



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

PUBLIC INTEREST LITIGATION NO. 128 OF 2006

Gamdevi Residents' Association
and others

....*Petitioners*

: *Versus* :

Municipal Corporation of Greater
Mumbai and others

....*Respondents*

Mr. Zubin Behramkamdin, Senior Advocate with Ms. Sakshi Kashyap,
Mr. Meiron Damania and Ms. Hilla Boatwalla i/by. Nanu Hormasjee & Co.
for the Petitioner.

Ms. Oorja Dhond with Ms. Chaitalee Deochake i/by. Ms. Komal R. Punjabi
for MCGM-Respondent Nos.1 and 10.

Smt. Usha Rahi, AGP for State-Respondent Nos.5 and 6.

Mr. Ankit Lohia with Mr. Chirag Sarawagi with Mr. Yash Sinha i/by. Mr.
Tushar Goradia for Respondent No.7A and 17.

Mr. Pratik Shah, for Respondent No.8A.

CORAM : ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON : 11 JULY 2025.

JUDGMENT PRONOUNCED ON : 22 JULY 2025.

JUDGMENT (*Per Sandeep V. Marne, J.*) :

1) Petitioners have filed the present petition in public interest
challenging the construction permissions granted for re-developement

of old structure forming part of Gamdevi Heritage Precinct. Petitioners are aggrieved by construction of 15 storey building in Gamdevi Heritage Precinct on the ground that construction of such a tall building would mar the grandeur of Gamdevi Precincts. Petitioners have also challenged the order dated 14 August 2006 of Municipal Commissioner granting Heritage NOC for the impugned construction. Since the Municipal Commissioner has granted special permission for construction of the building from heritage point of view under sub-clause (iii) of Development Control Regulation 67(2), the same is also challenged by the Petitioners.

2) Briefs facts leading to filing of the present petition, as pleaded, are as under:

Petitioners-Gamdevi Residents' Association is an Association of Persons who reside in the buildings forming part of Gamdevi Heritage Precinct, Mumbai. Petitioner No.1 claims to have been engaged in preserving and protecting the urban environment in and around the Gamdevi Heritage Precinct. It is claimed that Gamdevi Heritage Precinct is threatened by illegal excessive development activity that far exceeds the carrying capacity of the locality.

3) By Indenture of Lease dated 15 February 1918, the trustees for Improvement of City for Bombay leased Plot No.71 of Gamdevi Estate with building thereon to one Dattaram Vinayak Mulgaonkar for a period of 999 years. From 1 October 1933, the properties of the trustees including Plot No.71 came to be vested in the Municipal Corporation for Greater Mumbai (**MGCM**). The said Plot No.71 is a leasehold land admeasuring 599 sq. mtrs. and a building thereon named 'Saraswati House' was constructed comprising of ground plus two upper floors with a garage. The leasehold interest in the said plot

was inherited by the lessee's widow Savitribai Dattaram Mulgaonkar and upon her death on 8 October 1972, to one Dr. Achyut Vishwanath Kerkar. It appears that Dr. Achyut Vishwanath Kerkar died intestate on 22 February 2001 leaving behind his wife Mrs. Chitra Achyut Kerkar as sole legal heir. On 1 March 2001, the Deed of Assignment was executed between Mrs. Chitra Achyut Kerkar and Shri. Sumermal Hajarimalji Shah and Shri. Kishorimal Hajarimalji Shah by which leasehold rights in the plot were assigned. According to the Petitioners, the building Saraswati House was occupied by only three families, the ground floor being in occupation of Zaveri family, the first floor and the two rooms on the second floor were occupied by Kerkar Family and the balance portion of the second floor was occupied by Sanghavi Family. The Developer sought No Objection Certificate from MHADA for redevelopment of the subject plot in accordance with modified D.C. Regulation No.33(7). The Executive Engineer certified the total number of occupiers in Saraswati House as six. The Chief Officer of Mumbai Building Repairs and Reconstruction Board issued NOC for redevelopment of the subject plot on 8 March 2002. The Architect of the developers submitted plans to the Municipal Corporation for construction of building on the plot. According to the Petitioners, bogus tenancies were shown with ulterior motive of claiming excess FSI.

