittedly, subject plot is situate in A Ward where loading of TDR is prohibited. In short, he submitted that petitioners were not entitled to utilize FSI of the BEST plot while carrying out construction in the subject plot.

115. Mr. Shah invited our attention to Rules of Business pertaining to UDD and Environment Department and submitted that the grant of NOC clearly falls within the domain of Environment Department who is authorized to deal with the subject of environment and all other related matters. He, therefore, submitted that in fact Mr. Deshmukh was not at all authorized to address a letter dated 05.10.2002 to MOEF. It cannot be said that Mr. Deshmukh who was holding the post of Deputy Secretary was not aware of the Business Rules. In any case, he was disqualified as it amounted to conflict of interest.

116. Mr. Shah submitted that the appropriate authority did not make any application as contemplated by Section 50 of M.R.&T.P. Act. He has taken us through the file pertaining to issuance of Notification dated 03.03.2006 under Section 50 of M.R.&T.P. Act.

117. In rejoinder, Mr. Seervai strenuously contended that respondents have not answered following points raised by him as they have no answer in law or in fact. The points raised by him strike at the root of the matter. Respondents did not bother to deal with rules or principles of natural justice and the consequences that flow therefrom. He submitted that Mr. Khambata conceded that the doctrine of prejudice does not apply to the case of bias. MOEF did not deal with the contentions raised by the petitioners as regards bias. Elaborating this, he submitted that on 12.11.2010, notice was issued to the petitioners to WP369chamber.odt show cause within 15 days as to why the unauthorized structure erected by the Adarsh Society should not be removed forthwith in its entirety.

He submitted that illegality was already predetermined / prejudged. No attempt was made by the respondents to deal with this point. He submitted that the said notice was explicit, unequivocal and clear about issuing direction to demolish the building in its entirety. The minutes of the 66th meeting of MCZMA held on 03.11.2010, minutes of meeting dated 11.11.2010 of NCZMA, show cause notice dated 12.11.2010, report dated 13.01.2011 submitted by respondent No.4 Dr. Nalini Bhat, order dated 14.01.2011 passed by the respondent No.3 Dr. Bharat Bhushan and order dated 16.01.2011 passed by respondent No.2 Mr. Jayram Ramesh intrinsically show that issue was predetermined / prejudged and totally smack of the bias. All decisions / actions of the respondents are vitiated by bias. Respondent No.2 Mr. Jayram Ramesh, respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu were having bias against the petitioners and though these points were specifically urged, they were not dealt with by

the respondents.

118. Mr. Seervai submitted that four officials of MOEF namely, respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu were integrally involved in coming to the decision that the construction carried out was illegal.

They had actively participated in the meeting of NCZMA, which was held on 11.11.2010. They recommended to MOEF that the only course open was to order demolition of entire building. In effect, four officials recommended to themselves to accept the report in its entirety. These four officials, based on their own recommendations, accepted the observations / conclusions in show cause notice dated 12.11.2010.

WP369chamber.odt

119. Mr. Seervai submitted that respondent No.4 Dr. Nalini Bhat having already decided that the building is illegal, without issuing notice to the petitioners to show how it is legal and proceeded to hear the petitioners. He, therefore, submitted that she could not have possibly heard the petitioners and submitted the report.

120. Mr. Seervai submitted that the so called hearing given by the respondent No.4 Dr. Nalini Bhat is further vitiated by a presence of three unauthorized persons namely, Dr. Bharat Bhushan, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu. They dishonestly misled the petitioners at the time of hearing that they were duly authorized to hear the petitioners along with the respondent No.4 Dr. Nalini Bhat. In fact, order dated 30.09.2009 authorized only respondent No.4 Dr. Nalini Bhat to hear the petitioners. In other words, respondent No.3 Dr. Bharat Bhushan, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu had no authority to participate during the course of hearing. In any case, these persons having participated in the decision of the NCZMA dated 11.11.2010 were interested parties who had already determined that the petitioners were guilty. Hearing is infected by bias of Dr. Nalini Bhat. It is a case of substantive ultra vires and not a case of prejudice.

121. Mr. Seervai further submitted that even otherwise, the decisions / actions of the respondents are vitiated on account of procedural ultra vires. Proceedings right from 03.11.2010 to 16.01.2011 are vitiated by procedural ultra vires. He submitted that it is admitted / accepted position that respondent No.4 Dr. Nalini Bhat was authorized to give hearing to the petitioners. If she had heard the petitioners, it was only Dr. Nalini Bhat who could have passed the order which is based on the principle that one who hears has to decide. The report prepared by respondent No.4 Dr. Nalini Bhat is subversive of judicial system / WP369chamber.odt functioning. The entire report is based upon the minutes of NCZMA and thus, the issue was predetermined. Respondent No.4 Dr. Nalini Bhat became Judge in her own cause. Respondent No.3 Dr. Bharat Bhushan could not factually and legally give hearing. Respondent No.3 Dr. Bharat Bhushan, therefore, could not have passed the order on 14.01.2011. The order is based on a report, copy whereof was not given to the petitioners. Respondent No.4 Dr. Nalini Bhat was disqualified from hearing the matter. Respondent No.3 Dr. Bharat Bhushan was also disqualified from passing the order. He submitted that from the material on record, it is evident that even before issuing show cause notice on 03.11.2010, draft demolition

order was ready. The said fact is not and cannot be disputed and is an admitted fact. It is evident from the minutes of MCZMA meeting dated 03.11.2010. In view thereof, nothing remained to be decided and the hearing was an empty ritual and an idle formality.

122. Mr. Seervai submitted that report prepared by Dr. Nalini Bhat was not given to the petitioners. The petitioners did not know about the said report. Report is a sole basis of order dated 14.01.2011 passed by respondent No.3 Dr. Bharat Bhushan. He submitted that it is a fundamental principle that material which is relied by the authority passing the order ought to have been supplied to the petitioners. Mr. Seervai relied upon the decision in Karunakaran's case47. Petitioners were also denied to cross-examine Mr. Sitaram Kunte and Mr. T. C. Benjamin whose lengthy statements were recorded. NCZMA's meeting of 11.11.2010 was orchestrated by respondent No.4 Dr. Nalini Bhat. He submitted that the foundation of report prepared by Dr. Nalini Bhat was the statements of Mr. Sitaram Kunte and Mr. T. C. Benjamin. He, therefore, submitted that the report prepared by Dr. Nalini Bhat and the order passed by Dr. Bharat Bhushan are vitiated as petitioners were not WP369chamber.odt permitted to cross-examine Mr. Sitaram Kunte and Mr. T. C. Benjamin. Petitioners were heard by Dr. Nalini Bhat and the order was passed by Dr. Bharat Bhushan, which is contrary to the principle that one who hears, must pass the order as also it is vitiated on account of bias. He submitted that the decision in Gullapalli Nageswararao12 is reiterated in the following three judgments:

> a. Rasid Javed Vs. State of U.P.73, and in particular paragraph 51; b. Union of India Vs. Shiv Raj74, and in particular paragraphs 17 to 20; and c. Automotive Tyre Mfgrs. Assocn.11, and in particular paragraphs 80, 83 and 84.

123. Mr. Seervai invited our attention to the decision relied by Mr. Khambata namely, Karunakaran's case47, and in particular paragraph 7(i), (iii) and (iv). He submitted that petitioners were deprived of right to prove innocence. Respondents did not answer these points as they could not answer the same. Respondents jumped to second stage namely, imposing penalty and prejudged the case behind the back of the petitioners by relying upon the statements of Mr. T. C. Benjamin and Mr. Sitaram Kunte. He also relied upon State Bank of Patiala48, and in particular paragraphs 8(iii) and 9 to 11 as also Haryana Financial Corporation49.

124. Mr. Seervai submitted that order of MOEF is only on two issues and it is impermissible to go into other issues. Judicial review under Article 226 is proceedings either of administrative or quasi-judicial nature. Order cannot travel beyond the show cause notice. Jurisprudentially, a person has to deal with the show cause notice alone. Courts have consistently held that it is impermissible for the 73 (2010) 7 SCC 781 74 (2014) 6 SCC 564 WP369chamber.odt adjudicating authority to travel beyond the show cause notice. If the order travels beyond the show cause notice, it is bad in law as it is in violation of principles of ad alteram partem. Petitioners cannot in a worst position in this Court. He submitted that the following aspects were not in show cause notice / minutes of MCZMA / NCZMA / orders:

> a. FSI exceeded in view of 1967 DCR excluding lift rooms, lobby, stair case, etc.;

b. BEST plot was allotted to the petitioners or not; c. Under 1967 DCR, if the decision of the Apex Court in Suresh Estate1 applies then permissible FSI is 3.5;

d. Contention that Notification dated 03.03.2006 issued under Section 50 of the M.R.&T.P. Act is ultra vires was not raised in the order and nobody challenged that Notification;

e. Letter dated 15.03.2003 of Mr. P. V. Deshmukh granting NOC because he was a member is irrelevant;

f. Sanctioning Authority is MOEF as per CRZ Notification dated 19.02.1991 and UDD / MMRDA as per Notification dated 09.07.1997. The contention that Environment Department of Government of Maharashtra was the appropriate authority was not raised.

125. Respondents' contention that MOEF's permission is necessary as the conditions stipulated in letter of allotment dated 09.07.2004, memorandum dated 05.08.2005 and notification dated 03.03.2006 cannot be gone into and it is irrelevant. Respondent No.4 Dr. Nalini Bhat accepts that by memorandum dated 05.08.2005, subject plot was allotted by Government to the petitioners. In the show cause notice, it is not stated that MOEF's prior clearance is not obtained, and therefore, it is illegal. Order of Dr. Bharat Bhushan dated 14.01.2011, report of Dr. Nalini Bhat dated 13.01.2011, minutes of MCZMA dated 03.11.2010 WP369chamber.odt and minutes of NCZMA dated 11.11.2010 do not violate the principle that order travels beyond the show cause notice. The Counsel during the course of arguments cannot violate that principle. Counsel for respondents however went beyond show cause notice / orders by raising additional grounds in support of the impugned orders / actions. Show cause notice, orders and minutes speak about 09.07.1997 Notification, and therefore, that Notification is relevant and not the subsequent Notification dated 22.04.2003. Respondents' argument that Notification dated 22.04.2003 is relevant is contrary to record. He further submitted that the order cannot be improved by affidavit and oral submissions of respondents in the Court. He submitted that it is impermissible. He relied upon - a) Commissioner of Police Vs. Govardhan Bhanji 75 and b) Mohinder Singh Gill's case28. Submission of Mr. Khambata that the ratio in Mohinder Singh Gill's case28 is watered down is wholly unacceptable. In fact Mohinder Singh Gill's case28 is followed in the following decisions:

a. Deepak Babaria29, and in particular paragraphs 62 to 65, 69 and 70;

b. Rashmi Metaliks Limited30, and in particular paragraph 15;

c. All India Railway Recruitment Board31; d. Dharampal Satyapal Limited25.

126. He also relied upon Union of India Vs. Dhanwanti Devi 76, and in particular paragraphs 9 and 10 dealing with binding nature of precedents. He submitted that the aforesaid contentions advanced by the petitioners were not dealt with by the respondents as they had no answer. On merits, Mr. Seervai submitted that as no clearance under CRZ Notification is required, it is unnecessary to

obtain the recommendations of MCZMA. The controversy raised in this Petition 75 AIR 1952 SC 16 76 (1996) 6 SCC 44 WP369chamber.odt centers around six documents namely, 05.10.2002, 02.12.2002, 04.01.2003, 10.01.2003, 11.03.2003 and lastly, 15.03.2003. As far as the issue of CRZ clearance is concerned, he submitted that if the documents from 05.10.2002 to 15.03.2003 are read as a whole, it shows that 11.03.2003 is CRZ clearance. In substance, it is CRZ clearance. Alternatively, 15.03.2003 is the clearance of the State Government. He submitted that the Court ought not to shut eyes to - a) every single authority involved during 2007-2008 at every stage of granting permission on the footing that CRZ clearance was granted; b) on 03.11.2009 show cause notice was issued by MCZMA which was replied by the petitioners on 17.12.2009, enclosing therewith communications dated 11.03.2003 and 15.03.2009. MCZMA thereafter did not give any reply nor it take any action for more than 1½ years.

MCZMA did not intimate that petitioners did not obtain its recommendations. In fact, the authorities themselves are not sure as to who is the appropriate authority to grant clearance.

127. Mr. Seervai submitted that the contention advanced by Mr. Khambata that the expressions 'clearance' and 'regulation' mean the same thing cannot be accepted. When the subordinate legislation uses two different expressions, namely, clearance and regulation, obviously, they cannot mean the same thing. Regulation includes complete prohibition. He submitted that the concept of regulation and clearance are two different concepts. He has taken us through paragraphs 2 and 3 of CRZ Notification dated 19.02.2011 to contend that the expressions 'clearance' and 'regulation' are different. In short, he submitted that clearance of either MOEF or State Level Authorities is not required and consequently, recommendations of MCZMA are also not necessary.

128. Mr. Seervai submitted that regulation laid down three things WP369chamber.odt which are to regulated by the State Level Authorities. MCZMA cannot regulate on the issue of FSI. The Legislation does not confer such power on MCZMA. The issue of FSI is to be regulated by either Corporation being the Planning Authority or MMRDA, which is a Special Planning Authority. In fact, in the past, MCZMA has never looked into the aspect of FSI. They have never examined FSI aspect after 04.01.2002 onwards. M.R.&T.P. Act also does not authorize MCZMA to go into FSI aspect.

129. Mr. Seervai submitted that if for the sake of argument, it is held that 1967 DCR are applicable, as a matter of right and not as a matter of discretion, FSI permissible in BBRS-III-VI, petitioners are entitled to consume 3.5 FSI. He submitted that MCZMA show cause notice / report / impugned orders do not hold that petitioners' building has exceeded FSI under 1967 DCR. In the minutes of the meeting dated 03.11.2010 of MCZMA, it is recorded that the plot is not amalgamated.

Nobody considered Notifications of 10.06.1977 and 05.10.1989 as they were not relevant. Even the Apex Court in Suresh Estate1, did not consider these Notifications. The minutes of NCZMA, MCZMA, show cause notice, reports, impugned orders do not refer to these Notifications. He submitted that under Rule 10(1) of 1967 DCR, as a matter of right, permissible FSI is 3.5. Rule 10(2) gives discretionary powers to the Planning Authority.

130. Mr. Seervai submitted that even according to Mr. Khambata's calculations, petitioners have consumed 2.9 FSI and thus, it has not exceeded FSI of 3.5. He submitted that it is settled principle of law that in judicial review of quasi-judicial orders, it is impermissible to go beyond the show cause notice. He submitted that MMRDA in its affidavit filed in Writ Petition No.2407 of 2010 categorically stated that WP369chamber.odt it took into account 1989 Draft DC Regulations. MMRDA itself did not consider Notifications dated 10.06.1977 and 05.10.1989 as relevant. In fact, Notification dated 05.10.1989 lapsed in 2007 when the commencement certificate was issued. In short, Mr. Seervai submitted that there is no FSI violation and the Court should accept affidavit of Special Planning Authority namely, MMRDA. MMRDA had passed all the plans and granted valid permissions taking into account 1989 Draft DC Regulations. The Apex Court decided Suresh Estate1 on 14.12.2007. All the permissions were validly granted prior to 2007. He further submitted that in Suresh Estate1, the Apex Court was dealing with property situate in 'C' Ward. In that case, application was made for carrying out development and building was not already constructed. The Apex Court was not dealing with 'A' Ward. The Apex Court was also not concerned with Draft DCR and Draft Plan qua 'A' Ward. Apex Court was dealing with the Final Development Plan and Final DCR of 1967 and Draft DCR and Draft Development Plan of 1989. He invited our attention to paragraphs 7, 24 and 25 of Suresh Estate. Mr. Seervai submitted that Suresh Estate1 does not deal with Final Development Plan of 1990 of 'A' Ward.

131. Mr. Seervai submitted that in the show cause notice as also report, it is observed that petitioners have utilized FSI of adjoining plot of BEST without amalgamation. He submitted that in fact, in the report of Dr. Nalini Bhat, there is a finding that BEST plot was allotted. MMRDA in its affidavit categorically stated that BEST plot was allotted on 05.08.2005.

132. Mr. Seervai submitted that none of the respondents have challenged the Notification dated 03.03.2006. MMRDA, Corporation, State Government do not say that utilization of FSI of BEST plot is WP369chamber.odt illegal; it is MOEF who says that it is impermissible. It is for MOEF who asserts to prove that aspect and MOEF has not proved it by relying upon any Statute, Notification, Regulation, Rule, Bye-laws, and provisions of Maharashtra Land Revenue Code, 1966. It is not possible for the petitioners to prove negative. On mere ipse dixit of respondents, not supported by any legal provision, Court ought not to invalidate the same without challenge to memorandum dated 05.08.2005 and notification dated 03.03.2006 merely because respondents say so. If there is no specific prohibition then law presumes that it is permissible. The permissions granted in favour of the petitioners are not challenged and set aside.

133. Mr. Seervai submitted that show cause notice, minutes of MCZMA / NCZMA, reports and impugned orders do not deal with validity of Notification dated 03.03.2006. They do not say that the Notification dated 03.03.2006 is illegal. The Notification dated 03.03.2006 is not challenged. The judgments relied by Mr. Toor appearing on behalf of the BEST are, therefore, irrelevant. He further submitted that even the State Government does not say that the Notification dated 03.03.2006 is illegal. In fact BEST did not write a single letter from 2010 to the State Government alleging that the Notification dated 03.03.2006 is illegal. He further submitted that similar type of Notifications under Section 50 were issued and the same were upheld by this Court in the Judges' Society case.

134. Mr. Seervai relied upon Sneh Mandal CHSL42, and in particular paragraph 18 onwards to contend that for changing reservation, prior approval of MCZMA is not required. He submitted that the Division Bench of this Court dealt with change of classification of Coastal Regulation Zones and not change of reservation.

WP369chamber.odt

135. Mr. Khambata drew our attention to 1991 Notification and in particular paragraphs 3(1), 3(2)(i) to (iii) and submitted that the decision in Sneh Mandal CHSL42 was not in respect of change of CRZ I to CRZ II. In fact the plots 146 and 147 in that case, were in CRZ II and not in CRZ I. Mr. Khambata submitted that the decision in Mohinder Singh Gill's case28 is not applicable where larger public interest is involved. He relied upon M/s. PRP Exports Vs. Chief Secretary, Govt. of T.N. 77, and in particular paragraph 7 thereof.

136. Mr. Shah appearing on behalf of the State Government submitted that the prior recommendations of MCZMA are required to be obtained as per the order dated 04.01.2002. As per Rules of Business, it is the Environment Department who has to consider granting of clearance under CRZ prior to 22.04.2003. He has taken us through the affidavit filed by the State Government in Writ Petition No.2407 of 2010 as also report of Dr. Nalini Bhat. He reiterated that BEST plot was not allotted to the petitioners. He also relied upon MI Builder's case43 and also Jeetram Shivkumar Vs. State of Haryana 78, and in particular paragraph

51. He submitted that in show cause notice as also order, issue of excess FSI was specifically raised. He submitted that petitioners have contended that they were allotted BEST plot and hence, they are entitled to utilize FSI of BEST plot. If that be so, respondents are entitled to meet the arguments so advanced by the petitioners, and therefore, issue about utilization of excess FSI directly arises from the petitioners' arguments.

137. Mr. Apte reiterated that the respondents have taken institutional decision. Respondent No.3 Dr. Bharat Bhushan passed final order on 14.01.2011 after obtaining approval of respondent No.2.

77 (2014) 3 SCJ 593
78 AIR 1980 SC 1285

WP369chamber.odt

CONSIDERATION

138. We have recorded the above submissions in great detail, lest, we are accused of not correctly depicting the submissions as they were canvassed before us. We have carefully considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the material on record including the report prepared by the Commission of Justice J. A. Patil (Retired). In our opinion, following questions arise for our consideration:

(1) Whether before carrying out construction activities in CRZ-II area, clearance under 1991 Notification, as amended from time to time, is required at all?

(2) If answer to the above question is in the affirmative then who is the appropriate authority to grant clearance during the periods between -

a. 19.02.1991 and 08.07.1997;

b. 09.07.1997 and 04.01.2002;

c. 05.01.2002 and 21.04.2003;

d. 22.04.2003 and 30.12.2008;

e. 31.12.2008 and 05.01.2011; and f. 06.01.2011 onwards.

(3) (a) Whether in terms of paragraph VIII of order dated 04.01.2002 of MOEF, prior recommendations of MCZMA are mandatorily required to be obtained before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under 1991 Notification? and

(b) Whether prior recommendations of MCZMA are necessary before change of reservation / zoning?

(4) Whether in law it is the UDD or Environment Department of Government of Maharashtra authorized to grant clearance during the WP369chamber.odt period between 09.07.1997 and 21.04.2003?

(5) Whether communication dated 11.03.2003 of MOEF constitutes its clearance?

(6) Whether communication dated 15.03.2003 of UDD, Government of Maharashtra constitutes clearance of State Level Agency?

(7) Whether communications dated 11.03.2003 and 15.03.2003 collectively constitute clearance under CRZ Notification?

(8) Which of the DCRs namely, 1967 DCR, draft 1989 DCR, 1991 DCR are, in the facts and circumstances of the present case, applicable?

What is the permissible FSI and how much FSI is consumed by the petitioners' building?

(10) Whether the various facets of the principles of natural justice namely;

a. non-supply of report of respondent No.4 Dr. Nalini Bhat;

b. not permitting the petitioners to cross-examine Mr. T. C.

Benjamin and Mr. Sitaram Kunte;

c. hearing by respondent No.4 Dr. Nalini Bhat and passing of order dated 14.01.2011 by respondent No.3 Dr. Bharat Bhushan;

d. (i) by participating in the NCZMA meeting dated 11.11.2010, respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu, have disqualified themselves in dealing with the petitioners' case;

(ii) the above officers were having bias against the petitioners;

(iii) the respondent No.3 had made up his mind while issuing show cause notice dated 12.11.2010;

(iv) the officers have abdicated their powers, functions and duties and acted on dictates of others;

(v) the impugned order / action travel beyond the show cause WP369chamber.odt notice;

e. preparation of draft demolition order purportedly by Dr. A.

Senthil Vel;

f. not hearing by respondent No.2 Mr. Jayram Ramesh before accepting one of the three options;

are, in the facts and circumstances of the present case, grossly violated?

(11) Whether this is a fit case for invocation of extra-ordinary jurisdiction under Article 226 of the Constitution of India?

(12) What order?

Re: Question No.(1) (1) Whether before carrying out construction activities in CRZ-II area, clearance under CRZ Notification dated 19.02.1991, as amended from time to time, is at all required?

139. In order to answer this question, it is necessary to consider the object for which E.P.Act was enacted. E.P.Act was enacted with a view to providing for the protection and improvement of environment and for matters connected therewith. Decisions were taken at the United Nations Conference on the Human Environment held at Stokholm in June 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment. Section 2(a)

defines the expression "environment" to include water, air and land and the inter relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property. Section 3(1) lays down that subject to the provisions of the E.P.Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, WP369chamber.odt controlling and abating environmental pollution. Clause (v) of sub-section (2) of Section 3 lays down that in particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect of all or any of the following matters namely, (v) restriction of areas in which any industries, operations, processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Section 24 of the E.P.Act deals with effect of other laws. It provides that subject to the provisions of sub-section (2), the provisions of the E.P.Act and the rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than E.P.Act. In other words, the provisions of the E.P.Act and the rules or orders made thereunder are given overriding effect.

140. MOEF issued 1991 Notification under Section 3(1) and Section 3(2)(v) of the E.P.Act and Rule 5(3)(d) of the EP Rules declaring coastal stretches as CRZ and regulating activities in the CRZ. In exercise of powers conferred by clause (d) of sub-rule (3) of Rule 5 of the EP Rules, and all other powers vesting in its behalf, the Central Government declared coastal stretches of seas, bays, estuaries, creeks, rivers and High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL as Coastal Regulation Zone and imposed with effect from the date of that Notification, the restrictions on the setting up and expansion of industries, operations or processes etc. in the CRZ. Paragraph 2 thereof deals with the Prohibited Activities. Activities enumerated in clauses (i) to (xiii) are declared as prohibited activities within CRZ. Paragraph 3 deals with Regulation of Permissible Activities. All other activities, except those prohibited in paragraph 2 are regulated as under:

WP369chamber.odt (1) Clearance shall be given for any activity within the CRZ only if it requires water front and foreshore facilities.

(2) Clause (iv) of sub-paragraph (2) of paragraph 3, namely, all other activities with investment exceeding Rs. 5 crores, will require environmental clearance from MOEF, Government of India. Paragraph 3 reads thus, "3. Regulation of permissible activities:

> All other activities, except those prohibited in para 2 above, will be regulated as under:
>
> (1) Clearance shall be given for any activity within the Coastal Regulation Zone only it it requires water front and foreshore facilities.
>
> (2) The following activities will require environmental clearance from the Ministry of Environment & Forests, Government of India, namely:-

(i) Construction activities related to Defence requirements for which foreshore facilities are essential (e.g. slipways, jetties, etc.); except for classified operational component of defence projects for which a separate procedure shall be followed. (Residential buildings, office buildings, hospital complexes, workshops shall not come within the definition of operational requirements except in very special cases and hence shall not normally be permitted in the CRZ);

(ii) Operational constructions for ports and harbours and light houses requiring water frontage; jetties wharves, quayst slipways etc. (Residential buildings & office buildings shall not come within the definition of operational activities except in very special cases and hence shall not normally be permitted in the CRZ);

(iii) Thermal power plants (only foreshore facilities for transport of raw materials facilities for in-take of cooling water and outfall for discharge of treated waste water cooling water); and

(iv) All other activities with investment exceeding rupees five crores."

(i) The coastal States and Union Territory Administrations shall prepare, within a period of one year from the date of this Notification, Coastal Zone Management Plans identifying and classifying the CRZ areas within their respective territories in accordance with the guidelines given in Annexures-I and II of the Notification and obtain approval (with or without modifications) of the Central Government in the Ministry WP369chamber.odt of Environment & Forests;

(ii) Within the framework of such approved plans, all development and activities within the CRZ other than those covered in para 2 and para 3(2) above shall be regulated by the State Government, Union Territory Administration or the local authority as the case may be in accordance with the guidelines given in Annexure I and II of the Notification; and

(iii) In the interim period till the Coastal Zone Management Plans mentioned in para 3(3)(i) above are prepared and approved, all developments and activities within the CRZ shall not violate the provisions of this Notifications. State Governments and Union Territory Administrations shall ensure adherence to these regulations and violations, if any, shall be subject to the provisions of the environment (Protection) Act, 1986."

141. Paragraph 4 thereof deals with the procedure for monitoring and enforcement and reads thus, "4. Procedure for monitoring and enforcement:

The Minister of Environment and Forests and the Government of State or Union Territory and such other authorities at the State or Union Territory levels, as may be designated for this purpose, shall be responsible for monitoring and enforcement of the provisions of this notification within their

respective jurisdictions.

142. Annexure I deals with coastal area classification and development regulations. Paragraph 6(1) provides that for regulating development activities, coastal stretches within 500 meters of High Tide Line of the landward side are classified into four categories namely, Category-I (CRZ-I), Category-II (CRZ-II), Category-III (CRZ-III) amd Category-

IV (CRZ-IV).

143. In Category-I (CRZ-I), (i) areas that are ecologically sensitive and important, such as national parks / marine parks, sanctuaries, reserve forests, wildlife habitats, mangroves, corals / coral reefs, areas close to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty / historical / heritage areas, areas rich in WP369chamber.odt genetic-diversity, areas likely to be inundated due to rise in sea level consequent upon global warming and such other areas as may be declared by the central Government or the concerned authorities at the State / Union Territory level from time to time; (ii) area between the Low Tide Line and the High Tide Line, are included.

144. In Category-II (CRZ-II), the areas that have already been developed upto or close to the shoreline and for that purpose, 'developed area' is referred to as that area within the municipal limits or in other legally designated urban areas which is already substantially built up and which has been provided with drainage and approach roads and other infrastructural facilities, such as water supply and sewerage mains are included. It is not in dispute that the subject plot is situate in CRZ-II. It is, therefore, not necessary to deal with Category-III and IV.

145. Paragraph 6(2) of Annexure-I deals with norms for regulation of activities and reads thus, "6(2) The development or construction activities in different categories of CRZ areas shall be regulated by the concerned authorities at the State / Union Territory level, in accordance with the following norms:

CRZ - I ...

CRZ - II

(i) Buildings shall be permitted neither on the seaward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) nor on seaward side of existing authorized structures. Buildings permitted on the landward side of the existing and proposed roads / existing authorized structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of FSI / FAR.

(ii) ...

