2019 INSC 1188

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL/APPELLATE JURISDICTION

CIVIL APPEAL NOS 8265-8266 OF 2019
[Arising out of SLP [C] Nos.10704-05 of 2016]

SHREE RAM URBAN INFRASTRUCTURE LTD. & ANR. ... APPELLANTS

VERSUS

STATE OF MAHARASHTRA & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NOS. 8267-8272 OF 2019
[@ S.L.P. [C] .....CC Nos.13527-13528 OF 2016]

TRANSFER CASE [C] NO.271 OF 2017

AND

TRANSFER CASE [C] NO.6 OF 2018

J U D G M E N T

ARUN MISHRA, J.

1. Shree Ram Urban Infrastructure Ltd. has filed the appeals challenging the judgment and order dated 22/25/27.1.2016 passed by the Division Bench of the High Court of Bombay in W.P. [C] No.2223 of 2013 and First Appeal No.884/2015. Janhit Manch has also filed an

appeal. It has also filed two Public Interest Litigations (PILs.) in the High Court, which have been transferred to this Court and registered as T.C. (C) No.271/2017 and T.C. [C] No. 6/2018, challenging the order dated 31.8.2016 (in T.C. (C) No.271/2017) passed by the Municipal Corporation of Greater Mumbai (MCGM), (for short 'the Corporation') and order dated 10.11.2016 in (T.C. (C) No.6/2018) passed by the Additional Municipal Commissioner and also order dated 30.1.2017 and 14.3.2017 passed by the Corporation.

2. The matter relates to the building at Plot No. 5B+6, admeasuring 28,409.50 sq.mt. Shree Ram Urban Infrastructure Ltd. applied for grant of permission to construct and build on the said plots. The commencement certificate was granted by Planning Authority on 24.2.2005, under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short, "the MRTP Act") read with Development Control Regulations for Greater Bombay, 1991 (for short "DCR"). The modification in the building plan was made on 8.2.2011 under which the Corporation approved construction of a residential building for two basements, ground, entrance level, eight parking levels, amenity levels, service floor, and other areas plus 13th to 54th floors having a height of 294.84 meters.

3. After the issuance of commencement certificate dated 24.2.2005 amendment was made in the DCR by incorporating clause 24 in

Regulation 33, *w.e.f.* 20.10.2008. The amendment provided that with the previous approval of the Government, the development of multi-storeyed parking lots abutting the roads to be permitted. On parking area being constructed and handed over to the Corporation, free of cost, FSI, as specified therein, shall be allowed on the land belonging to the private owners, which is not reserved for any public purpose. Shree Ram Urban Infrastructure Ltd. (for short, 'SRUIL') applied for the construction of public parking lot (PPL). The plans were approved for the construction of three basements, ground floor, and 15 upper floors. The commencement certificate was accordingly endorsed up to the plinth level of the PPL, including three basements.

4. SRUIL has completed the construction of the main residential building of 56 floors. Though the Corporation had issued the commencement certificate up to the 43rd floor, 13 upper floors up to 56 have been constructed by SRUIL. The PPL has been constructed entirely. Though the commencement certificate granted by the Corporation is up to the plinth level, including the basements, so far as commencement certificate for the upper floors of the PPL is concerned, SRUIL has relied upon deemed permission.

5. On 7.5.2011, SRUIL wrote a letter to the Municipal Corporation for seeking commencement certificate for construction above the plinth

level of the PPL under Regulation 6(4) of the DCR. In clause 24 of regulation 33, there was no upper limit for seeking incentive FSI.

6. The Corporation issued a circular on 22.6.2011, which restricted PPL to two basements, ground, and four upper floors. The premium was also enhanced. A stop-work notice was issued on 16.7.2011 in respect of the construction by the Corporation under section 354 of the Mumbai Municipal Corporation Act, 1888 ("MMC Act"). The said notice was withdrawn on 11.11.2011.

7. On 29.11.2011, the Corporation issued a notice under section 51 of the MRTP Act calling upon SRUIL to show cause as to why the commencement certificate concerning PPL may not be revoked, this was followed by a notice under section 354A of the MMC Act calling upon SRUIL to stop the work of PPL beyond plinth level as there was no commencement certificate issued above the plinth level. SRUIL filed a representation. After that, they filed Civil Suit No.2942 of 2011 in City Civil Court at Mumbai, wherein the challenge was confined to the stop-work notice dated 14.12.2011. The interim injunction was granted restraining the Corporation from taking any action based on the said notice. The order remained operative till the disposal of the said suit. Under the deemed permission, upper floors above the plinth level of the PPL have been constructed by SRUIL.

8. On 16.5.2013, the city civil court decreed Civil Suit No.2942/2011 by holding that the stop-work notice dated 14.12.2011 was illegal. It was found by the civil court that further commencement certificate to construct the 15 floors above the plinth of the PPL shall be deemed to have been granted in terms of Regulation 6(4) of DCR. Therefore, the stop-work notice was declared illegal against which the first appeal was filed. The same has been decided by the impugned judgment and order passed by the High Court at Mumbai.

9. PIL No. 43 of 2012 was filed by Janhit Manch, challenging the construction of PPL above the plinth level. There was also a challenge to the construction of the residential building. It was decided on 13.5.2013 by the High Court. The directions were issued to Corporation to decide as to PPL given findings recorded. Special leave petition was filed in this Court by Janhit Manch, challenging the judgment and order mentioned above.

10. In P.I.L. No.43 of 2012, a direction was issued to the Corporation to pass an order on various aspects after hearing the parties. The Municipal Commissioner has passed an order dated 12.9.2013, which was impugned in the High Court by SRUIL and a prayer was made for quashing and setting aside the order dated 12.9.2013 passed by the Commissioner of the corporation. A prayer was also made for issuing mandamus enjoining upon the Corporation to take over possession of

the PPL consisting of basement, ground plus 15 upper floors and forthwith endorse the said commencement certificate for residential building up to the full height of 56 floors. Unless incentive FSI in respect of the PPL is made available, 13 upper floors of the main building would be illegal as the FSI of PPL was to be used for the upper 13 floors.

11. In the writ petition, which was filed by the Janhit Manch, PIL No.43/2012, it was contended that permission granted to erect floor Nos.44 to 56 of the residential building was dependent upon the availability of the incentive FSI on account of PPL. SRUIL illegally erected all floors above the 43rd floor. Secondly, the construction of PPL consisting of basements plus ground plus 15 floors was illegal as there was no commencement certificate issued to proceed with the construction above the plinth level. Next, it was contended that the refuge area in the residential building, which is free of FSI, is excessive, and such excessive refuge area could not have been permitted, which constitutes to the extent of 72% of the total habitable built-up area of the residential building. SRUIL were not entitled to FSI on account of the setback area of 705.45 sq.m. as they had already received compensation for the said area. The question as to the height of the habitable floors about the consumption of FSI was also raised. Besides, it was contended that the passage at manor level and entrance,

swimming pool, area over deck, and refuge area of the residential building ought to have been computed in the FSI of the residential building. The height of the service floor of the building is 8.40 meters; the height above 4.5 meters could not have been granted free of FSI. FSI relating to service floors, amenity floor, and FSI of duplex floors ought to have been counted. Besides, FSI about service toilets, structural columns, toilets at the duplex level, and the floor bed ought to have been counted.

12. The High Court in PIL No. 43 of 2012 held that construction of PPL could not be held as illegal, SRUIL cannot be deprived of claiming incentive FSI for the residential building. Other aspects to be considered by the Commissioner/Corporation at the time of issuance of an occupation certificate. The FSI granted in respect of the refuge area is excessive, so the Commissioner was directed to re-examine the issue and re-work the FSI accordingly and whether FSI could be claimed in lieu of the setback area. The Commissioner was directed to reconsider FSI granted at manor level, swimming pool, the area over deck and refuge area at entrance level, FSI concerning structural columns along with refuge area, etc. The decision of the Commissioner to permit the height of service floors at 8.40 meters was upheld. SRUIL to be heard before the Commissioner takes a final decision.

13. After that, parties were heard by the Municipal Commissioner, and an order was passed on 12.9.2013. The Commissioner has held that PPL shall be as per the MCGM Circular dated 22.6.2011 and State Government directives dated 19.3.2012 issued under section 37(1) of the MRTP Act, the Municipal Commissioner observed:

> "(i) As regards the Public Parking Lot (PPL), it shall be as per the MCGM Circular dated 22.06.2011 and as per State Govt. directives dated 19.03.2012 issued under section 37(1) of MRTP Act, which is in accordance with the law. Hence, MCGM will accept PPL comprising of 3 basements + Ground + 4 upper floors, which only will be eligible for grant of incentive FSI towards the construction of PPL, on payment of requisite premium as per policy.
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> (ii) Refuge areas shall be provided free of FSI only to the extent of 4% of the built-up area it serves. Refuge areas in excess of the aforesaid requirements shall be counted in FSI in accordance with clause 4.12.3 of National Building Code.
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> (iii) There is no provision in the DCR for the exclusion of the structural columns from FSI computations. Hence, the structural columns need to be counted in FSI.
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> (iv) As regards the set back area admeasuring 705.45 sq.mt., FSI advantage in lieu of handing over of the same cannot be granted at this stage, in absence of conclusive documentary evidence.
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> (v) The passages at manor level and entrances, swimming pool, area over deck, and refuge area at the entrance level, which were earlier permitted free of FSI, shall be counted in FSI in accordance with law.
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> (vi) The request of SRUIL to pay the security deposit under DCR 5(3)(xi) and to levy the premium as per section 22(m) of MRTP Act, 1966, is rejected.
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> (vii) Since there are many interlinked revised FSI computations as aforesaid, the Project Proponent (SRUIL) is directed to submit modified plans in accordance with the regulations."

14. The High Court in the impugned judgment and order has quashed and set aside the judgment and decree passed by the civil court on 16.5.2013, and the suit has been dismissed. In the writ petition, the

order of the Commissioner dated 12.9.2013 as far as clauses (v), (vi) and (vii) of the directions are concerned, has been confirmed. The direction contained in clause (ii) has been set aside. The direction in clause (iii) of the Commissioner's order dated 12.9.2013 has been set aside. The Commissioner has been directed to consider, exclusion of structural columns from the computation of FSI and the issue of refuge area. Clause (iv) of the Commissioner's order has been set aside, holding that there was no reason to disturb the grant of FSI of the set-back area admeasuring 705.45 sq.m. Clause (i) of the Commissioner's order dated 12.9.2013 has become inoperative because of the findings recorded by the High Court while deciding the first appeal. The Corporation has been directed to hear the parties and to decide as to the reasonable refuge area considering various factors in light of the observations and the discussion made in the judgment and order. The Commissioner was directed to pass the order within four months.