4) The plans for construction of the building were approved by the Municipal Corporation on 25 October 2004. The structure on the plot was demolished and Petitioners noticed construction work on the subject plot in late 2003 – early 2004. By last quarter of 2004, Petitioners noticed that the construction of the subject plot was going higher and higher and a building comprising of basement, stilts and 15 upper floors was being constructed on the plot. Petitioners accordingly obtained copies of various permissions issued for carrying out

construction on the subject plot. Petitioners accordingly filed Writ Petition No.1599/2005 in this Court which was withdrawn with liberty to approach the relevant authorities regarding grievances raised in the petition vide order dated 18 January 2006. Petitioners accordingly made representation dated 30 January 2006 to Respondent Nos.1 to 5 and 10 setting out their grievances and demanding withdrawal of the directions. Petitioners were granted personal hearing before Respondent No.4. Thereafter, another hearing was held before Respondent No.2 on 6 February 2006. Another personal hearing was held before the Assistant Engineer (A-Ward) Byculla on 22 February 2006. By order dated 2 May 2006, the representation of the Petitioners came to be rejected. Petitioners have accordingly filed the present petition seeking withdrawal of all the directions granted for construction on the subject plot. The substantive prayers sought in the petition are as under:-

(a) That 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 calling for the records of the case and after going into the question of the legality and propriety thereof be pleased to quash and set aside the following permissions/No Objection Certificate / sanctions/orders:

(i) The No Objection Certificate granted by the 3rd and/or 4th Respondents dated 8th March, 2002 (Exhibit-H hereto);

(ii) The list of occupants certified by the Executive Engineer, D1 Ward under his letter No. 515 dated 11 February, 2002 certifying the existing occupiers of Saraswati House as six (Exhibit G-3 hereto);

(iii) All planning permissions including the IOD CC, etc. granted by the 1 Respondent in respect of the proposed 15 storey building coming up on the property at CS No. 481 (New Survey No. 7335) of Malabar Hill Division at Gamdevi (previously known as 'Saraswati House');

(iv) The order/minutes passed by the Respondent dated 16.2.2006 (Exhibit P hereto)

(v) The Order dated 2 May 2006 passed by the 3 Respondent (Exhibit R hereto);

(vi) The non-speaking order / permission granted by the 1st Respondent dated 27 March, 2002 (Exhibit K hereto) permitting the impugned high rise building to come up in the Gamdevi Heritage Precinct:

(vii) The permissions and/or orders granted by the 1st and/or 10th Respondents granting concessions / waivers / relaxation of compliance with the requirements for compulsory open space around the building, open space from the roads on which the building stands and open space from boundary walls, and restrictions with respect to height of the building having regard to the width of the street/road;

Rider (viii) The Order of the 10th Respondent dated 14th August 2006 (Exhibit V hereto).

Rider a-1

(a-1) That this Hon'ble Court 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 calling for the records of the case and after going into the question of the legality and validity thereof be pleased to quash and set aside sub clause (iii) of DC Regulation 67 (2).

(b) That 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 ordering and directing:

(i) The 3rd and/or 4th Respondents to forthwith withdraw and / or cancel the No Objection Certificate granted by them dated 8 March, 2002 (Exhibit-H hereto):

(ii) The 3rd and/or 4th Respondents to forthwith withdraw and / or cancel the list of occupants certified by the Executive Engineer, D1 Ward under his letter No. 515 dated 11th February, 2002 certifying the existing occupiers of Saraswati House as six (Exhibit G-3 hereto);

(iii) The 1st Respondent to forthwith withdraw and / or cancel all planning permissions (IOD, CC, etc.) granted in respect of the proposed 15 storey building coming up on the property at CS No. 481 (New Survey No. 7335) of Malabar Hill Division at Gamdevi (previously known as 'Saraswati House');

(iv) The Respondents to forthwith demolish the 15 storey (or thereabout) structure erected on the property at CS No. 481 (New Survey No. 7335) of Malabar Hill Division at Gamdevi (previously known as 'Saraswati House');

(v) The Respondents to forthwith carry out an appropriate investigation and prosecute the 7th, 8th and 9th Respondents as well as officers of the Respondent authorities who are found to have colluded in or connived with or to have aided or abetted in securing sanctions of the building plans and other related sanctions and

permissions on the basis of fraudulent representations made by the 7th Respondent;

(vi) The 3rd and 4th Respondents be directed to grant inspection and furnish copies of the documents purportedly relied upon by the 7th and 8th Respondents with respect to the separate tenancy/occupation of Mr. Loonker / Jain and Mr. Rajendra Kerkar and Sanjay Kerkar,