(iii) ... "

146. Thus, perusal of 1991 Notification clearly shows that in terms of paragraph 3(2)(iv), all other activities [activities other than clauses (i) to

(iii)] with investment exceeding Rs.5 crores, require environmental clearance from MOEF, Government of India. This position continued till 08.07.1997. Even petitioners did not dispute this position. On 09.07.1997, MOEF amended 1991 Notification. Insofar as the controversy raised in the present Petition is concerned, relevant amended clauses are clause (iv) of paragraph 3(2) and item (i) of sub-paragraph (2) of paragraph 6 in Annexure-I. Amended paragraph 3(2)(iv) reads thus, "All other activities with investment exceeding Rs.5 crores except those activities, which are to be regulated by the concerned authorities at the State / Union Territory level in accordance with the provisions of paragraph 6, sub-paragraph (2) of Annexure-I of the Notification."

147. Item (i) of sub-paragraph (2) of paragraph 6 in Annexure-I under heading "CRZ-II"reads thus, " Building shall be permitted only on the landward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) or on the landward side of the existing authorized structures. Buildings permitted on the landward side of the existing and proposed roads / existing authorized structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor Space Index / Floor Area Ratio.

Provided that no permission for construction of this shall be given on landward side of any new roads (except roads proposed in the approved Coastal Zone Management Plan which are constructed on the seaward side of an existing road:"

148. Mr. Seervai submitted that paragraph 6(2) of 1991 Notification inter alia provides that the development or the construction activities in different categories of CRZ areas would be regulated by the concerned authorities at the State / Union Territory level in accordance with the norms provided therein. Thus, the 1991 Notification casts a WP369chamber.odt responsibility on local authorities at the State level only to regulate the building and construction activity with an investment exceeding Rs.5 crores. By 1997 Notification, MOEF amended the 1991 Notification. The 1997 Notification restricted the requirement of clearance by MOEF in paragraph 3(2)(iv) only to activities with investment exceeding Rs.5 crores and which are not regulated by the concerned authorities at State / Union Territory level in accordance with paragraph 6(2) of the Notification of 1997. In view of the 1997 Notification, the MMRDA being the special planning authority for the area where the petitioners' building is situate was the concerned regulating authority and / or the concerned authority within the meaning of paragraph 3(2)(iv) of paragraph 6(2) of the 1997 Notification. The development / construction of the petitioners' building being regulated by MMRDA did not require clearance as per paragraph 6(2)(iv) read with paragraph 6(2) of the 1997 Notification.

149. On the other hand, Mr. Khambata submitted that the 1991 Notification does not create any dichotomy between regulation on the one hand and clearance on the other. He submitted that a purposive interpretation of the CRZ Notification requires that regulation and clearance be treated at

par and interchangeably. Any interpretation giving them different meanings and scopes would undermine the effect of the CRZ Notification and the regulation of activities in the CRZ. A plain reading of paragraph 3 of the 1991 Notification indicates that the Notification itself treats the environmental clearance as one of the aspects of the regulation. In any event, in law, the expression "regulation" has a very wide meaning and includes even a "prohibition". In the absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control. To read the expression 'regulated' appearing in paragraph 3(3) WP369chamber.odt as limited to the mere clerical activity of determining whether a project is to the landward or seaward side of an authorized existing structure or road is to deliberately trivialize the regulatory role and to do violence to the plain language of the CRZ Notification. It is a mis-characterization of the State / Local Authority's CRZ regulatory function under the CRZ Notification.

150. Mr. Khambata further submitted that 'clearance' and 'regulation' are interchangeable. The 'regulation' is a wider expression, which includes clearance as also prohibition. In the alternative, if the clearance and regulation are to be given different meaning, regulation has a wider meaning and will include clearance. He submitted that the Court has to give purposive interpretation and the Court will hold that the clearance and regulation are the same. In support of these submissions, he relied upon (i) M/s. Hindstone32, and in particular paragraph 10 and (ii) K. Ramnathan33, and in particular paragraphs 18 and 19 to contend that regulation under CRZ Notification will include clearance as also prohibition.

151. As noted earlier, there is no dispute that between 19.02.1991 and 08.07.1997 in terms of paragraph 3(2)(iv), all activities with investment exceeding Rs. 5 crores would require environmental clearance from MOEF, Government of India. The dispute is whether from 09.07.1997, the clearance of either MOEF or the concerned authorities at the State / Union Territory level is at all required. In our opinion, even after 09.07.1997, the clearance of State level authorities would be required before carrying out activities with investment exceeding Rs.5 crores in terms of amended paragraph 3(2)(iv). If the contention of Mr. Seervai that clearance of MOEF or State level authorities is not required in respect of plot falling in CRZ area is accepted, it will render CRZ WP369chamber.odt Notification otiose. It is also not possible to accept submission of Mr. Seervai that the construction activities are required to be regulated only by the concerned planning authorities. If the contention of Mr. Seervai is accepted, it will not make any difference between the plot falling in CRZ area and the plot not falling in any of the CRZ areas. Because even in respect of plots not falling in any of the CRZ area, for construction activities, the permission of the concerned planning authority is necessary. The very purpose of issuing notification under E.P.Act will be defeated if the contention of Mr. Seervai is accepted.

152. In the case of M/s. Hind Stone32, the Apex Court considered its earlier decision in G. K. Krishnan Vs. State of Tamil Nadu 79, wherein it was observed that the word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied. In modern statutes concerned as they are with economic and social activities, 'regulation' must, of necessity, receive so wide and interpretation that in certain situations, it must exclude competition to the public sector from the private sector. Each case, it was said, must be judged on its own facts

and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The Apex Court was dealing with the Mines and Minerals (Regulation and Development) Act and it was observed that the said Statute is aimed at the conservation and the prudent and discriminating exploitation of minerals. It was observed that surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present.

79 AIR 1975 SC 583

153. In the case of K. Ramanathan33, it was observed in paragraph 18 that the word 'regulation' cannot have any rigid or inflexible meaning as to exclude 'prohibition'. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning and is very comprehensive in scope. In paragraph 19, it was observed that the power to regulate carries with it full power over the things subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would, therefore, appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

(emphasis supplied)

154. It is also relevant to note here that on 12.11.1997, Principal Secretary to Government of Maharashtra addressed a letter to the Municipal Commissioner of Corporation wherein it was clarified that the total development permission cannot be stopped in CRZ area. Municipal Commissioner was requested to scrutinize the proposals as per 1991 Notification, subsequent letters dated 27.09.1997 and 1997 Notification. It was further set out therein that the development proposals within a CRZ area in which investment exceeds rupees five WP369chamber.odt crores should only be referred to State Government for clearance and other proposals should be cleared by the Corporation as per the approval of the Government of India, MOEF Notification and letter. In other words, the clearance of the State Government was required in respect of development proposals within the CRZ areas in which the investment exceeds Rs. 5 crores and other proposals were required to be cleared by Corporation as per the approval of Government of India, MOEF Notification and letter. It, therefore, cannot be said that post 1997 Notification, clearance was not

required at all.

155. It is settled principles of interpretation that if the provisions of Statute are ambiguous and are not clear, the Court has to resort to purposive interpretation. Bearing in mind the object for which the E.P.Act was enacted as also the object for which the CRZ Notifications are issued and the communication dated 12.11.1997, it has to be held that even after 09.07.1997, the clearance of MOEF or authorities at State level will be required to be obtained depending upon the activities falling in amended paragraph 3(2)(iv) of 1997 Notification. It is only after obtaining clearance from concerned authorities, the construction activities can be carried out after obtaining permissions from the concerned planning authorities. Question No.1 is answered accordingly.

Re: Question No.(2) (2) If answer to the above question is in the affirmative then who is the appropriate authority to grant clearance during the periods between -

a. 19.02.1991 and 08.07.1997;

b. 09.07.1997 and 04.01.2002;

c. 05.01.2002 and 21.04.2003;

d. 22.04.2003 and 30.12.2008;

e. 31.12.2008 and 05.01.2011; and WP369chamber.odt f. 06.01.2011 onwards.

156. Mr. Khambata submitted that the competent Regulatory Authority for CRZ-II for the different periods is as under:

Period	Authority for regulatory permission
A. 19.02.1991 - 08.07.1997 19.02.1991: CRZ Notification 27.09.1996: CZMP for Maharashtra approved by MOEF. [CZMP Paragraph 2A(i) : All relevant provisions of CRZ Notification incorporated in CZMP	(1) All paragraph 3(2) activities including (iv) i.e. "All other activities with investment exceeding rupees five crores" : MOEF [paragraph 3(2) - page 210] (2) "...all development and activities ... other than those covered in paragraph 2 and paragraph 3(2) above" : State Government / Union Territory

ig CZMP paragraph 2A(xi) : "Government of Maharashtra or any other Authority so designated shall be responsible for monitoring and enforcement of the provisions of CRZ Notifications and CZMP"]	Administration / Local Authority [Para 3(3)(ii) - page 210]
B. 09.07.1997 - 04.01.2002 09.07.1997 Amendment to the CRZ Notification (at Pg.217). Paragraph 3(2)(iv) substituted (at pg. 220) [NB: MCZMA constituted on 26.11.1998 (pg.225) and renewed for 3 years on 04.01.2002 (pg.228)]	(1) All paragraph 3(2) activities including (iv) i.e. above Rs.5 crores, other than development or construction activities covered by paragraph 6(2) of Annexure I (in CRZ I, II and III) : MOEF. (2) Development/construction activities (paragraph 6(2) of Annexure I) regardless of value of investment : State Government / Union Territory Administration / Local authority [paragraph 3(3)(ii) page 210] - referred to as "concerned authorities at the State/Union Territory level" [Para 6(2) page 212] [NOTE: From 12.11.1997, the State Government directed the MCGM (at page 495) that proposals exceeding Rs.5 crores were to be referred by the local authority to the State Government.]
C. 05.01.2002 - 21.04.2003 Clause VIII of MCZMA Notification of 04.01.2002 (page 229) required prior MCZMA	(1) All paragraph 3(2) activities including (iv) i.e. above Rs.5 crores, other than development or construction activities covered by paragraph 6(2) of Annexure I (in CRZ I, II and III) : MOEF after the

recommendation i.e. "before the project proposals are referred to the Central Government or the agencies who have been entrusted	MCZMA's CRZ recommendation. (2) Development/construction activities (paragraph 6(2) of Annexure I) regardless
to clear such projects under ... (the CRZ Notification)". This was a	of value of investment : State Government / Union Territory
condition precedent.	Administration / Local Authority, after the MCZMA's CRZ recommendation. [Paragraph 3(3)(ii) page 210] - referred to as "concerned authorities at the State / Union Territory level" [Para 6(2) page
	212]
D. 22.04.2003 - 30.12.2008 Amendment to paragraph 3(2)(iv) of	(1) Rs. 5 crores and over : MOEF after the MCZMA's CRZ recommendation [paragraph 3(2)(iv) - page 249]
CRZ Notification (page 249)	(2) Under Rs.5 crores: Concerned

[NB: Notification dated 02.09.2005 ig authorities at the State / Union Territory reconstituting MCZMA for 3 years level, after the MCZMA's CRZ

- Clause VIII continued.} recommendation [proviso to paragraph 3(2)(iv) - page 249 read with paragraph 3(3)(ii) - page 210] E. 31.12.2008 - 05.01.2011 (1) Rs. 5 crores and over: MOEF after the MCZMA's CRZ recommendation Although the Notification reconstituting MCZMA omitted (2) Under Rs.5 crores: Concerned Clause VIII, proposal continued to authorities at the State / Union

Territory be sent to the MCZMA for its CRZ level, after the MCZMA's CRZ approval. recommendation [paragraph 3(2)(iv) -

page 249 read with paragraph 3(2)(ii) -

page 210].

F. 06.01.2011 onwards (1) Over 20,000 sq. mtrs. built up are :

MOEF (after SEIAA environmental (New CRZ Notification) clearance) (2) Under 20,000 sq. mtrs. built up area :

MCZMA.

a. 19.02.1991 and 08.07.1997;

157. As noted earlier, 1991 Notification was amended on 09.07.1997. It, therefore, follows that between 19.02.1991 and 08.07.1997, MOEF was the Appropriate Authority to grant environmental clearance in term of paragraph 3. As per paragraph 3(2), all activities (i) to (iii) and clause

(iv) i.e. "all other activities with investment exceeding Rs.5 crores, WP369chamber.odt environment clearance from MOEF is necessary". As per paragraph 3(3)(ii), all development and activities within the CRZ other than those covered in paragraph 2 and paragraph 3(2) are to be regulated by the State Government, Union Territory Administration or the Local Authority, as the case may be, in accordance with the guidelines given in Annexures I and II of the Notification. In the present case, it is not disputed that the building activity will not fall in clauses (i) to (iii) and will fall in clause (iv) of paragraph 3(2) of the 1991 Notification. The building activities will require environmental clearance from MOEF for the period between 19.02.1991 and 08.07.1997.

b. 09.07.1997 and 04.01.2002;

158. As noted earlier, on 09.07.1997, 1991 Notification was amended and clause (iv) in paragraph 3(2) was substituted. Environmental clearance of MOEF is required in respect of activities covered by clauses (i) to (iv) of paragraph 3(2) other than development or construction activities covered by paragraph 6(2) of Annexure-I.

159. Environmental clearance of the State Government / Union Territory Administration / Local Authority is required in respect of development / construction activities covered by paragraph 6(2) of Annexure-I, regardless of value of investment. This is evident from paragraph 3(3)(ii) of 1991 Notification. At this juncture, it is relevant to note that on 12.11.1997, Principal Secretary, Government of Maharashtra addressed a letter to the Municipal Commissioner of Corporation informing that the development proposals within the CRZ area in which investment exceeds Rs.5 crores should only be referred to the State Government for clearance and other proposals should be cleared by the Corporation as per the approval of MOEF Notification and letter dated 27.09.1996.

160. Mr. Seervai strenuously contended that all the proposals were considered and processed by the UDD, and therefore, UDD of Government of Maharashtra is the appropriate authority to grant environmental clearance. As against this, Mr. Shah submitted that having regard to the Rules of Business pertaining to UDD and Environment Department, the granting of environmental clearance falls within the domain of Environment Department. We will deal with this aspect in detail little later while answering question No.4. Suffice it say, at this stage that we find substance in the submissions of Mr. Shah. We have carefully perused the Rules of Business pertaining to UDD and Environment Department. Perusal thereof clearly shows Environment Department is authorized to deal with the subject of environment and all other related matters. We are, therefore, of the opinion that between 09.07.1997 and 04.01.2002, the Environment Department of the Government of Maharashtra was authorized to deal with the granting of environmental clearance.

c. 05.01.2002 and 21.04.2003;

161. On 04.01.2002, MOEF issued order and added clause VIII which requires that MCZMA has to examine all projects proposed in CRZ areas and give their recommendations before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under 1991 Notification. In view thereof, all the activities including the activities covered by clause (iv) of paragraph 3(2) i.e. above Rs. 5 crores, and other than development or construction activities covered by paragraph 6(2) of Annexure-I, environmental clearance from MOEF is required to be obtained after obtaining MCZMA's recommendations. The environmental clearance of State Government / Union Territory Administration / Local Authority is required to be obtained after obtaining recommendations of MCZMA in WP369chamber.odt respect of development / construction activities covered by paragraph 6(2) of Annexure I regardless of value of investment. This is evident from paragraph 3(3)(ii) of 1991 Notification.

d. 22.04.2003 and 30.12.2008.

162. On 22.04.2003, MOEF issued Notification substituting clause (iv) in sub-paragraph (2) of paragraph 3. Effect of that Notification is that environmental clearance of MOEF is required to be obtained after obtaining MCZMA's recommendations in respect of all activities with investment of Rs.5 crores or more. As per the proviso to amended clause (iv) of sub-paragraph (2) of paragraph 3, environmental clearance at State / Union Territory level is required to be obtained after obtaining MCZMA's recommendations in respect of activities involving investment of less than Rs. 5 crores. This is evident from proviso to paragraph 3(2)(iv) of 2003 Notification read with paragraph 3(3)(ii) of 1991 Notification.

163. It is not in dispute that and it is a matter of record that in exercise of powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the E.P.Act read with sub-rule (3) and (4) of Rule 5 of the EP Rules, the Central Government made amendments in 1991 Notification and substituted clause (iv) as under:

"(iv) Demolition or reconstruction of -

(i) buildings of archaeological or historical importance

(ii) heritage buildings; and

(iii) buildings under public use.

Explanation: - For the purpose of this clause iv, 'public use' shall include use for purposes of worship, education, medical care and cultural activities.

(iv) All other activities with investment of five crore rupees or more:

Provided that activities involving investment of less than five crore rupees shall be regulated by the concerned authorities at the WP369chamber.odt State or Union Territory level in accordance with the provision of sub-paragraph (2) of paragraph 6 of Annexure-I of this notification:

164. Perusal of the amended clause (iv) of paragraph 3(2) shows that all other activities with investment of Rs.5 crores or more will require environmental clearance from MOEF and activities involving investment of less than Rs. 5 crores are required to be regulated by the concerned authorities at the State or Union Territory level in accordance with the provisions of paragraph 6(2) of Annexure I of 1991 Notification. In the present case, the building activity exceeded Rs. 5 crores and consequently, environmental clearance is required to be obtained from MOEF.

e. 31.12.2008 to 05.01.2011

165. Although the Notification reconstituting MCZMA omitted clause VIII, Mr. Khambata submitted that proposals continued to be sent to the MCZMA for its CRZ recommendations. He submitted that if the investment exceeded Rs.5 crores, the clearance was given by MOEF after obtaining recommendations from MCZMA. In respect of investment under Rs.5 crores, the concerned authorities at the State / Union Territory level were giving clearance after obtaining recommendations of MCZMA as per paragraph 3(2)(iv) of 2003 Notification read with paragraph 3(3)(ii) of 1991 Notification.

f. 06.01.2011 onwards

166. Mr. Khambata submitted that projects / construction involving more than 20000 sq.mtrs. built up area under CRZ-II are considered in accordance with the Environmental Impact Assessment Notification, 2006 by MOEF after the State Environmental Impact Assessment WP369chamber.odt Authority has granted environmental clearance and in case of projects less than 20000 sq.mtrs. built up area, MCZMA, after obtaining recommendations from MCZMA. Thus, question no.2(a) to 2(f) is answered accordingly.

Re: Question No.(3) (3) (a) Whether in terms of paragraph VIII of order dated 04.01.2002 of MOEF, prior recommendations of MCZMA are mandatorily required to be obtained before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under 1991 Notification? and

(b) Whether prior recommendations of MCZMA are necessary before change of reservation / zoning?

167. As noted earlier, on 26.11.1998, in exercise of the powers conferred by sub-sections (1) and (3) of Section 3 of the E.P.Act, the Central Government constituted MCZMA conferring certain powers on it. On 04.01.2002, MCZMA was reconstituted and by paragraph VIII, MCZMA was empowered to examine all projects proposed in CRZ area and give their recommendations before the project proposals are referred to the Central Government or to the agencies who have been entrusted to clear such projects under 1991 Notification. The question is whether the prior recommendations of MCZMA are mandatorily required to be obtained or not?

168. Mr. Khambata submitted that Section 24 of the E.P.Act has overriding effect. Unless and until, recommendations of MCZMA are obtained, neither the Central Government nor the agencies who have been entrusted to clear such projects can consider granting of environmental clearance. In other words, he submitted that WP369chamber.odt recommendations of MCZMA are mandatory and are condition precedent before Central Government or other agencies entrusted to clear the project. In support of these submissions, he relied upon following decisions:

(i) V. M. Kurian36, and in particular paragraphs 7 and 8;

(ii) Dinkar Anna Patil37, and in particular paragraphs 8 and 18; and

(iii) Manbodhan Lal38, and in particular paragraph 7 thereof.

169. In the case of V. M. Kurian36, the construction of the provisions of the Kerala Municipal Building Rules and particularly, Rule 5 thereof, fell for consideration. Rule 5 thereof empowered Government to examine buildings and it laid down that the Government may in consultation with the Chief Town Planner exempt (any building) from the operation of all or any of the provisions of these rules subject to conditions if may, to be stipulated in the order, granting such exemptions. Proviso thereto laid down that such exemption shall be considered on individual application forwarded to the government through the Greater Cochin Development Authority (GCDA) and the Chief Town Planner with their specific recommendations;

170. After considering Rule 5 in paragraph 7, the Apex Court posed the question namely whether in the absence of recommendation by GCDA and the Chief Town Planner, the State Government was competent to grant exemption from operation of the Rules for construction of a high-rise building. The Court noted the dictionary meaning of the word 'recommend' is "to advise", "to praise or commend". In P. Ramanatha Aiyar's Law Lexicon, the meaning of the word 'recommendation' is a 'statement expressing commendation or a message of this nature' or suggests fit. It was noted that

the word WP369chamber.odt 'recommendation' is not defined in the Rules, and therefore, observed that in such a situation, the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules. The Rules provide for regulation and construction of building in an urban area. The object behind the Rules is maintenance of public safety and convenience. The Municipal Corporation, GCDA, and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of the Rules while permitting construction of an eight storeyed building. Thus, the meaning of the word 'recommend', when read in the context of Rules shows that it means 'giving of a favourable report opposed to an unfavourable one'. The Apex Court, therefore, held that the recommendations by GCDA and the Chief Town Planner are sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of a high-rise building.

171. In the case of Dinkar Anna Patil37, the Apex Court considered Rule 4-A of the Maharashtra Sales Tax Officers Class-I (Recruitment) (Amendment) Rules, 1987, which provided that notwithstanding anything contained in Rule 4, if in the opinion of the State Government, the exigencies of service so require, the Government may, in consultation with the Maharashtra Public Service Commission, wherever necessary, make appointments to the posts in relaxation of the percentage prescribed in Rule 4 for appointment by promotion and nomination. The Tribunal held that the word 'may' is directory. The WP369chamber.odt Apex Court held that such a meaning would render the very object of consultation with the MPSC wherever necessary nugatory. It would give unbridled power to the Government to dispense with the consultation with MPSC which may result into arbitrary exercise of the powers by the Authority. In our opinion, if it is held that the recommendations of MCZMA are directory and not mandatory, the very object of obtaining prior recommendations of MCZMA would be rendered nugatory and otiose. It would give unbridled power to the Central Government or the agencies concerned, which may result into arbitrary exercise of the powers while granting environmental clearance by these authorities. That could never be the object of adding clause VIII by order dated 04.01.2002.

172. In the case of Manbodhan Lal38, the Apex Court dealt with Articles 320 and 323 of the Constitution. Article 320 requires consultation of Public Service Commission in conducting examinations for appointments as also on all matters relating to methods of recruitment. It was further observed that once relevant regulations have been made, they are meant to be followed and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Service that a wholly independent body not directly concerned, with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services. It is, therefore, incumbent upon the Executive Government when it proposes to take any disciplinary action against a public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in

excess of the WP369chamber.odt requirements of the situation.

173. We have perused the Notification dated 26.11.1998 as also order dated 04.01.2002. The composition of MCZMA shows that it consists of (i) Secretary, Department of Environment, Government of Maharashtra, (ii) Secretary, Department of Revenue and Forest, Government of Maharashtra, (iii) Secretary, UDD, Government of Maharashtra, and (iv) experts in fields relating to environment. In our opinion, MCZMA consists of experts in the field of environment. Considering the composition as also power conferred on MCZMA, we are of the opinion that the Central Government or the agencies, who have been entrusted to clear the projects under 1991 Notification cannot clear the said projects unless MCZMA first examines all projects proposed in CRZ area and gives their recommendations before project proposals are referred to these authorities. We have already noted that the E.P. Act is enacted with a view to providing for the protection and improvement of environment and for matters connected therewith.

Decisions were taken at the United Nations Conference on the Human Environment held at Stokholm in June 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment.

174. Section 3(1) lays down that subject to the provisions of the E.P.Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. Clause (v) of sub- section (2) of Section 3 lays down that in particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect of all or any of the WP369chamber.odt following matters namely, (v) restriction of areas in which any industries, operations, processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Section 24 of the E.P.Act deals with effect of other laws. It provides that subject to the provisions of sub-section (2), the provisions of the E.P.Act and the rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than E.P.Act. In other words, the provisions of the E.P.Act and the rules or orders made thereunder are given overriding effect.

175. We have already extracted Clause VIII or order dated 04.01.2002. As per that clause, MCZMA has to examine all projects proposed in the CRZ areas and give their recommendations before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under the 1991 Notification. The expression 'recommendation' is not defined either in the E.P. Act or in the E.P. Rules. In such a situation, the meaning of the word has to be understood in the context of the provisions of the Act and Rules and the object behind such provisions. MOEF and the agencies who have been entrusted to clear such projects are obliged to protect and improve environment. The members of the MCZMA have special and technical knowledge in the field of environment. In view of the decision of V. M.

Kurian36, it has to be held that the recommendations by MCZMA are sine qua non for considering the project proposals by the Central Government or the agencies entrusted for granting clearance. In

the absence of such recommendations, the Central Government or the agencies concerned will not be justified in granting clearance for construction of a building.

WP369chamber.odt

176. As the members of MCZMA are having special and technical knowledge in the field of environment, it can give unbiased advice and opinion on matters vitally affecting the environment as held in Manbodhan Lal38. In view thereof, the recommendations of MCZMA are mandatorily required to be obtained, and therefore, is condition precedent. Question No.3(a) is answered accordingly.

3(b) Whether prior recommendations of MCZMA are necessary before change of reservation / zoning?

177. Mr. Seervai submitted that respondents relied upon paragraph 20 of Sneh Mandal's case42 wherein it is held that for changes in the zoning in respect of the concerned plots, the prior approval of MCZMA was a must. He submitted that the ratio in that decision is not applicable in the present case. He submitted that in that case, the Court was concerned with plots 146 and 147, which are abutting the sea on two sides namely, on the southern side as well as on the western side. Plots No.146 and 147 were shown as a garden in the Development Plan. The Division Bench held that having regard to the location of these plots, they are not only abutting the sea but are only touching the high tide lines on two sides. Further, these plots are on the seaward side of the main road and are even 500 mtrs from the High Tide Line and there exists no authorized structure from which the imaginary line could be drawn as contemplated by clarification issued by MOEF on 08.09.1998. The Court further observed that at the relevant time, these plots were partially submerged by the sea on the Northern portion of plot No.147. He, therefore, submitted that it is amply clear from the situation, which was before the Division Bench that plots 147 and 148 were in fact in CRZ-I which is also clear from the fact that there was no authorized structure from which the imaginary line could be drawn through.

WP369chamber.odt

178. He further submitted that approval of MCZMA was required in that case because in the draft Development Plan, these plots were earmarked for residential / government housing by MMRDA, being the Special Planning Authority which would have resulted into the changes in the classification of CRZ from CRZ-I to CRZ-II. In the light of change in the classification of CRZ, the approval of MCZMA was necessary, being one of the functions of the MCZMA under paragraph II(i) and paragraph IX of the order dated 04.01.2002.

179. As against this, Mr. Khambata submitted that the Division Bench in Sneh Mandal's case42 has held that reservations in the Development Plan are frozen as on 19.02.1991 and any change in reservation has no effect unless approved of by the MCZMA. He submitted that the contention advanced by the petitioners that the said decision is in respect of CRZ-I area / plots is incorrect. Sneh Mandal's case42 was concerning plots at Cuffe Parade ('A' Ward) falling in CRZ-II. Plots 146

and part of plot No.147 (on which there was a reservation for garden) were not in or under the sea or un-reclaimed much less were they foreshore land which is evident form paragraphs 18 to 20. He, therefore, submitted that plots 146 and 147 (part) were not in CRZ-I. It was the reservation of these plots (as garden) that was sought to be changed to residence / government housing requiring MCZMA approval not of adjoining plots No.143, 144 and 145, which were as yet un-

reclaimed. Plots 146 and 147 were existing plots but bordered by the sea on three sides. The question, therefore, arose as to how the imaginary line could be mapped. He submitted that the concept of imaginary line applies only to CRZ-II and is usually drawn between two adjoining plots - one from an existing authorized structure on the plot to the right and the other from the existing authorized structure to the left of the subject plot as per letter dated 27.03.1998 an clarification dated WP369chamber.odt 08.09.1998 issued by MOEF.

180. He further submitted that there is no question of "deemed conversion" of the area behind the line from CRZ-I to CRZ-II. Both the area behind as well as that in front of the imaginary line remain in CRZ- II. It was never CRZ-I which is defined as "Category I (CRZ-I)" in Annexure I to the 1991 Notification, which reads thus, "Category I (CRZ-I):

(i) Areas that are ecologically sensitive and important, such as national parks/marine parks, sanctuaries, reserve forests, wildlife habitats, mangroves, corals / coral reefs, areas close to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty/historical/heritage areas, areas rich in genetic-diversity, areas likely to be inundated due to rise in sea level consequent upon global warming and such other areas as may be declared - by the Central Government or the concerned authorities at the State / Union Territory level from time to time.

(ii) Area between the Low Tide Line and the High Tide Line."