15. The High Court held that the construction of the PPL above the plinth level and the construction of the floors above the 43rd floor of the main building is illegal as the same has been constructed without obtaining the commencement certificate(s). SRUIL may apply for regularisation of the construction made of the PPL above the plinth and the construction of the upper floors of the main building. A fresh proposal for grant of commencement certificate and the development

permission shall be submitted. In case no regularisation is made by the Corporation, steps shall be taken for demolition after the expiry of the period of 8 months. SRUIL to submit a modified plan to the Commissioner of Corporation while applying for regularisation. After an appropriate order is passed, SRUIL to apply for a grant of occupation certificate in respect of the residential building up to the 43rd floor.

16. According to the direction issued by the High Court, the Commissioner on 31.8.2016 concerning refuge area has passed the following order:

"ORDER

"(1) The area provided on the external peripheral face of the flat, which are marked hatched on the accompanying plan, shall be allowed as refuge area. This order should be mentioned in all Sale Deeds and/or in Supplementary Sale Deeds to ensure that it is not sold as a habitable area. Further, the building would prominently display the access route to these refuge areas. These refuge areas will be kept open and accessible to all Occupants of the Building at all times.

(2) The refuge areas at the inside of the building at the entrance of flats shall not be considered as refuge areas.

(3) The four full floors shown as refuge will not be taken as refuge.

(4) The structural columns falling in the refuge areas stated in Point (1) above can be allowed free of FSI. Areas of remaining structural columns shall be counted in FSI.

(Ajoy Mehta)
Date : 31 August, 2016 Municipal Commissioner"

17. The Corporation has also passed order dated 10.11.2016 in which it has held that under section 51 of the MRTP Act, the Planning

Authority can revoke or modify the permission provided that the construction of PPL has not sufficiently progressed or completed. In PPL, the total construction cost incurred is about Rs.165 crores, out of which Rs.70.28 crores were incurred on the construction of PPL up to plinth. The construction has proceeded substantially as on the date of the notice under section 51. There was no stay to the interim order dated 24.12.2011 of the city civil Court. A subsequent Circular and Notification cannot be given retrospective effect, and the prevailing regulations on the date of the approval have to be considered. The decision in *Kohinoor CTNL Infrastructure Co, Pvt. Ltd. & Anr. v. The MCGM & Ors*. reported in (2013) 3 BCR 410 has been referred to by the Additional Municipal Corporation Commissioner, and it has been held that construction of public parking lot carried out on the spot under reference constituted sufficient progress. Bypassing the order dated 30.1.2017, notice under section 51 of the MRTP Act was ordered to be withdrawn. The premium was directed to be levied as per modified DCR 33(24).

18. In T.C. No.6/2018 filed by Janhit Manch, the order dated 10.11.2016 has been questioned.

19. SRUIL submits that the Government of Maharashtra has granted in-principle approval for multi-storey parking lot to SRUIL at Mumbai on 20.8.2010 comprising 3 basements plus stilt on ground plus 15

upper floors, accommodating 900 car parking spaces with sufficient car lifts and passenger lifts. The construction was completed in September 2012 on the privately-owned land of the petitioners. The total built-up area of the PPL is 62,005.91 sq.m. and has spent about Rs.165 crores for construction of PPL, apart from the value of the land. The PPL is to be handed over free of cost to the Corporation to be used by the general public. It is lying completed but unused since 2012, which is against the public interest. Thus, the cause espoused by Janhit Manch is not in the interest of the public.

20. Mr. C.U. Singh, learned senior counsel appearing on behalf of SRUIL, further submitted that the civil suit, which questioned the notice under section 354A of the MMC Act, was decreed by the civil court holding that there was deemed grant of further commencement certificate in accordance with DCR 6(4) as the application submitted by the Architect on 7.5.2011 for further commencement certificate beyond plinth level was not refused by the Corporation as such the civil court held that construction is with permission and in accordance with the sanctioned plan and there is no deviation from it. The view taken earlier by the Corporation in order dated 12.9.2013 was that the construction of PPL, 3 basements and plinth and 15 upper floors were legal and valid being based upon the deemed commencement certificate under DCR 6(4), nevertheless, it was observed that the construction of

PPL above the 4th upper floor was not legal as it was contrary to Government circular dated 22.6.2011.

21. SRUIL submits that in W.P. [C] No.2223 of 2013 filed by Janhit Manch, the challenge was limited to incentive FSI arising out of the PPL above the fourth floor. The High Court in the impugned judgment has held that the findings of the Commissioner based on Circular dated 22.6.2011 cannot be sustained, as the Circular, as well as the consequential directives, had been struck down by the High Court in several cases. It was also the stand taken by the Corporation in various matters that Circular dated 22.6.2011, and the directives would not be enforced because of statutory regulation, which has to prevail. The facts mentioned above have not been disputed before us and that the Circular dated 22.6.2011 has been struck down by the High Court.

22. SRUIL submits that the Corporation had filed the first appeal in the High Court belatedly for challenging the civil court's judgment and decree. The High Court has erroneously held that the application dated 7.5.2011 made by the architect for further commencement certificate was not in the prescribed form since it is not stated that the work has been completed "under my supervision" instead, the architect has mentioned, "we have completed the work."

23. It is further urged that permission under DCR was a central issue in the civil suit filed by SRUIL against the Corporation. The Corporation in the first appeal did not challenge the finding of the City Civil Court nor pleaded in a written statement that there was a failure to apply prescribed form Appendix XVI, and as such, there was no deemed permission. It was not the Corporation's case that the letter received on 7.5.2011 was not in the prescribed form as per Appendix XVI and nor that deemed permission was unavailable for this reason. No issue was framed, and no evidence was adduced as to the invalidity of the letter dated 7.5.2011, and that deemed permission did not accrue. On the contrary, the Corporation's witness admitted receipt of the letter dated 7.5.2011 and its failure to reply to the same. Thus, the findings recorded by the High Court about the irregular construction of 1 to 15 floors of the PPL are neither proper nor sustainable.

24. It is further submitted that the finding recorded in the impugned judgment that the commencement certificate is valid for 4 years in aggregate and that the commencement certificate was lastly endorsed on 18.11.2011, and therefore, it has lapsed, is contrary to Regulation 5(6) and section 48 of the MRTP Act. Regulation 5(6) stipulates that the construction up to the plinth level has to commence within 4 years. In case it is not commenced, then only the commencement certificate lapses and new development permission has to be obtained. Thirdly,

the mandate under section 48 of the MRTP Act is that the new permission would be required if the construction work up to plinth is not completed within 4 years. Admittedly, in the present case, the construction of the PPL was complete in the year 2012 itself. Hence, there was no requirement for new development permission. The finding of the High Court is belied by section 51of the MRTP Act, which protects the landowner against any revocation or modification in the building permissions or the plans once the construction has substantially progressed.

25. It is submitted that PIL No. 43 of 2012 was filed belatedly by Janhit Manch on 1.3.2012 after three basements, and 9-10 upper floors of a PPL were already constructed and by that date, India's tallest residential building had already been constructed up to 56 floors. The stage mentioned above of construction was admitted to in the PIL. There is an unexplained delay amounting to laches by Janhit Manch; on this ground alone, the appeal and the Transfer Cases deserve dismissal.

26. It is further submitted on behalf of SRUIL that it was neither pleaded nor argued by Janhit Manch in the PIL that the letter dated 7.5.2011 submitted by the Architect of SRUIL to the Corporation was not in the prescribed form, i.e. Appendix XVI, nor that the permission by deeming fiction under DCR 6(4) did not accrue for the said defect. In

SLP [C] No.20279/2013 only those contentions which were raised therein were left open by this Court as no such contentions/grounds were raised in the previous special leave petition, as such the contentions which were not raised in the special leave petition are not open to being agitated now at a subsequent stage. The High Court also had kept open only those grounds that were raised and left to be decided by Corporation. Submission of Janhit Manch that construction of PPL above plinth level is illegal as the same was carried out during the stop-work notice dated 16.7.2011, is erroneous. The said notice did not relate to PPL as has been made clear by the Corporation in their affidavit dated 4.5.2012.

27. Alternatively, it is urged on behalf of SRUIL that the ground raised by Janhit Manch that the High Court could not have issued the direction for regularisation deserves to be rejected in the light of this Court's decision in *Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & Ors*. (2006) 8 SCC 590. The challenge by Janhit Manch that regularisation ought to be rejected and could not have been ordered by the High Court is contrary to the decision in *Muni Suvrat* (supra). It is for the Corporation to take a decision, and Janhit Manch has not questioned the vires of the statutory provisions which allow regularisation. Thus, the ground raised by Janhit Manch ought to be summarily rejected. The construction of 15 upper floors of the PPL cannot be said to be illegal. Even otherwise, in the absence of

endorsement on the commencement certificate is a procedural irregularity, and the same can be regularised under section 53(3) read with section 44 of the MRTP Act, as the construction falls in the categories as specified in section 52. The Municipal Corporation has itself issued Circulars in the exercise of its powers under the provisions of section 53 read with section 44 of the MRTP Act on 4.2.2011, which prescribes various modes of regularisation.

28. It is further submitted in the alternative that in case deemed commencement certificate for further construction beyond plinth is incorrect, and that there was no deemed commencement permission for construction above the plinth. The Commissioner has directed regularisation of 15 upper floors of PPL in terms of the order of the High Court upon payment of Rs.44,80,15,781 as a penalty for building beyond the plinth and Rs.117,81,10,640 as premium under the amended DCR No.33(24) which came into force in 2014.

29. SRUIL also submitted that the challenge raised by Janhit Manch to the order of regularisation on the ground of DCR 33(24) as amended in 2014, to the effect that only two basements plus ground plus 4 floors can be regularised on payment of premium as on the date on which order is passed. It is contrary to the settled position of law that the existing provisions as on the date of permission and construction would be applicable and not the subsequently amended law, as observed in

Suresh Estates Pvt. Ltd. & Ors. v. Municipal Corporation of Greater Mumbai & Ors. (2007) 14 SCC 439, and *T. Vijayalakshmi & Ors. v. Town Planning Member & Anr.* (2006) 8 SCC 502. It is submitted that the High Court's finding on lack of deemed permission for PPL deserves to be set aside, and alternatively, the Corporation be directed to accept the PPL upon payment by the petitioner of the amount on receiving the amounts of premium and penalty. The application of the petitioner for the regularisation of Floors 44 to 56 may be directed to be considered and decided on its own merits by the Corporation.

