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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 95 OF 2023**

SHREEJI REALTY,
A sole proprietary concern of Bhavesh
Nandani, an Indian Citizen, having his
address at Room No. 4, Motiwala Mansion,
19, Nadirshah Sukhiya Street, Fort, Mumbai
400 001.

...Petitioner**~ VERSUS ~**

- 1. BRIHANMUMBAI MUNICIPAL CORPORATION,**
a statutory corporation constituted
under the Mumbai Municipal
Corporation Act, 1888, having its office
at Mahapalika Marg, Opp C S M T,
Mumbai 400 001.
- 2. THE MUNICIPAL COMMISSIONER,**
Brihanmumbai Municipal Corporation,
having his office at Mahapalika Marg,
Opp C S M T, Mumbai 400 001.
- 3. THE CHIEF ENGINEER
DEVELOPMENT PLANNING,**
Brihanmumbai Municipal Corporation,

having his office at Mahapalika Marg,
Opp C S M T, Mumbai 400 001.

4. **THE CHIEF ENGINEER
DEVELOPMENT PLANNING,**
Brihanmumbai Municipal Corporation,
having his office at Mahapalika Marg,
Opp C S M T, Mumbai 400 001

5. **MUMBAI HERITAGE
CONSERVATION COMMITTEE,**
having its office at MCGM Head Office
Annex Building, Mahapalika Marg,
Opp C S M T, Mumbai 400 001

...Respondents

APPEARANCES

FOR THE PETITIONER	Dr Abhinav Chandrachud , with <i>Sanjay Kadam, Sanjeel Kadam, Soham Salvi i/b Kadam & Co</i>
FOR RESPONDENTS BMC	Mr Joel Carlos, with Pooja Yadav i/b <i>Sunil Sonawane,</i> Mr Vitthal Jadhav, Architect, <i>MHCC present</i>

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 30th August 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** There is an affidavit in reply from page-142 of Respondent Nos. 1 to 4. Hence, Rule is made returnable forthwith and the Petition is taken up for final disposal.

2. The Respondent Nos. 1 to 4 are the Municipal Corporation of Greater Mumbai (“**MCGM**”) and various authorities or officers. Respondent No. 5, added by a relatively recent amendment is the Mumbai Heritage Conservation Committee (“**MHCC**”). The Petitioner is a proprietorship of one Bhavesh Nandani. The firm is a real estate developer.

3. The subject of the Petition is the proposed redevelopment by the Petitioner of a property in Mumbai’s Fort area. This stands on CS No. 486, 487, 488, 489, 490 of the Fort Division. Altogether, the plot is 323.57 sq mts. It stands at the junction of the Barbar Lane (Nadirshah Sukhiya Street) and Pitha Street. There are buildings on this property. It is not in dispute that the location of the property falls in Serial No. 633(6) of the list of Heritage Sites and Heritage Precincts as formulated under the applicable Development Control Regulations. This is known as the Fort Heritage Precinct.

4. The prayer in the Petition is first for a certiorari to delete and strike down Condition 38 in the development permission known as the Intimation of Disapproval (“**IOD**”) dated 29th December 2021 at Exhibit “M” to the Petition granted by the MCGM for the redevelopment of this property. The second prayer is for a mandamus directing the MCGM to issue a complete Commencement Certificate (“**CC**”) and further permission including an Occupation Certificate

(“OC”) for the new building proposed on this property without reference to and without requiring a No Objection Certificate (“NOC”) from the MHCC.

5. The development proposed is under the Regulation No. 33(7) of what is called the Development Control and Promotion Regulations for Greater Mumbai 2034. There is no dispute also that the Petitioner submitted plans for approval for the construction of a new building of 69.90 meters in height or that the MCGM approved this proposal on 29th December 2021 vide Exhibit “M”. However, while doing so it imposed the impugned Condition 38, that the Petitioner would have to submit a NOC of the MHCC. The Petition has been amended and there is also now a prayer to set aside the Municipal Commissioner’s order of 27th December 2022. A copy of that order is at page 136 at Exhibit “R”. That order demands that the Petitioner approach the MHCC. The reasoning is that under Regulation 52 of the DCPR 2034 where the proposed redevelopment exceeds 32 meters in height, a special permission from the Commissioner is to be obtained and, while doing so, the Commissioner may take into consideration any guidelines regarding listed precincts. The letter clearly says that the Municipal Commissioner has granted this permission but made it subject to a MHCC no objection before granting a CC. The letter says that the redevelopment has to be “of heritage significance worthy of recognition and conservation”.

