Vijay Krishna Kumbhar vs The State Of Maharashtra & Others on 15/3/1999

ORDER

B.N. Srikrishna, J.

1. These two petitions are in the nature of public interest litigation, the first at the instance of a journalist from Pune and the second at the instance of a Corporator of Pune Municipal Corporation. These petitions under Article 226 of the Constitution broadly challenge the action of the first respondent, the State of Maharashtra and the Commissioner of Pune Municipal Corporation (hereinafter referred to as "P.M.C") in granting building permission to respondent Nos. 7 and 8 for construction of a building on Final Plot No. 110, Erandwana, Pune. The petitions also allege that the action of the Commissioner of P.M.C. was at the behest of respondent No. 5 who was the Chief Minister of the Government of Maharashtra at the material time and contrary to the provisions of the Maharashtra Regional And Town Planning Act, 1966, (hereinafter referred to as "the M.R.T.P. Act"). It is contended that the said buildings permission is not only illegal, but also vitiated as it has been procured by sheer abuse of power. While the first petition seeks relief by way of demolition of the offending construction, the second petition seeks a direction to the P.M.C to acquire the said land along with the building and use it for a public purpose.

2. In order to understand the legal matrix under which the challenges arise, it is necessary to trace the chronology of events in some detail so that the import and the impact of the contentions urged at the Bar are properly appreciated. The strict chronology of events may occasionally be deviated from, for the sequence of events has independent trails and each trail would have to be examined, albeit, again chronologically.

3. For the purpose of convenience we would divide the sequence of events into two broad heads: (A) Events leading to the present writ petitions within the knowledge of the petitioners and (B) The events which transpired within the corridors of power which have now come to light as a result of the perusal of the State Government’s files and the documents produced by the P.M.C.

(A) CHRONOLOGY OF EVENTS LEADING TO THE WRIT PETITIONS AS KNOWN TO THE PETITIONERS:

4. In the sanctioned final development plan of Pune Municipal Corporation of 1966 there were three plots bearing Final Plot Nos. 110, 111 and 112 under the Town Planning Scheme No. I in Erandwana, Prabhat Road, Pune. These plots were given Final Plot Nos. 110, 111 and 112 (these three plots are hereinafter referred to as "FP–110, FP–111 and FP–112") under the Town Planning Scheme No. I which was brought into effect under the Bombay Town Planning Act, 1931. Originally the plot of land was one and admeasured 9960 square meters. After this plot was sub–divided and reconstituted, the areas of the three reconstituted plots were: 1) FP–110 = 3450.98 square meters, 2) FP–111: 2483.52 square meters and 3) FP–112= 3935.50 square meters. We are concerned only with FP–110 admeasuring 3450.98 square meters. A part of this plot was occupied by old sheds which house 24 tenants (respondent Nos. 12 to 35 in W.P. No. 4433 of 1998 and respondent Nos. 9 to 32 in W.P. No. 4434 of 1998). FP–110 to FP–112 were reserved for a garden in the 1966 Development Plan of Pune City.

5. On March 13, 1976 the P.M.C as the planning authority under the provisions of the M.R.T.P Act passed Resolution No. 758 and declared its intention to publish a revised development plan under section 23(1) read with section 38 of the M.R.T.P Act. Some time in the month of December 1979 one Laxmikant Murudkar, the owner of the said FP–110 served a purchase notice on the P.M.C under section 49 of the M.R.T.P Act. On January 5, 1980 the Standing Committee of the P.M.C passed Resolution No. 1523 and approved the proposal for acquisition of FP–110.

On May 9, 1980 the P.M.C forwarded the proposal to the Collector of Pune. On July 19, 1980 the Collector of Pune appointed a Special Land Acquisition Officer (hereinafter referred to as the "SLAO") to acquire the land. On July 27, 1982 the P.M.C obtained possession of FP−112 by paying compensation of Rs. 7,52,613/−.

6. On September 17, 1982 the fourth respondent, Director of Town Planning was appointed by the State Government as a Special Officer for exercising functions of planning authority under sections 28 and 29 of the M.R.T.P. Act. On September 18, 1982 the fourth respondent revised draft development plan under section 26(1) and called for objections and suggestions. In this revised draft development plan FP−110 to FP−112 were shown as "reserved for children's play ground". On May 12, 1983 the SLAO No. 15, Pune, awarded a sum of Rs. 6,10,323/− to the owner of the land FP−110, Murudkar and Rs. 2,500/− each to the tenants/occupants. Some time in 1983, Murudkar filed Land Acquisition Reference No. 273 of 1983 in the District Court, Pune under section 18 of the Land Acquisition Act, 1894 seeking enhancement of compensation. Simultaneously in the same year 1983 about 10 of the tenants filed Civil Suit No. 966 of 1983 against the P.M.C. and the State Government challenging the acquisition proceedings and the award dated May 12, 1983. The Civil Court granted an interim injunction on June 19, 1983 restraining the authorities from taking possession of the land FP−110. The interim injunction granted by the Civil Court, Pune came to be vacated on February 9, 1984 as the Court was of the view that the suit could not be entertained for want of notice to the public officers under section 80 of the Code of Civil Procedure. The Court returned the plaint to the plaintiffs on this ground. Murudkar thereafter approached the Minister of State, Urban Development Department (U.D.D.) and obtained from him an administrative order preventing the authorities from taking possession of the land FP−110 which was sought to be acquired. Some time in the month of April 1985 Murudkar owner of the said land accepted the compensation of Rs. 6,10,323/− in respect of FP−110, albiet, under protest.

7. On January 5, 1987, the revised development plan was sanctioned and became the final development plan under section 31 of the M.R.T.P Act. In this final development plan, FP−110 to FP−112 were reserved for primary school. The gazette notification (Ex. B to the petition) dated January 5, 1987 notified the final plan. Annexure No. 1 to the plan gives the legends and the contents of each column in the schedule. Clause (ii) of the instructions states that column 3 of the schedule shows the purpose of designated site. Clause (v) of the instructions points out that the person notified in column 6 represents appropriate authority for acquisition and development of the site. However, where the owner has been shown as appropriate authority the question of acquisition does not arise, where owner himself develops the site. Detailed explanations of the abbreviations used in the plan are also indicated in this annexure. Letters 'PS' denotet "primary school". When we turn to the final development plan of Pune revised in 1987 (schedule at pages 44 to 54) we see that a number of reservations/designations are indicated for primary school, high school, hospital, maternity home and dispensary, shopping centre, children's playground, playground, park, garden, green belt, fire brigade, parking, P.M.T parking, pumping station, office complex, civic and cultural centre, slum improvement, post office, economically weaker section housing, police chowky, Municipal purpose, high level after tank, cremation and burial ground, cattle shed and industrial zone. The relevant entry is at Serial No. 8. Serial No. 8 shows that in Sector No. III− traffic plan sheet No. 10− traffic zone No. 38 FP−111 and a part of FP−112 are reserved for "primary school". In column No. 7 it is indicated, "reservation continued. Development allowed as per note 4. Note 4 says : "Sites designated for Primary Schools from Sector I to VI as may be decided by the Pune Municipal Corporation, may be allowed to be developed by recognised public institutions registered under the Public Charitable Trust Act working in that field or the owners of the land". Thus, it would appear that under the sanctioned final development plan of Pune, 1987, FP−110, FP−111 and part of FP−112 were reserved for the purpose of a primary

school and this could have been developed either by a recognised public charitable institution registered under the Public Charitable Trust Act working in the field of education or the owner of the land. A reference to column No. 4 of the schedule indicates that out of the total area of about 8,340 square meters, an area of about 0.816 hectares was under reservation and fell within plot Nos. 4, 5 and 6 of the town planning scheme−I.