(c) That this Hon'ble Court may be pleased to issue a Writ of Prohibition or a writ in the nature of Prohibition or any other appropriate writ, order on direction under Article 226 of the Constitution of India ordering and directing the Respondents to forthwith forbear from taking any steps pursuant to or in implementation of:

(i) The No Objection Certificate granted by the 3rd and / or 4th Respondents dated 8 March, 2002 (Exhibit -H hereto);

(ii) The list of occupants certified by the Executive Engineer, D1 Ward under his letter No. 515 dated 11 February, 2002 certifying the existing occupiers of Saraswati House as six (Exhibit -G3 hereto);

(iii) Planning permissions (IOD, CC, etc.) granted by the 1st Respondent in respect of the proposed 15 storey building coming up on the property at CS No. 481 (New Survey No. 7335) of Malabar Hill Division at Gamdevi (previously known as 'Saraswati House');

(iv) The order/minutes of Respondent No.2 dated 16.2.2006 (being Ex. P hereto)

(v) The Order dated 2 May 2006 passed by the 3rd Respondent (Exhibit R hereto);

(vi) The non speaking order / permission granted by the 1st Respondent dated 27 March, 2002 (Exhibit K hereto) permitting the impugned high rise building to come up in the Gamdevi Heritage Precinct;

(vii) The permissions and/or orders granted by the 1st and/or 10th Respondents granting concessions/waivers/relaxation of compliance with the requirements for compulsory open space around the building, open space from the roads on which the building stands and open space from boundary walls, and restrictions with respect to height of the building having regard to the width of the street/road;

5) The petition came to be admitted by order dated 15 March 2007 leaving open all the issues relating to maintainability of the petition.

6) Mr. Behramkamdin, the learned Senior Advocate appearing for the Petitioners would submit that the construction permission granted in respect of the subject plot is contrary to the provisions of Development Control Regulations, 1991 (**DCR, 1991**). That Regulation 67(2)(i) does not permit any redevelopment in an Heritage Precinct except with the prior permission of the Municipal Commissioner, who is required to act on the advice of the Heritage Conservation Committee. That therefore recommendation of Heritage Conservation Committee (**HCC**) is compulsory in all the cases relating to development in the precinct area. That Regulation 67(7) mandates that buildings listed in the Heritage Precincts shall maintain the skylines in the Precincts without any high-rise so as not to diminish or destroy the value of Heritage Precinct. That provisions of Regulation 67(2)(iii)(b) cannot be construed to mean as if proposed building exceeds 24 meters in height, the approval of HCC is dispensed with. That the said Regulation only provides for special permission from Municipal Commissioner to allow building of height of more than 24 meters. That therefore for every building having height of more than 24 meters, approval of HCC as well as special permission of Municipal Commissioner is mandatory. That the introduction of Regulation 67(2)(iii)(b) of non-requirement of HCC approval would lead to absurdity, thereby defeating the entire objective of Regulation 67. Such interpretation is also contrary to the intent of Regulation 67(2)(i) and Regulation 67(7) which mandates HCC approval for every development in a Heritage Precinct.

7) Mr. Behramkamdin further submits that in the event of this Court coming to the conclusion that approval of HCC is not necessary, in that case, Regulation 67(2)(iii)(b) must either be read down or must be declared unconstitutional or illegal. That the special permission

granted by the Municipal Commissioner in the present case does not contain any reasons and that therefore the same is liable to be set aside. That recording of reasons is mandatory when the Municipal Commissioner grants special permission by exercise of discretion vested in it. Reliance is place on judgments of the Apex Court in A.N. Parasuraman and others Versus. State of Tamil Nadu¹ and Himat Lal K. Shah Versus. Commissioner of Police, Ahmedabad and another². It is further submitted that the developers have artificially increased the number of tenants in the old building-Saraswati House with ulterior objective of securing higher FSI. That there were only three occupants in the building, whereas six tenancies are shown for claiming higher FSI. Reliance is placed on judgment of this Court in Normandie Cooperative Housing Society Limited and others Versus. State of Maharashtra and others³ in support of the contention that where there is a dispute about tenancies, the decision in that respect must be set aside if all relevant considerations have not gone into adequately and the decision is not based on all the relevant evidence. So far as the issue of passage of time after the construction of building is concerned, reliance is placed on judgment of the Apex Court in M.I. Builders Pvt. Ltd. Versus. Radhey Shyam Sahu and others⁴ contending that if the construction is illegal, the same must be demolished even if the construction is complete or third-party rights are created.