6. To appreciate the background to this, we need to go back to the previous development regime of the Development Control

Regulations, 1991. These replaced the previous 1984 development Control Rules. After the DCR 1991 came into force in February 1991, by an amendment of 21st April 1995, DC Regulation 67 came to be added. This was known as the Heritage DCR.

7. Very broadly speaking, the Heritage Regulations had four distinct features. *First*, it introduced a series of regulations or restrictions on development of what were called heritage buildings and structures. *Second*, there was a grading of these structures into Grade-I, Grade-II, Grade-III and precincts. *Third*, it provided for the various development permissible in each Grade. *Fourth*, there was a long list in a tabular form of buildings across the city. The grading or classification of individual structures is easily understood.

8. This very building, i.e., the High Court building itself, is listed as a Heritage Building as are many of the surrounding buildings such as the University, the Institute of Science, the Churchgate Railway Station, Chhatrapati Shivaji Maharaj Terminus and so forth. Some buildings are classified as Grade-I and their definition in the 1991 DCR is of buildings and precincts of national or historical importance embodying excellence in architectural style, design, technology and material usage or which may be associated with a great historical event, personality, movement or institution. These are said to be landmarks in the city.

9. Grade-II includes buildings or precincts of regional or local importance with special architectural or aesthetic merit or cultural or historical value although of a lower Grade or order than Heritage

Grade-I. These are local landmarks that contribute to the image and identity of the city and may be the work of master craftsmen or models of proportion and ornamentation or designed to suit a particular climate. Within Grade-II, there are some small sub-grades such as Grade-IIA, Grade-IIB but we are not concerned with those.

10. Grade-III is said to be of importance for the townscape. These are said to evoke architectural, aesthetic or sociological interest though not as much as heritage Grade-II. They determine the character of a locality and may be representative of lifestyle of a particular community or region and may also be distinguished by a particular setting on a street line or special character of the façade and uniformity of height, width and scale.

11. The DCR defines the different objectives for each Grade. Obviously those in Grade-I require the most careful preservation. Those in Grade-II are available for construction and require intelligent conservation. Grade-III deserves protection of unique features and attributes. Then there is a detailing of these permissible scope of changes. No changes are permitted in the exterior or facade or even the interior of Grade-I buildings unless necessary to protect, strengthen or prolong the life of the building. Only the most minimal and absolutely essential changes are allowed. Separate provisions are made for development of Grade-IIA & IIB buildings. For Grade-III, external and internal changes and adaptive reuse is generally allowable. Changes can include extensions, additional buildings in the same compound or plot provided there is a harmonisation and not a

detraction from the heritage building precinct. There is a procedure to be followed.

12. The Development Control and Promotion Regulations for Greater Mumbai 2034 or DCPR 2034 carried forward the heritage regulations and the heritage lists. A revised list came to be published on 31st July 2012 proposing additions and deletions and changes in the grading. There were public suggestions and objections. Predictably some writ petitions came to be filed. All these writ petitions were admitted and, while doing so, the High Court stayed a Circular of 14th August 2013 which directed that all development proposals including repairs, demolitions, etc. in precincts in the revised list be referred to the MHCC. Then, on 3rd February 2014, this Court passed an order that the reference to the MHCC was necessary only if in a precinct a building was of Grade-I or of Grade-II classification.

13. Pausing briefly for a moment, we note that the Fort Precinct is not the only one in the city. There are many others such as Kotachiwadi, Banganga, Bandra Village and so on. The old Regulation 67 of the DCR 1991 ultimately carried forward to Regulation 52 in the DCPR 2034 for heritage conservation. A copy of this regulation is annexed to the memo of Writ Petition at Exhibit "D" from page 77. It falls in Part X, captioned 'special provisions'. We are here concerned with Clause 9 of DCR 52 of 2034 which deals with the grading of listed building/sites and listed precincts. We are told that Grade-III includes buildings *and precincts* of importance for townscape etc. But a precinct now has a separate definition, i.e., as

being an area of heritage value and cultural significance. Within a specified boundary such an area may possess a setting reminiscent of significant urbanscape/townscape attributes and comprising a number of buildings and spaces within a structure or streets or roads and other landscapes and qualifies to have cultural or heritage significance worthy of recognition and conservation. The objective in sub-clause (b) is for sensitive development in terms of mass, scale, setting and require conservation of heritage and cultural significance. The same tabulation also says in the caption of procedure that minor and structural repairs are to be permitted without insisting on a NOC of MHCC. But sub-clause (b), which is the contentious clause, and which we find at page 85 along with sub-clause (c) at page 86 says this:

“(b) In case of reconstruction or redevelopment of buildings in heritage Precincts, height up to 32 m. shall be permitted by Commissioner. If the height of the building to be reconstructed/- redeveloped exceeds 32 m., special permission from the Commissioner may be obtained, who may take into consideration guidelines if any in respect of listed Precincts.