30. It is further submitted concerning Floors 44 to 56 of the residential building that the construction has been raised following the sanctioned plans. It is nobody's case that the construction of the residential building is in violation or the deviation of the sanctioned plans. The plans have been approved and amended from time to time. Last such amendment being on 8.2.2011 for the entire 56 floors of the building. The commencement certificate was lastly endorsed up to the 43rd floor for the height of 238.50 meters on 18.11.2011. Floors 44 to 56, as per the last sanction plan, are approved utilising 12344.63 sq. mts. of additional 31002.5 square mts. of incentive FSI of the PPL. The commencement certificate for the said floors was to be endorsed on handing over the PPL to the Corporation, which releases an additional 31,002.51 sq. mts. of incentive FSI. The non-endorsement of

commencement certificate from 44 to 56 floors is merely an irregularity and not a breach of Development Control Regulation or statute.

31. Concerning the refuge areas for floor safety, it is submitted that Janhit Manch seeks to challenge the exclusion of certain refuge areas from the calculation of FSI. The rules provide for refuge areas. There is no challenge to DCR 2(13), 2(42), 35, 37, 43, and 44, especially DCR 44(7). Fire escape in multi-storeyed buildings is necessary, and the Chief Fire Officer has to approve the plans. The refuge area, as recommended by the CFO in his report and as sanctioned by the Corporation, cannot be said to be excessive and contrary to DCR Regulations.

32. Regarding section 51 of the MRTP Act, it is submitted that once the Planning Authority has sanctioned the plans, the power to modify or revoke is under section 51, which can be exercised only in case of the contingencies provided in the provisions of the said section.

33. SRUIL lastly submits that Janhit Manch has no right to challenge the judgment. They were aware of the civil suit and interim order granted therein. They have filed the order in PIL No. 43/2012. Janhit Manch has filed IA No.2/2013 and has withdrawn it. After that, they sought impleadment in W.P. No. 2223/2013 in the High Court and after that, again withdrew the Chamber Summons. In the circumstances,

Janhit Manch should not be permitted to approbate and reprobate, and the petition filed by it be dismissed as well as the Transfer Cases. The petition is not filed to subserve any public interest.

34. Mr. Ahmadi, learned senior counsel appearing on behalf of Janhit Manch has submitted that the development permission issued under section 45 of the MRTP Act is valid for a maximum period of 4 years in aggregate and lapses under section 48 upon expiry of the said period. He has further submitted that the additional amended plans of SRUIL dated 8.2.2011 are illegal and contrary to DCR 33(24) as the incentive FSI did not accrue without handing over of the PPL. The construction of PPL beyond the plinth area was illegal, as the deemed permission under DCR 6(4) did not accrue in favour of SRUIL. The construction of the PPL was done in violation of the stop-work notice issued by the Corporation. The Corporation rightly limited the construction of the PPL to ground plus 4 upper floors and two basements in terms of Circular. The sanction of the PPL building by way of an endorsement of the commencement certificate of the residential building is wholly illegal. The order dated 31.8.2016 passed by the Municipal Commissioner regarding the refuge area is illegal, being contrary to the judgment of the High Court and provisions of NBC. The order of the Additional Municipal Commissioner dated 10.11.2016 purportedly adjudicating the notice under section 51 of the Act is also illegal. Janhit Manch has

filed a writ application and the Transfer Cases in the public interest and has also attracted the attention of this Court to the inconsistent stand taken by the Corporation at various stages.

35. Shri A.N.S. Nadkarni learned Additional Solicitor General, submitted on behalf of the Corporation that pursuant to the order passed by the High Court, the Commissioner has already passed an order compounding the PPL and construction of PPL is in the public interest as 900 cars can be parked in the same. It has been constructed by spending a massive amount of Rs.165 crores; in addition, fine and penalty have been imposed by the corporation, which is a substantial one, amount of which is also going to be used for a public purpose. Thus no case for interference is made out. Due to the order passed by the Commissioner imposing fine and penalty, the matter is given a quietus, and no public interest is going to be served by entertaining the petitions filed by Janhit Manch.

In re. : development permission issued under section 45 of the MRTP Act :

36. First, we take up a question for consideration whether the permission for development issued under section 45 has lapsed? It is submitted on behalf of Janhit Manch that permission granted under section 45 of the MRTP Act is valid for a maximum period of 4 years in aggregate and lapses under section 48 of the Act on expiry of the said period. It is submitted that intimation of disapproval (IOD) under

section 346 of the MMC Act was given to SRUIL in respect of a proposed commercial building. It was necessary to obtain a commencement certificate as per the conditions of IOD couched in negative form. On 24.2.2005 first commencement certificate was issued. As per condition Nos. 5 and 9 of the commencement certificate, it is renewable every year and can be extended for 3 years. After that, fresh permission under section 44 of the MRTP Act has to be obtained. The commencement certificate was extended up to the 43rd floor on 8.2.2011. The commencement certificate was endorsed on 12.9.2006. Earlier commencement certificate was for different plans of commercial building and lapsed on 23.2.2006. Thus, the plans dated 12.7.2005 could not have been approved as the modification was substantial; hence, a fresh IOD and commencement certificate was required as per Regulation 6(5) of DCR 1991. On 24.1.2008, a commencement certificate was endorsed concerning a residential building as per the amended, approved plan dated 7.11.2007. Earlier commencement certificate was for a different plan which lapsed on 11.9.2007. The plan of 7.11.2007 could not have been approved as the modification was substantial, which involved basements. The commencement certificate concerning the residential building lapsed on 9.7.2010. It was endorsed on 11.8.2009 up to 34 floors. On 1.10.2010, the commencement certificate concerning PPL was endorsed up to the plinth level only. On 18.11.2011, it was extended from time to time concerning the

residential building. It is also submitted that under section 48 of the MRTP Act, commencement certificate shall remain in force for one year from the date of receipt of such grant, failing which it will lapse. The endorsement made concerning the residential building was invalid. The endorsement on the commencement certificate dated 24.1.2008 was also illegal.

37. Learned senior counsel further submitted that under section 44 of the MRTP Act, application for permission for development has to be filed. It can be granted or refused under section 45. In case it is granted, it shall be contained in the commencement certificate in the prescribed form. Section 48 has been relied upon, which provides that every permission shall be valid for 1 year and renewable for the next 3 years. The MRTP Act has been amended by Maharashtra Act 17 of 2007 amended section 48 by substituting the second proviso. It is provided that if the development is not completed up to the plinth level within 1 year or the extended period, it shall be necessary for the applicant to make an application for new permission, the second proviso cannot be interpreted to nullify the effect of the main provision. Thus, development permission lapses upon expiry of the aggregate period of four years. Regulation 5(6) of DCR 1991 has also been relied upon by Janhit Manch. Similar was the condition mentioned in the commencement certificate dated 24.2.2005.

38. On the other hand, on behalf of SRUIL, it is submitted that the finding of the High Court that commencement certificate is valid for 4 years in aggregate, is contrary to Regulation 5(6) of DCR 1991 and section 48 of the MRTP Act, as amended. In case construction work up to the plinth level is not completed within 4 years, it is necessary to obtain fresh permission and not otherwise.

39. Regulation 5 contains the procedure for obtaining commencement certificate, Regulation 5(6) provides as to commencement of work. Regulation 5(6) is extracted hereunder:

> "5. Procedure for obtaining Development Permission and Commencement Certificate:-
> (6) Commencement of work:— A commencement certificate/development permission shall remain valid for four years in the aggregate but shall have to be renewed before the expiry of one year from the date of its issue. The application for renewal shall be made before expiry of one year if the work has not already commenced. Such renewal can be done for three consecutive terms of one year each, after which proposals shall have to be submitted to obtain development permission afresh.
>
> For the purpose of this Regulation, 'Commencement' shall mean as under:—

(a)	For a building work including additions and alterations:-	Up to plinth level
(b)	or bridges and overhead tanks;	Foundation and construction work up to the base floor
(c)	For underground works:	Foundation and construction work up to floor of underground floor
(d)	For lay-out, subdivision, and amalgamation proposals:	Final demarcation and provisions of infrastructure and services up to the following stages — (i) Roads: Water bound macadam complete.

		(ii) Sewerage, drainage, and water supply excavation and base concreting complete."

40. Section 48 of the MRTP Act, as amended in 2007, is relevant. Same is extracted hereunder:

> "48. Every permission for development granted or deemed to be granted under section 45 or granted under section 47 shall remain in force for a period of one year from the date of receipt of such grant, and thereafter it shall lapse :
>
> Provided that, the Planning Authority may, on application made to it extend such period from year to year; but such extended period shall in no case exceed three years:
>
> Provided further that, if the development is not completed up to plinth level or where there is no plinth, up to upper level of basement or stilt, as the case may be, within the period of one year or extended period, under the first proviso, it shall be necessary for the applicant to make application for fresh permission."
>
> (emphasis supplied)

It is provided in section 48 that permission for development or deemed permission shall remain in force for a period of 1 year from the date of receipt of such grant, and thereafter it shall lapse. It can be extended from year to year, but such extended period shall in no case exceed three years. The second proviso as inserted by way of amendment in 2007 provides that if the development is not completed up to plinth level or where there is no plinth, up to the upper level of basement or stilt, as the case may be, within the period of 1 year or extended period, under the first proviso, it shall be necessary for the applicant to make application for fresh permission. Thus, it is apparent from the second proviso that in case construction has not been made

up to plinth level or where there is no plinth, up to the upper level of the basement or stilt, within one year or the extended period, it is necessary to make an application for new permission. Since the main section 48 does not deal with the situation where construction has been made up to plinth level or where there is no plinth, up to the upper level of basement or stilt, as the case may be, and neither first proviso deals with the situation above. The interpretation of the second proviso is clear that in case construction has been made up to the plinth level or where there is no plinth, up to the upper level of the basement or stilt, within 4 years, it shall not be necessary for the applicant to make application for fresh permission for development in the light of the second proviso to section 48.

41. Regulation 5(6) deals with the commencement of the work. It does not deal with the situation mentioned in the second proviso to section 48 of the Act. Regulation 5(6) provides that on expiry of one year if the work has not already commenced and such renewal can be done for three consecutive terms of one year each. The Regulation has to be interpreted in tune with the provisions contained in section 48, as amended. It cannot curtail the ken of section 48. Thus we hold that in case construction has been done up to the plinth level within four years from the date of development permission, it would not be necessary to

obtain it afresh. The finding of the High Court, to the contrary, is set aside.