181. We find merit in the submission of Mr. Khambata. In paragraph 2, the Division Bench framed three points for determination. Point No.3 was to the following effect:

> "(c) Whether change of user from garden / playground to government housing / residence on plots No.146 and 147 is in contravention of CRZ Notification of 1991?"

182. In paragraphs 18 and 19, it was noted that MMRDA prepared a draft development plan for 'A' Ward in which plots 146 and 147 were shown as garden. The Corporation prepared draft development plan and in the modified draft development plan, plots 146 and 147 were earmarked for residential / government housing to which petitioners raised objections. In paragraph 20, the Division Bench recorded findings. It was observed that plots 146 and 147 were shown as garden on the development plan when 1991 Notification came into force. A part of plot 147 is subsequently earmarked for road. In the affidavit WP369chamber.odt made by MMRDA, it was further stated that no proposal has been received from the Government with regard to government housing. It was thereafter observed that looking to the location of plots, it is clear that they are not only abutting the sea but are only touching the high tide lines on two sides. Further, these plots are on the seaward

side of the main road and are even 500 mtrs from the High Tide Line. There is no authorized structure from which the imaginary line could be drawn as contemplated by clarification issued by MOEF on 08.09.1998.

183. We have already extracted classification of CRZ-I. It neither falls in (i) nor in (ii) of category-I, CRZ-I. In other words, Division Bench was dealing with plots in CRZ-II. We are, therefore, of the view that even for change of reservation / zoning, prior approval of MCZMA was necessary. In the instant case, on 10.04.2002, the State Government reduced the width of Captain Prakash Pethe Marg from 60.97 mtrs. to 18.40 mtrs. Area so deleted was included partly in residential among others. In our opinion, in view of the decision of Sneh Mandal CHS42 without obtaining prior approval of MCZMA, the State Government could not have changed the reservation from road to residential as far as the subject plot is concerned. Question No.3(b) is answered accordingly.

Re: Question No.(4) (4) Whether in law it is the UDD or Environment Department of Government of Maharashtra is authorized to grant clearance during the period between 09.07.1997 and 21.04.2003?

184. As noted earlier, in exercise of powers under Section 3(1) and 3(2)(v) of the E.P.Act, and Rule 5(3)(d) of the EP Rules, MOEF issued 1991 Notification. Paragraph 4 thereof deals with procedure for monitoring and enforcement and reads thus:

> WP369chamber.odt "Procedure for monitoring and enforcement: The Ministry of Environment and Forest and Government of State or Union Territory and such other authorities at the State / Union Territory levels, as may be designated for this purpose, shall be responsible for monitoring and enforcement of the provisions of this Notification within their respective jurisdictions."

185. It is, therefore, necessary to find out whether as far as the State of Maharashtra is concerned, any authority / department is designated for monitoring and enforcing 1991 Notification. Perusal of affidavit dated 14.07.2011 made by Mr. Sanjay R. Kurve shows that, it is specifically asserted that UDD, State of Maharashtra was not the competent authority authorized to grant NOC under CRZ Regulations. The projects proposed in CRZ areas were to be first examined by MCZMA as per the order dated 04.01.2002 and given recommendations before the project proposals are referred to the Central Government or the agencies entrusted to clear such projects. This is reiterated by Mr. Kurve in paragraph 15 of the same affidavit. Mr. T. C. Benjamin, Principal Secretary, UDD made affidavit dated 19.01.2011 in Writ Petition No.2407 of 2010. In paragraph 10, it is asserted that petitioners ought to have obtained NOC from the Environment Department for carrying out any construction activity as the subject plot is situate in CRZ II.

Petitioners did not even make an application for obtaining NOC from the Environment Department. In paragraph 3(b), it is asserted that approval of the Environment Department was required to be obtained.

186. Perusal of the Rules of Business framed by the State of Maharashtra in respect of UDD and Environment Department shows that the grant environmental clearance clearly falls within the domain of Environment Department. The Environment Department is authorized to deal with the subject of environment and all other related matters. The said subject does not fall within the domain of UDD.

WP369chamber.odt

187. In view of the Rule of Business framed by the State Government, we are clearly of the opinion that it was the Environment Department and not UDD, who is the Competent Authority to consider granting of environmental clearance after obtaining MCZMA's recommendations post 04.01.2002. Question No.4 is answered accordingly.

Re: Questions No.(5) to (7) (5) Whether communication dated 11.03.2003 of MOEF constitutes its clearance?

(6) Whether communication dated 15.03.2003 of UDD, Government of Maharashtra constitutes clearance of State Level Agency?

(7) Whether communications dated 11.03.2003 and 15.03.2003 collectively constitutes clearance under CRZ Notification?

188. Mr. Seervai submitted that communication dated 11.03.2003 of MOEF constitutes its clearance. In any case, communication dated 15.03.2003 of UDD, Government of Maharashtra constitutes clearance of State Level Agency. At any rate, communications dated 11.03.2003 and 15.03.2003 collectively constitute clearance under CRZ Notification. On the other hand, learned Counsel for the respondents submitted that petitioners have not obtained clearance either from MOEF or from State Level Agency.

189. In order to appreciate this submission, it is necessary to deal with the correspondence between 05.10.2002 and 15.03.2003, and in particular 6 documents referred hereinabove. On 05.10.2002, Deputy Secretary, UDD, Government of Maharashtra addressed a communication to the Secretary, MOEF. After giving the background, he requested for issuing NOC for development of the subject plot. The copy of the said communication was not sent to MCZMA. During the WP369chamber.odt course of evidence before Justice J. A. Patil's Commission, Mr. Deshmukh admitted that his letter dated 05.10.2002 is not an application seeking environmental clearance for construction of Adarsh building under CRZ Notification. His letter dated 05.10.2002 cannot be construed as an application for NOC under the 1991 Notification. It was never his intent while writing letter dated 05.10.2002 to file application, as required under 1991 Notification inasmuch as on that date Society was not registered; LOI was not issued by the Government of Maharashtra; neither Notification of allotment was issued nor possession of plot was given to Adarsh Society. He further admitted that MOEF's letter dated 11.03.2003 is not an environmental clearance under 1991 Notification for construction of Adarsh building. He was further put question namely, whether MCZMA's recommendation was condition precedent under CRZ Notification as amended from time to time before MOEF or the

State Authority could grant environmental clearance for construction and he replied it in the affirmative. He was also put question whether Deputy Secretary, UDD is competent to issue NOC from CRZ point of view to which he replied that it is the Principal Secretary of UDD who is the appropriate authority to issue such NOC. In the cross-examination at page 1259, he admitted that when he addressed a letter dated 05.10.2002, he was fully aware that the power to issue NOC was with the State Government and permission was required to be obtained by the proponent of the project. He further admitted that MCZMA's recommendation was a condition precedent under the CRZ Notification, as amended from time to time, before MOEF or State Government Authority could grant environmental clearance for construction. Thus, it is evident that after 04.01.2002, recommendations of MCZMA are mandatorily required to be obtained. Admittedly, in the present case, petitioners have not obtained recommendations of MCZMA. In fact, having regard to the Rules of Business referred WP369chamber.odt hereinabove, UDD was not the competent department to grant environmental clearance. Mr. P. V. Deshmukh was holding the post of Deputy Secretary. It is, therefore, not expected from Mr. Deshmukh to be unaware of this position. Despite that, he addressed a letter dated 05.10.2002 to MOEF for issuing environmental clearance. We will deal with this aspect in detail at a later stage. Suffice it to say that Mr. Deshmukh had no authority to address a letter dated 05.10.2002 to MOEF seeking NOC as at the relevant time, it was the State Government who was authorized to issue NOC.

190. That apart, Mr. Deshmukh further admitted that MOEF's letter dated 11.03.2003 is not an environmental clearance under 1991 Notification for construction of Adarsh building. He further admitted that MCZMA's recommendations was a condition precedent under the CRZ Notification, as amended from time to time, before MOEF or the State Level Authority could grant environmental clearance for construction.

191. What is significant to note that when Mr. Deshmukh addressed a letter on 05.10.2002, even Letter of Intent was not issued to the petitioners much less allotment letter. LoI was issued on 18.01.2003 and the allotment letter was issued on 09.07.2004 and possession of the subject plot was handed over on 04.10.2004. Even on this count, the exercise undertaken by Mr. Deshmukh by addressing letter on 05.10.2002 was wholly uncalled for. This is to be appreciated on the backdrop of the fact that Mr. Deshmukh had made application for membership on 12.03.1999, though attempt is made to show that he made application on 10.02.2003. At that time, the Society was neither registered nor the plot was allotted. Mr. Deshmukh further admitted that Principal Secretary of UDD is the appropriate authority to issue NOC WP369chamber.odt from CRZ point of view.

192. Communication dated 11.03.2003 reads thus, " Government of India Ministry of Environment & Forests (IA-III Division) Paryavaran Bhavan, C.G.O. Complex, Lodhi Road, New Delhi - 110 003 Dated 11th March, 2003 To, Shri P. V. Deshmukh, Dy. Secretary, Govt. of Maharashtra, Urban Development Department, Mantralaya, Mumbai 400032.

Sub: Development Permission on land deleted 60.96 mt. To 18.40 mt. Road for residential purposes, BBR Block III to VI, Adarsh Co-operative Housing Society.

**** Sir, This has reference to your letter No.TPB 2009/1095/CR- 154/99/UD 12, dated 4th January, 2003 regarding the subject mentioned above. As per the information provided in the above letter and the revised Coastal Zone Management Plan of Greater Mumbai, it is noted that the proposed residential complex falls within the Coastal Regulation Zone-II area. This Ministry has already delegated the powers to the concerned State Government for undertaking development in Coastal Regulation Zone-II. Accordingly, the proposed construction may be taken up as per the Coastal Regulation Zone Notification, 1991 (as amended from time to time) and the approved revised Coastal Zone Management Plan of Greater Mumbai.

Yours faithfully, sd/-

(A. Senthil Vel)
Joint Director "

193. Perusal of communication dated 11.03.2003 shows that by that communication, MOEF informed that it has already delegated the powers to the concerned State Government for undertaking development WP369chamber.odt in CRZ-II, and accordingly, the proposed construction may be taken up as per 1991 Regulations (as amended from time to time) and the approved revised CZMP for Greater Mumbai. During the course of arguments, Mr. Seervai conceded that the plain language of communication dated 11.03.2003 does not amount to clearance. He however submitted that communications dated 11.03.2003 and 15.03.2003 collectively constitute clearance.

194. Apart from concession, as noted earlier, even Mr. Deshmukh admitted before Justice J. A. Patil's Commission that his letter dated 05.10.2002 was not an application seeking environmental clearance from MOEF. That apart, letter dated 11.03.2003 is also not clearance from MOEF. Dr. A. Senthil Vel had filed affidavit made some time in December 2011 before Commission of Inquiry headed by Justice J. A. Patil. In paragraph 13, it is contended that letter dated 11.03.2003 issued by MOEF cannot be interpreted as environmental clearance.

1991 Notification contains the entire mechanism for the same, under which the following information is required for consideration of any proposal seeking clearance:

(i) Cost of the project and the details of project authority.

(ii) Details of survey numbers of land in possession.

(iii) Project area superimposed on the CZMP.
(iv) Categorization of the CRZ area.

(v) Recommendations from the State / Union Territory Coastal Zone Management Authority.

(vi) Details of Floor Space Index and Floor Area Ratio.

(vii) Environmental issues / aspects of the project.

195. After considering any proposal under 1991 Notification, Ministry issues clearance letter in a prescribed format clearly indicating that the project has been accorded clearance under the provisions of 1991 WP369chamber.odt Notification. Along with this affidavit, communication dated 23.01.2002 giving environmental clearance and communication dated 22.08.2003 giving environmental clearance in two cases is annexed as exhibits XVI in favour of TIFR and XV in favour of Khar Land Development Circle (KLDC) respectively. Comparison of these clearances with communication dated 11.03.2003 of MOEF leads to an irresistible conclusion that the communication dated 11.03.2003 cannot be construed as environmental clearance. This aspect is considered in paragraphs 14(v) and (vii) of the report dated 13.01.2011 made by the respondent No.4 Dr. Nalini Bhat as also reference is made in paragraphs 3(c) and (e) of the press note dated 28.10.2010.

196. After going through the communication dated 11.03.2003, we are satisfied that the same cannot be construed as clearance of MOEF. This is more so when admittedly, as per order dated 04.01.2002, recommendations of MCZMA were not obtained. We have already held that before the Central Government or agencies entrusted to clear such projects, the MCZMA has to examine the projects proposed in CRZ areas and has to give recommendations before referring the same to the Central Government or the Agencies. We are, therefore, of the opinion that communication dated 11.03.2003 does not constitute clearance of MOEF. Thus, the contention of the petitioners that communication dated 11.03.2003 constitutes CRZ clearance is without any substance.

197. Now the next question is whether communication of 15.03.2003 of Deputy Secretary, UDD, Government of Maharashtra constitutes clearance. The said communication reads thus, "Government of Maharashtra No. TPB 2099/1095/CR-154/99/UD-12 Urban Development Department, Mantralaya, Mumbai-400 032.

WP369chamber.odt Dated : 15th March, 2003.

To The Chief Engineer (Development Plan), Brihanmumbai Municipal Corporation, Fort, Mumbai.

Sir, Sub : Development permission on land deleted 60.96 mtr. road for residential purpose, BBR Block III to VI, Adarsha Co-op. Housing Society.

Reference : 1) Office letter No.TPB 2099/1095/CR-

154/99/UD-12 dated 10th April, 2002.

2) MOEF letter No.FF No.J-17011/46/ 2002/1A III dated 11th March, 2003.

The Government in Urban Development Department vide Notification No.TPB 2099/1095/CR-154/99 (A) / UD-12, dated 10th April, 2002 sanctioned the modification to the Development Plan of Mumbai Backbay Reclamation area under Section 37(2) of the Maharashtra Regional and Town Planning Act, 1966 as regards change in the width of the Prakash Pethe Marg. By virtue of this modification, the width of Prakashpethe Marg was modified to 18.440 mtrs. from 60.97 mtrs. and in the area so deleted, as shown on the accompanied plan of the Notification was included partly in residential zone, parade ground, Helipad and BEST Depot. The matter was referred to the Ministry of Environment, Government of India as regards modification since it falls in CRZ-II area. It was specifically noted in the Notification that the development of land within Coastal Zone area CRZ-II shall be subject to the conditions mentioned in Government of India, Ministry of Environment and Forests Notification No.SO 114 (E) dated 19th February, 1991 as modified from time to time. Accordingly, the reference was made to the Government of India MOEF seeking permission for the Adarsha Co-op. Housing Society to allow them to have a building on the land which falls in residential zone vide Government letter dated 4th January, 2003. The Ministry of Environment and Forests have communicated their no objection to allow the said residential development since it falls within the Coastal Regulation Zone II area which satisfies the norms of Notification dated 19 th February, 1991 and amendments made therein made upto 21st May, 2002. Now, there appears therefore, no objection to allow the residential development to the Adarsha Co-op. Housing Society on the land included in residential zone as per the notifications sanctioned by the Government. The copy of the letter dated MOEF dated 11 th March, 2003 is enclosed herewith for ready reference.

WP369chamber.odt Yours sincerely, sd/-

(P. V. Deshmukh) Deputy Secretary to Government.

Copy to :

1) Chief Planner, Mumbai Metropolitan Region Development Authority, Mumbai.

2) The Executive Engineer (Bldg. proposal), Municipal Corporation of Gr. Mumbai, Byculla.

3) The Chairman, Adarsh Co-op. Housing Society, Mumbai."

198. In the first place, as per the Rules of Business referred hereinabove, UDD was not the appropriate authority to consider proposal for grant of environmental clearance. Secondly, even as on 15.03.2003, recommendations of MCZMA were not obtained. UDD, therefore, could not have considered and issued environmental clearance on 15.03.2003. Thirdly, perusal of communication dated 15.03.2003 shows that, it is entirely based on communication dated 11.03.2003 of MOEF. In other words, the communication dated 15.03.2003 was not independent of communication dated 11.03.2003 and the said letter recorded that MOEF communicated their no objection to allow the residential development since it falls in CRZ area. Once it is held that communication dated 11.03.2003 does not constitute clearance, equally, the communication dated 15.03.2003 cannot be construed and considered as environmental clearance. Apart from that, Mr. Deshmukh admitted

before Justice J. A. Patil's Commission that MOEF's letter dated 11.03.2003 is not an environmental clearance. We are, therefore, clearly of the opinion that communication dated 15.03.2003 of Mr. P. V. Deshmukh, Deputy Secretary, UDD, Government of Maharashtra does not constitute clearance of the State Level Agency.

199. The next question is whether the communications dated 11.03.2003 and 15.03.2003 collectively constitute environmental WP369chamber.odt clearance. For the reasons already indicated, we are clearly of the opinion that these communications collectively also do not constitute environmental clearance. In other words, petitioners have not obtained environmental clearance either from MOEF or from State Level Agency and proceeded to carry out construction in the absence of recommendations of MCZMA as also environmental clearance either from MOEF or State Level Agency.

200. Mr. Seervai submitted that note dated 10.03.2003 prepared by Dr. A. Senthil Vel read with communication dated 11.03.2003 unequivocally indicate NOC of MOEF. In fact all the authorities acted upon communications dated 11.03.2003 and 15.03.2003 on the basis that environmental clearance was obtained by the petitioners. It is only after 7 years, respondents are contending that letter dated 11.03.2003 of MOEF is clarificatory in nature and does not constitute environmental clearance. All that was required to be done by MCZMA was done by MOEF and no recommendations of MCZMA were required. For the reasons already indicated, we do not find any merit in any of the submissions. Questions No.5 to 7 are answered accordingly.

Re: Question No.(8) (8) Which of the DCRs namely, 1967 DCR, draft 1989 DCR, 1991 DCR are, in the facts and circumstances of the present case, applicable?

201. Mr. Seervai submitted that the question namely which of the Development Control Regulations are applicable in the present case, namely 1967, 1989 or 1991 Regulations, is wholly irrelevant. He submitted that it is not for the petitioners to elect which DCR is applicable. The Planning Authority namely, MMRDA applied 1989 Draft DCR being stringent of the two namely 1967 and 1989 Draft WP369chamber.odt DCR.

202. Mr. Seervai submitted that on 20.07.1990, Government of Maharashtra sanctioned Final Development Plan under Section 31(1) of M.R.&T.P. Act in respect of 'A' Ward where the subject plot is situate. The said Plan was brought into force with effect from 01.09.1990. 1989 Draft DCRs will be applicable and not 1967 DCR. He submitted that in the case of Suresh Estate1, the Apex Court was dealing with property in 'C' ward. As far as 'C' ward is concerned, there was no final development plan in force at the relevant time. In other words, the decision of Suresh Estate is not applicable to the facts of the present case. In particular, he invited our attention to paragraphs 7, 24 and 25 thereof. On the other hand, respondents submitted that the judgment of Suresh Estate1 applies on all fours and 1967 DCR are applicable in the present case.

203. In order to appreciate these submissions, it is necessary to have a glance at 1991 Notification. Paragraph 6(2) thereof lays down that the development or construction activities in different categories of CRZ areas shall be regulated by the concerned authorities at the State / Union

Territory level, in accordance with the norms laid down in the respective CRZ areas. Insofar as CRZ-II areas area concerned, buildings are neither permitted on seaward side of the existing road (roads proposed in the approved CZMP of the area) nor on seaward side of the existing authorized structures. Buildings permitted on the landward side of the existing and proposed roads / existing authorized structures are subject to the existing Local Town and Country Planning Regulations including the existing norms of FSI / FAR. Thus, one has to find out which are the existing norms of FSI / FAR as per 1991 Notification.

(emphasis supplied) WP369chamber.odt

204. As noted earlier, by Notification dated 15.06.1983, State of Maharashtra appointed MMRDA (the then BMRDA) as the Special Planning Authority under Section 40(1)(c) of M.R.&T.P. Act in respect of the notified area of BBRS Blocks III-VI. MMRDA became the Planning Authority under Section 2(19) of the M.R.&T.P. Act for that notified area. Thus, Corporation ceased to be Planning Authority as far as the notified area is concerned. On 18.05.1983, Corporation published notice under Section 25 of the M.R.&T.P. Act inviting objections / suggestions in respect of the revised draft Development Plan for 'A' to 'G' Wards. On 30.03.1985, the draft Development Plan was submitted by the Corporation under ig Section 30(1) after carrying out modifications / changes on the basis of objections / suggestions received. On 30.04.1985, Corporation submitted the revised Building Bye-laws and Development Control Rules to the Government of Maharashtra under Section 30(1) of the M.R.&T.P. Act. On 14.12.1989, the Government of Maharashtra issued Notification under Section 31(1) of the M.R.&T.P. Act and published the revised draft Building Bye-laws and Development Control Rules for Grater Mumbai and invited objections and suggestions in respect thereof. On 20.06.1990, Government of Maharashtra issued Notification extending the period for sanctioning the said draft Building Bye-laws and Development Control Rules. On 29.06.1990, Deputy Director of Town Planning submitted a report to the Government of Maharashtra. On 20.07.1990, draft Development Plan submitted by the Corporation was sanctioned by the Government of Maharashtra in respect of 'A' Ward. It is material to note that at that time, the Building Bye-laws / Regulations were not sanctioned along with the Plan. On 20.02.1991, Development Control Regulations of 1991 were finally sanctioned and it came into force with effect from 25.03.1991.

WP369chamber.odt

205. As against this, on 01.03.1985, MMRDA, as the Planning Authority, declared its intention to prepare a development plan for Blocks III - VI of BBRS. On 04.05.1990, MMRDA notified the Draft Development Plan for BBRS Blocks III to VI and invited suggestions and objections under Section 26. After following the procedure prescribed by Section 28, MMRDA submitted Draft Development Plan on 08.10.1991 to the Government of Maharashtra. It was ultimately sanctioned and the Development Plan came into force with effect from 24.07.2000.

206. Thus, the position which emerges from the above discussion is that as on 19.02.1991, Draft Development Control Regulations of 1989 prepared by the Corporation submitted to the State Government were pending consideration of the State Government for its sanction. As far as the

MMRDA is concerned, it had submitted Draft Development Plan on 08.10.1991, that is to say, after 19.02.1991. It is in this context, material to consider the decision of the Apex Court in the case of Suresh Estate1. In paragraph 17, the Apex Court noted clarification dated 08.09.1998 issued by MOEF stating that Development Control Regulations as existing on 19.02.1991 would apply for all developmental activities in CRZ including CRZ-II. MOEF also issued clarification on 18.08.2006 reiterating that the existing Development Control Regulations applicable to CRZ-II areas in Mumbai would mean the Development Control Rules, 1967. It was also noted that the Development Control Regulations for Greater Bombay 1991 were notified on 20.02.1991 and came into force with effect from 25.03.1991.

207. In paragraph 19, it was observed that the word 'existing' as employed in the CRZ Notification means the town and country planning regulations in force as on 19.02.1991. In paragraph 20, it was noted that WP369chamber.odt on 20.02.1991, when the CRZ Notification was issued, the only building regulations that were existing in the City of Mumbai were the Development Control Rules, 1967. The Apex Court held that in view of the contents of CRZ-II Notification issued under the provisions of the E.P.Act which has the effect of prevailing over the provisions of other Acts, the application submitted by the appellants to develop the plot belonging to them would be governed by the provisions of the Development Control Rules, 1967 and not by the draft development regulations of 1989 which was notified on 20.02.1991 and which came into force on 25.03.2991. In paragraph 26, the Apex Court categorically held that the draft regulations of 1989 were not in force as on 19.02.1991.

208. Mr. Seervai, however, gave emphasis to the observations in paragraph 24 to the effect that "the draft published is to be taken into consideration so that the development plan is advanced and not thwarted. The draft development plan was capable of being sanctioned, but when the final development plan is not applicable, its draft would equally not apply as there is no question of that plan being thwarted at all. He submitted that the Apex Court was dealing with the property situate in 'C' Ward in respect of which final development plan was not sanctioned. In the present case, in respect of 'A' Ward where the subject plot is situate, final development plan was sanctioned on 20.07.1990 and which came into force with effect from 01.09.1990. He submitted that the Apex Court was not dealing with the property situate in 'A' Ward and consequently, had no occasion to consider the effect of sanctioning of draft Development Plan in respect of 'A' Ward on 20.07.1990 which came into effect from 01.09.1990.

209. Mr. Seervai further submitted that the Development Control WP369chamber.odt Regulations are the integral part of the Development Plan. He relied upon Sections 22(a), (m) and 46 of the M.R.&T.P. Act. He also relied upon the following decisions:

a. Nariman Point Association2, and in particular paragraph 11;

b. D. B. Reality Limited3, and in particular paragraphs 22 to 25; c. M. A. Panshikar4, and in particular paragraph 14.

210. There is no dispute with the proposition laid down by the aforesaid decisions namely that the Development Control Regulations are integral part of the Development Plan. The question is whether they existed as on 19.02.1991. As noted earlier, on 15.06.1983, MMRDA was designated as a Special Planning Authority in respect of BBRS Blocks III to VI and consequently, became the Planning Authority as per Section 2(19) of the M.R.&T.P. Act. In the case of Vyankatesh Y. Shinde41, the Division Bench of this Court held that there cannot be two planning authorities for the same area. Thus, on and after 15.06.1983, as far as BBRS Blocks III to VI is concerned, Corporation ceased to be the Planning Authority. That apart, as on 19.02.1991, Draft Development Control Regulations, submitted on 30.04.1985 by the Corporation to the State Government, were not sanctioned. They were sanctioned on 20.02.1991 that is to say after 19.02.1991 and came into effect from 25.03.1991. Thus, though as far as 'A' Ward is concerned, the plans submitted by the Corporation were sanctioned by the State Government on 20.07.1990 and came into force with effect from 01.09.1990, nonetheless, the regulations submitted on 30.03.1985 were at the stage of draft and they were not sanctioned prior to 19.02.1991 and thus, were not existing as on 19.02.1991. The Regulations submitted on 30.03.1985 by the Corporation were draft Regulations and in view of the categorical finding of the Apex Court in paragraph 26 that the draft regulations of 1989 were not in force as on 19.02.1991, the only sequitur WP369chamber.odt is that the Development Control Regulations of 1967 are applicable to the facts of the present case and not Draft 1989 Development Control Regulations as contended by the petitioners in the alternative.

211. Apart from this, as noted earlier, the then BMRDA had issued Notification on 10.06.1977 restricting the permissible FSI in the municipal limits of Corporation to 1.33. The said Notification was to have effect for a period of two years from the date of its issue. On 05.10.1989, BMRDA issued Notification restricting permissible FSI in the municipal limits of Corporation to 1.33. The said Notification was to have effect and be in force until 10.10.1991. In other words, the said Notification was in force as on 19.02.1991 when Central Government issued 1991 Notification. The said Notifications were issued under Section 13(1) of MMRDA Act read with Section 21 of the Bombay General Clauses Act, 1904. Clause B of Notification dated 05.10.1989 reads thus, (B) In the are of the 'Municipal Corporation of Greater Bombay' as defined in the Bombay Municipal Corporation Act, 1888 (III of 1888), excluding the area of the Bandra-Kurla complex as specified by Government Notification, Urban Development and Public Health Department, No.BKR-1177/262-UD-5, dated the 7th March 1977 as modified by Government Notification, Urban Development and Public Health Department No.BKR-1177/262- UD-5, dated the 16th May 1979, and the area of District Centre, Oshiware as specified by Government Notification, Urban Development and Public Health Department, No.TPB- 4382/26/UD-5, dated the 18th June 1982--

construction or reconstruction of any building, including addition to any existing building, so as to have a floor space index, as defined in Rule No.51 of the Development Control Rules for Greater Bombay, exceeding 1.33 or that provided in the said Development Control Rules, whichever is lower, but excluding construction or reconstruction of any building or addition to any existing building-

It is also relevant to note that Dr. A. Senthil Vel addressed a letter dated 18.08.2006 to the Principal Secretary, UDD clarifying that all development activities proposed to be taken up in the CRZ area have to WP369chamber.odt follow the norms as existed on 1991 including FSI / FAR norms. It was

further explained that the word "existing" has been interpreted by the Ministry by its letter dated 08.09.1998 as prevailed on 19.02.1991. The letter further stated that "in view of the above clarifications, the DCR which was under implementation on 19.02.1991 i.e. the approved DCR of 1967 shall be considered and not the draft of 1989 which came into force on 20.02.1991 as it was still in the draft stage on 19.02.1991".

MMRDA being the Planning Authority in respect of BBRS, FSI / FAR is 1.33 as per the Notification dated 05.10.1989, which was in force as on 19.02.1991. Question No.8 is answered accordingly.

ig Re: Question No.(9) (9) What is the permissible FSI and how much FSI is consumed by the petitioners' building?