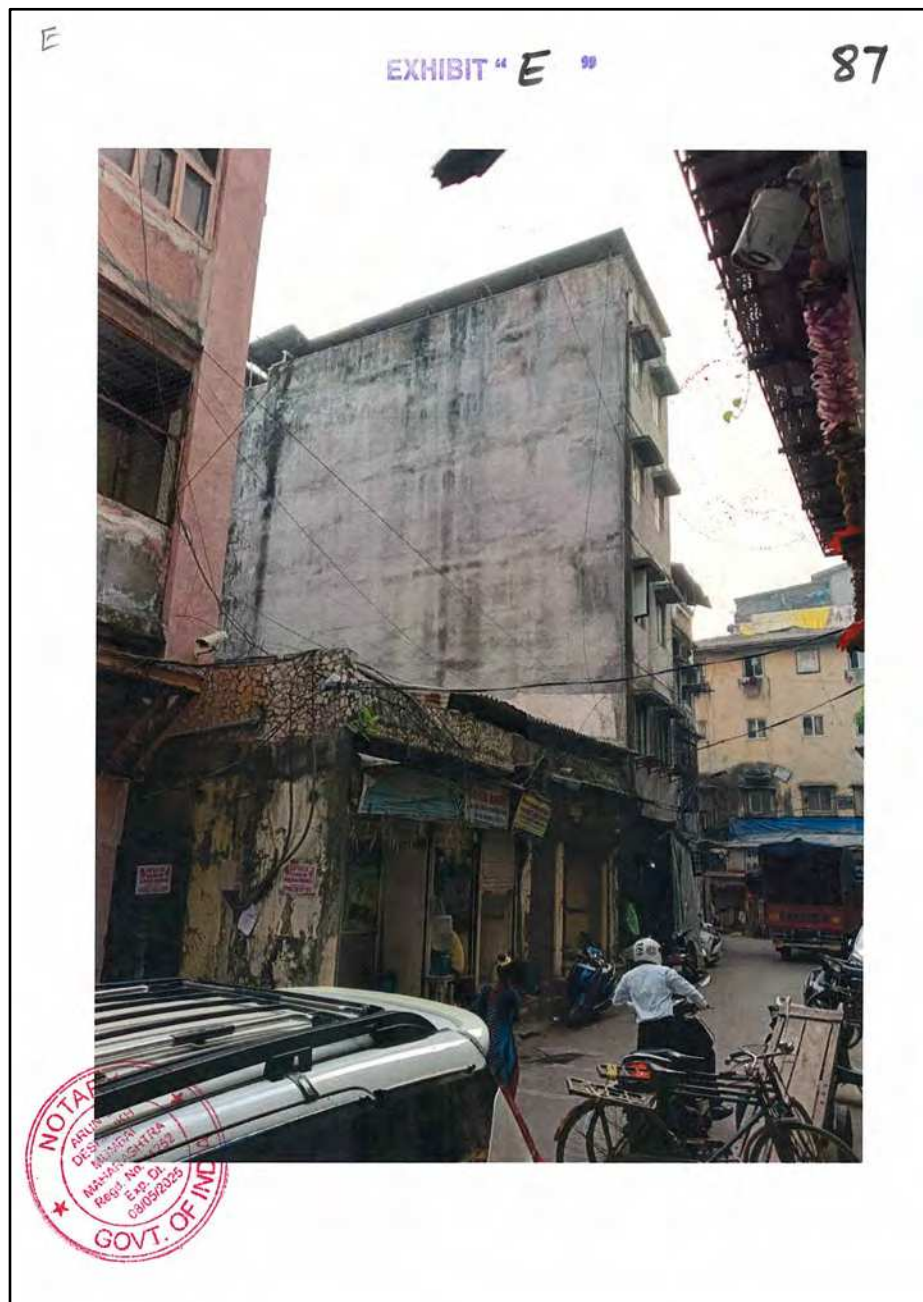
(c) However, before allowing demolition of a Precinct building/structure, complete documentation of faced elevations/material specifications, detailing etc. should be prepared by the owner through an architect and shall be submitted to approving authorities along with any reconstruction/redevelopment proposal so that cognizance of any special features etc. can be taken while finalising the design/elevations of the new building. It shall be ensured that external appearance, elevation shall be in harmony/- consonance with the characteristics of listed Precinct.”