8) The petition is opposed by Mr. Lohia, the learned counsel appearing for Respondent Nos.7A and 17. He would submit that the petition deserves dismissal for reasons of gross delay and laches in filing the same. That even the first petition was filed only after the building was constructed upto 15 floors. Reliance is placed on

¹ (1989) 4 SCC 683

² (1973) 1 SCC 227

³ 2018 SCC OnLine Bom 3419

⁴ (1999) 6 SCC 464

judgment of this Court in Bombay Environmental Action Group Versus. State of Maharashtra⁵ in support of the contention that the rules governing delay are applicable even to a Public Interest Litigation. By relying on judgment in Nariman Point Association & Anr. Versus. State of Maharashtra & Ors.⁶ it is contended that the petition deserves to be dismissed as the same is filed after substantial progress of construction was made. It is submitted that a building next to the residence of the Petitioners had gone upto 9 storey, but they have chosen not to challenge the same indicating selective approach of targeting only the construction carried out at the subject plot. That the question of number of tenants is irrelevant as the FSI granted for the Project is 2.5 which has no relevance to the number of tenancies. That no incentive FSI has been granted based on the number of tenancies.

9) So far as the Regulation 67(2)(iii)(b) is concerned, Mr. Lohia would submit that validity of the same was not challenged in previous Writ Petition No. 1599/2005. That the same cannot be questioned in a PIL and would rely upon judgment of the Apex Court in Guruvayoor Devaswom Managing Committee and another Versus. C. K. Rajan and others⁷. Reliance is also placed on order passed by this Court in Dr. Arun R. Chitale & Another Versus. State of Maharashtra & others⁸ in support of the contention that grant of special permission by the Municipal Commissioner with HCC's approval is held to be sufficient. That there is presumption of constitutionality of Regulation 67 which is part of delegated legislation burdening the Petitioners to show that there has been a clear transgression of the constitutional principles. That the framers of Regulation have balanced the requirement of protecting the

⁵ 2005 (6) Bom.C.R. 574

⁶ 2003(5) BCR 273

⁷ (2003) 7 SCC 546

⁸ Order dated 3 February 2014 passed in Writ Petition No. 867 of 2013 (OS)

heritage against inconvenience caused to the residents of dilapidated buildings. That there is nothing unreasonable or irrational about the amendment in the Regulation and the amended Regulation does not negate the purpose of preservation of Heritage Precinct as several safeguards are provided to ensure that the sanctity of the Precinct is preserved. It is only where the Municipal Commissioner is satisfied that the height of the building could exceed 24 meters in a given situation that a special permission is required under the amended Regulation. Lastly it is contended that there are as many as 11 other buildings consisting of G+4 to G+10 within the Precinct area and that construction at the subject site is selectively and deliberately sought to be targeted.

10) We have also heard Ms. Dhond, the learned counsel appearing for Respondent-MCGM (Respondent Nos.1 and 10) who would submit that the Gamdevi Precinct is Grade-III heritage and therefore in view of amended Regulation 67, the development activity can be allowed only with special permission from the Municipal Commissioner if the height of the new building exceeded 24 meters. That Municipal Corporation had called for comments of MHCC who remarked that NOC of MHCC was not necessary in view of amendment to Regulation 67. She would submit that all permissions in respect of the construction at the subject site have been issued strictly in conformity with the DCR and that there is no illegality in the said direction. She would pray for dismissal of the petition.

11) We have also heard Mr. Shah, the learned counsel appearing for Respondent No.8A who would adopt the submissions of Mr. Lohia.

12) Rival contentions of the parties now fall for our consideration.

13) The petition is filed in public interest challenging the permissions granted in respect of the construction at the subject plot. Petitioners are essentially aggrieved by construction of a multi storey building comprising of ground plus stilts plus 15 floors on the subject plot as they believe that construction of such a high-rise building would destroy and diminish the value and beauty of Gamdevi Heritage Precincts. Though the Petitioners are not *per se* opposing to redevelopment of buildings in Gamdevi Heritage Precincts, they insist that the newly constructed buildings must maintain the same skyline throughout the precincts.

14) Gamdevi Heritage Precinct is a part of integrated development and comprises of buildings situated on Alexandra House (*Kashibai Navrange Marg, Laburnum Road, Wachha Gandhi Marg, Tejpal Marg, Owendunn Road (Krishna Sanghi Marg)*). Having regard to the architectural significance of Gamdevi area, the Heritage Regulations for Greater Bombay, 1995 designated the area as Gamdevi Heritage Precincts. The special features of these Precincts are recognized by Heritage Regulations as Vernacular Style 2/3 storey houses. The said buildings were erected between 1900-1920. 'Mani Bhavan', which is Group-I Heritage building is also located in Gamdevi Precinct. Mahatma Gandhi lived in Mani Bhavan during his visits to Mumbai between 1917 to 1934 and currently Mani Bhavan houses Gandhi Memorial.