8. On March 1, 1988 the SLAO issued notice of possession to the owner− Murudkar.

9. On April 15, 1988, Land Acquisition Reference No. 273 of 1983 filed by Murudkar in the District Court Pune was dismissed but solatium was enhanced to 30% and special component of 12% under section 12(A) of the Land Acquisition Act, 1894 was directed to be paid for the period from August 27, 1981 to May 12, 1983. Murudkar accepted this amount also under protest but did not challenge the said order of the District Court by way of appeal under section 54 of the Land Acquisition Act, 1894

10. On March 7, 1988 some of the tenants filed Civil Suit No. 397 of 1988 against the State Government and the P.M.C challenging the award and obtained an interim injunction protecting their possession. Initially Murudkar was made defendant No. 7 in the suit but by an order of the Civil Judge, Senior Division, Pune dated April 2, 1988 he was deleted as defendant No. 7 and transposed as plaintiff No. 5 in the said suit.

11. Two well known educational institutions. "Symbiosis International Cultural & Educational Centre" (hereinafter referred to as the "Symbiosis") Maharashtra Education Society ("M.E.S"), which were both active in the educational field were interested in getting the reserved FP−110 to FP−112 allotted to them for the purpose of building educational institutions. M.E.S had applied as early as on April 29, 1986 to the Commissioner of P.M.C. pointing out that under the draft development plan for Pune City, FP−110, 111 and 112 (part) falling under the town planning scheme−I, situated at Prabhat Road, Galli No. 15, Pune 411 004 had been reserved for primary school and that the area of the reserved plot was 0.816 hectares; that the entire area was open and that the said institution was badly in need of land for extension of its educational activities. The letter also indicates that the M.E.S. had taken up the matter with the then Chief Minister of the Government of Maharashtra who had by his letter dated April 9, 1986 recommended that the said reserved plot be allotted to the said institution. M.E.S therefore, pressed upon the Commissioner of P.M.C. by the said letter to urgently allot and hand over the reserved plots to it for developing and constructing a primary school thereupon. Apparently this was not done. Symbiosis had addressed a letter dated April 28, 1988 to the Commissioner of P.M.C. and requested for allotment of FP−110, 111 and 112 (part) − (PS−57 in Sector III/10/38) which had been reserved for primary school. As a sequel to this correspondence, it appears that on August 16 ,1989 it was decided by the P.M.C to lease out entire FP−112 to Symbiosis. A lease deed was executed on August 16, 1989 between the P.M.C. and Symbiosis under which the prescribed lease rent and lease premium was to be paid by Symbiosis and Symbiosis was allotted the said plot for construction of a primary school. Accordingly, Symbiosis developed the said plot by constructing a school and is running a primary school on the said plot FP−112. We are also informed at the Bar that FP−111, which was also reserved for primary school, has been allotted to the Indian Law Society which has developed the land and constructed a specialized educational institution for spastic children. FP−110 however, was not allotted to any one and remained under litigation at the material time.

12. On August 17, 1989, Murudkar executed a development agreement with Mukesh B. Jain. The said Mukesh B. Jain did not take any further steps regarding development and construction on the said FP−110.

13. On April 23, 1990, the Civil Judge, Senior Division, Pune decreed Regular

Civil Suit No. 397 of 1988 and granted a declaration that the award made by the SLAO dated May 12, 1983 and subsequent acquisition proceedings were illegal and invalid; that the notices for possession issued to the plaintiffs and other persons were also illegal and invalid. The Court also granted permanent injunction restraining the State of MAHARASHTRA. Collector−Pune, the SLAO, Tahsildar−P.M.C., Commissioner of P.M.C. and the Secretary, Urban Land Development, from taking possession of the suit property from the plaintiffs, by themselves or through their agents or servants.

14. On January 7, 1991, the P.M.C. filed a First Appeal in this Court which was returned by the Additional Registrar of this Court on April 21, 1992 for presentation to the District Court. The P.M.C. then presented it before the District Court on April 29, 1992. On April 7, 1994, the District Court returned the appeal to the P.M.C. for representing it to this Court on ground that the suit was valued above Rs. 50,000/−. Finally, on July 18, 1994 the appeal was filed in this Court and remained pending without being moved for admission till it was withdrawn under circumstances to which we shall advert subsequently.

15. On March 14, 1995, the Government headed by respondent No. 5 was installed in power. Respondent No. 5 took charge as the Chief Minister and retained the portfolio of Urban Development Department with him.

16. On October 20, 1995, Murudkar executed a development agreement in favour of respondent No. 7−M/s. Vyas Constructions−of which respondent No. 8 is the proprietor. The preamble of the said development agreement dated October 20, 1995 makes interesting reading. After narrating the chronology of events, the preamble to the agreement dated October 20, 1995 recites.

"And WHEREAS the said Shri Mukesh Bhabutmal Jain did not take further steps regarding development and construction in the said property as per the agreement dated 17−8−1989. And WHEREAS due to reservation on the said property for primary school under present Development Plan of Pune city the vendor also could not do the development of the said property on his own by terminating the said agreement or otherwise.

And WHEREAS the Vendor therefore, approached the Developer and requested them to solve the legal complication and practical difficulties in the matter of development and construction in the said property."

(Vendor here is the said Mukesh B. Jain and the Developer is Girish Vyas−respondent No. 8). Further, the agreement recites in para 7 as under:

"7. The Developer in his absolute discretion and if he thinks fit and proper and at his own cost and through his own efforts shall follow up the procedure or process of de−reservation of the said property and/or for change of reservation/designation of the said land and/or for getting any other benefits arising out of transfer of development rights or in lieu of compensation or otherwise as per the D.C Rules/bye−laws/M.R.T.P Act/Development Plan or otherwise. The Vendor upon the instruction and at the request of the Developer from time to time shall give his necessary consent or signature on any paper, application, form or other representation or statement as and when required by the Developer".

Paragraph Nos. 20 and 21 of the development agreement read as under:

"20. After de−reservation of the said property the clearance under Urban Land (Ceiling and Regulation) Act, 1976 may be necessary and the Developer herein agrees to get it done at his own cost and consequences and the Vendor agrees to co−operate in all respects with the Developer and shall give his signature whenever demanded by the Developer.

21. The Developer is fully empowered and authorised to get any scheme

sanctioned under any of the provisions of the U.L.C. Act and/or get any exemption granted from the Ceiling Authorities in respect of the said land. The Developer shall be entitled to execute and implement any such scheme or exemption order and take all the benefits/profits accruing therefrom. The Vendor shall give the necessary signatures to the Developer on any plan/form/statement as may be required by the Developer and co−operate with the Developer in executing and implementing any scheme/order/exemption under U.L.C. Act".

These recitals in the development agreement do suggest that respondent No. 8 was confident of having FP−110 de−reserved and obtaining clearance under the Urban Land (Ceiling and Regulation) Act, 1976. We have quoted these portions from the development agreement as they have a material bearing on other aspects of the case.