212. Mr. Seervai submitted that the building constructed by the petitioners has not exceeded permissible FSI. He submitted that if it is held that 1967 DCR is applicable, as a matter of right and not as a matter of discretion, FSI permissible in BBRS Blocks III to VI, the petitioners are entitled to consume 3.5 FSI. Thus, even if the calculation made by the respondents that petitioners have consumed 2.932 FSI is accepted, still, petitioners have not exceeded FSI of 3.5. The permissible FSI was 1.33 subject to exemptions. MMRDA rightly applied draft DCR of 1989. In the affidavit dated 13.01.2011 made by Mr. Pradeep Murlidhar Yadav, Senior Planner in the Town and Country Planning Division of MMRDA, in Writ Petition No.2407 of 2010, it is specifically averred that permissible FSI on the subject plot as per the DCR of 1967 is 3.5 and as per the draft DCR of 1989, permissible FSI is 1.33. MMRDA has restricted FSI to 1.33 using the stringent of the two Development Control Regulations. If 1989 Draft DCR is made applicable, the WP369chamber.odt permissible FSI is 1.33 excluding lift room lobby, staircase, etc. If 1991 DCR is made applicable, permissible FSI is 1.33 excluding lift room lobby, staircase, etc. In other words, he submitted that there are no FSI violations.

213. Mr. Seervai further submitted that the Memorandum dated 05.08.2005 as also Notification dated 03.03.2006 are not challenged by any of the respondents. The show cause note as also the impugned orders do not deal with validity or otherwise of the Memorandum dated 05.08.2005 and Notification dated 03.03.2006. It is, therefore, no open to the respondents to contend that Notification dated 03.03.2006 is illegal and that, petitioners are not entitled to consume additional FSI of BEST plot as there is non-compliance of conditions stipulated in Office Memorandum dated 05.08.2005 and Notification dated 03.03.2006.

214. He further submitted that Notifications dated 10.06.1977 and 05.10.1989 issued by MMRDA are wholly irrelevant and they were not in force when the building plans were approved. He submitted that these Notifications were issued by MMRDA under Section 13(1) of BMRD Act. Section 13 has nothing to do with limiting FSI. Section 13 talks of "undertaking any development within the Metropolitan region of the type". "Development of the type" has to be notified by MMRDA. Section 13 does not apply to area where MMRDA itself is the Planning Authority. In any case, MMRDA in its affidavit made in Writ Petition No.2407 of 2010 has gone on record in asserting that building of the petitioners has consumed permissible FSI and is authorized.

215. Mr. Seervai submitted that MMRDA, Corporation, State Government do not say that utilization of FSI of BEST plot is illegal. He further submitted that in the impugned minutes of meetings of NCZMA WP369chamber.odt and MCZMA as also report and the impugned orders, finding is given that petitioners did not amalgamate subject plot with the BEST plot. It is for the MOEF who asserts this aspect to prove the same. MOEF has not proved it by relying upon some Statute, Notification, Regulation, Rule, Bye-laws, and provisions of Maharashtra Land Revenue Code. Mr. Seervai submitted that Government had allotted BEST plot on occupancy basis to the petitioners by issuing memorandum dated 05.08.2005. In short, he submitted that the Notification dated 03.03.2006 is legal.

216. On the other hand, respondents submitted that petitioners have exceeded permissible FSI, and in particular MCZMA has given detailed calculations in respect thereof. Mr. Khambata has given us the details of FSI and built-up area calculations for Adarsh Society as per 1991 DCR based on the sanctioned plan dated 16.09.2010 at page 80 of the Writ Petition which is as under:

FSI and Built up area calculation for Adarsh CHS Ltd. as per DC Regulations 1991 (based on sanctioned plan dated 16.09.2010 at page 80 of Petition) Sr. Adarsh Plot BEST Plot Total No.

1	Area of plot	3824.43	2669.68	6494.11
2	Deduction for Road Set Back area	628.57	367.91	996.48
	Net Plot Area (1-2)	3195.86	2301.77	5497.63
3	Net Plot area for FSI calculation	3195.86	2125	5329.86
4	Deduction for 15% RG (on Sr.No.3)	479.38		479.38
5	Net Plot Area (3-4)	2716.48	2125	4841.48
6	Additions for FSI purpose (100% of Set Back Area) (On Sr.No.2)	628.57	367.91	996.48
7	Plot Area (5+6)	3345.06	2492.91	5837.96
8	FSI	1.33	1.33	1.33

9	Total available FSI (7x8)	4448.92	3315.57	7764.49
10	Permissible Built up area	4448.92	3315.57	7764.49
11	Additional FSI in lieu of 15%	637.57		637.57

	RG (4x8)	
12	Total permissible Built up	8402
	Area (10+11)	
13	Proposed Built up area	8401

NOTE:
(1) Total area of staircase, lift, lift lobby, which is not counted in FSI as

per DC Regulation 35(2)(iv) of the DC Regulations 1991 = 2814.92 sq.m.

(Minutes of MCZMA meeting of 3-11-2010 page 707 at page 711) Under Rule 51(vi) of the 1967 DC Rules only staircase room and lift room above topmost storey, were excluded from FSI and hence the area of staircase, lift and lift lobby would have to be counted towards FSI if the 1967 DC Rules are applicable.] FSI COMPUTED USING DIFFERENT METHODOLOGIES:

A. FSI calculated as in the sanctioned plan (excluding area of staircase / lift / lift lobby and with FSI from BEST plot) Proposed built up area (Staircase, lift, lift lobby area excluded)/Plot Area = 8401 / 6317.34 (5837.96 + 479.38) = 1.329 B. FSI calculations (including area of staircase, lift, lift lobby as per Rule 51(vi) of the 1967 DC Rules, but with FSI from BEST plot) Proposed built up area / Plot area = (8401 + 2814.92) / 6317.34 = 11,215.92 / 6317.34 = 1.775 C. FSI calculation (excluding area of staircase, lift, lift lobby as per Regulation 35(2)(iv) of the DC Regulations 1991 but without FSI from BEST plot) WP369chamber.odt = 8401 / 3824.44 (3345.06 + 479.38) = 2.196 D. FSI calculation (including area of staircase, lift, lift lobby as per Rule 51(vi) of the 1967 DC Rules and without FSI from BEST plot) Proposed built up area (including staircase/lift/lift lobby) / Plot area = 8401 + 2814.92 = 11,215.92 / 3824.44 (3345.06 + 479.38) = 2.932 [NOTE: The above calculations are on the basis that the additional FSI in lieu of the 15% RG area is available as per DC Regulation 35(1) of DC Regulations, 1991, even though it may not be available under the 1967 DC Rules (see MMRDA letter dated 24-2-2009 page 453 at page 464]

217. Mr. Khambata submitted that the petitioners have utilized FSI of BEST plot on the basis of the memorandum dated 05.08.2005. Clause 2 thereof laid down that as investment of project exceeds Rs.5 crores, permission of MOEF for utilizing FSI of BEST plot is necessary. He further submitted that by Notification dated 03.03.2006 issued under Section 50 of the M.R.&T.P. Act, Government sanctioned deletion of land admeasuring 2669.68 sq.mtrs., which was reserved for BEST plot and included the same in the residential zone without obtaining sanction of MCZMA or MOEF. He also relied upon the decision of in Sneh Mandal CHSL42. Mr. Khambata submitted that Development Control Rules of 1967 are applicable. Rule 51 thereof provides that FSI to be consumed is 1.33 or that provided in the DCR, whichever is lower, was permissible. In other words, FSI of 1.33 or that

provided in the 1967 DCR, whichever is lower is permissible. In any case, it cannot exceed 1.33 FSI. He invited our attention to Rule 51 (vi) and (d) of Development Control Rules of 1967 as also DCR 35(2), Clause (c) and

(iv) of DCR 1991.

WP369chamber.odt

218. Mr. Khambata further submitted that as the subject plot and BEST plot are two separate plots, FSI of one plot namely BEST plot cannot be utilized on the another plot namely, the subject plot. As there was no amalgamation of two plots, FSI of BEST plot cannot be utilized.

The BEST plot and the subject plot are two separate plots with two separate Cadestral Survey Numbers and this fact is borne out from the Property cards.

219. Mr. Khambata submitted that the net plot area is 3345.06 sq.mtrs. and permissible FSI is 1.33. The total built up area comes to 4448.92 sq.mtrs. and total FSI available is 1.33. As against this, petitioners built up area is 8401 sq.mtrs. and thus the FSI consumed is 2.932.

220. Mr. Toor appearing for BEST submitted that basically BEST, being the appropriate authority, has not made application for deletion. In any case, if the land is released from such reservation, it becomes available to the owner for the purpose of development. It is the petitioners' case that the State Government is the owner then the land will become available to the State Government for development. From the correspondence on record, it is evident that the State Government has permitted petitioners to utilize the additional FSI and not allotted the BEST plot.

221. Mr. Shah submitted that it is for the petitioners to satisfy this Court that the building constructed by it is perfectly in accordance with law and also it does not exceed FSI. He relied upon Section 2(13-A) and 2(21) of M.R.&T.P. Act, which defined the expressions 'FSI' and 'plot' respectively. He submitted that FSI of a particular plot has to be used in that plot only. In other words, FSI of BEST plot has to be utilized in BEST plot otherwise it will amount to TDR. Admittedly, WP369chamber.odt subject plot is situate in 'A' Ward where loading of TDR is prohibited. Mr. Shah submitted that respondents cannot be precluded from agitating this point as they have to squarely meet the challenge raised by the petitioners and meet the arguments advanced by the petitioners.

222. We have already held that the 1967 DCRs are applicable. It is also not disputed that MMRDA was appointed as a Special Planning Authority by Notification dated 15.06.1983. On 10.06.1977, the then BMRDA, in exercise of powers under Section 13(1) of the BMRD Act, issued Notification. The said Notification was to have effect for the period of two years. On 05.10.1989, BMRDA again issued Notification.

It is provided therein that no authority or person shall undertake, within the area specified within the jurisdiction of the MMRDA except with the previous permission of the Metropolitan Authority, the construction or reconstruction of any building excluding addition to any existing building so as

to have the FSI as defined in Rule 51 of the DCR for Greater Bombay, 1967 exceeding 1.33 or that provided in the said DCR, whichever is lower. The said Notification was in force until 10.10.1991, that is to say, when 1991 Notification was issued on 19.02.1991. Thus, the permissible FSI would be 1.33 as per 05.10.1989 Notification.

223. Now, the next question is whether the petitioners are entitled to utilize FSI of BEST plot. Petitioners contend that by memorandum dated 05.08.2005, Government has allotted BEST plot on occupancy basis to the petitioners and consequently, petitioners are entitled to utilize FSI of BEST plot. With the assistance of the learned Counsel appearing for the parties, we have gone through the entire correspondence leading to issuing memorandum dated 05.08.2005. After considering the correspondence in its entirety as also the interim reply dated 24.11.2010 and in particular paragraph 3(ix) as also detailed WP369chamber.odt reply dated 15.12.2010, and in particular paragraph 21 thereof, as also memorandum dated 05.08.2005 and Notification dated 03.03.2006, we are more than satisfied that petitioners were allowed to utilize the FSI of BEST plot. Petitioners were not allotted BEST plot. It is however, material to note that the petitioners changed their stand and improved it in their written submissions submitted on 10.06.2011 and in particular paragraph 3(ii) and came out with the case that on 05.08.2005, Government of Maharashtra allotted land admeasuring about 2669.68 sq.mtrs. to Adarsh Society on occupancy basis. Mr. Seervai submitted that in fact in the report of Dr. Nalini Bhat, there is a finding to the effect that the BEST plot is allotted to the petitioners. We do not find any merit in this submission at all as basically, the correspondence and the memorandum dated 05.08.2005 and notification dated 03.03.2006 leave no room for doubt that what was permitted to the petitioners was utilization of FSI of BEST plot.

224. The next question is whether the petitioners can utilize FSI of BEST plot on the subject plot. The answer to this question is emphatically in the negative. As noted earlier, the property card of the subject plot shows that the cadastral survey number of the subject plot is

652. In column No.10, name of person in beneficial ownership, after the name of Government of Maharashtra, Adarsh Society's name is recorded. As far as the BEST plot is concerned, its cadastral survey number is 657. In column No.10, name of person in beneficial ownership, name of Government of Maharashtra alone is recorded. It is material to note that the Survey Map and register is prepared under Section 282(1) and (2) of the MLRC, which requires that "every piece of land" has to be separately shown on the map and entered in the register with a distinct indicative number being assigned to it. Section 2(37) provides for a separate survey number for each portion of land. If WP369chamber.odt plots are carved out or sub-divided out of a larger plot then under Section 2(35) of the MLRC, a survey number is given to them which is indicative that it is subordinate to that of the survey number of which it is a portion, for example, Survey No.37/Part or Hissa No.2. In the present case, the subject plot and BEST plot are given separate cadastral survey numbers.

225. Thus, the BEST plot and the subject plot are two separate plots having different cadastral survey numbers. The subject plot and the BEST plot are adjacent and are in 'A' Ward. As noted earlier, in 'A' Ward loading of TDR is not permissible. As the subject plot and BEST plot are two distinct / separate plots, FSI of one plot namely BEST plot cannot be utilized on the another plot

namely, the subject plot. It is not the case of the petitioners that the two plots were amalgamated. As there is no amalgamation of two plots FSI of BEST plot cannot be utilized. Section 2(13-A) defines the expression 'Floor Space Index' to mean the quotient or the ratio of the combined gross floor area to the total area of the plot, Total covered area of all floors FSI = _____ Plot area

226. Section 2(18) defines the expression 'owner to include any person for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose, the rents or profits of the property in connection with which it is used. Section 2(21) defines the expression 'plot' to mean portion of land held in one ownership and numbered and shown as one plot in a town planning scheme. We are, therefore, of the opinion that as the BEST plot and the subject plot are two separate plots, petitioners cannot utilize FSI of BEST plot on the WP369chamber.odt subject plot.

227. That apart, clause 2 of memorandum dated 05.08.2005 laid down that as the investment of the project exceeds Rs.5 crores, permission of MOEF for utilizing FSI of BEST plot is necessary. Clause 4 thereof requires compliance of all the conditions laid down therein before utilizing FSI of BEST plot. It is evident that petitioners did not obtain permission of MOEF before utilizing FSI of BEST plot.

228. We have also perused Notification dated 03.03.2006 issued under Section 50 of the M.R.&T.P. Act. Section 2(3) defines the expression 'appropriate authority' to mean any public authority on whose behalf land is designated for public purpose in any plan or scheme and which it is authorized to acquire. In the present case, it is not disputed that the land is designated for the BEST bus depot and consequently, BEST is the appropriate authority. Section 50(1) lays down that the appropriate authority (other than the planning authority), if it is satisfied that the land is not or no longer required for the public purpose for which it is designated or reserved or allocated in the interim or the draft development plan or plan for the area of comprehensive development, or the final development, may request (a) Planning Authority to sanction deletion of such designation or reservation or allocation from the interim or the draft development plan or plan of the area of comprehensive development, or (b) the State Government to sanction deletion of such designation or reservation or allocation from the final development plan. Proviso to sub-section (2) thereof lays down that the planning authority or as the case may be, the State Government, may, before making any order, makes such inquiry as it may consider necessary and satisfy itself that such reservation or designation or allocation is no longer necessary in the public interest. Sub-section (3) thereof lays down that upon an WP369chamber.odt order under sub-section (2) being made, the land shall be deemed to be released from such designation, reservation or as the case may be, allocation and shall become available to the owner for the purpose of development as otherwise permissible in the case of adjacent land under the relevant plan.

229. In the present case, perusal of the record shows that at no point of time, appropriate authority, namely BEST had requested the State Government to release the land from reservation. In fact, the said request has to be made only after the appropriate authority is satisfied that the land is no longer required for the public purpose for which it is designated. In the present case, from the material on

record, no such satisfaction is arrived at by the appropriate authority namely BEST.

That apart, the appropriate authority namely BEST has not made request as contemplated by Section 50(1). In view thereof, in our opinion, State Government was not justified in invoking Section 50. In any case, even if the land is released from reservation, as per Section 50(3), the land becomes available to the owner for the purpose of development as otherwise permissible in the case of adjacent land under the relevant plan. Petitioners also do not dispute that the BEST plot is owned by the State Government. If at all, the State Government is justified in invoking Section 50, nonetheless the land will become available to the petitioners for development and the same will become available to the State Government being the owner of the said land.

230. In the case of Manohar Joshi69, the Apex Court observed that Section 50 can be invoked at the instance of appropriate authority only when it does not want the land for designated purpose. Reliance was also placed on Subhash Khaire70, and in particular paragraph 17 thereof to contend that the Notification dated 03.03.2006 is illegal, null and void WP369chamber.odt ab initio and it cannot be an order / notification issued in exercise of powers under Section 50 of the M.R.&T.P. Act. Reliance was also placed on Deepak Kumar Mukherjee71, and in particular paragraphs 8, 9 and 29 to submit that if the notification under Section 50 is void ab initio, the consequence is to order demolition of a portion of a building which utilizes FSI of BEST plot. We find merit in these submissions as in the facts and circumstances of the present case, State Government could not have invoked Section 50 for the following reasons:

> (1) Application was not made by the appropriate authority, as contemplated by Section 50(1);
>
> (2) Appropriate Authority did not record satisfaction that it no longer requires the land. On the contrary, from the material on record, it is evident that BEST requires BEST plot for ingress and egress of their buses from their bus depot; (3) Government has also not recorded its satisfaction as contemplated by proviso to sub-section (2) of Section 50;
>
> (4) In any case, after release of BEST plot from such reservation, the land will become available to the State Government being owner for the purpose of development and not to the petitioners.
>
> (5) FSI of BEST plot could not have been allowed to be utilized on the subject plot as both the plots fall in 'A' Ward where loading of TDR is impermissible;
>
> (6) Petitioners did not obtain permission of MOEF before utilizing FSI of BEST plot as per condition 2 of Memorandum dated 05.08.2005;
>
> (7) Even under Regulation 34 of the DCR, 1991, TDR is not available for use in the Island City of Mumbai. Only heritage TDR can be used in the Island City of Mumbai.

WP369chamber.odt

231. For all these reasons, petitioners cannot utilize FSI of BEST plot. We have already held that 1967 DCR are applicable and while calculating FSI, area covered by staircase, lift, lift lobby as per Rule 51(vi) of the 1967 DCR without considering FSI from BEST plot is to be considered. If the area covered by staircase, lift / lift lobby is divided by the plot area of subject plot then the calculation is thus: Proposed built up area (including staircase/lift/lift lobby) / Plot area = 8401 +2814.92 = 11,215.92 / 3824.44 (3345.06 = 479.38) = 2.932

232. Thus, petitioners have consumed FSI of 2.932 as against permissible FSI of 1.33. Question No.9 is answered accordingly.

Re: Questions No.(10) & (11) (10) Whether the various facets of the principles of natural justice namely;

a. non-supply of report of respondent No.4 Dr. Nalini Bhat; b. not permitting the petitioners to cross-examine Mr. T. C. Benjamin and Mr. Sitaram Kunte;

c. hearing by respondent No.4 Dr. Nalini Bhat and passing of order dated 14.01.2011 by respondent No.3 Dr. Bharat Bhushan; d. (i) by participating in the NCZMA meeting dated 11.11.2010, respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu have disqualified themselves in dealing with the petitioners' case;

(ii) the above officers were having bias against the petitioners;

(iii) the respondent No.3 had made up his mind while issuing show cause notice dated 12.11.2010;

(iv) the officers have abdicated their powers, functions and duties and acted on dictates of others;

WP369chamber.odt

(v) the impugned order / action travel beyond the show cause notice;

e. preparation of draft demolition order purportedly by Dr. A. Senthil Vel;

f. not hearing by respondent No.2 Mr. Jayram Ramesh before accepting one of the three options;

are, in the facts and circumstances of the present case, grossly violated?

(11) Whether this is a fit case for invocation of extra-ordinary jurisdiction under Article 226 of the Constitution of India?

233. Mr. Seervai strenuously contended that various facets of principles of natural justice have been grossly violated in the present case. On 03.11.2010, 66th meeting of MCZMA was held. Perusal of the minutes of that meeting shows that draft demolition order was already prepared. On 11.11.2010, Dr. Valsa Nair - Chairperson, MCZMA, respondent No.3 - Dr. Bharat Bhushan, respondent No.4 - Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu participated in the meeting of NCZMA. In the minutes of that meeting, it was recorded that the structure put up by the petitioners is unauthorized and without clearance of the appropriate authority, though there was no material. He relied upon the decision of the Apex Court in the case of Kishan Chand Chelaram15 to contend that without there being any material, NCZMA in its meeting dated 11.11.2010 recorded that the structure put up by the petitioners is unauthorized and without clearance of the appropriate authority. On 12.11.2010, respondent No.3 Dr. Bharat Bhushan issued notice to show cause within 15 days as to 'why the unauthorized structure erected by the Adarsh Society should not be removed forthwith in its entirety'. Dr. Bharat Bhushan having participated in the NCZMA meeting dated 11.11.2010 disqualified himself and he ought not to have WP369chamber.odt issued show cause notice. He having participated in that meeting, confirmed his own decision. He acted as a Judge in his own cause. The wording of the show cause notice also shows that it is a case of foregone conclusion.

234. Mr. Seervai submitted that even at the stage of the show cause notice, the respondents have completely made up their mind and reached the definite conclusion about alleged unauthorized structure put up by the petitioners. This has rendered the subsequent proceedings an empty ritual and an idle formality. He submitted that it is well settled that a quasi-judicial authority, while acting in exercise of its statutory power, must act fairly and must act with open mind while initiating the show cause proceeding. A show cause proceeding is meant to give a person proceeded against, a reasonable opportunity of making his objection against the proposed charges indicated in the notice. It is obvious that at that stage, the authority issuing show cause notice cannot instead of telling person the charges, confront him with definite conclusions of his alleged guilt. In the present case, the show cause notice records definite conclusions reached by respondent No.3 about alleged unauthorized construction made by the petitioners, and therefore, the entire proceeding initiated by the show cause notice is vitiated by unfairness and bias and the subsequent proceedings became an idle ceremony. He relied upon following decisions:

(a) Oryx Fisheries (P) Ltd.5 and

(b) Kumaon Mandal Vikas Nigam Limited6 to contend that show cause notice dated 12.11.2010 shows that respondents have completely made up their mind and reached the definite conclusion about alleged unauthorized structure put up by the petitioners. It also reflected bias of the respondent No.3. The quasi-judicial authority, while acting in exercise of its statutory power, must act fairly and must act with an open WP369chamber.odt mind while initiating a show cause notice proceeding.

235. Mr. Seervai submitted that respondent No.4 Dr. Nalini Bhat was authorized to hear the petitioners. She heard the petitioners on 04.01.2011. On 10.01.2011, petitioners filed written submissions. On 13.01.2011, respondent No.4 Dr. Nalini Bhat submitted report recommending that Adarsh building be removed in its entirety. He submitted that as the conclusion that the petitioners' building is unauthorized was already arrived at, within a short span of hardly two days, she submitted the report. The facts in the matter under consideration are singularly singular. The entire chain of events smacks of personal clash and adoption of a method unknown to law in hottest of haste.

236. Mr. Seervai submitted that apart from respondent No.4 - Dr. Nalini Bhat, respondent No.3 - Dr. Bharat Bhushan, Mr. E.

Thirunavukarasu and Dr. A. Senthil Vel assisted her during the course of hearing. During the course of hearing, petitioners were never informed that these 3 officers were there merely to assist respondent No.4 - Dr. Nalini Bhat and that they were not part of the panel to give hearing to the petitioners. Though respondent No.4 heard the petitioners, respondent No.3 Dr. Bharat Bhushan passed order on 14.01.2011. The principle that 'he who hears, must decide' is flagrantly violated. As respondent No.4 Dr. Nalini Bhat heard the petitioners, she alone could have passed the order. On this ground alone, the order dated 14.01.2011 passed by respondent No.3 Dr. Bharat Bhushan is liable to be quashed and set aside. Apart from that, as these officers participated in the meeting of NCZMA held on 11.11.2010, they have rendered themselves disqualified from participating further in the proceedings. The order also suffers from bias of respondent No.3.

WP369chamber.odt

237. Mr. Seervai submitted that in the affidavit of respondent No.3 Dr. Bharat Bhushan, he denied that he was not part of the panel. If he is part of the panel to hear the petitioners, it is contrary to notification dated 30.09.2009 which authorized respondent No.4 Dr. Nalini Bhat alone to hear the petitioners. The proceedings in pursuance of show cause notice were of quasi-judicial nature. If respondent No.3 Dr. Bharat Bhushan claims to have heard the petitioners, he had no authority to hear the petitioners in view of the notification dated 30.09.2009. Even on this ground, the order dated 14.01.2011 is liable to be set aside. He relied upon the following decisions:

(a) Gullapalli Nageswararao12,

(b) Rasid Javed73 and in particular paragraph 51,
(c) Shiv Raj74 and in particular paragraphs 17 to 20 as also

(d) Automotive Tyre Mfgrs. Assocn.11, and in particular

paragraphs 80, 83 and 84 to contend that the principles of natural justice "one who hears the case, must decide" is violated. The divided responsibility is destructive of the concept of the judicial hearing.

238. Mr. Seervai submitted that proceeding clearly smacks of bias and it is evidently writ large. Dr. Bharat Bhushan could not have issued show cause notice. He could not have proposed draft order and consequently, could not have passed final order on 14.01.2011. He submitted that respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel, Mr. E. Thirunavukarasu, Ms Valsa Nair Singh, all these officers acted at the behest of the respondent No.2. The impugned show cause notice / report / orders are at the behest of the respondent No.2. When the quasi-judicial authority acts at the behest of some other authority, its order is vitiated. Respondent No.3 Dr. Bharat Bhushan and respondent No.4 Dr. Nalini Bhat abdicated their functions WP369chamber.odt and powers and acted on the dictates of respondent No.2. They fettered their discretion at the behest of the respondent No.2. Respondent No.2 passed order on 16.01.2011. The said order records that there were three options available. These three options were not recorded / noted in the show cause notice / report / minutes of either MCZMA or NCZMA. Respondent No.2 came to the conclusion that only one option, namely, removal of the entire building was available. The report dated 13.01.2011 submitted by respondent No.4 Dr. Nalini Bhat recommending removal of the entire building was not given to the petitioners. Petitioners were not heard by the respondent No.2 before holding that only that option is available. He submitted that this is not a case of institutional decision. In fact, the entire exercise undertaken by the respondents is subversive of quasi-judicial function. The petitioners were also not permitted to cross-examine Mr. T. C. Benjamin and Mr. Sitaram Kunte. In short, he submitted that this is not a case of violation of a facet of natural justice but squarely a case of not observing the principles of natural justice at all.

239. In support of his submissions, he relied upon the following decisions:

a. C.I.T.7 to contend that the show cause notice, report, impugned orders were passed by the respondents No.3 and 4 at the behest of the respondent No.2. Respondents No.3 and 4 abdicated their powers.

They also fettered their discretion.

b. Institute of Chartered Accountant8 and A. K. Kraipak9, and Rattanlal Sharma10 to contend that respondents No.3 and 4 had disqualified themselves by participating in the meeting of NCZMA dated 11.11.2010. The report prepared by respondent No.4 and the order dated 14.01.2011 passed by the respondent No.3 is vitiated on account of bias.

WP369chamber.odt c. Meenglas Tea Estate13, and in particular paragraph 6, Bareilly Electricity Supply14, A. K. Roy16 and Nusli Neville Wadia17 to contend that the statements of Mr. Sitaram Kunte and Mr. T. C. Benjamin were extensively quoted in the meeting of MCZMA behind the back of the petitioners and they were not given opportunity to cross-examine these witnesses.

d. Saroj Kumar Sinha18 and Dhakeswari Cotton Mills Limited19 to contend that non-supply of report dated 13.01.2011 prepared by the respondent No.4 has vitiated the impugned orders.

e. E. K. Andrews26 to contend that this is not a case of institutional decision and the principle that one who hears must decide the case is applicable in the facts of the present case.

f. Sanjay Jethi20, and in particular paragraphs 16, 33.5 to 36, 39, 41 to 43, 47 and 48 to contend that (i) petitioners were denied opportunity to cross-examine Mr. Sitaram Kunte and Mr. T. C. Benjamin; (ii) report prepared by Dr. Nalini Bhat was not supplied; (iii) the impugned actions taken by the respondents suffer from bias.

g. Anirudhasinhji Karansinhji Jadeja21, and in particular paragraphs 11 to 15 and Tarlochand Dev Sharma22, and in particular paragraphs 12, 13, 15 and 16 to contend that respondents No.3 and 4 must take decision independently and cannot act at the behest of the respondent No.2. It amounts to abdication of power and duty as also fettering discretion to that of other.

240. He relied upon Nawab Khan Abbas Khan Vs. State of Gujarat80 to contend that as the impugned orders are passed in gross violation of 80 (1974) 2 SCC 121 WP369chamber.odt principles of natural justice, they are void and not voidable.