15) The MCGM is the Planning Authority under the provisions of the Maharashtra Regional and Town Planning Act, 1966. DCR 1991

were formulated for regulating and promoting the developments within the City of Mumbai. By Resolution dated 21 April 1995, Heritage Guidelines for Greater Bombay, 1995 were notified under which Regulation 67 alongwith Appendix VIIA came to be sanctioned dealing with 'Conservation of Heritage'. Regulation 67 deals with conservation of listed buildings, areas, artefacts, constructions and preservation of all historical and/or aesthetical and/or architectural and/or cultural monuments collectively referred to as Heritage Buildings and Heritage Precincts. Regulation 67 applied to all Heritage Buildings and Heritage Precincts as listed in the Notification issued by the Government. Regulation 67(2) deals with restriction on development/redevelopment/repairs, etc. and provides thus:-

2. Restriction on Development/Redevelopment/Repairs, etc.

(i) No development or redevelopment or engineering operation or additions, alterations, repairs, renovation including the painting of buildings, replacement of special features or demolition of the whole or any part thereof or plastering of said listed/heritage buildings or listed/Heritage precincts shall be allowed except with the prior written permission of the Commissioner. The Commissioner shall act on the advice of/in consultation with the Heritage Conservation Committee to be appointed by Government (hereinafter called 'the said Heritage conservation Committed");

Provided that in exceptional cases for reasons to be recorded in writing the Commissioner may overrule the recommendation of the Heritage Conservation Committee:

Provided that the power to overrule the recommendations of the Heritage Conservation Committee shall not be delegated by the Commissioner to any other officer.

(ii) In relation to religious buildings in the said list, the changes, repairs, additions, alterations and renovations required on religious grounds mentioned in sacred texts, or as a part of holy practices laid down in religious codes shall be treated as permissible, subject to their being in accordance and consonance with the original structure and architecture, designs, aesthetics and other special features thereof. Provided that before arriving at his decision, the Commissioner shall take into consideration the recommendations of the Heritage Conservation Committee.

16) Regulation 67 was amended w.e.f. 25 January 1999 and Clause (iii) was inserted in Regulation 67(2) as under :-

(iii)(a) Provisions of Regulation 67 would be applicable only in Grade I and Grade II category of Heritage Building for reconstruction and development of old buildings undertaken under Regulation 33(7), 33(8) and 33(9) of these Regulations:

(b) In case of redevelopment of cessed buildings from Grade III and precincts special permission from the Municipal Commissioner, Municipal Corporation of Greater Mumbai may be obtained if the height of the building exceeds 24 metres (excluding height of slit on ground floor).

17) Thus as per the amended Regulation 67(2)(iii)(a), application of Regulation 67 is restricted only to Grade-I and Grade-II category of Heritage Buildings for reconstruction and redevelopment of old buildings undertaken under Regulations 33(7), 33(8) and 33(9). Clause(b) of Regulation 67(2)(iii) provides that in case of redevelopment of cessed buildings from Grade-III and Precincts, special permission from Municipal Commissioner is necessary if the height of the building exceeds 24 meters.

18) Thus, the broad scheme under the amended Regulation 67 is that development/redevelopment of Heritage buildings in Grade-I and Grade-II categories is allowed only after prior written permission of the Municipal Commissioner, who must consult the Heritage Conservation Committee. The Municipal Commissioner is empowered to overrule the recommendations of HCC in exceptional cases by recording reasons in writing. In respect of cessed buildings forming part of 'Grade-III Heritage buildings' and 'Precincts', the Municipal Commissioner need not act on advise of or consult the Heritage Conservation Committee, but he can grant special permission for redevelopment of cessed buildings. This is the classification that the amended provision of Regulation 67 has brought in. It has created two

classes of heritage structures (i) All Grade I and II heritage buildings (*whether cessed or otherwise*), requiring approval of HCC and Municipal Commissioner's permission and (ii) Grade III cessed building and cessed buildings in Precincts, which require only Municipal Commissioner's special permission.