(Emphasis added)

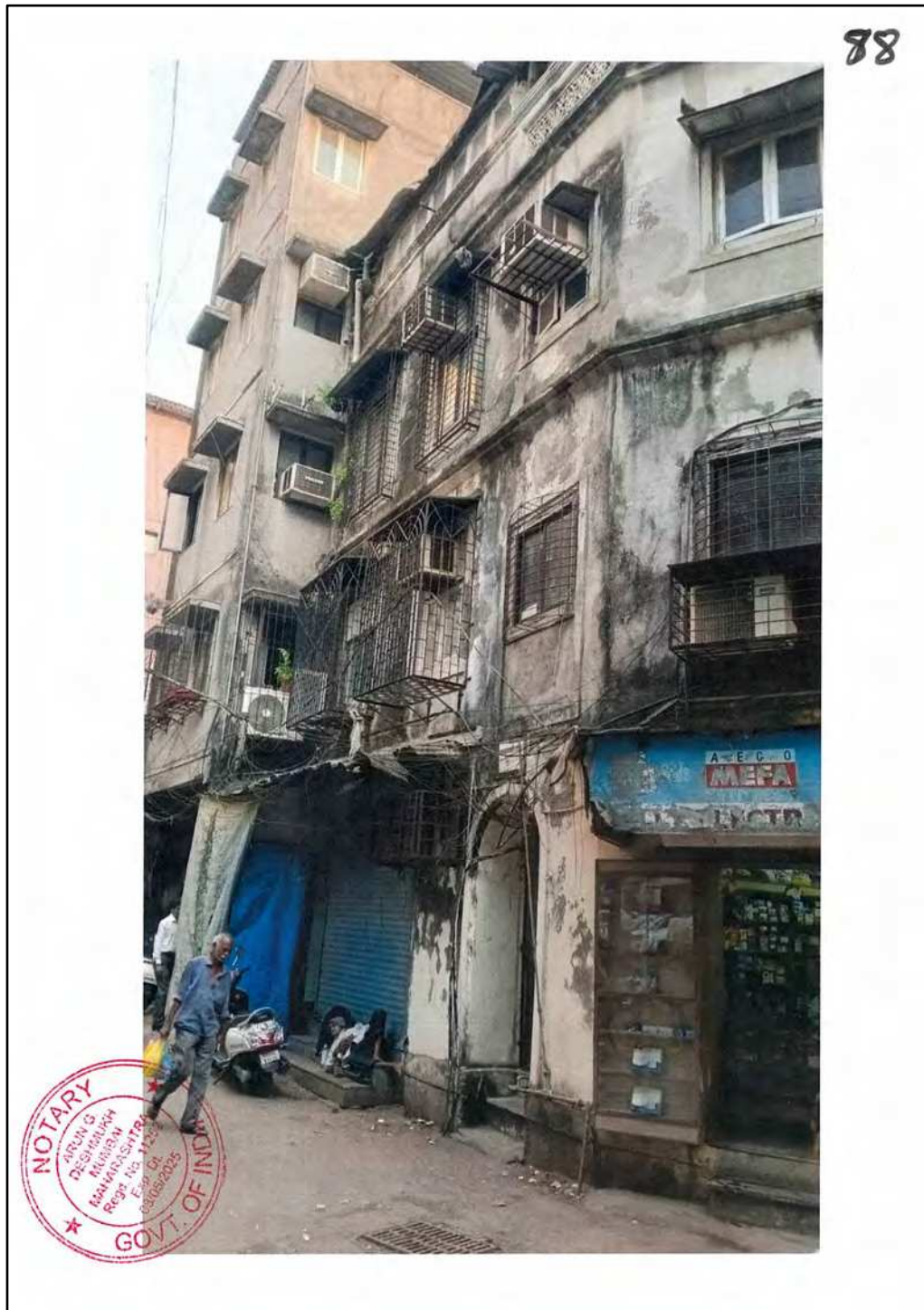
required and was given, there is no reason for it to be denied to the Petitioner's development literally across the street. To complete this aspect of the matter, we reproduce Exhibit "P-1" below.