In re: additional amended plans of SRUIL up to 56 floors:

42. It is submitted on behalf of Janhit Manch that additional amended plans submitted by SRUIL up to the 56th floor are illegal and contrary to DCR 33(24). DCR 33(24) was introduced vide a Notification by which a car parking scheme was brought into effect from 2008 thereunder for a public parking lot (PPL) constructed on a plot of land and handed over free of cost to the corporation. A plot owner/developer was entitled to receive incentive FSI, inter alia to the extent of 50% of the area of the PPL handed over by him, to be used on the said plot itself. DCR 33(24) allowed unrestricted construction of PPLs of unlimited floors without having any logical or scientific basis for their need in specific areas and/or localities. The provision was subjected to misuse. On 18.6.2010, the proposal for the construction of PPL received the approval of the Urban Development Department of the Government of Maharashtra in respect of the PPL proposed by SRUIL. Condition Nos.2, 5, and 8 of the said approval made it clear that the additional FSI in lieu of development of PPLs shall be granted after parking is created and handed over to the corporation free of cost. The Corporation has not taken over the PPL so far; as such, there is no additional FSI available to SRUIL. The IOD could not have been granted

beyond the 44th floor up to 56 floors. Thus, the sanction granted to SRUIL for construction of a Palais Royale having 56 floors was void ab initio.

43. It is further submitted that as per condition Nos.13, 18 and 24, it is after conditions under DCR 33(24) are complied with, and actual handing over of the PPL, commencement certificate for the additional FSI shall be granted and not before that. On 20.8.2010, the Corporation issued a letter approving the amended plan for the PPL proposing 3 basements plus lower ground plus stilt plus 15 floors. On 1.10.2010, commencement certificate for the PPL was granted up to the plinth level, only including the basement. On 8.2.2011, the plans for the residential Palais Royale building were sanctioned up to 56 floors for a total FSI of 54,715.19 sq. meters. It is submitted that the sanction was illegal. On realizing the disastrous consequences of DCR 33(24), a circular was issued on 22.6.2011, directing that all proposals of PPL may be considered subject to the height of PPL being limited to ground plus four upper floors and two basements. SRUIL did not challenge circular in the court. The State Government proposed the modification of DCR 33(24) on 19.3.2012. On 14.9.2012, SRUIL requested the Corporation to take over the PPL. The State Government issued a notification amending DCR 33(24) on 6.8.2014 by inter alia limiting PPL

as provided in said Circular, *i.e.*, three basements plus ground plus four upper floors.

44. It is apparent that in principle the approval had been granted to raise the PPL. On 18.6.2010 at that time, DCR 33(24), there was no restriction on the floors of PPL that came to be introduced in 2014 before that the completion of PPL has taken place. The PPL has been validly constructed under deemed permission. Additional FSI would be available as soon as the Corporation takes over the PPL. The High Court has directed the Corporation to decide the fate of 13 floors beyond the 44th floor in the impugned order concerning which the decision has to be taken as ordered by the High Court to the Corporation. FSI no doubt would be available once possession of PPL is handed over. The fact remains that residential building, as well as the PPL, have been constructed as per sanctioned plan, and now a final decision has to be taken by the Corporation regarding 44 to 56 floors as ordered by the High Court. We find ourselves in unison with the decision of the High Court that construction was not illegal as the development permission was granted, the plan was sanctioned for PPL as well as for the residential building. Thus, we find no force in the submission raised by Mr. Ahmadi. However, the Corporation to take a decision concerning 13 floors of the residential building as ordered by the High Court within 1 month.

In Re: deemed permission under Regulation 6(4) of DCR 1991:

45. SRUIL submits as to PPL that on the basis of application for inspection submitted on 7.5.2011 by the Architect who was looking after the project under Regulation 6(4), intimation was given for inspection under DCR 6(4) and there was no inspection made by the Commissioner jointly with the licensed technical personnel or Architect within 15 days from the date of receipt of the notice. It was incumbent upon the Commissioner either to refuse or to give permission for further construction as per the sanctioned plan in the form in Appendix XVI. As the permission had not been declined, the permission shall be deemed to have been given. It is submitted on behalf of SRUIL that though the application for inspection was not given in the prescribed format, nonetheless, the same fulfilled the requisites as provided in the prescribed form XVI. It is submitted that the Government of Maharashtra granted in-principle approval for construction of multi-storeyed parking lot to SRUIL on its land at Worli, Mumbai on 18.6.2010. The need for PPL had been examined. All the approvals, as contemplated by DCR 33(24), starting with the Government approval, were in place before commencing the construction of PPL. The total built-up area of the public parking lot is 62,005.91 sq.mtrs. It is submitted that in the construction of PPL, Rs.165 crores has been spent apart from the value of the land. The PPL is to be handed over

free of cost to the Corporation. In the civil suit, it was held that there was deemed permission under DCR 6(4). The judgment of the High Court dated 13.5.2013 in PIL No.43/2012 and the decree of the city civil court in Suit No.2942 of 2013 was at that stage, accepted by the Corporation and the Municipal Commissioner proceeded in September 2013 to determine the issues which were to be decided by him as per the decision of the High Court dated 13.5.2013.

46. It was held by the Commissioner that though the construction above the plinth level was legal and valid, the construction of the PPL above the 4th floor, i.e., floors 5 to 15 was against the Government circular dated 22.6.2011 by which restrictions have been imposed in the city of Mumbai to a maximum of 4 upper floors. In W.P. [C] No.2223/2013, the challenge was limited to the incentive FSI arising out of the PPL above the fourth floor. In the writ petition filed by SRUIL, the challenge was limited to incentive FSI arising out of PPL above the fourth floor, which the Commissioner held will not be granted as it was not in accordance with the Circular dated 22.6.2011.

47. The High Court in the impugned judgment has held that Circular dated 22.6.2011 has been struck down by the High Court in several cases. In the High Court, in many cases, the Corporation has taken the

stand that Circular dated 22.6.2011 and consequential directives would not be enforced in view of statutory provisions of DCR 33(24).

48. It is also submitted on behalf of SRUIL that after passing the order dated 12.9.2013 in which it was held that there was deemed permission, the Corporation belatedly filed First Appeal No.884 of 2015 on 20.11.2013 to challenge the City Civil Court's judgment and decree. Filing of the belated appeal after accepting the verdict of the trial court and that of the High Court and in view of the order dated 12.9.2013, it was not open to the Corporation to file the appeal. It is further submitted on behalf of SRUIL that the High Court has erroneously held that the application dated 7.5.2011 filed by the Architect for further commencement certificate above plinth level was not in the prescribed format as it does not state "under my supervision" instead, the Architect says "we have completed the work."

49. It is further submitted on behalf of SRUIL that it was not the Corporation's case in the written statement filed in the civil suit that the letter received on 7.5.2011 was not in the prescribed format, nor it was submitted that deemed permission did not accrue for the aforesaid reason. As such, no issue was framed on the aforesaid aspect. No evidence was adduced. At a subsequent stage, the plea could not have been raised by the Corporation. The witness examined on behalf of the

Corporation admitted the receipt of the letter dated 7.5.2011 and failure to send the reply that without raising the issue before the civil court, it was orally argued at the time of final argument which was rejected by the civil court. However, the Corporation in First Appeal No. 884/2015 did not challenge the said finding of the city civil court. It was not the case such set up that failure to follow the Appendix XVI format vitiated the deemed permission. Thus, deemed permission accrued under DCR 6(4).

50. SRUIL further submits that Janhit Manch filed PIL on 1.3.2012 after 3 basement levels, and 9-10 upper floors of a public parking lot had been constructed. There was a delay in filing the PIL as construction has substantially progressed. On this ground, the special leave petition of Janhit Manch and Transfer cases are liable to be dismissed. In PIL No. 43/2012, it was not the case set up by Janhit Manch that the letter dated 7.5.2011 was not in prescribed format Appendix XVI nor that the deeming fiction under DCR 6(4) was not available. The High Court in the previous round had rejected all the submissions which were raised therein vide judgment and order dated 13.5.2013 in paragraph 28(m) to (o). It is further submitted that in SLP [C] No.20279/2013, Janhit Manch challenged only those findings of the High Court, which were against it, and they did not raise any plea beyond what was argued and decided in PIL. It was not the case set up in the special leave petition that the letter received by the Corporation

on 7.5.2011 was not in the prescribed form. This Court closed the special leave petition on 15.1.2018 with the disposal of IA No.6. The contentions raised therein were left open as no such ground was ever raised in the said petition. Hence, the same cannot be raised now in the instant matter, which was not left open and taken in the previous round. The stop-work notice dated 16.7.2011 did not relate to PPL. The Corporation expressly asserts this fact in their affidavit dated 4.5.2012.

51. On the other hand, it was submitted on behalf of Janhit Manch that Regulation 6(4) mandates that an application should be filed in the prescribed form Appendix XVI. The form contains a mandatory requirement of the statement of the Architect that the work up to the plinth has been done under his supervision. The same is not an empty formality as the statement to that effect binds the Architect in respect of any defect or calamity, which may occur in the future. Letter dated 7.5.2011 did not fulfil the aforesaid mandatory requirement. It is also submitted that the letter was undated. The provision is mandatory. Janhit Manch further submits that stop-work notice was issued to SRUIL for the entire plot. An inventory was prepared on 22.7.2011, which records that "The work of PPL tower is in progress up to plinth which is as per commencement certificate granted." Therefore, the construction of the plinth was not complete even on 22.7.2011. The sine qua non for making an application under Rule 6(4) is that the work up to the plinth must be completed. Because of inventory dated

22.7.2011, it was submitted that the plinth was not completed up to that date. As such, no legal fiction is created under DCR 6(4). For deeming fiction of permission to take effect, the condition precedent must have strictly complied. There is no scope for a liberal interpretation of such condition, and unless there is strict compliance of the provisions, a deeming fiction cannot take effect. The High Court has rightly held that unless the application is submitted in the format, it will lead to chaos as lower-level officials would be saddled with the burden of deciding whether the applicant complies with the requirement of DCR 6(4). Even if the form is not mandatory, when the law prescribes a mode of doing a thing, it can be done in that manner only and not in any other mode. In any event, deemed permission under DCR 6(4) cannot go beyond 1 year. Therefore, the construction is done beyond the period of 1 year, that is, after 22.5.2012, is patently illegal. The construction was ready only on 14.9.2012.