241. Mr. Seervai relied upon the following decisions to contend that the orders cannot travel beyond the show cause notice. The order must stand or fall by the reasons recorded therein and the reasons cannot be supplemented by way of affidavit or otherwise:

a. Deepak Babaria29, and in particular paragraphs 62 to 65, 69 and 70;

b. Rashmi Metaliks Limited30, and in particular paragraph 15;

c. All India Railway Recruitment Board31;

d. Dharampal Satyapal Limited25.

242. On the other hand, Mr. Khambata submitted that rules of natural justice are not rigid and depend upon the facts and circumstances of each case. Court has to consider whether the authorities in the present case have acted fairly and with an open mind. The Court has also to consider whether the petitioners were given fair and reasonable opportunity to put up their case. Assuming for the sake of argument without conceding that there was infirmity in the procedure, one has to consider whether the petitioners suffered any prejudice in view of some irregularity committed during the course of the proceedings. In support of his submissions, he relied upon the following decisions:

a. S. L. Kapoor46, and in particular paragraphs 16 and 17 thereof to contend that where on an admitted or undisputable facts only one conclusion is possible and under the Law, only one penalty is permissible, the Court cannot issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because Courts do not issue futile writs. The petitioners were given opportunity at every level and in fact they were supplied WP369chamber.odt questionnaire and their response was sought.

b. Karunakaran47, and in particular paragraph 7(v) thereof to contend that petitioners have not demonstrated that non-furnishing of report dated 13.01.2011 submitted by the respondent No.4 Dr. Nalini Bhat have prejudiced the petitioners gravely. Even after furnishing of the report, no different

consequences would have followed. He submitted that even after getting the report, petitioners have not pleaded what prejudice was caused to them by not supplying the report to them. Had the report been given to them in advance, they would have established obtaining clearance as also case of utilizing permissible FSI.

No such attempt is made by the petitioners in the present case.

c. State Bank of Patiala48, and in particular paragraphs 28 and 33 (5) thereof to contend that the principles of natural justice cannot be put in a strait jacket. Their applicability depends upon the context and the facts and circumstances of each case. The objective is to ensure a fair hearing, fair deal to the person whose rights are going to be affected. The Court has to apply the test of prejudice. There is distinction between "no notice" / "no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity".

d. Haryana Financial Corporation49, and in particular paragraph 21 thereof, Bidyut Kumar Mitra50, and in particular paragraph 40 thereof, Alok Kumar51, and in particular paragraphs 85 to 90 thereof to contend that it is for the petitioners to plead and prove that non-supply of report dated 13.01.2011 submitted by Dr. Nalini Bhat had caused prejudice and resulted in miscarriage of justice. The petitioners have neither pleaded nor proved that non-supply of such report had caused prejudice and it resulted in miscarriage of justice.

WP369chamber.odt e. All India Railway Recruitment Board31 to contend that the principle laid down in Mohinder Singh Gill's case28 is not applicable where larger public interest is involved and in such situation, the additional grounds can be looked into to examine the validity of the impugned actions in the present case.

243. Mr. Apte submitted that in the present case, though Section 5 of the E.P.Act does not provide for personal hearing, petitioners were given hearing by the panel consisting of four persons. In pursuance of that hearing, respondent No.4 Dr. Nalini Bhat submitted a report dated 13.01.2011. Respondent No.3 Dr. Bharat Bhushan submitted draft order for approval of the respondent No.2. Only after obtaining approval of the respondent No.2, respondent No.3 passed final order on 14.01.2011.

Having regard to the office order dated 30.09.2009, the cases involving policy implications or other sensitivities are required to be brought to the notice of Hon'ble Minister of MOEF. In short, he submitted that the decision taken in the present case is institutional decision and approved by the respondent No.2. In support of these submissions, he relied upon the following decisions:

a. Jyoti Prakash55, and in particular paragraph 25 thereof to contend that when respondent No.2 is performing the quasi-judicial function while taking decision in the present case, he is not constituted by the Constitution, a Court.

b. Ossein & Gelatin Mfgrs. Assocn. of India 27, and in particular paragraphs 5 and 6 to contend that no prejudice is caused to the petitioners in the present case, assuming that any principle of natural

justice is violated.

c. Indore Textiles Mills Limited56, and in particular paragraphs 7 to WP369chamber.odt 12 thereof to contend that the principles of natural justice, namely, the person who passed the order, did not hear the petitioners, is not violated where the decision is institutional decision; that when a quasi-judicial power is conferred on the Government or a Minister, by a Statute, it is presumed that Parliament intends the power to be exercised in accordance with the principles of natural justice according to the usual practice of the department concerned. The normal practice of the Government departments is that the Minister in charge of the Department takes assistance from subordinate officials of his department. There is no breach of natural justice if the investigation or the hearing part is done by an official or a committee and the final decision is taken by the Minister after going through the report of the officer concerned and the evidence and material collected by him. Even in acting upon such a report, the Minister may take assistance from others in his department and the decision reached by him cannot be tested being in violation of the principles of natural justice if he has honestly applied his mind to the relevant material and the decision reached by him is really his decision.

d. Raghava Menon57, and in particular paragraph 3 thereof wherein reference was made to the decision of Pradyat Kumar Bose Vs. C. J. of Calcutta, AIR 1956 SC 285. In that decision, the observations of Lord Haldane in the Local Government Board Vs. Arlidge, 1915 AC120 at page 133 were extracted. We extract that observation:

> "The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his material vicariously through his officials and he has discharged his duty if he sees that they obtain these materials for him properly.
>
> . . . .
>
> Unlike a Judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is WP369chamber.odt directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it."

e. Trimbakpati58, and in particular paragraphs 15 and 17 thereof, Jawala Prasad59, and in particular paragraphs 7 to 9, S. Kapoor Singh60, and in particular paragraphs 21 to 23, A. Sanjeevi Naidu61, and in particular paragraphs 12 and Gullapalli Nageswarra012, and in particular paragraph 10 thereof. In paragraph 15, Full Bench of Allahabad distinguished the decision in Gullapalli Nageswarra012.

f. Dharampal Satyapal Limited25, and in particular paragraphs 38 to 40 to contend that the principles of natural justice are very flexible principles and cannot be applied in any strait jacket

formula. It also depends upon that kind of functions performed and to the extent to which the person is likely to be affected.

g. Kesava Mills Co. Ltd.62, and in particular paragraph 17 thereof to contend that non-supply of report dated 13.01.2011 submitted by respondent No.4 Dr. Nalini Bhat did not vitiate the proceedings. In the absence of any statutory provision to the contrary, parliament intended respondents to follow the procedure, which is its own and is necessary if the administration is to be capable of doing its work efficiently. All that was necessary for the respondents was to act in good faith and to listen fairly to both sides.

244. As far as the plea of bias is concerned, he submitted that petitioners have not pleaded that officers namely respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Dr. A. Senthil Vel, Mr. E. Thirunavukarasu and respondent No.2 were biased in replies to the show cause notices as also to the written submissions. Even no such case is made out in the present Petition. There is no cogent evidence on WP369chamber.odt record to come to the conclusion as to whether in fact there was existing a bias or a malafide motive, which resulted int the miscarriage of justice.

In support of these submissions, he relied upon the following decisions:

a. V. K. Khanna63, and in particular paragraphs 5 and 6 where the decisions in the cases of - (i) S. Parthasarathi Vs. State of Andra Pradesh, (1974) 3 SCC 459, (ii) Metropolitan Properties Company (F.G.C.) Limited 67 and (iii) Kumaon Mandal Vikas Nigam6 are referred.

b. Tata Cellular64, and in particular paragraphs 129, 131 to 138;

c. International Airports Authority of India65, and in particular paragraphs 5 and 6;

d. Susme Builders Private Limited66, and in particular paragraphs 29, 31 and 57;

e. Metropolitan Properties Company (F.G.C.) Limited67; f. All India Institute of Medical Sciences 68, and in particular paragraphs 23 and 29.

(11) Whether this is a fit case for invocation of extra-ordinary jurisdiction under Article 226 of the Constitution of India?

245. Mr. Khambata submitted that assuming for the sake of argument without conceding that there is some infraction of principles of natural justice, even then this is not a fit case for invocation of powers under Article 226 of the Constitution of India. He submitted that from the material on record, it is clear that petitioners have not obtained recommendations of MCZMA. They have not obtained clearance either from MOEF or from State level agencies. The building so constructed is totally unauthorized. It also consumes FSI of BEST plot in an illegal manner. The petitioners have not complied stipulations in - (1) LOI dated 18.01.2003, (2) allotment letter dated 09.07.2004 and (3) office memorandum dated 05.08.2005. Notification dated 03.03.2006 issued

WP369chamber.odt under Section 50 of M.R.&T.P. Act is also vitiated on various grounds. The petitioners have brazenly and high-handedly carried out unauthorized construction. They have not even prayed for regularization of the unauthorized construction. In fact, petitioners went to the extent of contending that clearance under CRZ Notification is not necessary and that they are not bound to point out which DCR is applicable. The conduct of the petitioners dis-entitles them from any discretionary relief and this is not a fit case for invocation of power under Article 226 of the Constitution of India. In support of these submissions, he relied upon the following decisions:

a. Morarji Cooverji52, and in particular page 331 to contend that it is not sufficient that party who comes to this Court and make out a case that the impugned actions / orders are invalid. In order to get that relief from the Court on a writ petition, not only petitioner must come with clean hands, not only must they not suppressed any material facts, not only must they show the utmost good faith but they must also satisfy the Court that the making of the order will do justice and that justice lies on their side. In short, he submitted that justice of the case does not lie on the side of the petitioners.

b. Prabhu53, and in particular paragraph 4 thereof to contend that one of the principles inherent in exercise of writ jurisdiction is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society then the court may restrain from exercising the power.

c. M. P. Mittal54, and in particular paragraph 5 thereof to contend that it is well settled that when the petitioner invokes the jurisdiction of the High Court under Article 226 of the Constitution, it is open to the High Court to consider whether, in the exercise of its undoubted discretionary WP369chamber.odt jurisdiction, it should decline relief to such petitioner if the grant of relief would disentitle the interests of justice. The Court always has power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure an dishonest advantage or perpetuate an unjust gain.

246. On the other hand, Mr. Seervai submitted that in fact, clearance of MOEF or State level agencies is not required having regard to the Notification dated 09.07.1997. In any case, petitioners have obtained clearance from the appropriate authority. Even the planning authorities have proceeded on the premise that petitioners have obtained clearance from the appropriate authority. He submitted that at every stage, the principles of natural justice have been grossly violated. The impugned report / show cause notice / orders clearly show bias as also show that the authorities have made up their mind. In any case, after setting aside

- i) the impugned report / minutes of 20 th meeting of NCZMA dated 11.11.2010 (exhibit-C), (ii) show cause notice dated 12.11.2010 (exhibit-D) issued by respondent No.3 Dr. Bharat Bhushan, (iii) report dated 13.01.2011 of respondent No.4 Dr. Nalini Bhat, (iv) order dated 14.01.2011 passed by respondent No.3 Dr. Bharat Bhushan and finally

(v) order dated 16.01.2011 passed by the respondent No.2, matter may be remitted for de novo consideration of the petitioners' case. He, therefore, submitted that this is the fittest case for invocation of extra-

ordinary jurisdiction under Article 226 of the Constitution of India.

247. As the submissions in respect of questions No.10 and 11 are overlapping, we deem it appropriate to answer these questions together. Before we consider case of the petitioners as regards violation of principles of natural justice, it is necessary to find out the pleadings of the petitioners in that regard. In paragraph 4.2, petitioners contended that the impugned actions / impugned orders are travesty of principles of WP369chamber.odt natural justice inasmuch as every cannon of principles of natural justice has been blatantly violated in the instant case. The material on the basis of which actions have been initiated is not furnished to them. The authority / person who heard the response on show cause notice has not made a report. The order is passed by two different authorities. The Minister of State for MOEF has virtually indicated that he has decided the matter, and under his dictate, the entire proceeding has been conducted and the orders were passed as per his desire.

248. In paragraph 4.3, it is contended that the principles of natural justice are completely violated as (a) the material on the basis of which the orders are passed has not been furnished to the petitioners and (b) respondent No.4 purported to grant hearing to the petitioners and respondent No.3 has passed the order. Further, respondent no.2 Minister claims that he has passed the order and has actually decided the matter.

249. In paragraph 5.3, it is contended that on 04.01.2011, respondent No.4 heard the petitioners. No authority letter or resolution or notification authorizing her to give hearing to the petitioners was ever produced. Impugned order dated 14.01.2011 was passed by respondent No.3 Dr. Bharat Bhushan and not by respondent No.4 Dr. Nalini Bhat who had in fact heard the petitioners. It is well established principle of law that division of responsibility of hearing the matter and passing the order is destructive of concept of judicial hearing. If one person hears and another decides, the personal hearing becomes an empty formality.

250. In paragraph 7.25, it is contended that NCZMA meeting was held on 11.11.2010 and the show cause notice was issued on the very next day i.e. 12.11.2010. The petitioners were not given any opportunity to present their stand either before MCZMA (MCZMA had convened 66 th WP369chamber.odt meeting on 03.11.2010) or NCZMA. Further, the statements of Mr. T. C. Benjamin, Secretary, UDD and Mr. Sitaram Kunte, Secretary, Revenue Department were not recorded in the presence of the petitioners nor were any opportunity given to the petitioners to controvert their statements.

251. In paragraph 9, dealing with denial of principles of natural justice, in sub-paragraph (a), it is contended that copy of the report dated 13.01.2011 was never furnished to the petitioners to enable them to present their case on the issues forming subject matter of the report.

Thus, there was a complete denial of opportunity to controvert / dispute the facts / contentions / conclusions in the report. In sub-paragraph (b), it is contended that report of respondent No.4 is based solely upon the minutes of the meeting of NCZMA recorded on 11.11.2010 and purported statements of Mr. T. C. Benjamin, Principal Secretary, UDD, State of Maharashtra and Mr. Sitaram

Kunte, Principal Secretary, Revenue Department, Government of Maharashtra. The purported statements were not made / recorded in the presence of the petitioners and reliance on the said statements, therefore, particularly in view of denial of right to cross-examine would amount to breach of principles of natural justice. In sub-paragraph (c), it is contended that the petitioners were not heard on the three options purported to have been considered by the respondents No.1 and 2 before passing the impugned order.

Impugned order is based upon the impugned decision taken by respondent No.2, who was not a part of panelist who heard the petitioners on 04.01.2011. In sub-paragraph (d), it is contended that respondent No.4 had no authority to take any decision or pass any order. The alleged authority letter or notification authorizing respondent No.4 to conduct the hearing was not produced. In sub-paragraph (e), it is contended that one of the panelists Dr. A. Senthil Vel was personally WP369chamber.odt involved in the process of various sanctions to the petitioners' building as he had issued NOC under the letter of 11.03.2003, which was later on denied by MOEF as late as 28.10.2010. The impugned order, therefore, suffers from an implicit bias and conflict thereby leading to a total denial of natural justice.

252. Insofar as the pleadings as regards premeditated decision / bias are concerned, in sub-paragraph (a), it is contended that respondent No.2 who has taken the decision reflected in the impugned order and in his statement dated 16.01.2011 as decided as far back as October 2010 that he would pass a direction to demolish the building of the petitioner No.1, the same is evident from the statements made by respondent No.2 in media during that period.

253. In sub-paragraph (b), it is contended that respondent No.2 had prejudged and pre-decided the issue much before the impugned order and his statement dated 16.01.2011 was given. The same is evident from the statements made by the respondent No.2 in media, both print and television somewhere in the month of November. In sub-paragraph

(c), it is contended that from the statements of the respondent No.2 in media, it is evident that respondent No.2 had never considered any options other than the demolition of building of petitioner No.1 and that the representation in the statement of the respondent No.2 issued on 16.01.2011 in relation to considering 3 options is farce.

254. In ground (aa), petitioners have alleged that the impugned decision is a premeditated decision taken immediately after the publication of the first newspaper report dated 25.10.2010 in the Times of India and the entire process of issuance of show cause notice and hearing thereupon was apparently an empty formality. In ground (qq), WP369chamber.odt petitioners contended that while passing the impugned order and while exercising the powers conferred upon an authority, the authority must bring to a bare and unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of the others as this would amount to abdication and surrender of its discretion and the same would not be the authority's discretion that is exercised, but someone else's.

255. The plea of non-application of mind is raised in grounds (w) to (z). Petitioners have reiterated submissions as regards violation of principles of natural justice in paragraphs 4 to 6 and 18 of the rejoinder and in written submissions.

256. We have already held that before carrying out construction activities, clearance of the appropriate authority under 1991 Notification as amended from time to time is necessary. On 26.11.1998, MCZMA was constituted. On 04.01.2002, MCZMA was reconstituted and clause (VIII) empowered the said authority to examine all projects proposed in CRZ areas and give their recommendations before the project proposals are referred to the Central Government or the agencies who have been entrusted to clear such projects under 1991 Notification. We have already held that petitioners did not even approach MCZMA for obtaining recommendations. The recommendations of MCZMA are mandatorily required to be obtained before the project proposals are referred to the Central Government or to the agencies who have been entrusted to clear such projects under CRZ Notification dated 19.02.1991. We have also held that petitioners have not obtained environmental clearance either from MOEF or any State level agency. The communications dated 11.03.2003 of MOEF and 15.03.2003 of WP369chamber.odt UDD do not constitute environmental clearance either individually or collectively. In short, this is a case of petitioners not obtaining environmental clearance at all.

257. We have also held that while consuming FSI of BEST plot, petitioners have not complied the conditions stipulated in- (i) LoI dated 18.01.2003 (condition No.7), (ii) letter of allotment dated 09.07.2004 (condition No.2), (iii) memorandum dated 05.08.2005 (conditions No.2 and 4) as also (iv) exercise of powers in issuing notification dated 03.03.2006 under Section 50 of M.R.&T.P. Act was illegal. We have also held that in view of the decision of Suresh Estate's case1, 1967 DCR Rules are applicable. We have also held that as against the permissible FSI of 1.33 as per 1967 DCR Rules, the petitioners have consumed FSI to the extent of 2.932.

258. With this preface, let us deal with the precedents dealing with the principles of natural justice:

259. In the case of Kesava Mills Company62, the Apex Court has held that "the concept of natural justice cannot be put into a straight-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of a given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially an reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly." In the case of Russell v. Duke of Norfolk, (1949) 1 All. ER. 109, it was observed that "the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under WP369chamber.odt which the tribunal is acting, the subject matter that is being dealt with and so forth."

260. In the case of A. K. Roy16, in paragraph 97, it is observed that, "there is no fixed or certain standard of natural justice, substantive or procedural, and in two English cases the expression 'natural justice' was described as one 'sadly lacking in precision' [CR Vs. Local Government Board ex-parte Arlidge, (1994) 1 K.B. 160] and as 'vacuous' [Local Government Board Vs. Arlidge, 1915 A.C.

138]. The principles of natural justice are, in fact, mostly evolved from case to case, according to the broad requirements of Justice in the given case. In paragraph 98, it was observed that "we do not suggest that the principles of natural justice, vague and variable as they may be, are not worthy of preservation. As observed by Lord Reid in Ridge v. Baldwin (1964 A.C.

40), the view that natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". But the importance of the realisation that the rules of natural justice are not rigid norms of unchanging content, consists in the fact that the ambit of those rules must vary according to the context, and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice."

261. In the case of V. K. Khanna63, in paragraph 8, the Apex Court laid down the test of bias and observed that the test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other WP369chamber.odt hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor would not arise. In paragraph 9, the Apex Court referred to the decision of Rattan Lal Sharma v. Managing Committee Dr. Hari Ram (Co-education) Higher Secondary School & Ors., , wherein the Apex Court was pleased to observe that the test is real likelihood of bias even if such bias was, in fact, the direct cause.

262. In the case of All India State Bank Officers' Federation Vs. Union of India81, in paragraph 21, the Apex Court observed that for an allegation of mala fide to succeed it must be conclusively shown that respondents 4 and 5 wielded influence over all the members of the Board who were present in the said meeting. No such allegation has been made. In paragraph 22, it was further held that neither the Chairman nor the Directors, who were present in the said meeting, were impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fide, which allegations, in fact, are without merit.

263. In Ratnagiri Gas & Power Private Limited Vs. Rds Projects Limited82, the Apex Court held in paragraph 25 that the law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity. In 81 (1997) 9 SCC 151 82 (2013) 1 SCC 524 WP369chamber.odt paragraph 27, it was observed that as and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority

concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding.

264. In the case of Dharampal Satyapal Limited25, in paragraph 39, the Apex Court was observed that while emphasizing that the principles of natural justice cannot be applied in strait jacket formula, the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason, perhaps because the evidence against the individual is thought to be utterly compelling, it is felt that a fair hearing 'would make no difference', meaning that a hearing would not change the ultimate conclusion reached by the decision-maker then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corporation, (1971) 2 ALL.E.R. 1278, who said that a 'breach of procedure...cannot give (rise to) a remedy in the courts, WP369chamber.odt unless behind it there is something of substance which has been lost by the failure. The court does not act in vain'. Relying on these comments, Brandon LJ opined in Cinnamond v. British Airports Authority, (1980) 2 ALL E.R. 368 that 'no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'. In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual.

265. In paragraph 40, it was observed that "Even if it is found by the Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non- grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that order passed is always null and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is always the same, namely, the test of prejudice or the test of fair hearing". The Apex Court referred to decision of B. Karunakar47, and in particular paragraph 30 thereof. In paragraph 31 of B. Karunakaran's case47, it was held that if after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/ Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The Court should avoid resorting to shortcuts. Since it is the Courts / Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside WP369chamber.odt the order of punishment, there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity.

266. In S. L. Kapoor46, it was observed in paragraph 17 that whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the

admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.

267. In the case of M/s. PRP Exports77, the Apex Court considered decision of All India Railway Recruitment Board31 which distinguished Mohinder Singh Gill's case28, stating when a larger public interest is involved, the Court can always look into the subsequent events and in such situations, additional grounds can be looked into to examine validity of the order.

268. In the case of Indore Textiles Mill Limited56, the Division Bench of Madhya Pradesh High Court considered the decision of the Apex Court in Gullapalli Nageswararao12 in the context of the principle that 'one who hears, must decide the case'. In paragraph 7, it was observed that when a quasi-judicial power is conferred on the Government or a Minister, by a statute, it is presumed that Parliament intends the power to be exercised in accordance with the principles of natural justice according to the usual practice of the department concerned. The normal WP369chamber.odt practice of Government departments is that the Minister in charge of the Department takes assistance from subordinate officials of his department. There is no breach of natural justice if the investigation or the hearing part is done by an official or a committee and the final decision is taken by the Minister after going through the report of the officer concerned and the evidence and material collected by him. Even in acting upon such a report the Minister may take assistance from others in his department and the decision reached by him cannot be tested being in violation of the principles of natural justice if he has honestly applied his mind to the relevant material and the decision reached by him is really his decision.

269. In paragraph 12, it was observed that the case of Gullapalli Nageswararao12 must be confined to the construction of Section 68D of the Motor Vehicles Act and the rules made thereunder which specifically required "giving an opportunity to the person of being heard in person".

The case cannot be understood to have decided that whenever a quasi-

judicial power is conferred on the Government, the Minister concerned must himself hear and he cannot act on the report of an officer to whom the hearing function is delegated.

270. Applying the principles laid down in the aforesaid decisions, we will deal with the contention of Mr. Seervai that various facets of the principles of natural justice are violated.

271. 10(a) Non - supply of report of respondent No.4 Dr. Nalini Bhat - We have already noted the contentions raised in the Petition namely, the material on the basis of which the orders are passed, has not been furnished to the petitioners (report of Respondent No.4, Dr. Nalini Bhat).

WP369chamber.odt

272. Mr. Seervai relied upon Dhakeswari Cotton Mills Limited19 and Saroj Kumar Sinha18 to contend that non-supply of report of respondent No.4 Dr. Nalini Bhat has vitiated the entire proceedings. We have already dealt with this aspect and held that petitioners have to plead and prove the prejudice. Had the report been submitted, it would have made any difference in the outcome of the proceedings. In view thereof, these decisions do not advance the case of the petitioners.

273. In the case of B. Karunakar47, the Apex Court was considering the question whether non furnishing of the enquiry report has caused prejudice to the delinquent employee. It was observed in paragraph 7(v) that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice. In all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and Tribunals should call the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court / Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the WP369chamber.odt Court / Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court / Tribunal should not interfere with the order of punishment. The Court / Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. It is only if the Court / Tribunal finds that the furnishing of the report would have made the difference to the result in the case that should set aside the order of punishment.

274. In the case of Haryana Financial Corporation49, in paragraph 21, the Apex Court held that the person who is not supplied with the report has to plead and prove that non-supply of report caused prejudice and resulted in miscarriage of justice. In the present case, the petitioners have annexed report of respondent No.4 Dr. Nalini Bhat. Even after getting copy of that report, in the Petition, petitioners have not proved that had the report been given to them in advance, it would have made any difference. The decision in B. Karunakar47 was considered therein as also in Dharampal Satyapal Limited's case25 . After perusing the assertions in the Petition, we do not find that petitioners have pleaded and proved that because of non-supply of report of respondent No.4 Dr. Nalini Bhat, any prejudice is caused to them or that had the report been supplied to them, it would have made any difference to the ultimate findings and it would have had any bearing on the impugned orders.

Question No.10(a) is answered accordingly.

275. 10(b) Not permitting the petitioners to cross-examine Mr. T. C. Benjamin and Mr. Sitaram Kunte - Petitioners allege that statements of Mr. T. C. Benjamin and Mr. Sitaram Kunte were extensively quoted in the meeting of MCZMA behind the back of the petitioners and they were not given opportunity to cross-examine these WP369chamber.odt witnesses. Mr. Seervai relied upon the following decisions:

> a. Bareilly Electricity Supply14 b. Kishan Chand Chelaram15 c. Meenglas Tea Estate13 d. Nusli Neville Wadia17

276. In the first place, this contention proceeds on the misconception that they were examined as witnesses, which is factually incorrect. Secondly, Mr. T. C. Benjamin and Mr. Sitaram Kunte had placed factual material on record before the MCZMA. During the course of lengthy hearing before this Court, petitioners were not in a position to satisfy us that no environmental clearance was required or that if required, communications dated 11.03.2003 and 15.03.2003 constituted environmental clearance. The petitioners did not establish that construction of the building is within permissible FSI. We, therefore, do not find any merit in the submission of Mr. Seervai that the principles of natural justice are violated as petitioners were not permitted to cross-

examine Mr. T. C. Benjamin and Mr. Sitaram Kunte. Question No.10(b) is answered accordingly.

277. 10(c) Hearing by respondent No.4 Dr. Nalini Bhat and passing of order dated 14.01.2011 by respondent No.3 Dr. Bharat Bhushan - Mr. Seervai relied upon the decision of Gullapalli Nageswararao12, which was subsequently followed in three cases, namely, Rasid Javed73, Shiv Raj74, and Automotive Tyre Mfgrs. Assocn.11. In the case of Gullapalli Nageswararao12, the Apex Court considered Section 68-D(2) which provided that the State Government may, after considering the objections and after giving an opportunity to the objector or his representatives and the representatives of the State Transport Undertaking to be heard in the matter, if they so desire, WP369chamber.odt approve or modify the scheme. Rule 10 thereof dealt with consideration of the scheme and provided that after the receipt of the objections, the Government may, after fixing the date, time and place for holding an inquiry and after giving a person so desire, at least 7 clear days notice of such time and place to the persons who filed objections under rule 8, proceed to consider the objections and pass such orders as they may deem fit after giving an Opportunity to the person of being heard in person or through authorised representatives. One of the parties to the dispute before the State Government was the Transport Department and the Secretary who heard the parties was the Head of the Department. It was observed that though the Secretary presumably discussed the matter with the Chief Minister before the latter approved the scheme and though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself.

278. In paragraph 31, it was observed that the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing. The procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. In our opinion, this decision does not advance the case of the petitioners and is rightly

distinguished in Indore Textiles Mills case56. The case of Gullapalli Nageswararao12, must be confined to the construction of Section 68-D of the Motor Vehicles Act and the Rules made thereunder which specifically required "giving an opportunity to the person of being heard in person". The case cannot be understood to have decided that whenever a quasi-judicial power is conferred on the Government, the Minister concerned must himself hear and he cannot act on the report of WP369chamber.odt an officer to whom the hearing function is delegated. In the present case, Section 5 of the E.P. Act does not contemplate giving a personal hearing.

That apart, respondent No.4 was authorized to give hearing to the petitioners and accordingly, she heard the petitioners and thereafter prepared a report. In view thereof, decisions of Gullapalli Nageswararao12 as also Rasid Javed73, Shiv Raj74, and Automotive Tyre Mfgrs. Assocn.11 do not advance the case of the petitioners as we have already held that in the present case, the decision is the institutional decision.