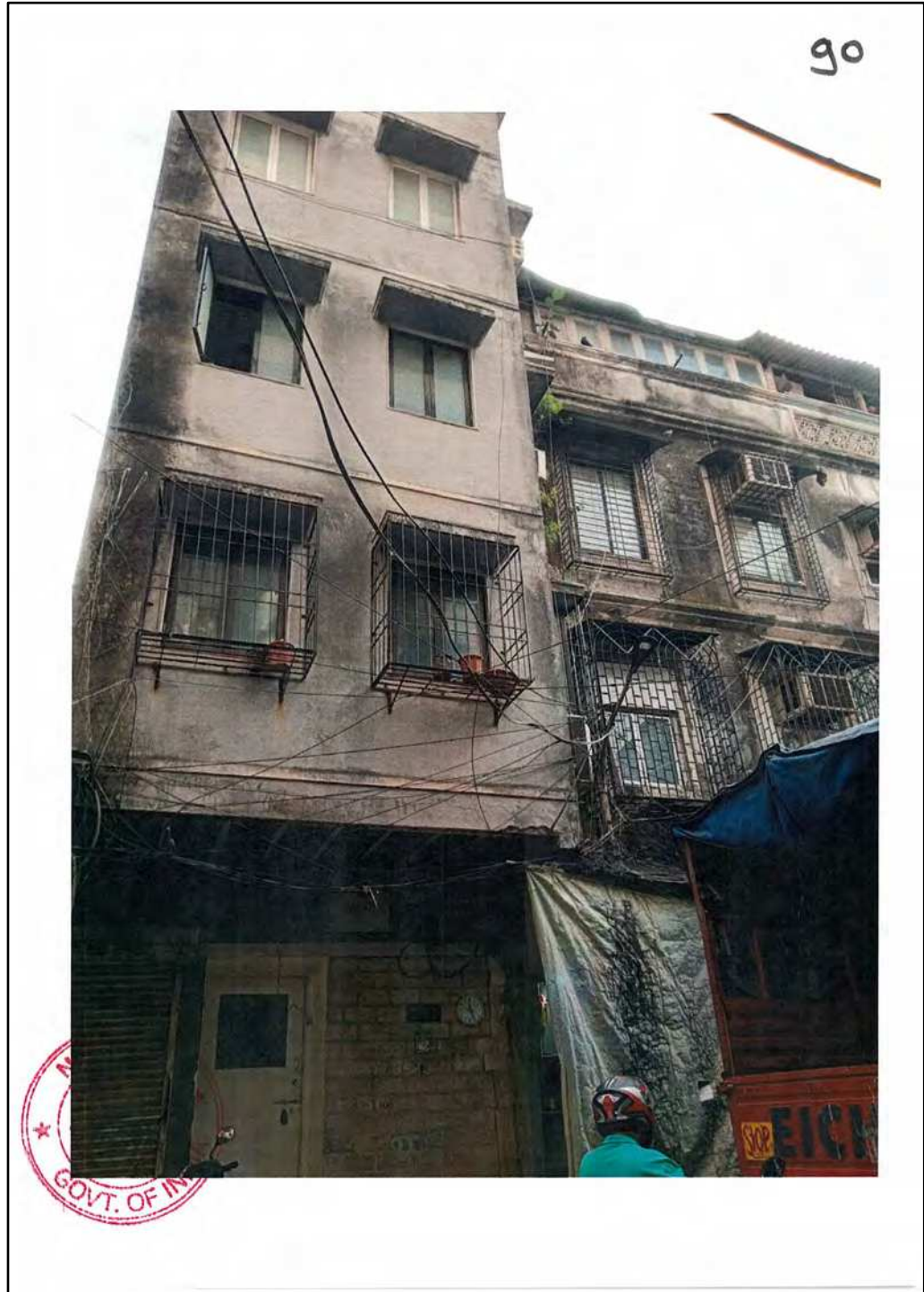


17. Dr Chandrachud for the Petitioner now invites our attention to Exhibit "E" which are images of the Petitioner's building. This, he submits, and we must say that from the photographs that we agree, is a structure of no redeeming value whatsoever. It has no aesthetic, architectural, historical or any other importance at all. Some of these photographs are reproduced below.