17. On January 16, 1998, a deed of confirmation was signed between Laxmikant Murudkar on one hand and M/s. Vyas Constructions (respondent Nos. 7 & 8) and Mrs. Ranjana Laxmikant Murudkar, Miss Rupali Laxmikant Murudkar, Master Manish Laxmikant Murudkar (minor) and Miss Deepali Laxmikant Murudkar (minor), under which the wife and children (including two minor children of Laxmikant Murudkar) confirmed that the developer (respondent Nos. 7 & 8) shall have the sole and exclusive rights of development of property FP−110 and was fully empowered to execute ownership flats scheme thereupon and to enter into agreement of sale/flat booking and/or mortgage the same for creating any charge security thereupon. The consenting parties, the wife and children of Murudkar, confirmed and affirmed the development agreement dated October 20, 1995 which had been entered into between Laxmikant Murudkar and respondent Nos. 7 & 8, which was claimed to be for legal necessity and benefit of the estate and fully binding on the consenting parties. The preamble of this deed of confirmation contains, inter alia, the following:

"AND WHEREAS the parties viz., the Vendor and the Developer submitted the necessary 37−I form before the Appropriate Authority under section 269(UA) of Chapter XXC of Income Tax Act and the Appropriate Authority has granted the clearance certificate/NOC for the transaction of development agreement between the Vendor and the Developer vide its letter No. AHD/LA/PL/2686 95−96 dated 12−1−1996:

AND WHEREAS after the 37−I clearance the developer on behalf of Vendor approached the Government of Maharashtra U.D. Department for getting directions regarding sanction of Development permission on the said land by the Pune Municipal Corporation;

AND WHEREAS the Government of Maharashtra U.D. Department, Mantralaya, Bombay vide its order letter dated 3−9−1996 directed the Pune Municipal Corporation to grant conditional development permission to the Vendor under certain terms and conditions;

AND WHEREAS by fulfilling the terms and conditions of the said directions of Government of Maharashtra the Developer has got sanctioned from Pune Municipal Corporation building plans of the proposed building vide Commencement Certificate No. 386 dated 3−5−1997 and also redevelopment permission from Competent Authority, Pune Urban Agglomeration, Pune under section 22 of the Urban Land (Ceiling and Regulation) Act, 1976 vide No. 431/574/MU dated 5−4−1997;....."

These recitals suggest that the developer (respondent Nos. 7 & 8) had obtained clearance under section 37(I) of the Income Tax Act, 1961 and thereafter approached the Government of Maharashtra for getting directions regarding sanction of development permission on the land; that by an order dated September 3, 1996 the Government of Maharashtra directed the P.M.C. to grant conditional permission; that after fulfilling the terms and conditions imposed by the Government of Maharashtra, the developer had got the building plans of

the proposed building sanctioned vide commencement certificate dated May 3, 1997 and also obtained redevelopment permission from the competent authority, Pune Urban Agglomeration, Pune, under section 22 of the Urban Land (Ceiling and Regulation) Act, 1976 vide order dated April 5, 1997.

18. On October 20 and 26, Murudkar executed two Powers of Attorney in favour of respondent Nos. 7 & 8.

19. On November 1, 1995, one Avinash Nawathe, acting on behalf of Murudkar, submitted building plans to the P.M.C. for approval under section 44 of the M.R.T.P. Act.

20. By an order made on November 6, 1995, the City Engineer of the P.M.C. who has been delegated the requisite powers, rejected the development permission sought on the ground that FP–110, town planning scheme–I, Pune was affected by reservation for primary school and the acquiring authority was the P.M.C. and that the development could be permitted only in accordance with Note No. 4 as indicated in the plan published in the official gazette. The City Engineer informed Avinash Nawathe that the building proposal was inconsistent with the note contained at Serial No. 4 and hence it was not possible to sanction the development permission sought. He was further informed that for the said reason and in accordance with the provisions of section 255 of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "the B.P.M.C. Act") read with section 45 of the M.R.T.P. Act read with Development Control Rules 6.1.1, the permission for development as sought was being refused. He was advised to collect permissible refund of the scrutiny fee. (This letter is produced at Annexure I to the affidavit of Vidyadhar Deshpande, Deputy Secretary, Government of Maharashtra, U.D.D filed on behalf of respondent No. 1 and made on September 17, 1998).

21. On November 20, 1995, one Shriram Karandikar, Constituted Attorney of Murudkar, made an application addressed to the Minister of State, U.D.D. Government of Maharashtra (respondent No. 6). The application sets out the chronology of events ending with the permanent injunction granted by the Civil Judge, Senior Division, Pune. It is pointed out that the property FP–110 was under restrictions on development since 1966, that the proceedings for acquisition of the property had become invalid, inoperative and void by reason of the judgment and decree of the Civil Court and that the reservation of the said property for primary school de novo in the development plan of Pune sanctioned in 1987 would necessitate fresh acquisition proceedings resulting in a fresh round of litigations inviting resistance from the tenants and occupants and thus freezing the development of the said property to the prejudice of the owner and putting him to incalculable loss for years to come. The application further says that the subsequent reservation for the purpose of primary school is against the judgements of the Supreme Court and High Courts which put restrictions on the power of acquisition by the State beyond 10 years. In the instant case, the applicant had suffered severely for almost 30 years. Should the State Government or the Municipal Corporation of Pune initiate acquisition proceedings, they would be resisted by the tenants and the occupants and there would be clusters of ramshackle and dilapidated structures on the said property. The application made the following submissions:

(i) by reason of the judgment and decree of the Civil Court in the said Civil Suits, fresh acquisition proceedings are barred,

(ii) the subsequent reservation of the property for the primary school is superfluous as circumstances after cases and facts as they develope, render fresh thinking necessary on planning,

(iii) there is deterioration in the state of the property,

(iv) the judgment and decree of the Civil Judge in the aforesaid suit would

render any further acquisition mala fide, arbitrary and capricious,

(v) the Supreme Court has ruled that reservation of private property must be followed by speedy acquisition within 10 years and such reservation cannot extend beyond 10 years,

(vi) the Supreme Court judgments constitute the law of the land and are binding on the executive and judicial branches of the Government,

(vii) during the pendency of the civil suit, it was incompetent for the State Government to further reserve the said property for the primary school, (viii) the prescription for the property for primary school in the development plan of Pune sanctioned in 1987 is inoperative as it was made in defiance of the orders of the then Minister of State.

The applicant claimed :

"The applicant submitted to the Pune Municipal Corporation a building plan for development of the said property on 1−11−1995. The Authorities of the Pune Municipal Corporation by their letter dated 6−11−1995 bearing No. DPO/4126 have informed the applicant that the building plans/ layout of the building cannot be sanctioned due to reservation of the said property for primary school. Thus the City Engineer, Pune Municipal Corporation, Pune has refused sanction to the building plans of the applicant submitted through Architect Shri Avinash Nawathe".

The Applicant further contended :

"..... this is a fit case in which the State Government may grant relief by directing the Municipal Commissioner, Pune Municipal Corporation, Pune, to consider the application for development by the owner and the tenants of the said property consistent with the character of neighbourhood as :

(a) the reservation of the said property for garden or primary school has become inoperative and on the face of it unfair in exercise.

(b) there is no option available to the State Government by inviting objections and suggestions as the options are closed by the judicial pronouncements.

(c) such publication for inviting objections and suggestions would mean traversing on the judicial pronouncements setting aside the acquisitions and would amount to a colourable exercise of power".

Finally, the following requests were made in the application :

"(a) That the Development permission sought by the applicant from the Municipal Commissioner, Pune, on 1−11−1995 and the building plans submitted by him through his Architect be directed to be sanctioned in view of the above referred legal position and judicial decisions.

(b) That appropriate steps be taken to correct the development plan consistent with the above legal position and judicial decisions."

22. How this application came to be processed by the State Government at various levels and by the Commissioner of the P.M.C. is obviously a matter which could not have been within the knowledge of the petitioners. We have gathered the material facts from the departmental official files produced by the learned Advocate General and the documents made available at our directions by the P.M.C. Since both these writ petitions in large measure turn upon how and in what manner this application was processed, it would be necessary to recount the events which transpired at the level of the State Government as well as the

P.M.C..