19) Having considered the classification brought in by the 1999 amendment to Regulation 67, we proceed to examine the broad object behind such classification. With a view to deal with the problems of repairs and reconstructions of old dilapidated tenanted buildings in the Island City of Mumbai whose rents were frozen at the year 1940 as per the provisions of the Rent Control Act the Govt. of Maharashtra, formed a Committee in the year 1968. On recommendations of the said Committee, Govt. of Maharashtra enacted the Bombay Building Repairs and Reconstruction Act in the year 1969. Under the provisions of this Act, the Bombay Building Repairs and Reconstruction Board was formed in the year 1971. A repair cess was levied on old dilapidated tenanted buildings under the provisions of the said Act. Thus, these buildings are called cessed buildings. The cessed buildings are divided into categories-A, B and C depending on the period of their construction.

20) As observed above, clause (iii)(b) of Regulation 67(2) applies only to cessed Grade-III Heritage buildings or cessed buildings in the Precincts. When such buildings, which are very old and tenanted, are taken up for redevelopment, a relaxation is provided where recommendations of HCC are not made mandatory and the Municipal Commissioner is empowered to issue a special permission from heritage point of view for redevelopment of the building, that too if the height of the building exceeds 24 mts. If the height of the redeveloped

building does not exceed 24 mts, even special permission of the Municipal Commissioner is not necessary from heritage point of view. This exceptional treatment is meted out to Grade III and precinct cessed buildings with a view to encourage their redevelopment. The heritage restrictions are somewhat relaxed to ensure that the old and dilapidated buildings which are infested with tenants, which cannot be repaired are redeveloped so as to save human lives. The Rent legislations in Maharashtra have frozen the rent, which makes impossible for the landlords to repair the old buildings. In order to give an impetus to redevelopment of old cessed buildings in Grade III and heritage precincts, Regulation 67 has been relaxed and their redevelopment is made possible only with special permission of the Municipal Commissioner.

21) So far as the subject plot is concerned, there is no dispute to the position that the same forms part of Gamdevi Heritage Precinct and accordingly would be governed by Clause-(b) of Regulation 67(2)(iii). There is also no dispute to the position that building Saraswati House was a cessed building and was taken up for redevelopment. Accordingly, the development activity on the subject plot is clearly governed by Clause (b) of Regulation 67(2)(iii) and approval of Heritage Conservation Committee is not required for such development. Therefore, the contention of the Petitioners that the development is being carried out without seeking approval of the Heritage Conservation Committee is clearly misplaced. We find that such development could be carried out under the provisions of Regulation 67(2)(iii)(b) without seeking prior approval/advice or consultation of HCC. There is no dispute to the position that the Municipal Commissioner has granted special permission for carrying out development on the subject plot. It is therefore seen that the

provisions of Regulation 67(2)(iii)(b) are fully complied with while issuing directions for carrying out development on the subject plot.

22) We are not impressed by the argument of absurdity raised by the Petitioners. It is contended that interpretation given by Respondents would mean that if the height of the building does not exceed 24 meters, even special permission of the Municipal Commissioner would not be necessary. It is therefore suggested that a purposive interpretation must be given to Regulation 67 so that the objective behind enactment of the said Regulation is ultimately fulfilled. Regulation 67 has to be interpreted in view of balancing act of preserving heritage and at the same time ensuring redevelopment of the old cessed buildings. The structures which are identified as Grade-I or Grade-II category Heritage buildings require stricter scrutiny of approval of Heritage Conservation Committee followed by written permission of the Municipal Commissioner. However, when it comes to Grade-III Heritage buildings and buildings located in the Precincts, a special dispensation is made where redevelopment of such cessed buildings can be carried out only with special permission of the Municipal Commissioner and it is not necessary to seek prior approval of the Heritage Conservation Committee. The law makers have drawn a conscious distinction between Grade-I and Grade-II Heritage buildings on one hand and cessed buildings in Grade III and in precincts on the other hand. Under the classification so made, the recommendations of HCC are not needed for carrying out redevelopment process of cessed buildings from Grade-III and Precincts and what is required is mere special permission of the Municipal Commissioner. By amending Regulation 67 w.e.f. 25 January 1999, cessed Grade-III Heritage Buildings and cessed buildings in Precincts have been excluded from the purview of mandatory

requirement of advice/consultation of Heritage Conservation Committee.