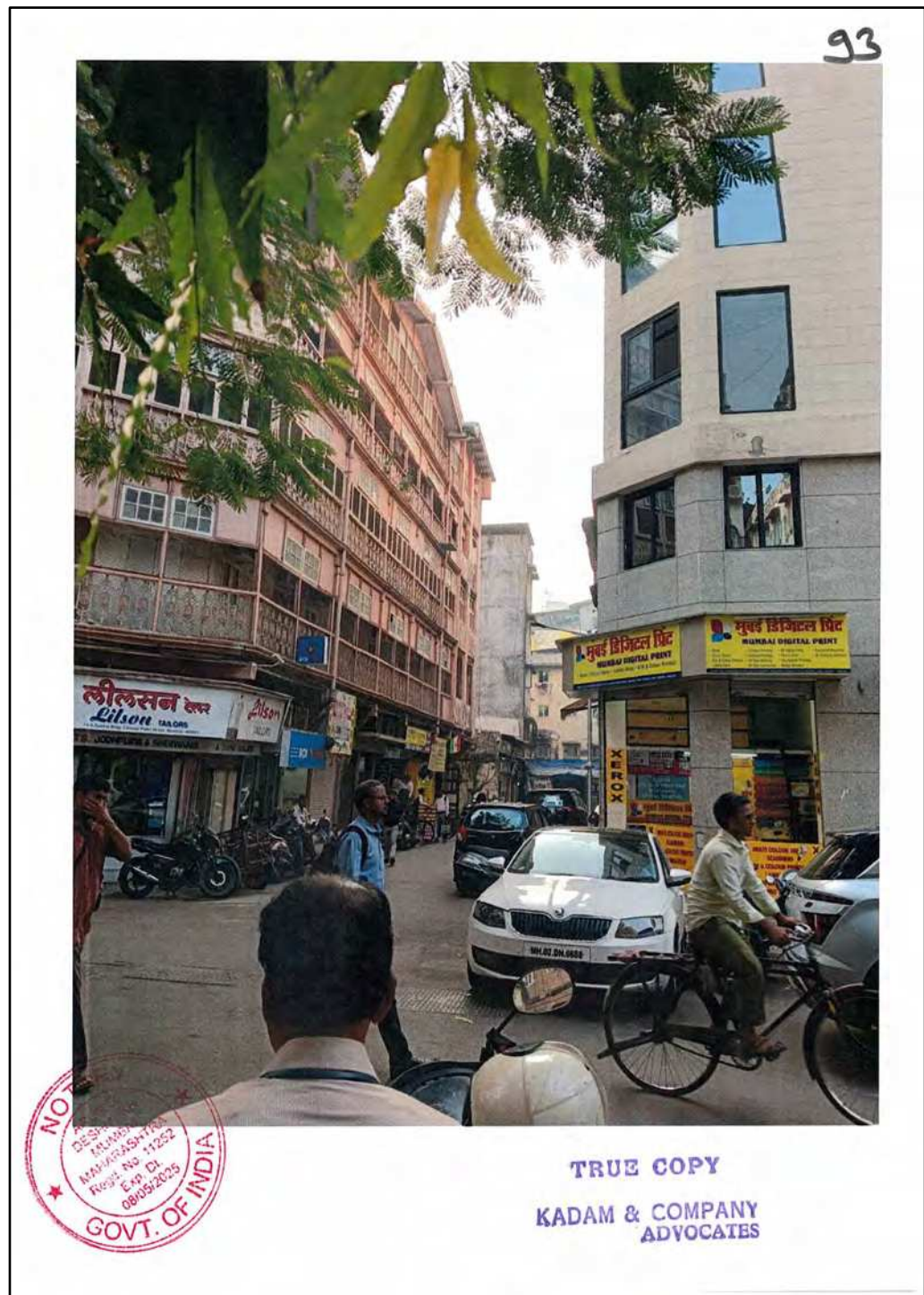


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18. In particular contrast at page 93, we see an image of the new building across the street that was permitted and, somewhere to the middle of the image and a bit towards the end of the image and the Petitioner's existing structure.



19. “My sin”, says Dr Chandrachud, “is that I am in the Fort Precinct. But for that, there was no reason for anybody to deny me this permission that otherwise falls fully within the frame of DCPR 2034”.

20. These graphic illustrations apart, we perceive the particular challenge in this case to be a straightforward Article 14 challenge. To summarise it, the submission is that the precinct classification (which is not challenged) includes both the Petitioner’s building and the building opposite. There is nothing to distinguish the earlier structures as they stood one from the other. Article 14 demands non-arbitrariness in executive action and decision making. Likes must be treated alike. If, therefore, the two buildings, i.e., the Petitioner’s and the one opposite, are indistinguishable in all respects, then it simply cannot be that permission is granted without a MHCC NOC for the building opposite but it is demanded from the Petitioner as a restriction.

21. The opposite is equally true, submits Dr Chandrachud: if the MHCC permission was granted for the building opposite within the Fort Precinct then it necessarily means that it cannot possibly be refused for the Petitioner’s building.

22. In regard to the height restriction, Clause 9(D)(b) of DCR 52 set out above shows that there is discretion vested in the Commissioner. Article 14 requires, Dr Chandrachud says, and we believe correctly, that when that discretion is exercised, it must be exercised equally for all who are similarly situated. Otherwise, there

is manifest or facial arbitrariness in executive action or administrative action immediately inviting judicial review and a certiorari as also the necessary mandamus that must follow as a consequence. It is impossible to accept that two buildings that face one another, though diagonally, on the same street and in the same precinct should receive differential treatment. This therefore becomes a matter of invidious discrimination impermissible under Article 14 of the Constitution of India. The law in that regard is well settled for the last six decades or more and really does not require much amplification.

23. Article 14 is in two parts:

Equality Before the Law: The State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.