(B) PROCESSING OF APPLICATION DATED NOVEMBER 20, 1995 :

23. According to the affidavit of respondent No. 8, after the application dated November 20, 1995 was made to the Minister of State for UDD, "meetings and discussions took place and at the meeting held on 3rd February, 1996 after due deliberation" certain decisions were taken. It is not clear from the departmental official file as to how the application dated November 20, 1995, was received by the Government of Maharashtra. The application is claimed to be an appeal under section 45 of the M.R.T.P Act against the order of refusal by the Commissioner of P.M.C. Such an appeal is to be addressed to the State Government or to an officer appointed by the State Government in this behalf, being an officer not below the rank of Deputy Secretary to Government.

24. The application dated November 20, 1995, in the first place is not addressed to the State Government but to the Minister of State for UDD. Secondly, the application does not bear inward stamp to suggest that it was tendered in any section of the Urban Development Department in Mantralaya. Presumably, therefore, this application was directly handed over to the Minister of State for UDD. In the margin, there is a noting by the Private Secretary to the Minister of State for UDD (respondent No. 6) addressed to the Deputy Secretary, UDD, "The Honourable Minister has directed that a meeting be called at 11 a.m. on 19−1−1996. Director, Town Planning and Commissioner of P.M.C. may kindly be informed to personally remain present at the meeting as directed by the Honourable Minister".

25. The official departmental file contains the office copy of the notices dated January 10, 1996 addressed to the Director, Town Planning and the Commissioner of the P.M.C. calling upon them to attend the concerned meeting on January 19, 1996 at 11 a.m. in the Chamber of respondent No. 6. Office copy of the letter dated January 15, 1996 addressed to Shriram Karandikar, Power of Attorney holder of the owner of the land, Director, Town Planning and the Commissioner of the P.M.C. informing them that the meeting proposed to be held with the Minister of State, UDD, on January 19, 1996 was being adjourned to January 22, 1996 at 3 p.m. is also found in the file. The concerned persons were requested to personally attend. What transpired on January 22, 1996 is not reflected in the file. Though, according to the affidavit of respondent No. 8, "meetings and discussions" preceded the meeting of February 3, 1996 the affidavits filed on behalf of the State Government, the Commissioner of the P.M.C. and the City Engineer of the P.M.C. do not throw any light on what happened between January 22, 1996 to February 3, 1996. There are also no minutes maintained, nor file notings, of what transpired during the said period. However, there is one sheet of paper which bears the heading "The discussions held on 22−1−1996 alongwith Honourable Minister of State for UDD, in connection with Erandwana City Survey No. 76, Final Plot No. 110, area 3541 square meters". This sheet of paper also indicates the names, designations and the signatures of the persons present. They are as under: [window.print()] ???

Perusal of this document suggests that there were four persons present at the meeting of January 22, 1996 and there were discussions held along with the Minister of State for UDD. Curiously, however, the file notings do not suggest such a meeting nor are any minutes, even of an adjournment, contained in the file.

24. The file contains an office copy of a letter dated January 23, 1996 addressed to (1) Shriram Karandikar (2) Director, Town Planning and (3) the Commissioner of the P.M.C. stating, "In order to hold further discussions with the Honourable Minister of State, UDD, now a meeting has been fixed on 3−2−1996 at 3 p.m. Kindly attend the said meeting personally". Then comes another sheet of paper with heading, "Hearing before the Minister of State for UDD dated 3−2−1996. Subject: Erandwana City Survey No. 76, Final Plot No. 110, for

deletion of area from reservation". This sheet of paper also shows who were present and who were not. It reads thus:

[window.print()] ???

Going by this document contained in the official file, it would appear that a meeting was held on February 3, 1996 with the Minister of State for UDD and the only persons attended the meeting were P.T. Dekne and S.D. Karandikar. The signatures of all other persons are conspicuously absent.

27. Before we turn to the file notes and the minutes with regard to the meeting of February 3, 1996 it would be interesting to notice the file note made by Under Secretary P.V. Ghadge on February 2, 1996. The note reads as under:

"UDD/UD 13

The facts pertaining to the case forwarded by Shri Shriram Karandikar, Pune, to the Government in connection with the above subject are briefly as under :

Under the Pune Development Plan, Erandwana, City Survey No. 76 Final Plot No. 110, area 3541 square meters was reserved for garden under the 1966 draft development plan. Under the 1987 draft development plan this reservation has been changed to primary school. There are about 25 tenants residing on this land for the past several years.

The P.M.C. has taken action in accordance with the purchase notice dated 5−12−1979 given by the land owner and even the land acquisition award has been made, and the land owner has received the compensation in respect of the land.

When this was the situation the tenants residing there filed a suit in the Civil Court in 1983 and prayed for injunction against taking possession. Injunction order was later on vacated. But thereafter in 1988 the tenants again filed a suit in the Court of the Civil Judge, Senior Division, Pune, and challenged the legality of the acquisition of the land and obtained from the said Court a permanent injunction on 23−4−1990. Thereafter the matter is just pending. The P.M.C. is taking steps to file appeal against the said order of the Civil Judge, Senior Division, Pune, before the High Court. On enquiries it is learnt that the appeal has not yet been filed.

It is the contention of the applicant that the 20/30 tenants have been staying on the land for several years, and these tenants have obtained a permanent injunction from the Court against the acquisition of the land. Hence, the Government may consider all the aforesaid facts and grant development permission by deleting the reservation.

The opinion of the department in this matter is that the land has been acquired along with the structures pursuant to the purchase notice. Compensation for acquisition has already been accepted. Even if the reservation is changed there is not going to be any difference thereby. The P.M.C. may be instructed to immediately appeal to the Bombay High Court. There is no question of returning the land to the owner".

28. On January 10, 1996 letters were sent to the Director, Town Planning and the Commissioner of the P.M.C. enclosing a copy of the representation dated November 20, 1995 made on behalf of the owner of the land by Shriram Karandikar. The letters also informs the recipients of a meeting arranged in the Chamber of the Minister of State, UDD, at 11 a.m. on January 19, 1996 and call upon them to submit a detailed report touching the subject and also to personally remain present for the meeting.

29. There is an office copy of the letter dated January 23, 1996 addressed to

Shriram Karandikar, Director Town Planning and the Commissioner of the P.M.C., informing them to attend a meeting on February 3, 1996 at 3 p.m. with the Minister of State, UDD "for further discussions with regard to the above matter", the 'above matter' indicated in the letter being the matter pertaining to development permission on FP–110.

30. (a) There is a file noting dated February 12, 1996 by Under Secretary P.V. Ghadge which, besides Ghadge, is signed by Deputy Secretary Pant Balekundri, Secretary D.T. Joseph and the Minister of State, UDD. This note suggests that the meeting called on January 19, 1996 pursuant to the application dated November 20, 1995 had been adjourned and fixed on February 3, 1996 and was actually held on February 3, 1996. The representatives of the land owner along with his Advocate, Secretary UDD Director–Town Planning, Commissioner of the P.M.C., City Engineer of the P.M.C. and Under Secretary–UD–13, were present. Upon a pointed query of the Secretary, UDD, as to whether the Advocate was urging on behalf of the land owner or the tenants on the land, the Advocate replied that he was urging on behalf of the land owner. To a further query from the Secretary, UDD, as to whether the owner of the land had any time objected to the reservation, the learned Advocate replied in the negative.