52. Before we appreciate the rival submissions, it is necessary to consider the provisions contained in DCR 6(4). DCR 6 deals with the procedure during construction. DCR 6(1) provides construction to conform to regulations. Under DCR 6(2), the owner shall give notice to the Commissioner of his intention to start work in the form given in Appendix XV. DCR 6(3) provides that results of the test of any material shall be kept available for inspection during the construction of the

building and such period after that, as may be prescribed. DCR 6(4) contains a provision for checking plinth columns up to the plinth level by the Commissioner. Regulation 6(4) with which we are concerned is extracted hereunder:

> "6. Procedure during construction:-
> (4) Checking of plinth columns up to plinth level:—The owner through his licensed surveyor, engineer, structural engineer or supervisor or his architect shall give notice in the form of Appendix XVI to the Commissioner on completion of work up to plinth level to enable the Commissioner to ensure that the work conforms to the sanctioned plans. The Commissioner may inspect the work jointly with the licensed technical personal or architect within fifteen days from the receipt of such notice and either give or refuse permission for further construction as per the sanctioned plans in the form in Appendix XVII. If within this period, the permission is not refused, it shall be deemed to have been given provided the work is carried out according to the sanctioned plans."

It is apparent from DCR 6(4) that the purpose of the intimation to be given by licensed surveyor, engineer, structural engineer or supervisor or his architect in the form of Appendix XVI to the Commissioner on completion of work up to plinth level is to enable the Commissioner to inspect to ensure that the work conforms to the sanctioned plans. It is the Commissioner's satisfaction that work conforms to the sanctioned plans, not that of Architect of builder. It is for the Commissioner to satisfy himself, he has to inspect the work jointly with the licensed technical person or Architect within 15 days from the receipt of such notice, and thereupon he has to form an opinion whether the work conforms to the sanctioned plans and thereupon he is required to give or refuse permission for further

construction as per the sanctioned plans. Further permission has to be issued in Form Appendix XVII.

53. It is also provided under DSR 6(4) that if within the period of 15 days, the permission is not refused, it shall be deemed to have been granted provided the work is carried out according to the sanctioned plans. Thus, it is necessary to decide whether to give permission or to refuse after inspection within 15 days of the notice. In case it is not so done within 15 days, the permission shall be deemed to have been granted. However, it is necessary for deemed permission to come into play; work of foundation up to the plinth level had been carried out according to the sanctioned plans.

54. In DCR 6(4), the prescribed Form XVI is extracted hereunder:

"APPENDIX XVI

[Regulations No.6(4)]

Form of intimation of Completion of Work up to Plinth Level

To

The Executive Engineer (Building Proposal) .....Ward,
Municipal Corporation of Greater Mumbai.

Sir,

The construction up to plinth/column up to plinth level has been completed in Building No.....on/in Plot No./C.S. No./ C.T.S.No.....Division/Village/Town Planning Scheme No. .....Road/Street.....Ward.....in accordance with your permission No.....dated.....under my supervision and in accordance with the sanctioned plan.

Please check the completed work and permit me to proceed with the rest of the work.

Yours faithfully,
Signature of Licensed Surveyor/ Engineer/Structural Engineer/Supervisor or Architect
Name .....
(in block letters)
Address.....
.....
.....

Date : ....."

55. The notice dated 7.5.2011, which has been served by the Architect of SRUIL under Regulation 6(4), is extracted hereunder:

"TALATI & TALATI & PANTHAKY
ASSOCIATES PVT. LTD.
EST, 1964
ARCHITECTURE & INTERIOR DESIGN
CHAIRMAN NOSHIR TALATI
M.DIRECTOR NOZER PANTHAKY
DIRECTORS – NOUSHIR DEVITRE – PHIROZE PANTHAKI – ZAHIR CASSUM – SHAROOKH MEHTA – XERXES TALATI

To,

The Executive Engineer (B.P.) City – 1,
'E' Ward MCGM Office,
Byculla, Mumbai – 400008

Dear Sir,

Sub: Development of Public Parking Lot on plot bearing C.S.No.288, 289, 310, 1/1540, 3/1540, 1547, 1548, 1549, 1/1539 & 1550 of Lower division belonging to Shree Ram Mill Ltd. at Ganpatrao Kadam Marg, Mumbai – as per the provisions of D.C. Regn. 33 (24).
Ref: File U/No. EB/987/GS/A.

With reference to the above subject. The amended plan submitted by us has been approved by your office. Further, we have complied all the condition of I.O.D. as well as amended plan, and we have complied work up to plinth as per approved plans. You are therefore requested to kindly check the plinth and grant us further C.C. at the earliest.

Thanking you,
Yours faithfully,
For Talati & Panthaky Associated Pvt. Ltd.
Sd/-

Authorised Signature”

(emphasis supplied)

56. When we compare the aforesaid Form XVI and the intimation submitted by SRUIL’s Architect on 7.5.2011, it becomes clear that notice given is rightly addressed to the Executive Engineer. The subject mentioned is the development of PPL as per the provisions of DCR 33(24). The requirement that construction up to plinth/column up to the plinth level has been completed, in accordance with the approved plan, fulfils the requirement of the first part of the format Appendix XVI mentioned before the word “date." After the word “date", the requirement in the prescribed format is that “the work has been completed under my supervision” and “in accordance with the sanctioned plan." The latter portion, in accordance with the sanctioned plan, has been mentioned in so many words. The only difference is the format prescribes that the work has been done "under my supervision and in accordance with the sanctioned plan.". It has been mentioned that "we have complied (sic – completed) work up to plinth as per approved plans."

57. The architect, by the aforesaid expression, is owning that he has completed the work as per the approved plans. He owns responsibility upon himself that he has ‘complied with’ or ‘completed the work’ up to the plinth level as per approved plans, which would obviously mean

that it has been done under his supervision. When the Architect is saying that we have completed the work, he owns the responsibility of the construction that has been made. When he owns that construction is on his part as per plan, that would mean under his supervision. Apart from that, the basic idea of DCR 6(4) is not to ensure the satisfaction of the Architect, some licensed surveyor, engineer, structural engineer, supervisor or Architect but it is for the Commissioner to ascertain that the work up to plinth level has been done as per sanctioned plan. A mere statement by the Architect that the work has been done under his supervision is not going to satisfy the main requirement of DCR 6(4) of satisfaction of the Commissioner. The intendment of DCR 6(4) is that the work conforms to the sanctioned plan, which is as per the satisfaction of the Commissioner. The purpose of the notice is to enable the Commissioner to inspect and reach the satisfaction that the work done conforms to sanctioned plan. Then he has to act further based on his satisfaction, in case of construction as per the sanctioned plan, he has to give permission for further construction within 15 days or refuse it. In case he fails to do so, permission is deemed to have been granted for further construction.

58. In the instant matter, the receipt of the letter dated 7.5.2011 has not been denied on behalf of the Corporation in the written statement filed in the civil suit, instead this fact has been admitted by the witness

examined on behalf of the Corporation in the civil suit, in the city civil court, that the communication dated 7.5.2011 had been received and no reply to it was sent. It is not the case anywhere set up by the Corporation that the construction up to plinth was not as per the sanctioned plan. Thus, the deemed permission has come in force under DCR 6(4), on expiry of 15 days from the service of notice dated 7.5.2011. In C.S. No. 2942/2011 filed by SRUIL in the plaint, it has been stated that the plaintiff's Architect has served notice on 7.5.2011 under DCR 6(4). No reply or any rejection was received within 15 days from the corporation/defendants. Thus, the deemed permission came into play. Following averments have been made in the plaint:

> "18. As per the LOI dated 6th August 2010, the Plaintiffs were required to complete and handover to the MCGM the said Public Parking Lots within 24 months of issue of the LOI, i.e., by 6th August 2012. The Plaintiffs state that the construction of the plinth was completed in May 2011 following the CC. The Plaintiffs, after that, gave notice as required under DCR 6(4) for inspection of the plinth and grant of further CC on 7th May 2011. Since the Plaintiffs received no reply nor any rejection to the same within 15 days, the construction of the Public Parking Lot was continued by the Plaintiffs as per the sanctioned plans, in accordance with the law. Hereto annexed and marked Exhibit "I" is a copy of the Plaintiffs Architect's letter dated 7th May 2011. The Plaintiffs say and submit that as no reply/rejection was received within 15 days from the Defendants as required under law and hence as per DCR 6(4), it is a deemed provision permitting the plaintiffs to carry out further work as requested in their letter dated 7th May 2011."

59. We have gone through the entire written statement filed by the corporation. They have nowhere denied that they received the notice dated 7.5.2011, nor it is denied that there was deemed permission, after the lapse of 15 days of notice under DCR 6(4). Averments made in

para 18 have not been replied. In para 5, there is a reply to paras 1 to 4. In para 6, there is a reply to paras 5 to 8 of the plaint. Then in reply to para 7, there is a reply to paras 9 to 20. Even otherwise, we have gone through para 7 and the special pleas and the entire written statement. We find no reply to the averments described above made in the plaint. Thus, in the civil suit, for want of denial, no issue was framed on the aspect of deemed permission. Apart from that, the witness of the corporation namely Ajay Sadanand Chawan has admitted in para 2 of the cross-examination that the letter issued by the plaintiff to the Corporation for obtaining further commencement certificate for the construction of public parking building, was received by the Corporation and that the Corporation did not reply to the said letter. Para 2 of cross-examination is extracted hereunder:

> "2. On perusal of the file in my custody, I had seen that there is one letter issued by plaintiff to the corporation for obtaining further commencement certificate for the construction of public parking building. The letter at Exh.14 now shown to me was received by our corporation. The corporation did not reply to the said letter either or allowing of the said letter or of refusing the said letter till the 31st May 2011. After the 31st May 2011, the corporation did not reply to the said letter copy at Exh.14. Public Parking Building is of RCC. So far as completion of the RCC Slab at each floor, there should be interval of two to three weeks' time. In order to complete the RCC Slabs up to the 7th floor, reasonable time of 3 to 4 months is required. The corporation had received a reply issued by the plaintiff to the notice dt/29/011/2011 copy at Exh.25. It is true that our corporation had received the reply to the notice dt. 19/12/2011 copy at Exh.24."