24. This is stated with admirable compactness and precision but the whole of it is freighted with meaning well beyond its words. It says, *first*, that there is a guarantee of equality before the law and, *second*, a guarantee of equal protection of laws within India. Both parts co-exist. There is not one prohibition here. There are two. The State cannot deny any person, *first*, equality before the law *or* — and this disjunctive is itself important; the word is not a conjunctive and, also for good reason — equal protection of laws. A conjunctive would have been problematic. The prohibition on the State would have been against doing *both*. It could, therefore, have done one — denied equality before the law — or the other — denied equal protection of laws — but it could not have done both. But that is not how Article 14 reads, and with good reason. The Article tells us that the State cannot do *neither* one *nor* the other.

25. The first part, *equality before the law*, has its roots in English common law and can probably be traced back to the upending of monarchies and the ascendance of Parliamentary democracy. This is said to be a declaration of equality. It has a negative connotation: *be you ever so high, the law is above you*. The law will not discriminate against or for a person on the basis only of birth, position, race, gender and so on. All are equal “*before the law*”. The second part allows the State some positive leeway to ensure that those who are similarly placed will be similarly treated. Like is treated as like and not unlike. This is the necessary balance to the first part.

26. If this fundamental test is applied, in Dr Chandrachud’s submission, there is no question of the imposition of a pre-condition of a MHCC NOC for the Petitioner’s building proposal. Notably, the Municipal Commissioner has accepted the proposal as placed by the Chief Engineer, DP (Exhibit “G” at page 95). That proposal is at Exhibit “F” at page 94, and it is this that imposes a requirement of a NOC from MHCC.

27. Dr Chandrachud points out that this requirement is contrary to decided law as well. In *Dr Arun R Chitale & Anr Versus State of Maharashtra and Ors*,¹ a Division Bench of this Court (Mohit S Shah CJ & MS Sanklecha J) considered the constitutional validity of DCR 67(3) of the 1991 DCR and the 14th August 2013 circular to which we have referred earlier. Paragraph 20 of that decision deals with constructions in precincts. The relevant portion (Page 75 of the paper book) reads thus:

1 2014 SCC OnLine Bom 4834.

“Even after following the aforesaid decision of the Division Bench, we find substance in the submission of learned Counsel for the petitioner that when the proposal under consideration of Municipal Corporation is not for declaring heritage building as Grade I or Grade II, the Regulation 67(2)(i) of the DCR 1991 will have no application in view of the clear exclusion provided in Regulation 67(2)(iii)(b) of the DCR 1991. Hence, there will be no requirement for sending the proposal for redevelopment of building not proposed to be declared as Grade I or Grade II heritage building to Mumbai HCC. However, in view of Regulation 67(2)(iii)(b) of DCR 1991, special permission of the Municipal Commissioner will be required only if the height of the proposed building is in excess of 24 mtrs. (excluding stilt on the ground floor).”

28. It is incomprehensible, in Dr Chandrachud’s submission, that stated law should be so entirely ignored by the planning authority. There is no ambiguity about the finding of this Court that the requirement of MHCC permission is not required unless the building is Grade-I or Grade-II. If the Municipal Commissioner’s permission is required, it is only if the height is above at that time 24 meters and now 32 meters. That permission has been granted.

29. In the present case, and we are not troubling with the various stages that the application of the Petitioner went through before the IOD, it is to be noted that Part A of the IOD has 45 conditions. Condition 38 is the one that is impugned in the present Writ Petition. However, this condition has had a ripple effect. The Petitioner cannot demolish the building because to construct the new building he needs a CC; and to do that Condition 38 comes in his way. If the Petitioner

was to proceed with the demolition, it would create an irreversible situation where the old building would be gone but no new building would be able to be put up without what the Petitioner describes as a wholly unnecessary, needless, and inapplicable MHCC NOC condition.

30. On 14th December 2022 and 16th December 2022, a Division Bench of this Court asked the MCGM to take a decision on the Petitioner's application within two weeks. The Petitioner was at liberty to submit additional material. A copy of the order of 16th December 2022 is at Exhibit "Q" to the Petition. The order of 16th December 2022 reproduces the order of 14th December 2022. It is pursuant to this that the Petitioner made a representation and then there followed the impugned Municipal Commissioner's order at Exhibit "R" of 27th December 2022.

31. We may note that the background is that the Petition had actually been disposed of but on an erroneous appreciation that the Petitioner's building was classified as Grade-II when this was incorrect. That order was recalled and therefore there was a subsequent order of 23rd December 2022 restoring the Petition to the file. In any case, we are past those considerations now that the Petition is restored and is before us.