(b) The stand of the City Engineer P.M.C. in the said meeting appeared to be that, on account of the reservation, the owner of the land had issued a purchase notice which resulted in the P.M.C. adopting acquisition proceedings : there was an award for acquiring the land and the owner had also accepted the compensation awarded. The City Engineer, P.M.C., pointed out that during the entire period from 1982 to 1987 the owner of the land had never raised an objection that the reservation affecting the plot had been changed. He was, therefore, of the view that the the question of objection by the land owner could not arise. The City Engineer, P.M.C., pointed cut that the P.M.C. had appealed to the Bombay High Court against the permanent injunction granted by the Civil Court and, therefore, the matter was subjudice. He also raised a question whether the hearing being given to the land owner was on his letter of request or on an appeal under section 47 of the M.R.T.P. Act, and contended that since the land in question was under reservation there was no possibility of cancelling the reservation in a hearing under section 47 of the M.R.T.P Act and that appeal should be dismissed if it was an appeal and if it was only a representation then no decision could be taken on that because the matter was subjudice.

(c) The owner of the land specifically pointed out that the application made by him was only a request or representation and not an appeal. He contended that the P.M.C, had not yet filed an appeal against the judgment and decree of the Civil Court. It was also pointed out by him that on the adjacent plots FP–111 and FP–112 there was reservation for primary school and schools had been established thereupon and hence if the P.M.C. did not need the plot, the owner should be permitted to develop it. Respondent No. 6, Minister of State for UDD and the Secretary, UDD, took the stand that if on the adjacent plots schools had been established, then the P.M.C. should realty investigate and find out if it needed the plot in question. Also, they must find out if the reservation could be maintained on some portion of the land and the balance of the land could be surrendered to the owner. In other words, if it was possible to enter into such a compromise, then the owner would have to accommodate the tenants on the land surrendered to him. If the P.M.C. had no objection to reducing the area of reservation, then the Government would give directions for taking action in accordance with section 37 of the M.R.T.P. Act.

(d) With regard to the aforesaid suggestion the Commissioner of the P.M.C. stated that if the action by way of deleting the reservation or reducing the area of reservation had to be taken, then the permission of the P.M.C. would have to be obtained.

(e) Finally, it was decided that first the Commissioner of the P.M.C. should personally inspect the plot and forward a report in connection therewith to the

Government and thereafter it would be considered as to what further action could be taken.

31. On February 14, 1996 a letter was addressed by Under Secretary P.V. Ghadge to the Commissioner of the P.M.C. and a copy of the minutes of the meeting held on February 3, 1996 was enclosed with the said letter and the Commissioner of the P.M.C. was requested to carry out the personal inspection of the plot and forward to the Government his frank opinion as to whether it was possible to arrive at any compromise in the case. The Commissioner of the P.M.C. was also requested to give information as to when the P.M.C. had filed an appeal in the Bombay High Court and what was its status and also forward a copy of the appeal to the Government.

32. A letter dated March 23, 1996 was addressed by Shriram Karandikar to the Minister of State, UDD in which a reference was made to the meeting of February 3, 1996 with him, the decision taken at the said meeting that some compromise could arrived at between the P.M.C. and himself and the fact that he had submitted his proposal to the Commissioner of P.M.C. as his offer to the P.M.C. Finally, a request was made in the said letter that his earlier application dated November 20, 1995 be treated as an appeal under section 47 of the M.R.T.P. Act. This letter too does not bear any inward stamp, though it bears an endorsement dated April 3, 1996 by respondent No. 6 in the margin saying, "Shri Pant, Deputy Secretary UDD examine". The letter also bears the endorsement of Under Secretary P.V. Ghadge, dated April 26, 1996, "kindly give it to me along with all the papers".

33. (a) On April 17, 1996 the Commissioner of the P.M.C. (respondent No. 10) made a detailed report on the subject. After narrating the events leading upto the meeting of February 3, 1996 and the directive of the Minister of State, UDD to personally inspect the plot and examine if the reservation could be changed or reduced, the report then goes on to say that before considering the various alternatives as directed by the Government it would be necessary to take into consideration some background information. The Commissioner of P.M.C. traced the history of events leading to the decree of the Civil Court dated April 23, 1990 in the Civil Suit No. 397 of 1988 permanently injuncting the P.M.C. from taking possession of the land. He also pointed out that an appeal had been filed by the P.M.C. in this Court which had been returned for being presented to the District Court and that it was re–presented to the District Court. Finally, he concluded by saying, "thus, despite payment of price to the owner, the proceedings of the P.M.C. for taking actual possession have been pending for 13 years and it has not been possible to make use of the land as needed".

(b) The Commissioner of the P.M.C. stated in the report that he had personally carried out the inspection of the area and noticed following things:

"1) There were about 36 houses of temporary nature on the plot.

2) Out of the total area of about approximately half was encumbered.

3) Adjacent to the plot, there are two educational institutions functioning.

4) There are about 11 educational institutions functioning in the close vicinity of the school.

5) Except temporary houses on the property the development in the area appears to be mainly in a planned manner and in that connection the development of the area would be under the Control of the P.M.C.".

Then he pointed out that according to Note No. 4 in the gazette pertaining to the development plan, the area could be developed either by the P.M.C. or by a Charitable Trust or by the owner of the property.

(c) After examining the matter in depth, the Commissioner of the P.M.C. was of the view that there was no possibility of anyone developing a primary school on the concerned property in the near future for the following reasons:

1) The Civil Judge, Senior Division, Pune has held that the land acquisition proceedings taken out by the P.M.C. were invalid.

2) The Court has permanently restrained the Collector and the P.M.C. from taking possession of the land.

3) There are about 36 temporary houses on about half the area of the reserved plot of land since about 40/60 years. According to the Court's order it is necessary to rehabilitate them in the same plan.

4) Since there are about 11 schools in the surrounding area and two big educational institutions are functioning in the adjoining plots, it may not be economically viable for any private institution (charitable trust) or owner of the land to carry out the development according to the plan.

5) There is doubt if there would be a proper response to a school constructed by the P.M.C. since the area is one of higher middle class. Considering the available funds, the P.M.C. could be inclined to construct a school according to the reservation in some other area of the city.

6) The attempt to construct a school on the land acquired for garden might result in the legality of such action being challenged."

(d) Then the Commissioner of the P.M.C. recorded his response to the proposal made by Shriram Karandikar, Power of Attorney holder of the owner of the land. The proposal was that in lieu of the concerned land, the owner would transfer free of cost to P.M.C. unencumbered land of 5 to 10 thousand square feet area in any suburb of the city for building a primary school. Considering that there were tenants on the concerned plot, the alternative suggested by Shriram Karandikar had also been carefully examined. Taking note of the instructions of the Government for deleting or reducing the reservation and the proposal suggested by Shriram Karandikar, the Commissioner of the P.M.C. suggested two options as under :

"1) Out of the area of approximately 3541 square meters of the concerned plot, about 50% of the area is occupied by the houses and under occupation of the tenants therein, while the balance is vacant. The owner of the land should transfer the area other than the area occupied by the houses, to the P.M.C. for a school but since the owner of the land has already received compensation for the entire area, the owner of the area should pay back to the P.M.C. the amount as suggested by the Director, Town Planning with regard to the encumbered area of the plot which would be handed over to the owner.

2) He should hand over to the P.M.C. the land of 3000 square meters at a convenient place and according to the rules of the P.M.C. and its specifications he should also build a school on 500 square meters area and hand it over to the P.M.C. free of cost, and it is necessary to enter into a proper agreement with the owner for this purpose. However, the land which to be given to the P.M.C. elsewhere should not be subject to reservation for primary school or of any other nature under the development plan.