23) Petitioners have challenged the entire clause-(iii) of Regulation 67(2) by amending the petition. The petition is filed in public interest. It is well settled that DCR is a delegated legislation. Statutory provisions cannot be challenged in a PIL as per the law laid down by the Apex Court in *Guruvayoor Devaswom Managing Committee* (supra) in which it is held in para-50(xi) as under:-

(xi) Ordinarily, the High Court should not entertain a writ petition by way of public interest litigation questioning the constitutionality or validity of a statute or a statutory rule.

24) Even if the aspect of permissibility to challenge a statutory provision in PIL is to be momentarily ignored, we are not impressed by the grounds raised for challenging Clause-(iii) of Regulation 67(2) by the Petitioners. By now it is well settled position that the Development Control Regulations sanctioned by the State Government under the provisions of the Maharashtra Regional and Town Planning Act, 1966, which form part of a development plan, are delegated piece of legislation. There is always a presumption of constitutionality of a statutory provision and the burden is upon those who challenge the enactment to show that there has been a clear transgression of the constitutional principles. There is no challenge to the legislative competence in incorporating clause (iii) of Regulation 67(2) by way of amendment. As observed above, clause (iii) in Regulation 67(2) is introduced with a view to ensure smooth implementation of redevelopment process of cessed buildings. However, it is not that every cessed building is excluded from the purview of approval of HCC. If a cessed building is a Grade-I or Grade-II category heritage

building, the requirement of seeking approval of Heritage Conservation Committee would still be necessary. The special exception is carved out only for cessed buildings in Grade-III and precincts, where redevelopment process can be carried out after securing special permission of the Municipal Commissioner. In Mumbai City, several cessed buildings are in dangerous and dilapidated conditions, which has large number of tenants residing in premises of smaller size. Timely redevelopment of such cessed buildings is in overall interest of the residents of such buildings. The relaxation granted by clause (iii) of Regulation 67(2) ensures that the strict scrutiny by the Heritage Conservation Committee is insisted upon for achieving the goal of expeditious redevelopment of cessed buildings falling in Grade-III and precincts. Redevelopment of such buildings can be carried out after securing special permission of the Municipal Commissioner. We therefore do not find any merit in the challenge raised by the Petitioners to the validity of Clause-(iii) of Regulation 67(2).

25) Though reliance is placed by Mr. Lohia on order passed by this Court in *Dr. Arun R. Chitale* (supra) in support of his contention that the validity of Clause-(iii) of Regulation 67(2) has been upheld, the same is merely an interim order and does not conclusively determine the validity of the Regulation.

26) In view of the above discussion, we reject Petitioners' prayer for reading down or setting aside clause (iii) of Regulation 67(2), both on counts of impermissibility to challenge statutory provision in a PIL as well as on merits.

27) Coming to the aspect of merits of the decision of the Municipal Commissioner in granting special permission, it is contended by the Petitioners that the decision of the Municipal

Commissioner suffers from non-application of mind and failure to record reasons. We have gone through the copy of the concerned file noting as approved by the Municipal Commissioner by which special permission has been granted. It must be borne in mind that the word '*special*' used in the context of permission of the Municipal Commissioner under Regulation 67(2)(iii)(b) is an additional permission over and above the usual development permission. Merely because the word '*special*' is used in Regulation 67(2)(iii)(b), it does not mean that special reasons are required to be recorded while granting the permission. while granting the development permission, the Municipal Commissioner needs to keep in mind the special circumstance that the redevelopment is of a heritage or precinct building.

28) Perusal of the file notings would indicate that the relevant material was placed before the Municipal Commissioner. He was made aware of the position that the plot is situated within the Gamdevi Precincts and included in the list at Serial No. 432. Attention of the Municipal Commissioner was also invited to modified Regulation 67 requiring special permission of the Municipal Commissioner if the height of the building was exceeding 24 meters. The Municipal Commissioner was also made aware of the fact that the height of the building, excluding the stilt, was 45.30 meters. After placing all material before the Municipal Commissioner, his approval was sought. The Municipal Commissioner has approved the file. It therefore cannot be contended that the Municipal Commissioner has not applied his mind or did not record reasons while granting the second permission. Though it is sought to be suggested that Regulation 67 does not contemplate recording of reasons, it is well settled position of law that the requirement of recording reasons can be read into a statutory

provision. However, it is difficult to hold in the present case that no reasons have been recorded by the Municipal Commissioner while granting the special permission. In that view of the matter, reliance by Mr. Behramkamdin on judgments of the Apex Court in *A.N. Parasuraman* (supra) and *Himat Lal K. Shah* (supra) is of no relevance.