32. The grounds in the Petition are that the IOD condition is entirely without the authority of law and is therefore non-est, null and void. Plainly read, this submission appears to be correct. It is also correct that the IOD condition is contrary to Clause 9(D)(b) of the

Regulation 52 of DCPR 2034 because that clause does not say that MHCC NOC is mandatory. It only requires that guidelines may be taken into consideration. But the important aspect about that clause is the conferment of discretion on the Municipal Commissioner. The question therefore is not about a blind application of some misinterpreted edition of the clause but to see whether the Municipal Commissioner's discretion has been exercised in a consistent, non-discriminatory, and non-arbitrary manner.

33. Unless, therefore, it is demonstrated to us, which it is not, that the MHCC permission was granted to the building opposite on CS No. 639, it is difficult to see how such a condition can be accepted for the Petitioner's property. If that permission was indeed granted and such a tall building has been allowed to be put up, it means that there is no restriction of the kind that is now sought to be imposed on the Petitioner.

34. The Affidavit in Reply filed by the MCGM does not take the matter much further. It recites up to paragraphs 8 the undisputed facts. Paragraph 14 says that it is a practice to insist on the MHCC NOC for all kinds of works in heritage Grade-I, Grade-II Grade-IIA, Grade-IIB, Grade III, and Precincts. This does not answer the question of CS No. 639 at all. In fact, the affidavit does not explain how this neighbouring development was permitted.

35. Mr Carlos on behalf of the MCGM attempted an argument that there was no such discretion in the earlier regime. We find that to be incorrect. DCR 67(2)(iii)(b) of the 1991 DC Regulations dealt

with redevelopment of Heritage Buildings/sites in Grade-III and precincts and required the special permission of the Municipal Commissioner if the height exceeded 24 meters. That discretion of the Municipal Commissioner has continued into DCPR 2034, but the minimum or threshold height requirement above which the permission is required is now increased to 32 meters.

36. Importantly, the High Court decision to which we have referred above said in paragraph 20 that no such permission was required and that was in the context of the DCR 1991 Regulations themselves. Therefore, this argument is of no avail to the MCGM.

37. To bring this matter to a close, we return to the simplest possible analysis. There is a precinct. It has a narrow street. On one side stands the Petitioner's structure which Dr Chandrachud describes in the most unflattering terms. Directly opposite is a new development soaring to well over 60 meters. There is no evidence of Heritage Committee permission for that new development. Yet, under the same set up heritage control regulations, the Petitioner is being told that he cannot develop as his neighbour opposite did, without permission from the Heritage Committee. This, we are asked to believe is not arbitrary, not discriminatory but is a fair application of a law to all equally placed. The facts indicate entirely otherwise. There is no challenge to the development of the neighbouring building on CS No. 639. There is no case in the Affidavit in Reply that it is illegal or that action has been ordered to be taken against it. It is simply being stated that irrespective of what was done or allowed to be done on CS No. 639, the Petitioner must be subjected to this

Condition 38 and must obtain permission for the same precinct on the same street for a new redevelopment of over 60 meters which is otherwise permitted from the MHCC.

38. We see no method by which we can accept the argument by the MCGM in opposition to the Petition. In our view, there is simply no answer to the Petition.

39. Rule is accordingly made absolute in terms of prayer clauses (a), (a1) and (b), set out below.

(a) this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India inter alia inter alia calling for the records and proceedings pertaining to the IOD bearing No. CHE/CTY/1246/A/337 (NEW)/ 337/1/New dated 29th December 2021 (being Exhibit "M" hereto) and after going through the legality and appropriateness thereof this Hon'ble Court may be pleased to delete and strike down Condition No. 38 in the said IOD;

(a1) this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India inter alia calling for the records and proceedings pertaining to Impugned Order as enclosed with the Dy. Chief Engineer (BP)- City's letter dated 27th December 2022 (being Exhibit "R" hereto) and after going through the legality, validity, correctness and appropriateness thereof this Hon'ble Court may be pleased to quash and set aside the said Impugned Order.

(b) this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other

appropriate writ, order or direction under Article 226 of the Constitution of India inter alia to ordering and directing the Respondents to process and issue Full CC and all the further permissions including OC for the New Building proposed to be constructed on the property bearing C.S. Nos. 486, 487, 488, 489 and 490 of Fort Division, situated at the junction of the Barbar Lane and Pitha Street, Fort, Mumbai 400 001, without insisting for obtainment and submission of the MHCC's NOC as a condition precedent:

40. In the facts and circumstances of the case, there will be no order as to costs.

41. It is understood that the IOD which may have lapsed in the meantime is required to be revalidated or renewed in light of this decision.

(Kamal Khata, J)

(G. S. Patel, J)