If the first of the above options is to be accepted, then the question of the judgment and order made by the Civil Judge, Senior Division, Pune would arise. In that case it was necessary to have the backing of the owner of the land and the tenants for this option. However, in order to implement either option, it would be appropriate to comply with the following:

1) The administration of the P.M.C. would have to take permission of the P.M.C. while giving up its rights on the subject property.

2) Action would have to be taken under section 37 of the M.R.T.P Act for cancelling the reservation on the land.

3) The approval of the concerned committee of the P.M.C. would have to be obtained for acquisition of new land as suggested in option No. 2."

Finally the Commissioner of the P.M.C. frankly expressed his view that the experience of the P.M.C. with regard to entering into such compromise in connection with the development plan was limited since no such case of compromise had occurred earlier. The Commissioner of the P.M.C. ended by saying, "till further directions of the Government, the legal proceedings in the Court started by the P.M.C. with regard to the concerned plot would be continued".

34. On April 24, 1996 the Private Secretary to respondent No. 6, addressed a note to Under Secretary P.V. Ghadge, stating, "as instructed by Shri Chavan, Private Secretary to the Honourable Chief Minister, please send a copy of the Commissioner of the P.M.C.'s report in the case of Shri Karandikar for the perusal of Honourable Chief Minister". On the note there is an endorsement of Under Secretary P.V. Ghadge made on April 24, 1996 "gave xerox copy".

35. On April 24, 1996 there is a file note made by P.V. Ghadge, Under Secretary, UDD also signed by Vidyadhar Deshpande, Deputy Secretary, UDD on June 4, 1996 and R.C. Singh, Additional Chief Secretary, UDD on June 7, 1996. The file note refers to the chronology of the case ending with the Commissioner of the P.M.C.'s report dated April 17, 1996 suggesting two alternatives and states in paragraph 8, "in the above circumstances it is clear that it would impossible that this land would be available for the purpose for which it is reserved". The file notings in paragraph Nos. 9, 10, 11 and 12 read as under:

"9. Considering all the aforesaid circumstances it is firstly pointed out that Shri Karandikar has approached the Government on behalf of the land owner but the land owner has taken away the price of the land in 1983. Although the P.M.C. has not obtained the actual possession of the land yet according to law, the P.M.C. has become the owner of the land. Hence, the land owner does not have any right to demand that the reservation be deleted and the land be returned to him. Now considering the tenants it is seen that they have gone to the Court and therefore, till the decision of the Court is given there is no necessity to consider anything with regard to them. Even if the decision of the Court goes against the P.M.C. those people would remain tenants and the P.M.C. would be the owner and apart therefrom the tenants have not even made a demand that this land should permitted to be developed.

10. Even if it is so if this matter is kept hanging it wilt not result in any solution and considering the said fact and also that in the vicinity of this land there are several schools there should be no objection to consider alternative No. 1 suggested by the Commissioner of the P.M.C. as indicated on the opposite page at the level of the Government and for approving it. However, the tenants would have to withdraw their case from the Court in respect of the 50% of the area left for the tenants they would have to give to the P.M.C. the land as determined by the Director, Town Planning. If this alternative is acceptable to the land owner then the P.M.C. may be informed the direction of the Government that for deletion of reservation on 50% area action may be taken under section 37 and the proposal should be sent to the Government.

11. The second alternative suggested by the Commissioner of the P.M.C. is not fit to be considered because the reservation has to be shifted in this manner the alternative land must be as big as the original land and it should be within approximately 200 meters of the distance from the reserved land. Further approach road and level of the land must also be identical.

12. The proposal in paragraph 10 is submitted for approval".

This file note by itself does not appear to have reached the Minister of State for UDD. On June 11, 1996 there is a note of the Private Secretary to the Minister of State, UDD, addressed to the Deputy Secretary V.V. Deshpande saying that the Honourable Minister of State, UDD, had ordered that it should be discussed with him on June 12, 1996 at 1 p.m. There is an endorsement on the said note by Under Secretary P.V. Ghadge dated June 12, 1996, "discussions held".

36. The file noting dated June 13, 1996 reflects what transpired in the meeting held on June 12, 1996. On that day apart from the Minister of State, UDD, Shriram Karandikar (applicant), Harihar (City Engineer of the P.M.C.), V.V. Deshpande (Deputy Secretary, UDD), and P.V. Ghadge (Under Secretary, UDD) were present at the meeting. It was submitted on behalf of the applicant−Karandikar that out of the two alternatives suggested in the report of the Commissioner of the P.M.C., it was not possible to accept the first alternative. He also urged that the P.M.C. should consider accepting the second alternative. The City Engineer, Harihar, suggested that if the applicant showed some alternative lands, the P.M.C. would look at all of them and decide as to which of them would be acceptable. If an alternative land was chosen by the P.M.C., then the question of changing the reservation on the present land in accordance with the Pune Development Control Rule No. 13.5 would be considered, but, to do so the condition, as to 200 meters distance would have to be relaxed and it would be necessary to take permission of the Honourable Chief Minister, was the clarification given on behalf of the department. The file note requested for approval and further action to be taken in accordance with what was suggested and for further directions to be given to the P.M.C.

37. On June 20, 1996 a letter was sent to the Commissioner of the P.M.C. by the Government conveying that out of the two alternatives suggested in the report dated April 17, 1996 the first alternative was not acceptable to the applicant−Karandikar. The suggestion made by Harihar, City Engineer of the P.M.C. in the meeting was highlighted in the letter. The offer of alternative plots was also emphasised and the Commissioner of the P.M.C. was informed that the applicant would contact him for that purpose. The Commissioner was requested to forward his opinion in the matter to the Government. This letter appears to have been sent by Fax also on June 21, 1996.

38. On July 17, 1996 a telegram was sent to Shriram Karandikar, Director−Town Planning and the Commissioner of the P.M.C. by which they were informed that a meeting had been arranged with the Minister of State, UDD, (respondent No. 6) in his Chamber on July 20, 1996 at 11 a.m. for further discussions in connection with the development permission sought in respect of FP−110, Prabhat Road Pune.

39. On July 22, 1996 the Government received a report dated July 15, 1996 from the Commissioner of the P.M.C. which was addressed to the Under Secretary, UDD. In this report the Commissioner of the P.M.C. stated that, as decided during the discussions of meeting held on June 12, 1996 the applicant had shown four alternative plots. Out of them a plot admeasuring 3000 square meters at Lohagaon, City Survey No. 261, Hissa No. 1/2 was suitable. However, the said area was in the agricultural zone under the sanctioned development plan, but there was a policy of the administration to change the zone of the said area shown in the development plan from agricultural to residential. The approval of the Government would have to be obtained to take appropriate steps in that direction. The Commissioner of the P.M.C. further requested for "guidance" of the UDD for further action after persual of all the points raised in his report dated April 17, 1996.