279. As noted earlier, by order dated 30.09.2009, respondent No.4 Dr. Nalini Bhat was authorized to to hear the petitioners and Dr. Senthil Vel and respondent No.3 Dr. Bharat Bhushan were to assist her at the time of hearing. The petitioners do not dispute presence of Dr. Bharat Bhushan. They submitted that order passed by Dr. Bharat Bhushan is vitiated as he did not hear the petitioners and the petitioners were heard by respondent No.4 Dr. Nalini Bhat. In this regard, it is material to note that by order dated 30.09.2009, respondent No.4 Dr. Nalini Bhat was authorized to hear the petitioners and Dr. Senthil Vel and respondent No.3 Dr. Bharat Bhushan were to assist her at the time of hearing. It is not in dispute that respondent No.4 Dr. Nalini Bhat has prepared the report. From the material on record, it is evident that respondent No.3 Dr. Bharat Bhushan had prepared draft order for approval of respondent No.2 and respondent No.3 has passed the final order on 14.01.2011.

280. In that context, the decision of Madhya Pradesh High Court in Indore Textile Mills Limited56 is material. In paragraphs 7 to 10, it was observed thus,

7. When a quasi-judicial power is conferred on the Government or a Minister, by a statute, it is presumed that Parliament intends the power to be exercised in accordance with the principles of natural justice according to the usual practice of the department WP369chamber.odt concerned. The normal practice of Government departments is that the Minister in charge of the Department takes assistance from subordinate officials of his department. There is no breach of natural justice if the investigation or the hearing part is done by an official or a committee and the final decision is taken by the Minister after going through the report of the officer concerned and the evidence and material collected by him. Even in acting upon such a report the Minister may take assistance from others in his department and the decision reached by him cannot be tested being in violation of the principles of natural justice if he has honestly applied his mind to the relevant material and the decision reached by him is really his decision. (Wade, Administrative Law. 4th Edition, p. 467: De Smith, Judicial Review of Administrative Action, 4th Edition, p. 220). In Local Government Board v. Arlidge, (1915) AC 120 (HL), which is leading authority on the point, it was held by the House of Lords that an order passed by the Minister, who was head of the Local Government Board, in an appeal, which required a quasi-judicial procedure, could not be set aside on the ground that the

enquiry in relation to the appeal was not made by and the hearing was not given by the Minister but by an official of the Board. In holding, so Viscount Haldane, L. C. made the following observations; "The Minister at the head of the Board Is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that ho and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his Staff."

8. The principle laid down in Arlidge's case (1915 AC 120) was accepted by the Privy Council in the case of Jeffs v. New Zealand Dairy Production and Marketing Board, (1967) 1 AC 551 (PC). In this case, the respondent Board was conferred with a quasi- judicial power by a statute to make a zoning order, it was held that the Board could appoint a person or persons to hear and receive evidence and submissions from interested parties, and if it reached the decision after fully informing itself of the evidence and submissions made, it could not be said that the Board had not heard the interested parties and had acted contrary to the principles of natural justice. It was also held that in some circumstances it may even suffice for the Board to have before it WP369chamber.odt and to consider an accurate summary of the relevant evidence and the submissions if the summary adequately disclosed the submission and evidence to the Board. The decision of the Board was, however, set aside on the ground that the report which the Board considered did not state what the evidence was and the Board reached its decision without consideration of and in ignorance of the evidence.

9. The principle that when a auasi-judicial power is conferred on a Government department or a Minister, the pre-decision hearing need not be by the persons passing the final order has also been accepted in the American Administrative Law, it was no doubt observed by Chief Justice Hughes in the Fred O Morgan case, (1938) 298 US 468, that "the one who decides must hear." But these observations have not to be understood in a literal sense. The word "hear" is used here in the artistic sense of requiring certain procedural minimum to insure an informed judgment by the one who has the responsibility of making the final decision and it does not necessitate that the person making the final decision must himself be the presiding officer at the hearing. In other words, the one who decides must give heed to the case and, directing his mind to it, must be the one who actually exercises the deciding function. It is not necessary that the person deciding should himself take the evidence and hear the oral arguments : (see Schwarts, Administrative Law, (1976) pp. 378 to 383). As observed by Professor wade :

"The work of holding the inquiry and reporting on the evidence must be delegated to officials, and so in many cases must be the substantive decision itself. But what the Supreme Court of the United States continued to require was that the decision should be the personal decision of the Minister in the sense that he sees the record and exercises his personal judgment upon it. The case may be predigested for him in his department, but he is the one who is required to decide. He must therefore 'hear' in the sense of applying his mind to both sides of the case." (Wade, Administrative

Law, 4th edition, p.

825).

10. The development of the Indian Administrative Law is also on the same lines (Jain and Jain, Principles of Administrative Law, 3rd edition, p. 250). The Supreme Court in Pradyut Kumar v. C. J. of Calcutta. AIR 1956 SC 285, expressly approved and followed the decision of the House of Lords in Arlidge's case (1915 AC

120). In Pradyut Kumar's case, the question was whether the Chief Justice who had the power to dismiss could not authorise a Judge to make enquiry into the charges and to report and whether it was obligatory on him to himself make the enquiry. In holding WP369chamber.odt that it was not necessary for the Chief Justice himself to make the enquiry, it was observed that although in case of a judicial tribunal, the tribunal cannot delegate its functions unless it is enabled to do so expressly or by necessary implication, the position is different in case of an administrative power which has to be exercised in a quasi-judicial manner and the statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent officer to enquire and report. It was further observed that what cannot be delegated is the ultimate responsibility for the exercise of the power. Arlidge's case had also decided that when hearing is held by one officer and the final decision is taken by another on the basis of the hearing officer's report, it is not always necessary to disclose the report to the affected person for inviting his comments before making the final decision. This principle has also been accepted by our Supreme Court : (Suresh Koshy v. University of Kerala, AIR 1969 SC 198; Kesava Mills Cc. v.

Union of India. AIR 1973 SC 389: Shadi Lal v. State of Punjab. AIR 197.) SC 1124 and Hira Nath v. Rajendra Medical College, AIR 1973 SC 1260.

281. In the case of A. Sanjeevi Naidu61, the Apex Court observed in paragraphs 12 to 17 thus,

12. The cabinet is responsible, to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard working minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department.

In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day to day administration. His primary function is to. lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the 'government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it

-on behalf of the government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of government business generally or as regards any specific case.

WP369chamber.odt Subject to that over all power, the officers designated by the 'Rules' or the standing orders, can take decisions on behalf of the government. These officers are the limbs of the government and not its delegates.

13. In Emperor v. Sibnath Banerji and ors. (1) construing Section 59(3) of the Government of India Act, 1935, a provision similar to Article 166(3), the Judicial Committee held that it was within the competence of the Governor to empower a civil servant to transact any particular business of the government by making appropriate rules. In that case their Lordships further observed that the Ministers like civil servants are subordinates to the Governor. In Kalyan Singh v. State of U.P.: this Court repelling the contention that the opinion formed by an official of the government does not fulfil the requirements of Section 68 (C) observed :

> "The opinion must necessarily be formed by somebody to whom, under the rules of business, the conduct of the business is entrusted and that opinion, in law, will be the opinion of the State Government. It is stated in the counter-affidavit that all the concerned officials in the Department of Transport considered the draft scheme and the said scheme was finally approved by the Secretary of the Transport Department before the notification was issued. It is not denied that the Secretary of the said Department has power under the rules of business to act for the State Government in that behalf. We, therefore, hold that in the present case the opinion was formed by the State transport undertaking within the meaning of s. 68 (C) of the Act, and that, there was nothing illegal in the manner of initiation of the said Scheme".

14. In Ishwarlal Girdharlal Joshi etc. v. State of Gujarat and another, this Court rejected_the contention that the opinion formed by the Deputy Secretary under Section 17(1) of the Land Acquisition Act cannot be considered as the opinion of the State government. After referring to the rules of business regulating the government business, this Court observed at p. 282-

> "In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfy themselves about the need for acquisition under Section 6, the urgency of the matter and the existence of waste and arable lands for the application of sub- sections (1) and (4) of s. 17. In view of the Rules of business and the Instructions their determination became the determination of Government and no exception could be taken."
>
> WP369chamber.odt
>
> 15. In Capital Multi-purpose Co-operative Society v. State of Madhya Pradesh and Ors. (1), this Court dealing with the scope of s. 68 (D) of the Act observed that the State Government obviously is not a natural person and therefore some natural

> person has to give hearing on behalf of the State Government and hence the hearing given by the special secretary pursuant to the power conferred on him by the business rules framed under Article 166(3) is a valid hearing.

16. As mentioned earlier in the very nature of things, neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the government and not as persons to whom the power of the government had been delegated. In Halsbury Laws of England Vol. I 3rd Edn. at p. 170, it is observed :

> "Where functions entrusted to a Minister are performed by an official employed-in the Minister's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister."

17. Similar view has been expressed in "Principles of Administrative Law" by Griffith and Street. That is also the view taken by Sir Ivor Jennings in his "Cabinet Government".

282. Thus, in the present case, on the basis of the order dated 30.09.2009, respondent No.4 Dr. Nalini Bhat heard the petitioners and submitted the report. After receipt of the report, respondent No.3 Dr. Bharat Bhushan prepared draft order and submitted it to the approval of respondent No.2 Mr. Jayaram Ramesh, the then Hon'ble Minister of MOEF. After obtaining the approval from respondent No.2, respondent No.3 Dr. Bharat Bhushan passed final order on 14.01.2011. As observed in the case of Indore Textile Mills Limited56 when a quasi-judicial power is conferred on the Government or a Minister, by a statute, it is presumed that Parliament intends the power to be exercised in accordance with the principles of natural justice according to the usual practice of the department concerned. The normal practice of Government departments is that the Minister in charge of the WP369chamber.odt Department takes assistance from subordinate officials of his department. There is no breach of natural justice if the investigation or the hearing part is done by an official or a committee and the final decision is taken by the Minister after going through the report of the officer concerned and the evidence and material collected by him. Even in acting upon such a report the Minister may take assistance from others in his department and the decision reached by him cannot be tested being in violation of the principles of natural justice if he has honestly applied his mind to the relevant material and the decision reached by him is really his decision. In that case, the following observations of Viscount Haldane, L.C. in Local Government Board Vs. Arlidge, (1915) AC 120 (HL) were quoted:

> "The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that ho and other members of the Board should do everything personally would be to impair

his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his Staff."

283. In the Fred O Morgan case, (1938) 298 US 468, the learned Chief Justice Hughes observed that "the one who decides must hear". But these observations have not to be understood in a literal sense. The word "hear" is used here in the artistic sense of requiring certain procedural minimum to insure an informed judgment by the one who has the responsibility of making the final decision and it does not necessitate that the person making the final decision must himself be the presiding officer at the hearing. In other words, the one who decides must give heed to the case and, directing his mind to it, must be the one who actually exercises the deciding function. It is not necessary that the person deciding should himself take the evidence and hear the oral WP369chamber.odt arguments.

284. We have already extracted paragraphs 12 and 13 of A. Sanjeevi Naidu61 hereinabove. In view thereof, in our opinion, this is a case of institutional decision, and therefore, we find no merit in the submission of Mr. Seervai that as the hearing was given by one person and order was passed by another person, the order passed by the respondent No.3 Dr. Bharat Bhushan on 14.01.2011 is vitiated on that ground. In the present case, the following facts become evident from material on record:

```
i.     Environmental         clearance
                                    ig   is   necessary   under    the     1991
Notification, as amended from time to time;
ii.    Petitioners have not approached MCZMA and also did not obtain

recommendations;
```

iii. Petitioners have not obtained environmental clearance either from MOEF or from the State level agency. In short, it is the case of no environmental clearance at all;

iv. Petitioners have committed breach of conditions stipulated in- (i) LoI dated 18.01.2003 (condition No.7), (ii) letter of allotment dated 09.07.2004 (condition No.2), (iii) memorandum dated 05.08.2005 (conditions No.2 and 4) as also exercise of powers in issuing notification dated 03.03.2006 under Section 50 of M.R.&T.P. Act was illegal; v. Letters dated 11.03.2003 and 15.03.2003 do not individually or collectively constitute environmental clearance; vi. Even otherwise, communication dated 15.03.2003 of UDD cannot be construed as environmental clearance as it is Environment Department of the State Government, who was at the relevant time, competent to issue environmental clearance and not the UDD; vii. 1967 DCR are applicable and not draft 1989 DCR or 1991 DCR. As against permissible FSI of 1.33 under 1967 DCR, petitioners have WP369chamber.odt consumed FSI to the extent of 2.932.

285. Applying the test applied by the Apex Court in the case of Dharampal Satyapal Limited25, we are of the opinion that no purpose will be served by directing respondents to hear the petitioners as no different conclusion is possible in the facts and circumstances of the present case. Question No.10(c) is answered accordingly.

286. 10(d)(i) - By participating in the NCZMA meeting dated 11.11.2010, respondent No.3 - Dr. Bharat Bhushan, respondent No.4

- Dr. Nalini Bhat, Dr. A. Senthil Vel and Mr. E. Thirunavukarasu have disqualified themselves in dealing with the petitioners' case and 10(d)(ii) - the above officers were having bias against the petitioners;

287. Mr. Seervai submitted that the impugned order of demolition is violative of various facets of principles of natural justice, of which the most serious and fundamental breach is that of bias. In support of this proposition, he relied upon the following decisions:

a. Rattanlal Sharma10 - In this case, the appellant was appointed as Principal of Dr. Hariram (Co-Edn) Higher Secondary School. He was placed under suspension by the Managing Committee of the said school and the charge-sheet containing 12 charges was issued to the appellant. The school authorities appointed Enquiry Committee consisting of three members of which Mr. Maru Ram was one of the members. It was an admitted position that said Mr. Maru Ram appeared as witness in support of charge No.12 on behalf of the administration in the said inquiry proceedings. The appellant raised objection for inclusion of Mr. Maru Ram in the enquiry committee but the same was overruled. The WP369chamber.odt learned Single Judge of Punjab & Haryana High Court allowed the Petition filed by the appellant on the ground that the departmental proceedings was vitiated for the flagrant violation of principles of natural justice as charge No.12 was sought to be proved by Mr. Maru Ram himself. The Division Bench however held that the plea of bias could be waived. In paragraph 11, the Apex Court held that Mr. Maru Ram was interested in establishing charge No.12 and it was apparent that he had a predisposition to decide against the appellant and though the appellant had raised the objection before the enquiry committee, the said objection was rejected on a very flimsy ground.

In paragraph 12, it was observed that if the plea though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the Court, it is only desirable that litigant should not be shut out from raising such plea which goes to the root of the lis involved. In the present case, we have already extracted plea of bias. We do not find that any foundation is laid in the Petition. Plea of bias is also not based on admitted or uncontroverted facts and it also requires further investigation. The decision, therefore, does not advance the case of the petitioners.

b. A. K. Kraipak9 - In this case, petitions were instituted under Article 32 by some of the Gazetted Officers serving as Conservators of Forests, some as Divisional Forest Officers and others as Assistant Conservators of Forests in the Forest Department of the State of Jammu & Kashmir.

WP369chamber.odt They felt aggrieved by the selections made from among the officers serving in the forest department of the State of Jammu and Kashmir to the Indian Forest Service. In pursuance

of the regulation 3, Special Selection Board was constituted for the purpose of selection. One of the candidates Shri Naquishbund was also appointed as one of the members of the selection board. In paragraph 15, the Apex Court held that under the circumstances, it was improper to have included Naquishbund as a member of the selection board. He was one of the persons to be considered for selection and it was against all canons of justice to make a man judge in his own cause. In our opinion, the said decision also does not advance the case of the petitioners.

c. Institute of Chartered Accountants8 - In this case, Disciplinary Committee consisted of the President, S.K. Gupta, the Vice-President, N.C. Krishnan, two members of the Institute, R.K. Khanna and Bansi S. Mehta and the Government nominee, Ganapathi. The Disciplinary Committee gave a personal hearing to respondent Ratna and his counsel.

The Disciplinary Committee opined that respondent Ratna was guilty of misconduct. In paragraph 25, the Apex Court observed that the President and the Vice-President do certainly hold significant status in the meetings of the Council. A member whose conduct has been the subject of enquiry by the Disciplinary Committee ending in conclusions adverse to him can legitimately entertain an apprehension that the President and the Vice-President of the Council and the other members of the Disciplinary Committee would maintain the opinion expressed by them in their report and would press for the acceptance of the report by the Council. To the member whose conduct has been investigated by the Committee, the possibility of the Council disagreeing with the report in the presence of the President and the Vice-President and the other members of the Committee would so rather remote. The Apex Court, WP369chamber.odt therefore, concurred with the High Court that the finding of the Council holding respondent guilty of misconduct is vitiated by the participation of the members of the Disciplinary Committee. In our opinion, this judgment is also not applicable to the facts of the present case.

d. Sanjay Jethi20- In this case, in paragraph 16, the Apex Court noted issues namely, whether the tribunal was justified in holding that the constitution of Court of Inquiry (COI) which consisted of two technical members and the presiding officer was vitiated as there was possibility of they are having an interest in the proceedings as a consequence of which being bias or there could be a perception or likelihood of bias in decision making process which would raise a doubt pertaining to the decision by a prudent or rational person and whether the presiding officer and technical member should have been made available for cross- examination in a COI in compliance of Rule 180 and in view of the earlier order passed in the case between the same parties there has been real violation of principles of natural justice which ultimately vitiates the proceedings of additional COI. In paragraph 33.3, it was observed that technical members having prepared and arranged the documents, which would mean that they had expressed an opinion at an early stage, yet they were retained as members of COI as a consequence of which the principles of natural justice were violated for one cannot be the judge in his own cause. For the reasons already recorded, we are of the opinion that this judgment also does not advance the case of the petitioners.

288. We have also considered the pleadings. Though elaborate arguments were advanced on this point, petitioners have, as a passing reference, pleaded in paragraph 9(e) that one of the panelists Dr. Senthil Vel was personally involved in the process of various sanctions to the petitioners'

building as he had issued no objection under the letter dated WP369chamber.odt 11.03.2003 which was later on denied by MOEF as late as 28.10.2010. The impugned order, therefore, suffers from the implicit bias and conflict thereby leading to a total denial of natural justice.

289. In the present case, petitioners have not impleaded Dr. A. Senthil Vel. There are no allegations of bias against the respondent No.3 Dr. Bharat Bhushan, respondent No.4 Dr. Nalini Bhat, Mr. E.

Thirunavukarasu and Dr. Valsa Nair. In the case of Ratnagiri Gas & Power Private Limited82, the Apex Court in paragraph 25 has held that the law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity. In paragraph 27, it was observed that in the absence of the person concerned as a party in his/her individual capacity, it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding.

WP369chamber.odt

290. In the light of this discussion, we do not find that the petitioners have satisfied the tests laid down in paragraphs 25 and 27 of Ratnagiri Gas & Power Private Limited82. We, therefore, do not find any merit in the submissions of Mr. Seervai that these are the persons who have disqualified themselves in dealing with the petitioners' case and that they were having bias against the petitioners. Questions No.10(d)(i) and

(d)(ii) are answered accordingly.

291. 10(d)(iii) Whether the respondent No.3 had made up his mind while issuing show cause notice dated 12.11.2010?

292. Mr. Seervai relied upon Oryx Fisheries (P) Limited5 and Kumaon Mandal Vikas Nigam Limited6. In the case of Oryx Fisheries (P) Limited5, the third respondent therein had issued show cause notice dated 23.01.2008. In paragraph 22 of that report, the Apex Court reproduced the show cause notice. The relevant portion of that notice is to the following effect:

> "22. ... At the meeting it was convincingly proved that the cargo shipped by you to the abovementioned buyer was defective and you have no so far settled the complaint. Therefore, in exercise of the powers vested in me vide Office Order Part II No.184012005 dated 25-11-2005 read with Rule 43 of the MPEDA Rules, I hereby call upon you to show cause why the Certificate of Registration as an exporter granted to you should not be cancelled for reasons given below:
>
> 1. It has been proved beyond doubt that you have sent sub-standard material to M/s. Cascade Marine Foods, LLC, Sharjah. ..."

293. In the order passed by the third respondent, no reference was made to the reply of the appellant except saying, that is not satisfactory. The third respondent without giving any reason and without giving the appellant any personal hearing, vide order dated 19.03.2008 cancelled the registration certificate of the appellant. In paragraphs 27 and 31, it WP369chamber.odt was observed thus, "27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge- sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.

...

31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show- cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence."

294. In paragraph 37, the Apex Court held that the order of the third respondent is a non-speaking one and is virtually no order in the eye of law.

> "37. Therefore, the bias of the third respondent which was latent in the show cause notice became patent in the order of cancellation of the registration certificate. The cancellation order quotes the show cause notice and is a non-speaking one and is virtually no order in the eye of law. Since the same order is an appealable one it is incumbent on the third respondent to give adequate reasons."

295. In the case of Kumaon Mandal Vikas Nigam Limited6, in paragraph 12, the Apex Court extracted the show cause notice which was later on treated as a charge-sheet. The relevant portion of

the show WP369chamber.odt cause notice is to the following effect:

> " Lastly, it is concluded that you never kept in mind the interest of the Nigam due to your personal vested interests. Due to your corrupt conduct, you had no control over your subordinates. You never submitted suggestion in the interest of the Nigam and never shown interest in the implementation of the schemes due to which the Nigam was unable to get the success as much as it should have, keeping in view the natural beauty of this place. The tourism section was suffering loss due to your activities. You always misused the Nigams tourism section for your personal vested interest and gains. Your conduct and integrity is highly doubtful.
>
> Apart from the above, Nigam suffered heavy loss due to irregularities in many purchases/matters and are being considered separately. You failed to take specific action for getting the tourism section in profit. You did not run the tourism section smoothly. Therefore, you are not capable to remain in your post."

296. In paragraphs 16 and 18, after analyzing the admitted set of facts, the Apex Court recorded the situation that emerged therefrom and observed that the chain of events did not indicate a very fair procedure.

297. In paragraph 20, the Apex Court observed that it is a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this country. The judicial process itself embraces a fair and reasonable opportunity to defend, though, however, we may hasten to add that the same is dependant upon the facts and circumstances of each individual case. In that case, General Manager, Kumaon Anusuchit Janjati Vikas Nigam was appointed as an inquiry officer by or at the instance of the Managing Director, who was having bias against the respondent. Incidentally, Anusuchit Janjati Vikas Nigam was a unit of Kumaon Mandal Vikas Nigam having a common Managing Director and admittedly, the enquiry officer was under direct supervision of the managing director.

WP369chamber.odt

298. In the present case, show cause notice was issued on 12.11.2010. After the recitals, in paragraph 14, petitioners were called upon to show cause within 15 days of receipt of the notice as to why the following directions may not be made final. Paragraph 14 reads thus, "14. Now, therefore, under the Section 5 of the Environment (Protection) Act, 1986, you are hereby directed to show cause within fifteen days of the receipt of this notice as to why the following directions may not be made final.

The unauthorized structure erected by M/s. Adarsh Co- operative Housing Society in CRZ area in Colaba area be removed forthwith in entirety.

Please note that in case you desire to be heard in person, this should be explicitly indicated in your reply and that such a hearing will be held within one week of the receipt of this reply.

Please note also that in case no response is received within the time frame of fifteen days indicated above, final directions may be passed without any further reference to you and formal action in terms of E(P) Act, 1986 may also be initiated.

These directions issue with the approval of the Competent Authority.

(emphasis supplied)"

299. Petitioners gave interim reply on 24.11.2010 and a detailed reply on 15.12.2010 through Advocate. Perusal of these replies does not even remotely show that petitioners contended that respondent No.3 has made up his mind while issuing the show cause notice. That apart, after carefully perusing the show cause notice, in the present case, we are firmly of the opinion that it cannot be said that the third respondent had made up his mind while issuing the show cause notice. After comparing the show cause notices in the cases of Oryx Fisheries (P) Limited5 and Kumaon Mandal Vikas Limited6, it cannot be said that the third respondent had made up his mind while issuing show cause notice. Question No.10(d)(iii) is answered accordingly.

300. 10(d)(iv) the officers have abdicated their powers, functions WP369chamber.odt and duties and acted on dictates of others - Mr. Seervai relied upon the following three decisions:

a. Anirudhasinhji Karansinhji Jadeja21 b. Tarlochand Dev Sharma22 c. C.I.T.7

301. In the case of Anirudhasinhji Karansinhji Jadeja21, District Superintendent of Police did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. The Apex Court observed in paragraph 11 that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction then it will be a case of failure to exercise discretion altogether. The Apex Court also referred to Gordhandas Bhanji's case75.

302. In the case of Tarlochand Dev Sharma22, in paragraph 16, the Apex Court did not record any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author, for want of adequate material. However, it held that the impugned order betrays the utter non-application of mind to the facts of the case and the relevant law.

303. In the case of C.I.T.7, the question was whether an order of assessment was passed at the instance of the higher authority. In paragraph 20, it was observed that an Income Tax Officer while passing an order of assessment performs judicial function. An appeal lies against his order before the Appellate Authority. A Revision Application lies WP369chamber.odt before the Commissioner of Income Tax. In paragraph 53, the Apex Court observed that the noting of the Assessing Officer was specific. It was stated so in the proceedings sheet at the instance of the higher authorities itself. It was observed that no doubt in terms of the circular letter issued by CBDT, the Commissioner or for that matter any other higher authority may have supervisory jurisdiction but it is difficult to

conceive that even the merit of the decision shall be discussed and the same shall be rendered at the instance of the higher authority who was the supervisory authority. It was observed that it is one thing to say that while making the orders of assessment the Assessing Officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment. In paragraph 64, the Apex Court ultimately held that the order passed by the Assessing Officer was at the dictates of the higher authorities.

304. In our opinion, the said judgments are not applicable as it cannot be said that the respondents No.3 and 4 had abdicated their functions and duties or that they fettered their discretion and acted on the dictates of the respondent No.2 for the reasons already indicated. Question No.10(d)(iv) is answered accordingly.

305. 10(d)(v) Whether the impugned order / action travel beyond the show cause notice?

306. Mr. Seervai relied upon decisions in-

a) Govardhan Bhanji75;

b) Mohinder Singh Gill's case28. Submission of Mr. Khambata that the ratio in Mohinder Singh Gill's case28 is watered down is WP369chamber.odt wholly unacceptable. In fact Mohinder Singh Gill's case28 is followed in the following decisions:

a. Deepak Babaria29, and in particular paragraphs 62 to 65, 69 and 70;

b. Rashmi Metaliks Limited30, and in particular paragraph 15; c. All India Railway Recruitment Board31; d. Dharampal Satyapal Limited25.

307. As against this, Mr. Khambata relied upon the decision in All India Railway Recruitment Board31 to contend that the principle laid down in Mohinder Singh Gill's case28 is not applicable where larger public interest is involved and in such situation, the additional grounds can be looked into to examine the validity of the impugned actions.

308. We do not find any merit in the submission of Mr. Seervai. In the first place, the controversy between the parties is clearly borne out from the material on record. The gist of the controversy between the parties is set out in questions No.1 to 11 and the same is evident from the record. The notice dated 12.11.2010 called upon petitioners to show cause why the building should not be demolished. The petitioners gave replies and were also heard. The petitioners were given questionnaire, which was also replied by them. The petitioners also gave written submissions. Secondly, assuming in favour of the petitioners that the impugned action travels beyond the show cause notice, in view of the decision in All India Railway Recruitment Board31, the principle laid down in Mohinder Singh Gill's case28 is not applicable where larger public interest is involved. In

the present case, the issue concerns serious violations of E.P.Act and the CRZ Notifications. Question No.10(d)(v) is answered accordingly.

309. 10(e) Preparation of draft demolition order purportedly by WP369chamber.odt Dr. A. Senthil Vel - Mr. Seervai submitted that respondents had already made up their mind and the draft demolition order was already prepared by Dr. A. Senthil Vel and this fact is noted in the minutes of MCZMA meeting dated 03.11.2010.

310. On the other hand, Mr. Khambata relied upon the following decisions:

a. Sethi Auto Services Station34, and in particular paras 14, 17 and 22; b. Sunil Kumar Vaish35, and in particular paragraph 24 thereof and submitted that the draft demolition order is not a decision and it was not even communicated to the petitioners. It could be at the highest a viewpoint of the concerned officer. We find merit in the submissions of Mr. Khambata. Even otherwise, on the facts that are established, in the present case, we do not find any merit in the submission as no other conclusion in the facts of the present case can be arrived at. Question No.10(e) is answered accordingly.