60. In para 1 of the cross-examination, the witness has admitted that the said work in respect of 14 floors of the PPL building was following the approved and sanctioned plan of the Corporation. It was not the

case set up by the Corporation that the notice dated 7.5.2011 was illegal, and it did not conform to Form XVI as prescribed under DCR 6(4). The factum of the receipt of the notice has been admitted. The submission raised on behalf of Janhit Manch that notice dated 7.5.2011 is a doubtful document is belied by the record of the Corporation and the admission made by the witness of the Corporation. The notice dated 7.5.2011 was available on the file of the Corporation, but it was not replied. The Division Bench of the High Court while deciding PIL No. 43/2012 filed by Janhit Manch vide order dated 13.5.2013, has called for the inward register to verify whether the Corporation received the notice and the High Court had made following observations:

> "(l) The Respondent no.5 has contended that it had submitted a letter on 7th May 2011 under DCR 6(4) for further commencement certificate and the application having not been refused, deemed to have been granted. The Petitioners have laid heavy emphasis on the fact that the said letter purported to be of 7th May 2011 is undated, and therefore there is no question of deemed permission. It is true that the said letter is undated, but there is a receipt by the Corporation of having received the application on 7th May 2011. During the course of the hearing, the learned counsel for the Corporation produced the original inward register. We perused the said inward register and found nothing suspicious or out of the ordinary. There is an entry of 7th May 2011 as regards receipt of the application of the Respondent No.5, which seems to be made in the usual course. Admittedly this application is not decided by the Corporation. In the circumstances, we do not find that the submission made by the Respondent no.5 that it had deemed permission is without any substance. The Respondent no.5 has filed a Civil suit taking this contention in which there is an interim order passed in favour of Respondent no.5."
>
> (emphasis supplied)

61. It is apparent that the Division Bench of the High Court has seen the inward register also and there is a corresponding entry on 7.5.2011 as regards the acceptance of notice. It seems to have been made in the usual course. In PIL No. 43 of 2012 filed by Janhit Manch, no such plea was taken that the notice was not in Form XVI, and it was illegal. In First Appeal No.884/2015, the Corporation did not challenge the finding of the civil court, nor did it raise the ground that owing to the failure to submit a notice in Form XV, the letter dated 7.5.2011 cannot be treated as valid intimation and as such deemed permission did not accrue. The main ground raised in PPL was about FSI, and concerning public car parking proposal, pleadings were made in para 23 of the writ petition. In para 25 it was pleaded that commencement certificate dated 1.10.2010, permitted construction only up to the plinth level for public parking lot vide undated letter of Architect of respondent no.5 received by the Building Proposal Department of the Corporation on 7.5.2011, respondent No.5 through its Architect informed that the amended plan has been approved by their office, and have completed the work as per the approved plans, and sought further commencement certificate at the earliest. In para 26, it was pleaded that the Corporation did not respond to the letter. Paras 25 and 26 of the petition are extracted hereunder:

> "25. Since the C.C. dated October 1, 2010, permitted construction only up to the plinth level for Public Parking Lot, a further Commencement

> Certificate was required for the ground + upper floors above the plinth. By an undated letter of the Architects of Respondent No.5 received by the Building Proposal Department of the MCGM on 7th May 2011, Respondent No.5, through its Architect, informed that "The amended plan submitted by us has been approved by your office. Further, we have complied all the conditions of I.O.D. as well as amended plan, and we have complied work up to plinth as per the approved plans. You are therefore requested to kindly check the plinth and grant us further C.C. at the earliest. This letter significantly is undated, and as more particularly set out hereafter, it is evident that work on the plinth was completed. This was clearly a false contention as set out hereafter. Hereto annexed and marked as Exhibit "O" is a copy of the undated letter addressed by the Architect of Respondent No.5 to the Executive Engineer (B.P.) City – I.
>
> 26. The MCGM apparently did not respond to this letter. Based upon the alleged lack of response, though no inspection was carried out, Respondent No.5 now contends that it carried out construction above plinth level pursuant to Regulation 6(4). Significantly, on the date of this letter of its Architect, there was no revised MOEF permission for this Public Parking Lot, and Respondent No.5 was not entitled to construct without prior permission of the MOEF under the Environment Impact Assessment Notification, 1994. This EIA Permission was only subsequently obtained on June 8, 2011."
>
> (emphasis supplied)

62. It was not the case set up by Janhit Manch in the previous writ petition (PIL) that the notice was not in Form XVI, and the letter dated 7.5.2011 did not fulfill the requirement of Form XVI. Instead, it was admitted that it was received by the Corporation and was not replied to and that the Architect intervened to have the work completed as per the approved plan. In the special leave petition preferred in this Court against the decision of the High Court in PIL No. 43/2012, this ground was not raised, nor was it raised before the High Court in the PIL. In SLP [C] No.20279/2013 as against order dated 13.5.2013 which was decided on 11.3.2016, the following order was passed by this Court:

"Permission to file additional documents is granted.

Having heard the learned counsels for the parties, we are of the view that there is no live issue for adjudication in the present Special Leave Petition. The Special Leave Petition is disposed of accordingly. However, we make it clear that in the event it becomes so necessary, after receipt of the order passed by the Bombay High Court, it will be open for the petitioners to make a mention for recall of the present order."

63. On 15.1.2018, IA No.6 was filed in SLP mentioned above, and the following order was passed:

"I.A. No.6 IN SLP (C) NO.20279/2013

Upon hearing Shri Shekhar Naphade, learned Senior Counsel appearing for the applicants we are of the opinion that in view of subsequent developments and subsequent challenges which are pending before this Court it is not necessary to reopen and reconsider the present I.A. Therefore, the present I.A. (No.6) shall stand closed.

Special Leave Petition (Civil) No.10704-10705 of 2016, Special Leave Petition (Civil) No..... CC No.13523-13528 of 2016 and Transferred Case (Civil) No.271 of 2017 shall, consequently, be de-tagged and be listed before the appropriate Bench. All issues are kept open.

Office to post Special Leave Petition (Civil) No.10704-10705 of 2016, Special Leave Petition (Civil) No..... CC No.13523-13528 of 2016 and Transferred Case (Civil) No.271 of 2017 before the appropriate Bench on 22nd January 2018."

Thus, it was not considered appropriate by this Court to reopen the matter and reconsider it. Thus, all the issues were left open. They were only those raised earlier in the PIL by Janhit Manch. It is also pertinent to mention that in compliance of the order passed by the High Court on 13.5.2013, the Corporation has passed order on 12.9.2013, before filing the First Appeal in the High Court, in which the Commissioner of the Corporation has clearly held that in view of notice

dated 7.5.2011 as per DCR 6(4), the deemed permission came into effect on lapse of 15 days.

64. Though we have decided the plea on merits, however, it is apparent from the aforesaid discussion that it is not open to the parties, i.e., the principle of constructive res judicata bars the Corporation and Janhit Manch to take somersault and take a different stand in the subsequent litigation and all the available pleas, which could have been taken in previous civil suit and PIL, ought to have been raised, otherwise raising of them in subsequent *lis*.

65. It passes comprehension how Janhit Manch is raising the question now that the notice dated 7.5.2011 was not served upon the Corporation, whereas it has been admitted by it in the previous PIL that it was served but was not attended to by the Corporation. In the written statement filed by the Corporation before the city civil court, it is not denied, and its witness has admitted that the notice was received and it was not replied to by the Corporation. It is not open to the parties to take a different stand at different stages. In the instant matter, these questions cannot be taken up by Janhit Manch, and the Corporation has not come up in the appeal against the decision dated 13.5.2013 of the High Court and has complied with the order bypassing the order dated 12.9.2013. The Corporation is not before us in the appeal. It is

only Janhit Manch agitating the matter. Janhit Manch has preferred the special leave petition in this Court as against the impugned judgment and order of the High Court deciding the second PIL and SRUIL has come to this Court and not the Corporation. As against the subsequent decisions taken by the Corporation according to the impugned judgment and order, Janhit Manch is before us.

66. Because of the discussion above, we are of the considered opinion that firstly, the finding of the High Court concerning the illegality of the notice dated 7.5.2011 is not sustainable on merits. In our opinion, there was substantial compliance with Form, and the purpose of giving notice is only to enable the Commissioner to inspect and ensure that the construction raised is as per the sanctioned plan. There is admission made by the witness of the Corporation that the entire construction is as per the sanctioned plan and since the Commissioner failed to inspect after notice, thus deemed permission came into being; as such, it was open to SRUIL to raise the construction of PPL up to 16th floor. There was no illegality in the same.

67. Coming to the submission that construction up to the plinth level had not been completed by 7.5.2011 when the architect gave the notice. The notice was given about the PPL, which was received by the Corporation. It was, therefore, open to the Commissioner to inspect and

to ensure whether the construction work was done up to the plinth level, and it was as per the sanctioned plan. After that, to decide within 15 days of the notice whether to grant permission for further construction or to refuse it. Thus, when it was open to making inspection as provided in the notice, it having not been done by the Commissioner, it is not open to the Corporation to contend that the work has not been completed up to the plinth level, as it was open to verify the fact on the spot which was not done. There is nothing to doubt the claim of SRUIL for the reasons to be mentioned hereafter.

68. It is submitted on behalf of Janhit Manch that on 16.7.2011, a notice was issued to SRUIL, and an inventory prepared on 22.7.2011 in which it was mentioned that the work of PPL tower was in progress up to plinth, as per commencement certificate granted. Therefore, it is submitted that the construction of the plinth was not complete even on 22.7.2011. Our attention has also been drawn on behalf of Janhit Manch to report dated 11.11.2011 in which it has been mentioned that the work of the PPL is found to be carried out up to the plinth level. Corporation has issued a notice dated 29.11.2011 to SRUIL concerning the public parking lot. In the notice dated 29.11.2011, it has been mentioned that the construction has not been completed beyond the plinth level as such why the permission should not be revoked, whereas the inventory dated 14.12.2011 of the Corporation indicates that the

work up to 6th floor of PPL is carried out. On 14.12.2011, the Corporation has issued second stop-work notice. On 19.12.2011, notice under the MRTP Act was issued. It was mentioned that the work of construction of PPL tower, 1st to 6th floor (entire), and 7th to 9th floors (Part) is beyond CC granted. Thus, it was mentioned by Corporation that by 19.12.2011, up to 6th-floor work was complete and 7th to 9th floors were in progress; whereas in the order of the court dated 24.12.2011 which is 4 to 5 days after that, the fact is mentioned that the work has been completed up to the 9th floor. The Court granted the interim injunction because of the deemed permission, according to the notice dated 7.5.2011, to complete the remaining work.

69. It is pertinent to mention here that the witness examined on behalf of the Corporation Mr. Ajay Sadanand Chawan stated in para 2 of the examination quoted above that so far as completion of the RCC slab at each floor, there should be an interval of 2 to 3 weeks which is a correct statement. In order to complete the RCC slabs up to the 7th floor, reasonable time of 4 to 5 months is required. It is also pertinent to mention here that an affidavit has been filed on behalf of the Corporation on 4.5.2012. Para 4 of the affidavit filed by the Corporation is as under:

> "(v) I submit that another Stop Work Notice dated 16th July 2011 was issued by these respondents to respondents no.5 for carrying out the work by misrepresenting by way of showing amalgamation of leasehold and freehold plot, but the same was withdrawn on 11th November 2011 as the same was rectified by the Respondent no.5 and has given a

registered undertaking. The respondent, no.5, was also directed to deposit a sum of Rs. One Crore with MCGM. The Respondent NO.5 has also agreed to convert their freehold land to a leasehold land with the lease of 30 years as against the existing lease of the leasehold land of 999 years. The said order is not in respect of the construction of public parking building, which to subject matter of the present petition."