40. The file note dated July 26, 1996 refers to the notings in the file note dated May 24, 1995, makes a summary of the developments upto date and states

further that there was a meeting on June 12, 1996 with the Honourable Minister of State, UDD, representative of the owner of the land, City Engineer of the P.M.C., Deputy Secretary, UDD, with regard to the two alternatives suggested by the P.M.C. At that time it was clarified on behalf of the owner of the land that the first alternative suggested by the P.M.C. (deleting reservation on half of the land and returning it to the owner) was not acceptable to him, because it was impossible to carry out development on such a small piece of land and it was also difficult to get the development permission with respect to such small piece of land. With regard to the second alternative, it was suggested on behalf of the owner of the land that he had already suggested an alternative plot at Lohagaon and was also prepared to show some more alternative plots. On whichever plot the P.M.C. chose, to the extent of 3000 square meters the owner was prepared to construct a school on 500 square meters area. On behalf of the department it was clarified that the reservation for school on the original plot at Erandwana would be shifted in accordance with the Pune Development Control Rule No. 13.5 to such alternative plot. However, in order to relax the condition with regard to 200 meters distance, the approval of the Honourable Chief Minister would have to be taken. Paragraph Nos. 5, 6, 7 and 8 read as under:

"5. In connection with the second alternative suggested in paragraph 3 above the P.M.C. has informed by its letter dated July 15, 1996 that out of the four alternative plots shown by the owner of the land the one admeasuring 3000 square meters at Lohagaon City Survey No. 261, Hissa No. 1/2 is appropriate. But since that land is in the agricultural zone under the sanctioned Pune Development Plan, it would have to be first incorporated into the residential zone.

6. There was further discussion on this matter on 20−7−1996 by the Honourable Minister of State, UDD, with the City Engineer of the P.M.C., Deputy Secretary, UDD, and the land owner. At that time all were agreed that the P.M.C. would not be able to implement the reservation at Erandwana FP−110 for primary school which is very clear. Apart thereform, there are several schools in the locality (about 11) as a result of which the requirement of a school at that place is also not so urgent. Further, since it is a highbrow area it is doubtful if there will be response to a Municipal school. On the other hand there is great need for a primary school at a place like Lohagaon where the owner of the land is going to construct a school on 500 square meters area on the plot of 3000 square meters area. Under the circumstances, the alternative suggested by the owner of the land is appropriate and there should be no objection to approve the same. It was suggested that with this point of view the department may consider all issues and submit a self contained proposal for approval of shifting of the reservation from the plot at Erandwana to the one at Lohagaon.

7. In the said matter the further consideration of situation if the reservation on FP−110, Erandwana for primary school is to be shifted to Lohagaon, City Survey No. 261 Hissa No. 1/2 the following issues would have to be taken into consideration:

The first issue is the P.M.C. has acquired Erandwana FP−110 including the structures thereupon and the compensation has also been accepted by the owner of the land. Therefore if the land is to be returned the legally admissible compensation thereupon together with simple interest must be returned by the owner of the land to the P.M.C.

The second issue is the reservation on the land at Erandwana would have to be shifted to the land at Lohgaon according to the Development Control Rule No. 13.5 (See plan 'A') and for that the condition that the distance between the two plots should not be more than 200 meters would have to be relaxed. If the reservation is shifted then there is no question of deleting reservation.

The third issue is the plot at Lohagaon on which it is proposed to develop a primary school is in the agricultural zone under the sanctioned development

plan and hence that plot has to be included in the residential zone by taking action under section 37−I of the M.R.T.P Act. For that, the Government would have to give a direction to the P.M.C.

8. Considering all the aforesaid and particularly (a) in special note No. 12 and (b) of note No. 14, there should be no objection for shifting of the reservation on FP−110 under the town planning scheme, Erandwana, for primary school under the Pune Development Plan according to Rule 13.5 of the Development Control Rules upto Lohagaon, City Survey No. 261, Hissa No. 1/2 by relaxing the necessary condition of 200 meters distance. The P.M.C. may be conveyed the directions of the Government for carrying out the necessary action as needed in connection therewith:

(1) The amount already given towards acquisition of FP−110, Erandwana, along with structures thereupon under the Land Acquisition Act and together with admissible (12%) interest thereupon (simple interest) should be collected by the P.M.C. from the owner of the land.

(2) In order to include the plot in agricultural zone at Lohagaon, Pune, City Survey No. 261, Hissa No. 1/2 to residential zone action should be taken in accordance with the M.R.T.P. Act and the PMC should send a proposal for approval of the Government. The Government may direct accordingly.

(3) The Commissioner of the P.M.C. shall take action to shift the reservation on FP−110, Erandwana, for primary school under the Pune Development Plan by following all the provisions of Development Control Rule No. 13.5 to shift it to Lohagaon, City Survey No. 261, Hissa No. 1/2. For that purpose, it is necessary to take the approval of the P.M.C. as already informed in another matter. (City Survey No. 39/1. Kothrud, Pune).

The file is kept below kindly see flag 'B'.

(4) After action in accordance with 1 and 3 above is taken the P.M.C. should enter into an appropriate agreement with the land owner for transfer of the plot at Lohagaon and thereafter issue permission for development on the land at Erandwana, but unless the work of construction of school at Lohagaon is completed, no completion certificate should granted.

9. Submitted for approval of the proposal in para 8 above. Sd/− P.V. Ghadge

Under Secretary

26−7−97."

This file note passed through the hands of Deshpande, Deputy Secretary, UDD, on July 26, 1996, R.C. Singh, Additional Chief Secretary, UDD, on July 26, 1996, Minister of State, UDD, (respondent No. 6) on July 30, 1996 and then went to respondent No. 5 who was the Chief Minister of the Government of Maharashtra at that time. On the file, respondent No. 5 made a noting dated August 21, 1996, "all actions to be taken according to rules. No objection". The file thereafter travelled back to the Additional Chief Secretary, R.C. Singh who has signed it on August 27, 1996 after which it was again forwarded to Rajan A. Kope, Under Secretary on August 27, 1996.

41. On August 30, 1996 Rajan A. Kope, Under Secretary, UDD, put up the following note:

"Kindly peruse the notings at pages 12 to 16 on the above issue. Approval has been obtained for conveying the directions of the Government at Serial No. 1 to 4 in the said matter to P.M.C. A draft of the letter to be issued accordingly to the P.M.C. is submitted at page No. 111. I may be permitted to issued the same."

This note is signed by V.V. Deshpande, Deputy Secretary, UDD, on August 30, 1996 and R.C. Singh, Additional Chief Secretary, UDD, on August 31, 1996 and after approval it was marked for action by Under Secretary, Kope by Deshpande, Deputy Secretary on August 31, 1996.

42. On September 3, 1996 a letter was issued by the Government of Maharashtra under the signature of Deshpande, Deputy Secretary to the Commissioner of the P.M.C. The letter conveyed the following directions of the State Government to him:

"(1) The Pune Municipal Corporation should recover from the owners of the land the original amount with interest of 12% which have been paid for the purpose of acquisition of land at Erandvane bearing Final Plot No. 110 along with the construction thereon.

(2) The agricultural land bearing Survey No. 261 Hissa No. 1/2 situated at Lohagaon, Pune be included in the residential area in the development plan. You are directed to send me the proposal to the Government for sanction after following legal procedure as per section 37(1) of the Maharashtra Regional and Town Planning Act, 1966.

(3) The Commissioner, Pune Municipal Corporation to take action for shifting the reservation of Primary School in the Pune Development Plan from land bearing Final Plot No. 261, Hissa No. 1/2 as per Rule 13.5 of Reservation Development Control Rules. For this purpose as communicated in another matter (Survey No. 39/1 Kothrud, Pune) it is not required to take the permission of Municipal Corporation.

(4) The Pune Municipal Corporation should execute the required agreement for the transfer of land at Lohagaon after completion of action as mentioned in Clauses (1) and (3) above and thereafter the development permission for Erandawana land be given. But, the completion certificate of the construction at the said place should not be given till the construction of school at Lohagaon is completed."

Finally, the letter called upon the P.M.C. to send a compliance report after taking action as directed.

43. On September 21, 1996, the Commissioner of the P.M.C. acted in accordance with the directions given to him and issued the following order:

"Letter of Order

Sub: Development work on T.P. Scheme No. 1 Final Plot No. 110.