311. 10(f) Not hearing by respondent No.2 Mr. Jayram Ramesh before accepting one of the three options - We have already held that respondent No.3 Dr. Bharat Bhushan had prepared draft order for approval of respondent No.2. Respondent No.2 approved the draft order. Respondent No.3 thereafter passed final order on 14.01.2011. In fact, last paragraph of the order clearly records that these directions are issued with the approval of the competent authority and the competent authority is the second respondent herein i.e. Mr. Jayram Ramesh, the then Hon'ble Minister of MOEF. The order dated 16.01.2011 passed by respondent No.2 shows that the MOEF decision on the Adarsh society building's case in Mumbai is available in all its details on www.moef.nic.in. The Adarsh Society dossier on the website contains the following:

1. The Final Order

2. Summary of Proceedings of Oral Hearing WP369chamber.odt

3. Analysis of Oral Submissions

4. Analysis of Written Submissions

5. Discussion, Consideration and Reasoning

6. Conclusions

312. Respondent No.2 thereafter observed that there were three options available, namely -

I. Removal of the entire structure, since it is unauthorized and no clearance whatsoever under the CRZ Notification, 1991 was obtained;

> II. Removal of that part of structure in excess of the FSI that might have been allowed had the requisite permission been sought from the appropriate authority, namely, FSI to the extent of 1.33 as per 1967 DCR; and III. Recommending government takeover of the building for a public use to be determined later.

313. It was thereafter observed that Option II was rejected since this would have been tantamount to regularizing or condoning an egregious violation of the 1991 Notification. Option III was considered but rejected because - (i) even though the final use may be in the public interest, it would still be tantamount to regularizing a violation of the 1991 Notification; and (ii) there would be substantial discretionary powers that would vest with the State or Central Government in case of takeover.

314. Respondent No.2, after considering all the facts, circumstances, discussion, consideration, reasoning and analysis presented in the Adarsh Society Dossier, decided on option No.I. Thus, perusal of the order clearly shows that respondent No.2 took into consideration entire material on record.

315. Mr. Seervai submitted that they were not heard before accepting option No.I. In view thereof, we have heard learned Counsel appearing for the parties on these three options. Mr. Seervai submitted that option No.III at this stage, is not available as Suit is pending between the State Government and the Central Government on the issue of ownership.

WP369chamber.odt Option No.III will, therefore, have to depend upon the outcome of the Suit. Option No.III was available at the time of passing of the order but that option is not available after filing of the Suit. He further submitted that land is allotted to the petitioners. Even if the structure is held to be unauthorized and is required to be demolished, nonetheless, since the land is allotted to the petitioners, after following due process of law, they can still construct building as per 1967 DCR. He, therefore, submitted that option No.III is really not an option at all.

316. He submitted that as far as option No.II is concerned, as per 1967 DCR, permissible FSI is 1.33. In other words, the portion of the building which exceeds 1.33 FSI is required to be demolished. However, this option is also not available as basically, option No.I records that petitioners have not obtained environmental clearance at all. In other words, even the building with permissible FSI cannot allow to stand as there is no environmental clearance. We enquired from the learned Counsel for respondents as to whether instead of demolishing the building, they can take over as per Option III. They submitted that neither respondent No.1-Union of India nor respondent No.7-State can retain the building which is constructed by committing illegalities, which includes violation of environmental laws. It is contrary to rule of law. It will amount to penalizing private party and conferring reward on the Government. It would lead to anomalous position. In the facts and circumstances of the present case, only Option I is available. In view thereof, we do not find any other option excepting option No.I was available to respondent No.2. Even after hearing petitioners and respondents, in the facts of the present case, we do not find any other option available save and except option No.I. As basically, the petitioners have not obtained environmental clearance either from MOEF or from State level agency and as we have held that the recommendations of MCZMA are mandatory and the environmental WP369chamber.odt clearance is also necessary, the only

option available is option No.I. We, therefore, do not think it appropriate to remand the matter to respondent No.2 to hear the petitioners on the 3 options. In view thereof, we do not find any merit in this submission as well.

317. The moot question is whether the petitioners were given a reasonable opportunity of presenting their case and the administrative authority while exercising quasi-judicial powers acted fairly, impartially and reasonably. It is not in dispute that a show cause notice was issued to the petitioners on 12.11.2010. On 24.11.2010, petitioners gave interim reply. On 15.12.2010, they gave a detailed reply. On 04.01.2011, petitioners were heard by the respondent No.4 Dr. Nalini Bhat. After the hearing, petitioners were handed over a questionnaire containing 13 questions. Petitioners gave written submissions on 10.01.2011. Though Section 5 of the E.P. Act does not contemplate giving personal hearing, the petitioners were heard by the respondent No.4. In our opinion, petitioners were given all the opportunities to present their case. It, therefore, cannot be said that the authorities concerned did not act fairly, impartially and reasonably. Question No.10(f) is answered accordingly.

318. That brings to the question whether this is a fit case for invocation of powers under Article 226 of the Constitution of India.

319. Mr. Khambata submitted that even accepting everything in favour of the petitioners, this is not an appropriate case for invocation of powers under Article 226 of the Constitution of India. He relied upon the following decisions:

> a. Morarji Cooverji52 and at pages 332 and 333; b. Prabhu53 and in particular paragraph 4; c. M. P. Mittal54 and in particular paragraph 5.
>
> WP369chamber.odt

320. In the case of Morarji Cooverji52, the Division Bench of this Court held that it is not sufficient that the party should come to this Court and make out a case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, no only must he come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.

321. In the case of M. P. Mittal54, in paragraph 5, it is held that when a petitioner invokes the jurisdiction of the High Court under Article 226 of the Constitution, it is open to the High Court to consider whether, in the exercise of its undoubted discretionary jurisdiction, it should decline relief to such petitioner if the grant of relief would defeat the interests of justice. The Court always has power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain.

322. In the case of Prabhu53, it is held that one of the principles inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order

results in greater harm to the society then the court may restrain from exercising its power. Applying the test laid down in these cases, we are more than satisfied in the present case that this is not a fit case for invocation of powers under Article 226 of the Constitution of India. Petitioners have brazenly carried out unauthorized construction. The members of the petitioners' society consists of officers of UDD, other bureaucrats, who are well conversant with the legal position. Despite that, they neither moved MCZMA for obtaining recommendations nor the appropriate authority under CRZ Notification for obtaining WP369chamber.odt environmental clearance. Attitude of the petitioner, to say the least, is defiant and which is counter productive to rule of law and subversive.

323. We have also gone through the report prepared by the Commission of Justice J. A. Patil (Retired), Chairman and Mr. P. Subrahmanyam, Retired Chief Secretary, Government of Maharashtra, Member. Perusal of the report shows that the Commission has considered the voluminous evidence on record and prepared the report. It inter alia depicts that the Adarsh Society (proposed) was floated in around 1994 with Shri R. C. Thakur as the Chief Promoter and Brig. M.

M. Wanchoo (Retd.) as the Secretary. On 06.08.1994, Shri Thakur in his capacity as Chief Promoter of Adarsh Society addressed a letter to the then Chief Minister setting out therein that "this is a society of mainly of serving and retired defence officers who have not been able to procure a shelter despite full length of service to the mother land". By that letter, allotment of land in C.S.No.4/600 admeasuring 8300 sq.mtrs. lying adjacent to Oyster and Dolphin buildings in Colaba area was sought.

On 06.01.1995, Shri Thakur addressed a letter to the Principal Secretary, Law and Judiciary Department, Government of Maharashtra. It was stated therein that the said piece of land was surrounded by the defence area and the Government of Maharashtra may not be able to use the said land for any commercial or other purposes. Assurance was also given that society will produce NOC from the defence authorities for allotment. On 04.09.1996, the society's request for allotment of the said land was turned down on the ground that in view of the CRZ Notification dated 19.02.1991, no construction could be made upon the land falling within 500 mtrs. from the High Tide Line. Adarsh society would not however give up its efforts so easily. Shri Thakur, again addressed a letter dated 20.7.1998 to the Secretary, Revenue and Forest Department and reiterated the demand for allotment of the land in C.S.

WP369chamber.odt No.4/600 stating that as per the Development Plan of Mumbai, a 60.96 meters road has been shown towards Uran bridge and the said road is towards the sea side and, therefore, there should be no objection from the CRZ point of view. Shri Thakur further assured that inspite of that if any hitch persisted from CRZ point of view, the allotment of land could be made subject to clearance from the MOEF. On 29.12.1998, similar letter was addressed by the Under Secretary, Revenue and Forest Department to Brig. Wanchoo regretting the Government's inability to allot the plot of land adjacent to Oyster and Dolphin buildings for the said reasons.

324. On 23.2.1999, another letter was addressed on behalf of Adarsh Society to Shri Narayan Rane, the then Chief Minister, pointing out therein that the society had been struggling for last five years

to get allotment of the land but the same was denied on the ground of CRZ objection. A request was made to intervene in the matter for allotment of the land to the society that "For shelter to our members who have dedicated their lives for the services of mother land." For the first few years, Adarsh society could not do much for achieving its objective. Finding that its efforts were falling short, the office bearers of the society decided to take assistance of Shri Kanhaiyalal Gidwani who was then an active member of Shiv Sena during the period from 1996 to 2006, and who later on became a Member of Legislative Council from 26.7.2000 to 30.5.2006. Later on, he joined the Congress party. The evidence of Shri Thakur showed that he was introduced to Shri Gidwani by Capt. Kala who advised him to seek help of Shri Gidwani in getting the government land allotted to the society. Shri Gidwani was a political figure wielding much influence and having direct access to the Chief Minister and other Ministers.

WP369chamber.odt

325. It was, therefore, decided by Shri Thakur and Brig. Wanchoo to take the help of Shri Gidwani, who agreed to act as a co-ordinator to deal with and represent the society "For the exclusive purpose of allotment of the said plot of land to the society for welfare and housing of Defence Personnel or Army Navy, Air Force servicemen or ex- servicemen under the Defence Ministry or in the service or ex-service men of para-military force, Defence Estate Organisation, Coastguards, Military Engineering Personnel or under any of the services of the Defence Ministry exclusively and absolutely qualified in accordance with the bye-laws of the said society" vide para-5 of the declaration-

cum-undertaking dated 9.6.1999.

326. The assistance promised by Shri. Gidwani was however not unconditional and unqualified. Shri Thakur and Brig. Wanchoo had to execute a declaration cum undertaking dated 9.6.1999 in favour of Shri Gidwani who consented to act as a coordinator and agreed to represent the society to the concerned competent authorities of the Government of Maharashtra for the purpose of allotment of government land for the society. In consideration for the assistance promised by Shri Gidwani, Shri Thakur and Brig. Wanchoo agreed that 30 flats would be placed at the disposal of the co-ordinator. It is with this assurance given to the co- ordinator Shri Gidwani, the society started its hunt for a suitable plot for constructing its building.

327. After Shri Gidwani took over as coordinator, he pursued the matter for allotment of land of subject plot by writing number of letters to various authorities including the Chief Minister. It appears that to overcome the obstruction of CRZ clearance, the office bearers of the society even discussed the matter with the Secretary of MoEF, New Delhi who advised them to approach the Government of Maharashtra for WP369chamber.odt change of classification of the plot in C.S. No.4/600 from CRZ-I category to CRZ-II category. After realizing that change of zone in respect of land in C.S. No.4/600 was difficult and it would consume further time, the society came with an alternate proposal for allotment of the subject plot.

328. It is however material to note that till this time Adarsh Society was pressing for allotment of land in C.S. No.4/600 admeasuring 8300 sq. mtrs. land adjacent to Oyster and Dolphin buildings in Colaba area. On 12.3.1999 Shri P.V. Deshmukh made an application for membership of Adarsh Society. On 03.01.2000, the society addressed a letter to Shri Ashok Chavan, the then Minister of Revenue. Thereafter on 13.1.2000, a letter was addressed by Shri Thakur to Shri Ashok Chavan. This was followed by letter dated 7.2.2000 addressed by Chief Promoter to the Chief Minister stating that "while the changing of zones may take some time and formalities may delay the project, we have an alternative proposal for allotment of a small block admeasuring only 3854 sq. mtrs.

of land out of Block VI of Backbay Reclamation Scheme (subject plot). Presently this land is duly fenced with a compound wall and in physical possession of the Local Military Authorities". It is interesting to note that it was pointed out therein that "about 15 years back the Government of Maharashtra had proposed to widen Cuffe Parade Road and join it to a 60 meters wide road known as Colaba Uran Road". It was further pointed out that "said proposal came to be dropped since the government had banned reclamation and therefore there was no need to widen the Cuffe Parade Road beyond BEST depot". It was therefore suggested that "with little changes in the Development Plan which was then still pending for approval with the UDD, the project of Adarsh society could be cleared by allotting the subject land which was then in possession of the Local Army Authority". Shri Vilasrao Deshmukh, the WP369chamber.odt then Chief Minister, made following order on the said letter:

> "Pri. Sec. (Rev) Pl. call for the proposal and put up immediately.
>
> Sd/-
>
> 19-2-2000".

329. Pursuant to this order, the Revenue and Forest Department addressed letter dated 6.3.2000 requesting the Superintendent, Land Records to submit a self-explanatory report in the matter along with relevant documents within a period of ten days. In the letter dated 8.3.2000 addressed to the Chief Minister a reference was made to the proposed widening of Cuffe Parade Road (Capt. Prakash Pethe Marg) so as to join it to Colaba-Uran road. It was pointed out that since the government had banned reclamation of sea, the proposal of Colaba-Uran sea link did not materialize. It was therefore suggested that, "In view of the above it is submitted that there is no need now to widen the Cuffe Parade road beyond BEST depot in the Backbay as military area starts from that point. In any case the proposal was to terminate the said widening at the junction of Block VI and VII of the Colaba Division. Our proposed block is exactly located at the very junction where military area begins and there is no proposal of any such widening in the military area and therefore with little changes in the Development Plan, which is still pending for approval with the Ministry of Urban Development, our project can be cleared ...." A similar prayer was made by Shri Gidwani in his letter dated 7.8.2000.

330. By letter dated 13.3.2000, the Collector, Mumbai City directed the Maintenance Surveyor to visit the subject plot personally, measure it and submit the map along with his report. On 28.3.2000

the Collector, Mumbai, City addressed a letter calling upon the Chief Promoter of the Society to submit necessary information as prescribed in annexure "A" and "B" thereof. The Maintenance Surveyor of the land records office WP369chamber.odt visited the land which was shown to him by the representative of Adarsh society on 29.3.2000, measured the same and prepared the map. On the same day, he submitted his report wherein it was stated that said land was plot No.87-C in Block No.VI adjacent to Backbay bus depot and that it measured approximately 3758.82 sq. mtrs... He also pointed out that said land was falling in the proposed road widening of Capt. Prakash Pethe Marg in the Development Plan of MMRDA.

331. On 29.3.2000, the Collector also addressed a letter to the General Officer Commanding (HQ), Maharashtra and Gujarat area Colaba, pointing out therein that at the time of site inspection, it was revealed that "The military department has constructed a wall to the above plot and hence government land was protected from encroachment" To this letter, an unusually prompt reply dated 5.4.2000 was given by Col. S.S. Jog on behalf of GOC stating that, "The said land falls in Block No.VI of Colaba Division (Backbay Reclamation Scheme-VI) which falls outside the defence boundary. Necessary action at your end may be taken as deemed fit for the welfare of service personnel/ex-servicemen/their widows."

332. On 12.5.2000, the Collector submitted his report to the Principal Secretary, Revenue and Forest Department. Since beginning it was being represented on behalf of the Society that it was exclusively for servicemen and ex-servicemen of defence, however, it changed its stand so as to allow the civilians to become its members. On 2.6.2000, the society addressed a letter to Shri Ashok Chavan, the then Minister of Revenue setting out therein that "we are agreeable to accommodate civilian members (members from outside defence services) in our society to the extent of 40%. . .."

WP369chamber.odt

333. On 5.6.2000, the Deputy Secretary of Revenue and Forest Department sought information from the Collector. On 19.6.2000, the Collector submitted his report. The draft Development Plan was approved in two parts, first on 3.6.2000 and second on 17.3.2001. The Adarsh society was therefore aware that the subject plot will not be available for allotment unless and until the development plan was suitably modified so as to reduce the width of Capt. Prakash Pethe Marg and also to change the reservation of the road to residence. Adarsh society was fully aware of this difficulty since beginning and addressed various letters to Government suggesting modifying the development plan.

334. As the MMRDA was the Planning Authority for BBRS Block III to VI, the reduction in the proposed width of Capt. Prakash Pethe Marg could not have been done without its approval. The UDD by its letter dated 10.8.2000 called upon the Chief C & TP of MMRDA to submit his report in this regard. Accordingly Shri V.K. Phatak C&TP submitted his report on 13.9.2000 to the Principal Secretary, UDD stating that "Apparently, the southern link i.e. Colaba-Uran link is at present not actively pursued. Moreover as pointed out in the letter of Defence Estate Officer dt. 23-9-1999 that in the approach road of Colaba-Uran link High Rise buildings known as Gangotri, Bhagirathi and Choudhary House have already been constructed. It is therefore unlikely that the original alignment

of the approach to Colaba-Uran link will continue to be valid any more." It was however clarified in the said letter as follows "The question of deleting the reservation of approach road to Colaba- Uran link is however outside the jurisdiction of MMRDA as the SPA for BBRS. However, if such a decision is arrived at and a logical consequence of that, the road width of Prakash Pethe Marg is to be accordingly reduced, MMRDA would have no objection to such a WP369chamber.odt proposal. Once the width of the Prakash Pethe Marg is determined, development of land requested by Adarsh Co-operative Housing Society will become feasible".

335. It has come on record that Mr. P.V. Deshmukh while working as a Joint Director, Town Planning, Mumbai had made a report dated 12.12.2000 to the Principal Secretary, UDD in connection with reduction of the width of Capt. Prakash Pethe Marg. In that report it was stated that spot inspection of said road made by him with shri R.C. Thakur and suggested how to propose the width of the road could be reduced.

336. By order dated 23.2.2001, the MMRDA was directed to initiate the modification to the Development Plan by taking recourse to provisions of Section 37 of the M.R.&T.P. Act. However, as MMRDA failed to publish the requisite notice, the Government, in exercise of its powers under Section 37(1)-A published a notice dated 3.10.2001 inviting objections and suggestions from the general public. Finally on 10.4.2002 the Government sanctioned the modification and issued notification under Section 37 of the M.R.&T.P. Act and reduced the width of Capt. Prakash Pethe Marg.

337. It is no doubt true that the notification dated 10.04.2002 was not challenged by anybody and even today, it is not challenged. The fact, however, remains that at the instance of office bearers of the Adarsh society and in view of the assistance rendered by Shri Gidwani, the State Government initiated proceedings under Section 37 of the M.R.&T.P. Act. By this process, the width of the road was reduced from 60.97 mtrs. to 18.40 mtrs. While considering this aspect, the Commission has considered issue No.3, which is to the following effect:

WP369chamber.odt "Whether the reduction of the width and the changes of the reservation from road to residential in respect of Captain Prakash Pethe Marg was in accordance with law?"

338. This issue was considered from paragraph 41 to 44.7. The Commission observed that this issue relates to two things namely, (I) reduction of width and (II) change of reservation from road to residential. In paragraph 43.18, the Commission recorded a finding that the reduction of the width of Captain Prakash Pethe Marg was not at all in public interest and it was meant to subserve the interest of the private society. The considerations of traffic congestion and security operations of army during exigent time were totally ignored. Moreover, the modification in the final Development Plan in that regard was not made in accordance with the provisions of Section 37(1) of M.R.&T.P. Act as no notice was given to Minister of Defence which is an affected party by the said modification pertaining to reduction in the width.

339. In paragraph 44.6, the Commission recorded that reduction in width of Captain Prakash Pethe Marg and inclusion in residential zone would obviously amount to change of user i.e. from 'no use'

to 'residential use' and the said change of reservation could not have been done without CRZ clearance. At that time, MCZMA was duly constituted and was in existence and its recommendations were required to be taken. At no stage, UDD considered it necessary to consult the Department of Environment even though so enjoined by R & FD resolutions. Ultimately, in paragraph 44.7, Commission recorded that the reduction of the proposed width and change of reservation from road to residential in respect of Capt. Prakash Pethe Marg was not in accordance with the provisions of the M.R.&T.P. Act and it was illegal and mala fide.

WP369chamber.odt

340. As noted earlier on 18.1.2003, LOI was issued. On 9.7.2004 the Government issued LOA and the possession of the subject plot was handed over on 4.10.2004. The society even before issuing the LOI on 18.1.2003 started corresponding with the State Government for additional FSI in respect of an adjoining BEST plot. The earliest letter is dated 7.1.2002 addressed by Shri Kanhaiyalal Gidwani to the Principal Secretary, UDD wherein he stated that "Meanwhile I have received a letter dated 20-10-2001 and letter dated 26-12-2001 from proposed Adarsh Co-op. Housing Society, Colaba with request of adjoining FSI/opening for the Military Officer's Co-operative Housing Society .....". Letter dated 20.10.2001 was addressed by the Chief Promoter, Shri R.C. Thakur to the Principal Secretary wherein he wrote "It will be desirable to give access to this plot from north side also, it being a narrow plot. The access to BEST plot should be part of D.P. Road. This will enable us to have side access to our plot. The width of this road approximately to the BEST should be 15 mtrs. and the society plot should be extended to this road. This will enable us to use the available land/FSI .....". Letter dated 26.12.2001 was addressed by Shri R.C. Thakur to the Principal Secretary, UDD to consider the request for allowing and opening towards BEST approach road and also because of the narrow size of the proposed plot of the society.

341. On 17.3.2003 Shri Thakur addressed a letter to Shri Sunil Tatkare, Minister of State for UDD, thanking him for allotment of subject plot and requested for grant of additional FSI. He wrote, "because of number of members of the society having gone up to 71 which has been approved by the Government of Maharashtra, department of Revenue, we are finding it difficult in allotting the residential flats to all of them as the plot is small in size. To overcome the said problem we propose to avail FSI of the area adjacent to our plot which is available for allotment WP369chamber.odt by government as shown in the site plan - Annexed X". Another letter of same date was addressed to Shri Sushilkumar Shinde, the then Chief Minister by said Shri Thakur wherein he wrote, "..... That our society may be permitted to avail FSI of the plot marked as B on the enclosed plan which is 2669.68 sq. mtr. situated adjoining to our plot on payment of reasonable charges as may be levied by the government. We undertake to keep the land as it is and also submit herewith our no objection to BEST for using the same as approach road to their bus depot....."

342. It has come on record that by letter dated 6.1.2004, Shri Sunil Tatkare, Minister of State for UDD informed Shri Gidwani that said land was reserved for BEST depot in the BBRS and therefore it was not permissible under the provisions of the DCR to use the FSI of that land on the adjoining land. Despite this, Adarsh society did not give up their efforts to secure additional FSI in respect of the BEST plot for using the same on subject plot which was proposed to be granted to the society as

per LOI dated 18.1.2003.

343. On 13.7.2004 Shri Gidwani wrote a letter to Shri Sushilkumar Shinde requesting him to call for a meeting of the concerned officers at the earliest to consider the request for additional FSI as by that time subject plot was allotted to the society as per LOA dated 9.7.2004. it was stated in the letter that "This extra FSI will greatly help the society to house the members of the society who are mostly service personnel. Also I will like to draw your kind attention to the fact that the Government of Maharashtra will be generating revenue from this FSI without losing the current status being the BEST's continuation of use of the land."

WP369chamber.odt

344. It appears that on the same day i.e. on 14.7.2004 a meeting was convened in the Chamber of the Minister of State for UDD for considering grant of additional FSI to Adarsh society. Said meeting was attended by AGM(c), BEST, Dy. Superintendent (Est), BEST, State Government's officers in UDD, Revenue, Collector and Shri Gidwani. The minutes of the meeting show that Shri Gidwani stated that as per the directives 71 members were required to be accommodated in the society but the FSI of the land of the subject plot was insufficient to accommodate them and, therefore, additional FSI of adjoining plot of land owned by Government of Maharashtra which was being used as an access by the BEST was required. The minutes further show that Shri Ramanand Tiwari, Principal Secretary, UDD expressed his view that it was not feasible to allot the FSI of the adjoining plot to the society and for that purpose the society would have to approach the State Government for allotment of the said land by deleting the reservation of BEST bus depot by following due process of law under Section 37 of the M.R.&T.P. Act. This procedural period would be of at least six months. It appears that the Minister and other officials agreed for the same and the meeting was concluded.

345. It appears that UDD made a reference to the BEST and called for its specific comments on the proposal of allotting additional FSI of the BEST plot to Adarsh society. On 7.12.2004 the Assistant General Manager prepared note recording his views in the following words, "We have examined the proposal and it is felt that we may differ with the Principal Secretary, Urban Development's above views expressed by him in the meeting held on 14.7.2004 i.e. deleting the reservation of BEST depot and then allot the land to the society. In view of the above it is felt that the subjected plot/land should be out of the purview of any reservation and allotment and shall be retained as an exclusive access to WP369chamber.odt the BEST bus depot."

346. On 29.12.2004, a meeting was convened at the residence of Shri Rajesh Tope, the Minister of State for UDD at Nagpur. The minutes of said meeting show that it was clarified to the Hon'ble Minister that as far as BEST was concerned, it would not grant NOC for de-reservation of land as suggested by Shri Ramanand Tiwari, Principal Secretary, UDD.

This meeting was attended by Assistant General Manager of BEST. On 11.1.2005, Shri Tayshetye the Asstt. General Manager of the BEST put up a note before the General Manager observing, "As regards the issue of allotting FSI of the said plot to Adarsh society, it is felt that we may convey to the State Government that it may decide on the request made by Adarsh Society to allow them to

utilize the FSI of the subjected plot.

However, while doing so the Undertaking's interest shall be fully protected by maintaining the present status of the access to the BEST bus in perpetuity without any encroachment on the said land." This note was approved by the General Manager on 12.1.2005. On the same day, by letter dated 12.1.2005 Shri Tayshetye informed the UDD that the land was being used as an approach road by the BEST buses as an easementary right and that in future also the same user will be required.

It was therefore suggested that maintaining the status of the access road of 44.40 meters and keeping the interest of the BEST unaffected, the government may take appropriate decision on the request made by Adarsh Society.

347. It appears that correspondence was thereafter exchanged. On 5.8.2005 memorandum was issued in favour of the society granting additional FSI of BEST though subject to conditions enumerated therein. On 16.1.2006 a note was put up by UDD for changing the zone of the BEST plot and it was suggested that instead of following the WP369chamber.odt procedure under Section 37 of the M.R.&T.P. Act, recourse could be had to the provisions of Section 50 of the said Act which contemplate deletion of reservation of designated land for interim draft of final Development Plan because the land was no longer required for public purpose for which it was designated or reserved. This note was approved by Shri Ramanand Tiwari, Principal Secretary, UDD on 17.1.2006 and was further approved by Shri Vilasrao Deshmukh, the then Chief Minister. On 3.3.2006 notification under Section 50 of the M.R.&T.P. Act was accordingly issued. In paragraph 46.10, the Commission concluded that the deletion of the plot reserved for BEST and its conversion to residential purpose for allotment to Adarsh society was not in accordance with law, particularly as per Section 50 of M.R.&T.P. Act.

348. Thus, the above narration will show two things. Initially, the Adarsh Society demanded land in C.S.No.4/600 admeasuring about 8300 sq.mtrs. For that purpose, correspondence was made right from 1994 till 1999. It is only thereafter Mr. Deshmukh made application for membership on 12.03.1999, the Society changed its stand and started addressing letters from 03.01.2000 for allotment of the subject plot. The Society also made suggestions to the State Government to modify the Development Plan. Prima facie, we are satisfied that the change in the stand was not innocuous and it is evident that the petitioners got information relating to Development Plan, and therefore, suggested to reduce the width of Captain Prakash Pethe Marg on the basis of the information shared by Mr. P. V. Deshmukh, who was working in UDD, with the members of the Society.

349. That apart, earlier the stand of the Government was to follow Section 37 of the M.R.&T.P. Act for changing reservation of BEST plot WP369chamber.odt to residential use. However, this stand was changed at the behest of Mr. Ramanand Tiwari, Principal Secretary, UDD who suggested to invoke Section 50 of the M.R.&T.P. Act. The purpose was obvious. Section 37 of the M.R.&T.P. Act requires inviting objections and suggestions as also giving hearing to the parties concerned. However, that is not the requirement under Section 50 of the M.R.&T.P. Act.

350. We have held that Mr. P. V. Deshmukh had no authority to address a communication dated 05.10.2002 to MOEF seeking environmental clearance for various reasons namely, (i) at the relevant time, LOI was not issued, (ii) letter of allotment was also not issued, (iii) the Society was also not registered, (iv) under the Rules of Business of the State Government, it was the Environment Department, who was designated authority for dealing with the proposals seeking environmental clearance.