(emphasis supplied)

70. It has been clearly admitted that show cause notice dated 16.7.2011 did not relate to PPL, and it was withdrawn on 11.11.2011, and it related to other parts of the plot of SRUIL. In view of the aforesaid clear admission it is apparent that there is misrepresentation made by Janhit Manch that this show cause notice related to PPL, in fact, same is not related to PPL, as admitted by the Corporation in its affidavit; and secondly when it has been mentioned in the notice dated 11.11.2011 that the work up to plinth level only was complete, the aforesaid fact was wrongly mentioned as in the notice dated 14.12.2011, issued by the Corporation after few days, it was mentioned that the work up to 7th floor had been completed. It passes comprehension when on 14.12.2011, the Corporation mentions that the work had been carried out up to the 6th floor, and on 19.12.2011, it has also been mentioned that it has been completed up to 6th floor, and from 7th to 9th storey was in progress, how overnight RCC construction of the various floors could have been completed without lapse of 2 to 3 weeks for each of storey which is a minimum period, as admitted on behalf of the Corporation by its witness also. Thus, obviously, the work

up to the plinth level had been carried out by 7th May 2011, the date on which notice was given and deemed permission came into force on the expiry of 15 days. Otherwise, 7th to 9th floors would not have been constructed by 19.12.2011. After that, the total days available to SRUIL were 210 till 19.12.2011. Thus, construction up to the 9th floor is bound to take at least 5 to 6 months even if it is done at a fast speed, and it also included the monsoon season, which also intervened in-between when work is slow or halted. It passes comprehension when on 11.11.2011; it was mentioned that work was only up to the plinth level, how within 35 days, a total of 9 floors could have been constructed, one floor every 3 days. Thus, there was something grossly amiss about what was happening on the part of the Corporation, and absolutely wrong facts had been mentioned in the inventories, which are contradicted by the facts mentioned in the notice for demolition and also by the minimum time required for construction of each floor. Thus, no reliance can be placed on the inventory dated 22.7.2011, and stop work notice dated 16.7.2011 was not related to PPL. Thus, it cannot be said that the work had been carried out in violation of stop-work notice dated 16.7.2011 as submitted on behalf of Janhit Manch. The submission has no legs to stand, and is hereby rejected.

71. In the inspection report dated 22.7.2011, it has not been mentioned what is the name of the representative of SRUIL who was

present on the spot. Nor is it mentioned in the subsequent report of November 2011. The Corporation has falsely mentioned in the notice dated 29.11.2011 that the work of PPL had not been carried out beyond the plinth level on 29.11.2011. How within 19 days, construction of 9 storeys could be completed, can only be explained by some superpower, and it appears to be a fairy tale. It appears that anyhow or somehow, the Corporation sat over the intimation dated 7.5.2011. The Commissioner did not inspect the plinth of PPL thereafter, and concerning the residential portion, the stop-work notice dated 16.7.2011 had been issued. Notice was withdrawn on 11.11.2011. After that, the notice was issued concerning PPL by mentioning patently wrong facts on 29.11.2011 for reasons best known to the Corporation. We are constrained to observe that the case reflects some severe kind of rivalry and distortion of facts. There was an attempt made to ensure that the building is delayed or is demolished by way of filing the PIL one after the other, taking different grounds at different stages, many interventions have been filed. The Human Rights Federation had also attempted to intervene in this Court. Though earlier, a PIL, which was filed by it on 9.5.2014, was dismissed as withdrawn on 7.11.2014 to approach an appropriate forum by way of filing appropriate application/representation. The said intervenor also filed an SLP before this Court challenging the impugned judgment and orders dated 22,25,27.1.2016 passed by the High Court. This Court has rejected the

prayer, dismissed the SLP filed by the petitioner to avail of any other remedy. After that, the intervention application has been filed. The intervenor cannot enlarge the scope of PIL. We have no hesitation in rejecting the intervention application filed on behalf of the said Federation.

In re: whether construction of PPL is limited up to 4 upper floors because of Circular dated 22.6.2011?

72. It is submitted on behalf of Janhit Manch that as per DCR 33(24) introduced w.e.f. 20.10.2008, "public car parking lot scheme" was brought into effect. Thereunder for a PPL constructed on a plot of land and handed over free of cost to the Corporation, the plot owner/developer was entitled to receive incentive FSI *inter alia* to the extent of 50% of the area of the PPL handed over by him. The unrestricted construction of PPL followed under the said Regulations.

73. It was submitted on behalf of Janhit Manch that the Government had issued a Circular on 22.6.2011 to limit the PPLs to ground plus four upper floors plus two basements. Thus, in the light of the Circular mentioned above, notice has been issued by the Corporation for the demolition of floors and why commencement certificate should not be modified or revoked. Notice was issued on 29.11.2011. The counsel has submitted that the notice dated 16.7.2011 was also issued. The Corporation pursuant to a direction issued in PIL No. 43/2012 passed an order on 12.9.2013 relying upon the Circular that construction from

5th to 15th floors of the PPL was not in consonance with the Circular of 2011. Mr. Ahmadi also submitted that the draft amendment was proposed to amend Regulation 33(24) on 19.3.2012. SRUIL had not submitted any modified plan despite the direction of the Corporation. Later on, an amendment had been incorporated on 6.8.2014 in DCR 33(24), restricting the height as mentioned in the Circular. As such, construction is illegal, and its regularisation could not have been ordered.

74. The submission is untenable. We have gone through the various orders passed by the High Court in which aforesaid circular of 2011 has been quashed as the Development Control Regulations, 1991 are statutory in nature and it was not open to issue any direction which is executive in nature, either by the State Government or the Corporation in derogation to the statutory provisions. When Regulation 33(24) was in vogue, development permission had been granted to SRUIL in the year 2010. The provisions of DCR 33(24) containing no restriction on the number of floors of PPL, came into force on 20.10.2008. Development permission has been granted on 18.6.2010 after 1 year 10 months and thereafter commencement certificate had also been granted on 1.10.2010 with respect to PPL and notice under which deemed permission accrued under DCR 6(4) had been served on 7.5.2011 by the Architect. Once deemed permission accrued to SRUIL on lapse of

15 days, the construction had been completed in 2012 before the amendment was made in the Regulations in 2014. The order of regularisation was not necessary because of deemed permission. Thus, in our opinion, the High Court has rightly held that the decision of the Corporation applying the said Circular was impermissible as it did not have the force of law, and it stood quashed by the High Court in other cases. Thus, the submission made by Mr. Ahmadi stands repelled.

75. It could not be said that the Circular of 2011 was supplementary to DCR 33(24). It was clearly in derogation to it and could not have prevailed over a statutory provision. It was not necessary to question it in the present petition by SRUIL as it has no force of law and has been rightly quashed by the High Court in other cases.

In re: whether the sanction of the PPL building by way of an endorsement of commencement certificate is illegal?

76. Mr. Ahmadi also submitted that initially, IOD was granted on 24.1.2005. After that, there was an amendment to the residential building on 12.7.2005, and again, there was an amendment of the plan for construction of a residential building on 7.11.2007, 2.2.2009, and 11.8.2009. SRUIL amended the plans from time to time for a residential building in question. On 8.2.2011, the plan for residential building was sanctioned for 56 floors. Because of the aforesaid, it is submitted on behalf of Janhit Manch that it is a case of departure of substantial

nature from the initially sanctioned plan, DCR 6(5) governs the deviation during construction. Even if the deviation is within the ambit of Regulation 6(5), the sanction is necessary under sections 337 and 346 of the Corporation Act.

77. When we examine the submission, it is apparent that the development permission has been granted. The residential building plan has been approved. The commencement certificate was endorsed from time to time. Amendment was made on 8.2.2011, and commencement certificate was again endorsed on 8.2.2011 under DCR 33(24). The PPL policy came into force in 2008, and its development plan was sanctioned in 2010, and commencement certificate had been granted on 1.10.2010. The reliance has been placed on Regulation 6(5), the same is extracted hereunder:

> "6. Procedure during construction:-
>
> (5) Deviation during constructions:— If during the construction of a building, any departure of a substantial nature from the sanctioned plans is intended by way of internal or external additions, sanction of the Commissioner shall be necessary. A revised plan showing the deviations shall be submitted, and the procedure laid down for the original plans heretofore shall apply to all such amended plans. Any work done in contravention of the sanctioned plans, without prior approval of the Commissioner, shall be deemed as unauthorised."

78. It is apparent from the aforesaid Regulation 6(5) that the same is applicable during the construction of the building, and any departure of substantial nature from the sanctioned plan can be allowed by the Commissioner. The provisions of section 337 do not restrict the ambit

and scope of Regulation 6(5). Initial permission had been obtained for development, and during construction, further variation could have been made. The provision of section 346 is of no help as, at no point in time, the development plan had been disapproved. The question of modifying disapproval is not germane. The submission raised by Mr. Ahmadi is held to be devoid of substance and cannot be accepted.

In re: Refuge Area

79. Janhit Manch submitted that the order dated 3.8.2016 passed by the Municipal Commissioner concerning the refuge area is illegal. It was further submitted that in the refuge area, occupants could take refuge and also can be rescued by the fire officers. Access to refuge area has been allowed, which is absurd that a disabled person or an older person will wait outside the flat, who stay at the 56th floor of the building to be rescued by the fire officer in case of a fire in the building, access to the area is difficult. In the case of senior citizens, disabled persons, small children in the building, it defies common sense to provide for refuge areas at such height, which are almost commensurate with the extent of the habitable area shown and included in the FSI. It was further submitted that the refuge area sanctioned by the Corporation in the order dated 31.8.2016 is a whopping 39,000 sq.mtrs against the habitable area of 54715.19 sq.mtrs., that is almost 60% of the habitable area. The said areas have also been sold to flat buyers under the guise

of decks/terraces and are, in fact, a device to get the additional habitable area for sale to flat buyers under the guise of refuge area. This point was agitated in PIL No.43/2012. The High Court has disposed of the said PIL by observing that the refuge area was excessive. It is urged that the Corporation has now accepted the area was excessive. There was a norm of 4%, and now Corporation has said that it has been now reduced to 23%. Janhit Manch has further submitted that the High Court in the impugned judgment observed that the Commissioner should recalculate the refuge area following the National Building Code (NBC). It is also submitted that in the order dated 31.8.2016, it has been observed that NBC cannot be applied in toto as the refuge area is already constructed. As the corporation has granted permission, refuge area has now been reduced to 23% and structural columns can be allowed free of FSI in the permissible area which is illegal, and four full refuge areas in one floor are not necessary and cannot to be taken as refuge area as they cannot be used in case of fire. It is submitted on behalf of Janhit Manch that the decision of the Commissioner is illegal and entirely contrary to DCR 44(7), which states that the refuge area over 4% of the habitable area has to be counted in FSI. Reliance has been placed on DCR 43(1), which provides that Chapter (iv) of NBC, 2005, shall apply unless the matter is otherwise provided. It is submitted that the reasoning employed by the Commissioner is perverse. On each floor, there are 4 flats of 4

bedrooms. Therefore, the maximum occupancy per flat can be estimated to be about 6-7 persons or at best 10 persons per flat, which for 4 flats will aggregate to 40 persons. Thus, the occupancy load of 322 persons per floor, to say, is perverse and arbitrary. There is an arithmetical mistake done while calculating the area. It is further submitted that as refuge areas have been provided for four flats, in case of an emergency like a fire, the fire brigade will find it impossible to access 144 different areas at the same point of time. It may not be in the interest of inhabitants. It is further submitted that the Chief Fire Officer has permitted to provide glass curtain walls on all sides of the building at refuge floors, regarding the individual refuge floors on the four floors of the building. The CFO has permitted glass curtain walls in the rest of the building, which makes the 144 refuge areas inaccessible and unusable as refuge areas. The areas are shown as refuge areas, and fire escape passages have been sold as decks/terraces to flat purchasers and merged with the flats as usable areas. The purpose is to create a balcony over the terrace. It was submitted that merely because construction has been completed, no equities can be claimed.