29) The last aspect highlighted by the Petitioners is about inflation of number of tenancies by the developers with the objective of securing higher FSI. It has been clarified by the Respondents that no FSI incentive is granted to the Project in question based on the number of tenants. Even the file approved by the Municipal Commissioner does not indicate that FSI corresponds to the number of tenants in the plot. In that view of the matter, it is not necessary to undertake an enquiry into the allegations raised by the Petitioner about artificial inflation of the number of tenants. In that view of the matter, it is not necessary to discuss the ratio of the judgment of Division Bench of this Court in *Normadie Co-operative Housing Society Limited* (supra).

30) Turning to the aspect of delay, it is well settled position that the principle of delay and laches are applicable to public interest litigations also. In *Bombay Dyeing and Manufacturing Co. Ltd. Vs. Bombay Environmental Action Group*⁹ it is held by the Supreme Court as under:

"341. Delay and laches on the part of the writ petitioners indisputably has a role to play in the matter of grant of reliefs in a writ petition. This Court in a large number of decisions has categorically laid down that where by reason of delay and/ or laches on the part of the writ petitioners the parties altered their positions and/ or third parties interests have been created, public interest litigations may be summarily dismissed. Delay although may not be the sole ground for dismissing a public interest litigation in some cases and, thus, each case must be considered having regard to the facts and circumstances obtaining therein, the underlying equitable principles cannot be ignored. **As regards applicability of the said principles, public interest**

⁹ AIR 2006 SC 1489

litigations are no exceptions. We have heretofore noticed the scope and object of public interest litigation. Delay of such a nature in some cases is considered to be of vital importance.

(emphasis added)

In *Govind Kondiba Tanpure & ors. vs. The State of Maharashtra & ors.*¹⁰

Division Bench of this Court has held as under:

21. The principle of denial of relief on the grounds of laches is equally applicable to public interest litigation. If there is no proper explanation for the delay or laches, even public interest litigations are liable to dismissal due to unexplained delay or laches. In the absence of any explanation, this Court is not obligated to consider whether the petitioners' explanation is sufficient to condone the delay and laches in filing the present PIL Petition.

Thus the Petitioners will have to pass the muster of delay and laches, especially since they seek demolition of the building consequent to cancellation of all the permissions.

31) By the time Petitioners filed the earlier Petition, the construction of the building was already complete upto 15 floors. Petitioners waited till the construction of the building was virtually complete and thereafter approached this Court. Petitioners are residents of the same locality and the construction came up in front of their eyes. This delay would be a relevant factor in deciding the Petition, particularly when the Petitioners seek the relief of demolition of the building.

32) During pendency of the present Petition, construction of the building has been completed. The occupancy certificate for the

¹⁰ PIL No. 60 of 2015 decided on 07-08-2024

building has been issued and occupants are residing therein for the last 20 long years. It is however contended by Mr. Behramkamdin that if the building is itself illegal, mere completion of construction or occupancy thereof cannot be a reason for Courts not directing its demolition. Reliance is placed on judgment of the Apex Court in *M. I. Builders Pvt. Ltd.* (supra). The case before the Apex Court involved construction of underground shopping complex in a park of historical importance in the City of Lucknow. The High Court had directed demolition of the entire Shopping Complex and for restoration of park to its original condition. In the light of this factual position, the Apex Court held that unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. The judgment has no application to the facts of the present case where the building is constructed on the subject plot cannot be termed as unauthorized by any stretch of imagination. The building has been constructed in accordance with the sanctioned plans. What Petitioners seek is declaration of the relevant part of DCR as unconstitutional so as to render the special permission granted by the Municipal Commissioner illegal. What is however ignored is the position that even if Clause (iii) of Regulation 67(2) is to be declared unconstitutional, the same would only mean that approval of HCC would be needed for undertaking development of the plot in question. It is not that upon setting aside Clause (iii) of Regulation 67(2), the building would automatically become illegal. This Court must also bear in mind the position that 20 long years has elapsed after construction of the building. The building has been constructed by considering the provisions of clause (iii) of Regulation 67(2). Even if this Court was to set aside clause (iii) of Regulation 67(2), whether the building already constructed in accordance with a statutory provision which was valid at the relevant time, would not be rendered unauthorized after reading down that provision.

33) After considering the overall conspectus of the case, we are unable to grant any relief in favour of the Petitioners in the present petition. The PIL is accordingly **dismissed**. Rule is discharged.

[SANDEEP V. MARNE, J.]

[CHIEF JUSTICE]