351. It has come on record of the J. A . Patil Commission that highly placed bureaucrats were involved in dealing with the file of Adarsh Society in one capacity or other. Mr. P. V. Deshmukh made application for membership on 12.03.1999. Mr. Deshmukh was allotted flat No.1201 in 'A' Wing having 1076 sq.ft. carpet area. In his capacity as Deputy Director, Town Planning, Mumbai, he had submitted a report dated 12.12.2000 to the Principal Secretary, UDD in connection with the reduction of width of Captain Prakash Pethe Marg. In the said report, he stated about the spot inspection of the said road made by him with Shri R. C. Thakur and suggested how the proposed width of the road could be reduced. The Commission also dealt with letter dated 05.10.2002 addressed by him in his capacity as Deputy Secretary of UDD to the Secretary, MOEF and letter dated 15.03.2003 addressed by him to the Chief Engineer (DP) of Corporation. In paragraph 66.2 of the report, WP369chamber.odt the Commission remarked that by letter dated 15.03.2003, Mr. Deshmukh virtually communicated grant of CRZ clearance to Adarsh Society when actually there was none. In paragraph 66.3, it was observed "it will be thus seen that proposal of Mr. Deshmukh's name as a member of Adarsh Society clearly related to the clearance to the Adarsh Society and these events cannot be looked into in isolation and have to be considered as quid pro quo.

352. In paragraph 72.31, the Commission observed that "the height of his dishonesty is obvious when he wrote a letter dated 15.03.2003 to the Chief Engineer (DP), Corporation informing that MOEF had communicated their no objection to allow the residential development to the Adarsh Society. This act of delinquency on the part of Mr. Deshmukh falls under Rule 3(1) of the Maharashtra Civil Services (Conduct) Rules, 1979 as he failed to maintain absolute integrity and devotion to his duty. The said act is certainly unbecoming of a Government servant. We have already held that Mr. P. V. Deshmukh had no authority to address this communication. In our opinion, this communication was the starting point of the controversy and was mischievously addressed by Mr. P. V. Deshmukh to MOEF knowing fully well that at the relevant time, Department of Environment of the State Government was the appropriate authority to grant environmental clearance.

353. The Commission also dealt with role of Mr. Ramanand Tiwari, who was at the relevant time, Principal Secretary of UDD. Mr. Tiwari's son Omkar applied for membership on 04.05.2006. He was enrolled as member on 12.05.2008 and was allotted flat No.2002 having carpet area of 620 sq.ft. in 'A' Wing. In paragraphs 67 and 67.1, the Commission dealt with evidence of Mr. Tiwari. In paragraph 7 of his evidence, he WP369chamber.odt admitted that he dealt with the file regarding Captain Prakash Pethe Marg between 26.02.2002 and 10.04.2002 and he was responsible for recommending the reduction in the width of Captain Prakash Pethe Marg, which ultimately resulted in creation of a plot that could be allotted to Adarsh Society. He had opportunity to deal with the file of Adarsh Society while considering the grant of additional FSI in respect of BEST plot. Initially, he had suggested for deletion of the reservation of the BEST plot and its conversion to residential use

by following procedure under Section 37(1) of the M.R.&T.P. Act. But later on, he changed his stand and suggested that instead of Section 37(1), the recourse could be had to Section 50 of the M.R.&T.P. Act, which was a short-cut method. He further confirmed that the letter dated 15.03.2003 addressed by Mr. P. V. Deshmukh was written at his instance. The Commission, therefore, observed that Mr. Ramanand Tiwari played an important role in granting clearances to the Adarsh Society while he was Secretary of UDD. Thereafter, the name of his son Omkar Tiwari came to be proposed for Adarsh Society. The Commission, therefore, observed that there is no alternative except the drawing of a conclusion that there was a quid pro quo between the clearances given by Mr. Ramanad Tiwari and the grant of membership of Adarsh Society to his son Omkar Tiwari. We are of the opinion that the stand is deliberately changed as procedure under Section 37 contemplates inviting objections and suggestions as also giving hearing to the affected persons. As against this, Section 50 does not contemplate inviting objection, suggestions as also giving hearing to the affected persons.

354. In paragraphs 72.13 and 72.14, the Commission noted that "Mr. Ramanand Tiwari deliberately committed omission as regards the expression 'existing FSI / FAR norms' in 1991 Notification." Dr. A. Senthil Vel addressed a letter dated 18.08.2006 to the Principal WP369chamber.odt Secretary, UDD clarifying that all development activities proposed to be taken up in the CRZ area have to follow the norms as existed on 1991 including FSI / FAR norms. It was further explained that the word 'existing' has been interpreted by the Ministry by its letter dated 08.09.1998 as prevalent on 19.02.1991. The letter further stated that "in view of the above clarifications, the DCR which was under implementation on 19.02.1991 i.e. the approved DCR of 1967 shall be considered and not the draft of 1989 which came into force on 20.02.1991 as it was still in the draft stage on 19.02.1991. It was absolutely necessary on the part of Mr. Ramanand Tiwari to have brought this clarification to the notice of the MMRDA, which was then dealing with the question of approving the plans and construction work of the Adarsh Society. However, since Mr. Ramanand Tiwari himself was very much interested in the Adarsh Society, he did not think it necessary to bring this clarification to the notice of the MMRDA as that would have affected the approval of plans of the Adarsh Society. This was obviously an act of dishonesty and selfishness on the part of Mr. Ramanand Tiwari, which exposes lack of absolute integrity and devotion on his part. Not only that, but his act of suppressing this material clarification regarding applicability of FSI in CRZ-II area was unbecoming of a member of the service." In paragraph 72.15, the Commission ultimately recorded that Mr. Ramanand Tiwari violated the provisions of Rule 3, 4(3)(a), 14(2) and 16(2) of the AIS Rules.

355. It has also come on record that Dr. Pradeep Vyas was the Collector of Mumbai from 28.08.2002 to 26.05.2005 and the letter of allotment was issued on 09.07.2004. His wife Ms Seema Vyas, IAS was working as Deputy Secretary in Rural Development Department and thereafter in General Administration Department. She applied for membership on 10.11.2004. In paragraph 65.4 of the report, the WP369chamber.odt Commission recorded that Dr. Pradeep Vyas obliged the Adarsh Society by his forbearance in imposing such conditions on Society as a Collector might think proper. It was noted that there were hundreds of standing trees in the Khukri garden which was located on the subject plot. The construction work could not have been undertaken unless and until those trees were felled with the previous permission of Tree Authority of the Corporation. However, Dr. Vyas did not put any such condition on the Adarsh Society. The result was that the standing

trees on the subject plot were felled by the Adarsh Society without obtaining prior permission of the Tree Authority.

356. It has also come on record that Kanishka Pathak, son of Dr. Jayraj Phatak made application dated 07.06.2003 for membership of Adarsh Society. He was granted membership in August 2004 and allotment of flat No.1802 having carpet area of 650 sq.ft. in 'A' Wing was made to him in July 2009. In paragraphs 68 to 68.2 of J. A. Patil's Commission report, it is noted that Dr. Jayraj Phatak became Municipal Commissioner of Corporation in 2007. He dealt with file of Adarsh Society in the year 2009 in connection with the height of the Adarsh building. In paragraph 52.8 of the report, the question of regularizing the unauthorized construction of 28th floor by Adarsh society came up before Dr. Jayraj Phatak when the Chief Engineer, DP of the Corporation had put up a note dated 20.10.2009. Dr. Phatak made the following remark in his own handwriting below the said note to the effect, "In view of the portion marked 'X' on page 1, there is no need to obtain NOC from High Rise Committee. However, the appropriate authority's i.e. MMRDA's approval may be obtained." In paragraph 68.2, the Commission recorded that there was quid pro quo as far as Dr. Jayraj Phatak was concerned.

357. As far as Dr. Devayani Khobragade is concerned, the issue WP369chamber.odt whether she is eligible to be a member of Adarsh Society was considered by the Commission in paragraphs 56.61 to 56.64. It was noted that Shri Uttam Khobragade, who was the General Manager of BEST stated in his affidavit dated 28.02.2011 that application form dated 29.06.2004 for membership of Adarsh Society was filled in and signed by him on his daughter's behalf. She was allotted flat No.2301 admeasuring 1076 sq.ft. in 'A' Wing. After considering the evidence on record, the Commission recorded that Dr. Devayani Khobragade was ineligible for becoming member of Adarsh Society on account of breach of eligibility condition mentioned in clauses (4) and (5) of Annexure-A to the Government Resolution dated 25.05.2007. In paragraph 72.17 of the report, the Commission recorded that there is nothing on record to show that Shri Uttam Khobragade had, at any point of time, occasion to handle the file of Adarsh Society. It cannot be said that he violated any rules of AIS Rules. Mr. Uttam Khobragade was General Manager of BEST from 28.06.2006 to 20.05.2010. He could have pursued the request made by BEST on 17.05.2000 for changing designation from BEST Bus Depot to BEST Depot and Housing. We are, prima facie, of the opinion that this will not rule out the quid pro quo qua Shri Uttam Khobragade as his daughter was made member. We are not recording any conclusive finding for want of material.

358. The Commission dealt with role of Mr. Ashok Chavan, the then Chief Minister of Maharashtra. The close relatives of Mr. Ashok Chavan were granted membership of Adarsh Society. They are- (1) Ms Seema Vinod Sharma. Her husband Mr. Vinod Sharma is brother of Ms Amita Chavan, wife of Mr. Ashok Chavan. She made application for membership on 18.06.2004 and she was allotted flat No.1202 having carpet area of 650 sq.ft. in 'A' Wing; (2) Mr. Madanlal Milkhiram Sharma, is the brother of Mr. Manoharlal Sharma, father-in-law of Mr. WP369chamber.odt Ashok Chavan. He made application for membership on 13.08.2009 and was allotted flat No.1203 having carpet area of 650 sq.ft. in 'B' Wing;

and (3) Ms Bhagwati Sharma who died on 15.07.2010 was the mother- in-law of of Mr. Ashok Chavan. She made application for membership on 13.08.2009 and was allotted flat No.1204 having carpet area of 650 sq.ft. in 'B' Wing.

359. The role of Mr. Ashok Chavan was discussed in detail from paragraphs 69 to 69.11. In paragraph 69.2, the Commission observed that the decision of reducing the width of Captain Prakash Pethe Marg was not legal and was not in public interest and the said decision, which was taken both by Mr. Ashok Chavan as the Revenue Minister and Mr. Vilasrao Deshmukh as the Chief Minister, obliged the Adarsh Society.

In paragraph 69.3, the Commission dealt with noting dated 02.06.2009 signed by Mr. Ashok Chavan in his capacity as the Chief Minister. The said noting was in connection with exclusion of 15% Recreation Ground from the subject plot. He was also holding the portfolio of UDD.

Because of this, the Adarsh Society was considerably benefited, which resulted in grant of additional FSI of 15% of the subject plot, which is equivalent to 563 sq.mtrs. (15% of 3758.22 sq.mtrs.). Ultimately, in paragraph 69.11, the Commission recorded that Mr. Ashok Chavan had given clearance / permissions in the matter of Adarsh Society as quid pro quo.

360. The Commission also dealt with the role of Mr. Vilasrao Deshmukh from paragraphs 75 to 75.6 and observed that the decisions to issue Letter of Intent in respect of subject plot to Adarsh Society and further granting additional FSI of BEST plot approved by Mr. Vilasrao Deshmukh as the Chief Minister were not proper and justifiable and that they were not in public interest. From paragraph 76 to 76.8, the WP369chamber.odt Commission dealt with the role of Mr. Sushilkumar Shinde, who was the Chief Minister from 18.01.2003 to 01.11.2004 and Minister Shivajirao Nilengekar Patil, Revenue Minister from 25.01.2003 to 06.07.2004. In paragraph 76.8, the Commission opined that undue haste was shown by Mr. Nilengekar Patil by approving the subject plot to Adarsh Society without authority. Mr. Sushilkumar Shinde failed to pay due attention to the suggestion made by the Finance Department. It was further observed that "the least that we can say is that the entire issue smacks of undue haste and desire to bestow benefit to the society".

361. The Commission also dealt with the role of Mr. Sunil Tatkare, Minister for Water Resources and Mr. Rajesh Tope, Minister for Higher and Technical Education in paragraphs 77 and 77.1. In paragraph 77, the Commission expressed its displeasure at the conduct of both these Ministers who tried to meddle with the issue of Adarsh Society when it was not within the purview of the distribution of their work.

362. The Government swiftly moved and took steps for reduction of width of Captain Prakash Pethe Marg so as to carve out a residential plot. If at all, Government was satisfied that it was in public interest to reduce width of Captain Prakash Pethe Marg from 60.97 mtrs to 18.40 mtrs., after reducing the width of the roa, the remaining plot could have been either merged in BEST depot or Government could have acceded to the request made by BEST for converting BEST depot reservation to BEST depot and housing. That apart, even if after reducing the width of road, the residential plot was carved out, in our opinion, Government could not have allotted plot directly to

Adarsh Society. We have noted earlier that on 17.05.2000, request was made on behalf of the BEST for designating the bus depot plot from "Bus Depot" to "BEST Bus Depot and Housing" to enable BEST to make use of the said bus depot plot WP369chamber.odt also for its officers' quarters. This was replied by the Under Secretary, UDD on 29.11.2003 wherein it was stated that bus depot land is included in CRZ-II and existing road from sea side is affected by high tide level and that, there is no existing building adjacent to plot No.87-

C. The said letter also stated that as per clarification dated 08.09.1998 given by MOEF, any construction affecting high tide level would not be permissible and therefore, request made by Assistant General Manager (Civil), BEST cannot be acceded to. However, as far as the petitioners are concerned, the State Government readily accepted their request and allotted the subject plot. We are more than satisfied that petitioners have virtually hijacked the subject plot by treating the same as if it is their private property. The Bureaucrats, the Ministers and the concerned Politicians misused / abused the power as also their position.

363. So far we have come across cases where people by using money / muscle power as also political influence try to secure allotment of land. This case goes one step further. Though the plot was not available, Adarsh society proposed reduction of Captain Prakash Pethe Marg from 60.97 mtrs. to 18.40 mtrs. The request made by Adarsh Society was readily accepted by the State Government, though the Planning Authority namely MMRDA declined to initiate proceedings under Section 37(1) of the M.R. & T.P. Act. The area so deleted was partly included in residential zone and was allotted to Adarsh Society without following due process of law.

364. In the case of CIDCO Vs. Platinum Entertainment83, the Apex Court was dealing with allotment of land by CIDCO to the respondent for erecting entertainment complex. The Apex Court was considering whether there was transparency maintained by CIDCO in making these allotments of Government land. In paragraph 37, the Apex Court 83 (2015) 1 SCC 558 WP369chamber.odt observed that it is well settled that whenever the Government deals with the public by entering into a contract or issuance of licence or granting other forms of largesse, the Government cannot act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not give the smack of arbitrariness. The Apex Court quoted its earlier decision in Raman Dayaram Shetty vs. International Airport Authority of India & Ors., (1979) 3 SCC 489 and extracted paragraph 12 thereof, which reads as under:

> "12. ... It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck

down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

(emphasis supplied)

365. In that case, Regulation 4 framed by CIDCO was pressed into service. Regulation 4 conferred an authority to CIDCO to dispose of plots of land by public auction or by tender or by considering individual applications as the Corporation would determine from time to time. It was observed that although CIDCO had the power to allot the land in any one of the manners stated in Rule 4, but the conduct of such allotment should have been more clear and transparent and without WP369chamber.odt presence of any element of favouritism and/or nepotism and without being influenced by any such thing in exercising the discretion conferred upon it.

366. In paragraph 54, the Apex Court observed that notwithstanding Regulation 4, as contained in the Regulations, the CIDCO may take all endeavour to make allotments of plots by open tender or competing bids and shall not take any decision for allotment of Government land for any purposes whatsoever.

367. The Apex Court also considered decision of Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh, (2011) 5 SCC 29 and extracted paragraphs 65 and 66, which read thus, "65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency / instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim.

WP369chamber.odt Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

(emphasis supplied)"

368. The Apex Court also referred to the decision of Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir, (1980) 4 SCC 1 and extracted paragraphs 14 and 15, which are to the following effect:

> "14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest WP369chamber.odt because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the

> legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter.

It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or [pic] lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

15. The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D. Shetty v. International Airport Authority of India that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14. The court referred to the activist magnitude of Article 14 as evolved in E.P. Royappa v. State of Tamil Nadu and Maneka Gandhi case, (1978) 1 SCC 248 and observed that it must follow as a necessary corollary from the WP369chamber.odt principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets that test of reasonableness and non- discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground. This decision has reaffirmed the principle of reasonableness and non-arbitrariness in governmental action which lies at the core of our entire constitutional scheme and structure."

369. The Apex Court also considered decision in Centre for Public Interest Litigation vs. Union of India, (2012) 3 SCC 1 and extracted paragraphs 75 and 80 which read thus, "75. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted

by Parliament and State Legislatures deal with specific natural resources i.e. forest, air, water, coastal zones, etc.

80. In Jamshed Hormusji Wadia, (2004) 3 SCC 214 case, this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods."

WP369chamber.odt

370. Ultimately, in paragraph 49, it was observed thus, "49. State and its agencies and instrumentalities cannot give largesse to any person at sweet will and whims of the political entities or officers of the State. However, decisions and action of the State must be founded on a sound, transparent and well defined policy which shall be made known to the public. The disposal of Government land by adopting a discriminatory and arbitrary method shall always be avoided and it should be done in a fair and equitable manner as the allotment on favoritism or nepotism influences the exercises of discretion. Even assuming that if the Rule or Regulation prescribes the mode of allotment by entertaining individual application or by tenders or competitive bidding, the Rule of Law requires publicity to be given before such allotment is made. CIDCO authorities should not adopt pick and choose method while allotting the Government land."

371. In paragraph 53, the Apex Court referred to case of Humanity Vs. State of West Bengal, (2011) 6 SCC 125, wherein it was held thus, "It is axiomatic that in order to achieve a bona fide end, the means must also justify the end. This Court is of the opinion that bona fide ends cannot be achieved by questionable means, specially when the State is involved. This Court has not been able to get any answer from the State why on a request by the allottee to the Hon'ble Minister for Urban Development, the Government granted the allotment with remarkable speed and without considering all aspects of the matter. This Court does not find any legitimacy in the action of the Government, which has to act within the discipline of the constitutional law, explained by this Court in a catena of cases. We are sorry to hold that in making the impugned allotment in favour of the allottee, in the facts and circumstances of the case, the State has failed to discharge its constitutional role."

372. The decisions referred in paragraphs 342, 345, 346, 347 and 349 apply on all fours to the present case. In the case of Humanity (supra), the Apex Court has held that it is axiomatic that in order to achieve a bona fide end, the means must also justify the end. In the present case, it cannot be said that petitioners achieved bonafide ends. At the same time, the means adopted by the petitioners are highly questionable. It has come on record that the Assistant General Manager (Civil), BEST submitted the internal note dated 29.12.2004 to the General Manager, BEST. In that note, reference was made for following procedure under WP369chamber.odt Section 37 of the M.R.&T.P. Act. It was clarified that BEST Undertaking will not grant NOC for de-reservation of land as suggested by Mr. Ramanand Tiwari, Principal Secretary, UDD. During the course of evidence

before J. A. Patil's Commission, he admitted that he dealt with the file of Adarsh Society between 26.02.2002 and 10.04.2002 and that he was responsible for recommending the reduction of width of Captain Prakash Pethe Marg. Initially, he had suggested to follow the procedure under Section 37(1) of the M.R.&T.P. Act for deleting the reservation of BEST plot and its conversion to residential use. We are of the opinion that he changed his stand and suggested that instead of following procedure under Section 37(1), the procedure under Section 50 of the M.R.&T.P. Act be followed and accordingly, Notification dated 03.03.2006 was issued under Section 50 of the M.R.&T.P. Act.

373. In our opinion, members of Adarsh society to say the least conspired together for allotment of subject plot, which was not in existence and successfully carved out residential plot which was falling in the development plan road. The members of the society are close relatives of highly placed bureaucrats as also near relatives of either politicians or ministers. In the present case, we are more than satisfied that the allotment was not made in a transparent manner and it clearly smacks out favoritism and / or nepotism. The greedy person is always looking after opportunities to secure unfair advantage by hook or crook.

It is said that every greedy person is a criminal and every criminal is a greedy person. At every stage, petitioners have acted contrary to provisions of law, be that (I) reduction of width of Captain Prakash Pethe Marg, (II) not obtaining environmental clearance and in fact coming with the case that the environmental clearance is not necessary and alternatively coming with the case that the communications dated 11.03.2003 and 15.03.2003 constituted environmental clearance; (III) WP369chamber.odt not complying with the conditions stipulated in- (i) LoI dated 18.01.2003 (condition No.7), (ii) letter of allotment dated 09.07.2004 (condition No.2), (iii) memorandum dated 05.08.2005 (conditions No.2 and 4) as also (iv) compelling or inducing State Government to invoke Section 50 of the M.R.&T.P. Act when appropriate authority did not even apply for deletion of reservation. It has also come on record before Justice J. A. Patil's Commission that in 22 cases of purchase of flats in Adarsh Society, transactions are found to be Benami, which are prohibited under the Benami Transactions (Prohibition) Act, 1988. In the light of the above discussion, we are satisfied that no case for invocation of powers under article 226 of India is made out. Question No.11 is answered accordingly.

374. Mr. Khambata submitted that the construction carried out by the petitioners is without obtaining environmental clearance. That apart, as against the permissible FSI of 1.33 under 1967 DCR, petitioners have consumed 2.932 FSI. In other words, petitioners have carried out unauthorized construction. He submitted that once the Court comes to the conclusion that the building constructed by the Adarsh Society is illegal, the following decisions lay down what should be the approach of the Court:

> a. M. I. Builders Pvt. Ltd.43 and in particular paragraph 82; b. Shanti Sports Club44 and in particular paragraphs 74 & 75;
>
> c. Esha Ekta Apartments Coop. Housing Society Ltd.45, and in particular paragraphs 46 and 56.

375. In the case of M.I. Builders43, in paragraph 82, the Apex Court observed thus, "82. High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is WP369chamber.odt unauthorised. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief.

Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

376. In the case of Shanti Sports Club44, in paragraphs 74 and 75, it was observed thus, "74. In last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorized constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorized constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realize that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians WP369chamber.odt and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorized constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the

town planning scheme etc. on the ground that he has spent substantial amount on construction of the buildings etc. - K.

Ramdas Shenoy v. Chief Officers, Town Municipal Council, Udipi 1974 (2) SCC 506, Dr. G.N. Khajuria v. Delhi Development Authority 995 (5) SCC 762, M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu 1999 (6) SCC 464, Friends Colony Development Committee v. State of Orissa 2004 (8) SCC 733, M.C. Mehta v. Union of India 2006 (3) SCC 399 and S.N. Chandrasekhar v. State of Karnataka 2006 (3) SCC 208.

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

377. Applying the tests laid down in the aforesaid cases as also for the reasons recorded earlier, we are more than satisfied that this is eminent case to order demolition as the entire construction carried out by the WP369chamber.odt petitioners is unauthorized and illegal and in total defiance of provisions of E.P. Act as also M.R.&T.P. Act. The building is liable to be demolished and we accordingly order that the Adarsh building constructed by the petitioners shall be demolished and the cost thereof shall be recovered from the petitioners.

378. In Prestige Lights Ltd. v. State Bank of India 84, it was held that in exercising power under Article 226 of the Constitution of India, the High Court is not just a court of law, but is also a court of equity. The Apex Court Court referred to the judgment of Scrutton, LJ. in R v.

Kensington Income Tax Commissioners, (1917) 1 K.B. 486 (C.A.) and observed:

> "In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. ..."

379. In the course of the judgment, we have dealt with various facets namely, petitioners -

a. not obtaining recommendations of MCZMA;

b. not obtaining environmental clearance either from MOEF or State level agencies;

c. consuming F.S.I. of BEST plot;

We have also held that initiation of proceedings under Section 37 of the M.R.&T.P. Act was not in public interest and the reservation of D.P. Road to residential user was without obtaining approval of MCZMA. Apart from that, initiation of proceedings under Section 50 of the M.R.&T.P. Act was also illegal. It is also brought on record that bureaucrats, ministers, army officers or their kith and kin became members of Adarsh Society. It cannot be said to be a sheer coincidence. Prima facie, the possibility of quid pro quo cannot be ruled out. This 84 (2007) 8 SCC 449 WP369chamber.odt Court cannot remain a mute spectator and shut its eyes to these illegalities. We, therefore, constrained to issue following directions to the respondents.

380. We direct the State Government to resume the subject plot for violating the conditions noted hereinabove, by following due process of law. Let that action be initiated within a period of four weeks from today. During the course of hearing, it is brought to our notice that suit as regards ownership of the subject plot is pending between the Central Government and the State Government. By way of abundant caution, we make it clear that we have not gone into this question.

381. It cannot be disputed that the bureaucrats and ministers are custodians of the Government property. They are entrusted with the Government property. People repose confidence in them that the Government property is in the safe hands of bureaucrats and ministers and that they will protect the Government property. Prima facie, they have dishonestly disposed of the property in violation of the settled position of law. In our opinion, prima facie, the bureaucrats and the ministers are guilty of various offences in acquiring the subject plot as also misuse and / or abuse of powers. We hereby direct the State Government to consider initiating appropriate civil / criminal proceedings against the concerned bureaucrats, ministers and politicians in accordance with law, if not already done. The concerned Court/s shall decide the case/s on the basis of evidence on record and in accordance with law, uninfluenced by the observations made / findings recorded herein. We further direct the State Government / Union of India to consider initiating departmental proceedings in accordance with law against the bureaucrats. The disciplinary authority/ies shall take the decision in accordance with law without being influenced by the WP369chamber.odt observations made / findings recorded herein.

382. After analyzing the material on record, we are satisfied that petitioners made baseless and reckless allegations for the first time, during the course of arguments, against respondents No.3 and 4 and Dr. A. Senthil Vel, Mr. Thirunavukarasu, Mr. T. C. Benjamin and Mr. Sitaram Kunte. Merely because respondents No.3 and 4 were not represented before this Court, that does not permit petitioners to make allegations against them. In fact, Dr. A. Senthil Vel, Mr. Thirunavukarasu, Mr. T. C. Benjamin and Mr. Sitaram Kunte were not even impleaded as party respondents. These officers were discharging their duties. We, therefore, feel that in order to ensure that no baseless and reckless allegations are levelled against the officers, and that, they should discharge their duties without fear or favour, they should be compensated. This will, hopefully, discourage the persons making baseless and reckless allegations. We, therefore, direct the petitioners to pay cost of

Rs.1,00,000/- each to respondents No.3 and 4 and Dr. A.

Senthil Vel, Mr. Thirunavukarasu, Mr. T. C. Benjamin and Mr. Sitaram Kunte.

383. We, therefore, direct-

(1) respondent No.1 - Union of India, Ministry of Environment and Forests to forthwith demolish Adarsh building constructed by the petitioners at the expenses of the petitioners;

(2) respondent No.1 - Union of India and respondent No.7 - State of Maharashtra to consider initiating appropriate civil / criminal proceedings against the concerned bureaucrats, ministers and politicians in accordance with law, if not already done for committing various offences in acquiring the subject plot as also misuse and / or abuse of powers. The concerned Court/s shall decide the case/s on the basis of WP369chamber.odt evidence on record and in accordance with law, uninfluenced by the observations made / findings recorded herein;

(3) respondents No.1 and 7 to consider initiating departmental proceedings in accordance with law against the bureaucrats. The disciplinary authority/ies shall take the decision in accordance with law without being influenced by the observations made / findings recorded herein;

(4) respondent No.7 - State of Maharashtra to resume CTS No.652, Block VI, Colaba Division, Captain Prakash Pethe Marg, adjacent to Backbay Bus Depot, Colaba, Mumbai - 400 005 by following due process of law. Let that action be taken within a period of four weeks from today;

(5) petitioners to pay cost of Rs.1,00,000/- each to respondents No.3 and 4 and Dr. A. Senthil Vel, Mr. Thirunavukarasu, Mr. T. C. Benjamin and Mr. Sitaram Kunte.

384. We place on record the fact that but for the complaint received from Shri Simprit Singh of NAPM, respondent No.6 MCZMA would not have initiated the proceedings under the E.P. Act. Mr. Simprit Singh of NAPM did not participate in the proceedings before the respondents as also he was not impleaded party respondent in this Petition. He also did not intervene in this Petition. But for his intervention, perhaps, the gross violations made by petitioners would not have been detected. He, however remained unsung hero. We place on record our appreciation for his making complaint to MCZMA in a sensitive matter like environment.

385. In the light of the aforesaid discussion, Petition fails and the same is dismissed subject to cost of Rs.6,00,000/-, as quantified above.

WP369chamber.odt

386. At this stage, Mr. Seervai orally applies for stay of this order for the period of 12 weeks from today. Learned Counsel for respondents oppose this application.

387. Having regard to the fact that the Petition is pending in this Court since the year 2011 and petitioners intend to challenge this order in the higher court, we find that request made by Mr. Seervai is reasonable.

Hence, notwithstanding dismissal of the Petition, this order shall remain stayed for a period of 12 weeks from today subject to clear understanding that no further request for extension of time shall be entertained.

[R. G. KETKAR, J.] [RANJIT MORE, J.]

Minal Parab