80. It is submitted on behalf of SRUIL that the vires of DCR 2(13), 2(42), and 2(44) have not been questioned. The regulations described above contain a clear and unambiguous provision which was in force at the relevant time. It is also submitted that Regulation 44(7) is

significant in this regard. The only requirement is the minimum area of 15 sq.mtrs of a specific width. There is no other restriction on the grant of refuge area. Regulations in respect of fire and safety are not exhaustive, and CFO is an expert authority to consider the requirement of high-rise buildings. It is also submitted that Regulation 44(5) makes it mandatory for high-rise and special buildings and exempts them from FSI calculations under DC Regulation 35(2)(d). It is further submitted that in the NOC granted by the CFO vide order dated 30.12.2006, it has been directed to provide requisite area as approved in the plan. The recommendation made by the CFO is the recommendation of an expert, which has expressly been recognised in DSR 5(ii). The Circular dated 21.9.1993, which is issued by CFO, provides for the size of the refuge area with the minimum requirement of 4% of the total built-up area and the size of each refuge area. The built-up area has been defined as the total built-up area. The circular is not a statutory circular and does not amend the DC regulations. Regulations are in the form of delegated legislation, as observed in *Pune Municipal Corporation & Anr. v. Promoters & Builders Association & Anr.* (2004) 10 SCC 796. Directions issued by the Urban Development Department dated 2.12.1993 required the Municipal Commissioner to withdraw the guidelines issued by the CFO as they were not in conformity with the DC Regulations. It is urged on behalf of SRUIL that DC Regulations cannot be amended except by following the procedure under the Town Planning Act under

section 37. Executive Circulars cannot amend the regulations as observed in *Godrej and Boyce Manufacturing Co. Ltd. v. State of Maharashtra & Ors.*, (2009) 5 SCC 24. Thus, relying on circular, the submission that the refuge area as recommended by the CFO and the corporation is excessive and contrary to DC Regulations is erroneous and incorrect.

81. The determination of the refuge area was done by the CFO, who is the competent and technical authority. The decision of the CFO has been revisited by 3 successive Commissioners and has been confirmed while approving the sanctioned plan merely because some apprehension was raised about possible misuse of the refuge area. It is impermissible to revisit the said decision. SRUIL submits that while order dated 31.8.2016 allowed free of FSI of 16262.06 sq.mtrs, that is the area at the external periphery and has further directed that this should be mentioned in and prominently displayed in the building. In *Indore Municipal Corporation & Anr. v. Dr. Hemalata & Ors.*, (2010) 4 SCC 435, possible misuse of the refuge area had been considered, and the court observed that based on possible misuse, the planning permission cannot be questioned nor can be revoked. This Court has observed:

> "14. The fact that the sanction is for a residential-cum-commercial purpose is not disputed by the respondents. They have never claimed that they will use the building contrary to the permissible user. Even before the completion of the construction and obtaining of occupation

> certificate, without issuing a show-cause notice alleging such misuse, an order has been issued alleging a violation of the permitted user. There is no occasion for the second appellant to assume that the respondent is likely to violate the sanctioned user. After the issue of occupancy certificate, if there is any violation of sanctioned use, it is always open to the Municipal Corporation to take appropriate action in accordance with law at that stage. The finding in the order dated 11.4.2000 that there has been a violation of the Rules in this behalf, is unwarranted and at all events premature."

82. It is further submitted on behalf of SRUIL that Maharashtra legislature has passed an Act known as the Maharashtra Fire Prevention & Life Safety Measures Act, 2006, which has received the assent of the President on 5.2.2007. Section 3 of which mandates owners to provide for fire prevention and life safety measures and also prescribes a stringent penalty for non-observance of such conditions. A Director or Chief Fire Officer has been empowered to prescribe measures for fire prevention and life safety measures. It is further urged that the National Building Code is in respect of the fire protection requirement of high-rise buildings (15 meters and above). As per clause C-1.11 provisions contained in clause 4.12.3 shall apply for buildings except for multi-family dwellings, refuge area of not less than 15 sq.m. shall be provided on the external walls. Clause 4.12.3 of the National Building Code does not stipulate 4% as a requirement of the refuge area. Even if the NBC provides that anything in excess of requirement is to be counted in FSI and that refuge area in excess of 4% is to be counted in FSI, it is submitted that it would require amendment of

DCRs 35 and 44(7) by following the procedure under section 37 of the MRTP Act.

83. When we consider the order that has been passed by the Municipal Commissioner pursuant to the impugned judgment passed by the High Court, re-determining the refuge area, it has been reduced to 23% only. The CFO has considered the higher requirement of building and providing a separate refuge area for each of the flat that is to say that four refuge areas on each floor, one attached to each flat, has been approved by the CFO and the corporation. The permission was granted way back in the year 2006 and the inspection note dated 11.11.2011 indicates that the construction of the residential building had been carried out up to a height of 180 meters *i.e.*, 36th floor, the permission was granted in 2006 and commencement certificate has also been issued from time to time as mentioned above. The construction of the residential building had been raised to the 36th floor in 2011, and Janhit Manch awakened the first time to file PIL No. 43/2012 in the High Court. Thus, it was a belated petition. For fire safety, with respect to the refuge area, the view of the Fire Safety Officer has to prevail not *ipse dixit* whether it would be appropriate to have more area or the lesser cannot be said to be acceptable which appears to be a hang-over, the objection appears to be more the outcome of some grudge harboured by unknown hands behind Janhit Manch.

84. The objections have been raised on behalf of Janhit Manch concerning the height of service floor and elevation features like flower beds, ornamental projection, servant toilets, and structural columns concerning which the Commissioner, Municipal Corporation has given in extensive details the reasons for the decision rendered by it. This Court is not an expert in the field of determination of refuge area and in our opinion, when Corporation and Chief Fire Officer had granted permission, it cannot be said that any tremendous public purpose is going to be served by entertaining the belated objections which appear to be the outcome of some business rivalry between warring groups. We find the order passed by the Municipal Commissioner dated 31.8.2016 with respect to refuge area cannot be said to be illegal or arbitrary in any manner in the facts and circumstances of the case, mainly due to the fact that permission had been granted by the CFO as well as the corporation which has been questioned belatedly. The order dated 31.8.2016 is upheld as we are not inclined to interfere on the aforesaid grounds in the peculiar facts and circumstances of this case.

In re: order of the Additional Municipal Commissioner dated 10.11.2016 and the notice under section 51 of the Act :

85. It is submitted on behalf of Janhit Manch that show-cause notice dated 29.11.2011 was issued under section 51 of the MRTP Act. A reply was filed on 14.12.2011 in which stand was taken that provisions of

section 51 are not applicable, and despite the notice, SRUIL did not stop the work as such the notice for demolition was issued on 19.12.2011. Ultimately, pursuant to the direction issued in PIL No. 43/2012, it was decided by the Municipal Commissioner on 12.9.2013 that PPL above 5th to 15th floors was not in consonance with the circular of 2011. Thus, no incentive FSI would accrue. It was submitted that the corporation took the stand that no decision was pending on show-cause notice dated 29.11.2011, as stated in the affidavit dated 26.2.2014. The High Court in the impugned judgment held that the Commissioner was required to re-work the FSI; hence, SRUIL ought to have submitted the modified plans. As SRUIL submitted no fresh proposal for development permission, the application for regularisation was not in compliance. On 10.11.2016, the Additional Municipal Commissioner passed an order deciding the show-cause notice dated 29.11.2011 and held that the construction of the PPL had substantially progressed, and as such, the entire PPL can be regularised, is contrary to law.

86. We have held there was deemed permission for PPL under DCR 6(4) as per notice of Architect dated 7.5.2011; thus, the submissions raised cannot be accepted. Moreover, it is not necessary to go into the question of whether the notice dated 29.11.2011 survives or not for the decision, as we have held that there was deemed permission. Thus,

there was no question of regularisation of the PPL. The submissions are devoid of substance and as a result of this repelled.

87. We have not accepted the finding of the High Court concerning deemed permission as to PPL. Thus, the findings recorded in the judgment and order and the submission raised on that basis by Janhit Manch, cannot be said to be sustainable. The consequent order of the Corporation in that regard falls.

88. We place it on record that we have examined the matter on merits, notwithstanding that we are not satisfied with the bona fides of PIL, as the litigation has a chequered history and has several rounds. Hence, we ignore the aforesaid aspect.

89. In the circumstances, we have no hesitation in setting aside the order of the High Court in part and also set aside the finding recorded by the High Court that no deeming permission accrued under Regulation 6(4) of Development Control Regulations, 1991. In our opinion, deemed permission accrued, and concerning the determination of refuge area as per order dated 31.8.2016 passed by the Municipal Commissioner, no interference is called for. Order dated 31.8.2016 passed by the Municipal Commissioner regarding the refuge area is upheld. Petitions filed by Janhit Manch – PIL [L] No.133/2015, T.C.

No.271/2017 and T.C. No.6/2018 deserve dismissal and are, as a result of this, dismissed.

90. Let the Corporation take over PPL and proceed further to decide concerning 13 floors, i.e., 44 to 56 floors of residential building within one month from today.

.....J.
(Arun Mishra)

New Delhi;
October 24, 2019.

.....J.
(Vineet Saran)