Ref: The order of Government dated 3rd September 1996 bearing No. T.P.S. 1996/102/P.K.7/96/N.V

The following direction is being issued in view of the decision of the Government received by the letter mentioned in reference with respect to development of the property mentioned hereinabove and action taken thereon by the Pune Municipal Corporation till date and the opinion of Hon'ble Legal Adviser, Pune Municipal Corporation regarding the agreement which is required to be executed with the developer.

1) The Pune Municipal Corporation should collect the payment made to the owner of the land for the acquisition of the said land as per the directions of the Government.

2) The action as per Rule 13.5. of Development Control Rules be taken for transferring the reservation of Final Plot No. 110 at Erandwana to land bearing

Survey No. 261, Hissa No. 1/2 at Lohagaon be taken in pursuance of the order of the Government and accordingly the changes in the Development Control Plan be made.

3) The draft prepared by the Department be amended appropriately as per the suggestions given by Legal Adviser and it be given finality.

4) After execution of the agreement as per the order of the Government the process of handing over of possession of Final Plot No. 110 and the process of taking over possession of land bearing Survey No. 261 Hissa No. 1/2 at Lohagaon be completed.

5) The developer should not be given building completion certificate of Final Plot No. 110 unless the construction of the school at Lohagaon is completed. But, as per the requirements of the developer the construction at Erandawana can be given part occupation certificate.

6) Hon'ble Legal Adviser has suggested that for the purpose of dropping the reservation at Erandawana place and for the agreement which is required to be executed for taking possession of the new land by Pune Municipal Corporation, consent of general body be taken. Since the Government has given clear direction to the administration that for completion of the aforesaid purposes action as per Rule 13.5 of Development Control Rules be taken and also gave direction that for carrying out such change taking the consent of Pune Municipal Corporation is not required, therefore for the aforesaid purposes the required agreement has to be executed by Hon'ble Municipal Commissioner. But, after the agreement with the developer comes into existence the aforesaid background be communicated to the Government.

7) After the agreement comes into existence the plans of the developer for the first phase of the rehabilitation programme be accepted immediately.

Sd/−

Municipal

Commissioner,

Pune Municipal

Corporation."

44. On November 19, 1996 (even before the land owner Murudkar refunded the amount of compensation and 12% interest thereupon) the letter bearing No. CEO/DPO/5434 was sent by the City Engineer of P.M.C. to Mr. R.G. Ketkar, learned Advocate on record for the P.M.C. in the First Appeal in the High Court of Bombay, instructing him to withdraw the said First Appeal.

45. On November 22, 1996, Murudkar paid a sum of Rs. 19,73,424/− to the P.M.C.

46. On November 27, 1996 the P.M.C. executed an agreement with Murudkar which contained a Clause that the P.M.C. would withdraw the first appeal filed in the High Court. The instructions for withdrawing the appeal appear to have been issued by the City Engineer even before the two conditions (refund of compensation and execution of an agreement) were fulfilled.

47. On November 28, 1996 building permission was granted to Murudkar. The commencement certificate No. 9739 dated November 28, 1996 is purportedly issued under sections 44, 45, 58 and 69 of the M.R.T.P. Act and under sections 253 and 254 of the B.P.M.C. Act. The certificate recites: "this certificate of commencement of work and permission for development is given under the

provisions of sections 44, 45, 58, 69 of the M.R.T.P. Act and sections 253 and 254 of the B.P.M.C Act on the undermentioned conditions". Condition No. 1 reads as under:

"The concerned revised development plan has been sanctioned by the Government of Maharashtra on January 5, 1987. If the new work is affected according to it or is prejudiced thereby you shall not ask for any compensation in that behalf nor shall the responsibility thereof be on the Municipal Corporation".

Clause 15 stipulates that the permission was being granted in accordance with the conditions stipulated as attached on the reverse of the building plan. The conditions attached were the following:

"(1) The ULD order to be filed prior to commencement of construction.

(2) NOC to be filed from the departments of drainage, water, tax, garden, encroachment etc. prior to seeking occupation certificate.

(3) All conditions in the agreement dated November 27, 1996 executed between the concerned persons and the P.M.C. shall be binding.

(4) The land under occupation of existing tenants would be taken possession of by legal and amicable means and only thereafter the existing structures to be demolished.

(5) The directions in the Maharashtra Government, UDD, Bombay letter No. TPS/1896/102/P.K./7/96 dated 3–6–1996 shall be binding.

(6) Building layout shall be got approved prior to seeking approval of additional plan construction/certificate or plinth".

48. On January 1, 1997 respondent Nos. 7 and 8 entered into an agreement with twenty four tenants for giving them permanent accommodation in a separate building consisting of ground plus four upper floors in lieu of their surrendering possession of the structures occupied by them. We have been shown a copy of one such agreement. Clause 2 of each agreement recites thus:

"The suit property has been given for development by consenting party No. 1 to the promoter vide agreement dated 20–10–1995 on the terms and conditions in the said agreement. The promoter has full right and authority to develop the property."

It may be mentioned here that the promoter is respondent No. 7. The consenting party is Laxmikant Murudkar the owner of the property, and the consenting party No. 2 is the concerned tenant.

49. On December 20, 1997 the P.M.C. issued occupation certificate Part–1 No. 380/9007, in favour of Laxmikant Murudkar through Karandikar and Girish Vyas and described the construction to be occupied as 24 flats being Flat No. 1 to 24 in building No. 8. Soon after possession was surrendered pursuant to the execution of the agreement dated January 1, 1997 respondent Nos. 7 & 8 re–housed the tenants in a temporary accommodation and immediately after the part occupation certificate was issued by the P.M.C. on December 20, 1997 the tenants started occupying flat Nos. 1 to 24 constructed in building 'B'. (There is also a third Commencement Certificate No. 3785 given on July 30, 1998 in respect of the extension of two further plans. Condition No. 12 in this certificate specifically provides that the commencement certificate is subject to all orders of the Government of Maharashtra, UDD, made in its order dated September 3, 1996).

50. On January 28, 1998 a proposal for change of the land at Survey No. 261

Hissa No. 1/2 Lohagaon from agricultural to residential together with similar proposals in respect of several other lands at Lohagaon were placed before the general meeting of the P.M.C. by way of resolution No. 502. After discussing the proposals contained in the said resolution the general meeting of the P.M.C. did not approve the change from agricultural to residential zone in respect of the plots situated at Lohagaon.

51. On March 30, 1997, the Commissioner of the P.M.C. sent a letter to the Deputy Secretary, Government of Maharashtra, UDD, indicating that in compliance with the directions given by the Government following actions had been taken:

"(1) The Pune Municipal Corporation has recovered the amount given to the owner in lieu of acquisition of the land with 12% interest. (The amount given Rs. 6,10,923/−): (Amount recovered Rs. 19,73,424/−)

(2) The subject regarding taking action under section 37(1) for changing the land at Lohagaon and other lands at Lohagaon from agricultural zone to residential zone in the Development Plan was put on the agenda of the general body meeting of the Municipal Corporation. The general body of the Municipal Corporation has given the final decision vide General Body Resolution No. 502 dated 28−1−1998 but it does not include the land under reference at Lohagaon. Since the said decision was taken in the previous month, the subject of the land is not put by a separate agenda.

(3) The reservation on the land bearing Survey No. 261, Hissa No. 1/2 at Lohagaon admeasuring 2803.40 sq. mtr. is changed and accordingly the Final Plot No. 108 at Erandawana as well as the Development Scheme Plan was changed on 21−9−1996. Therefore, the administration of Municipal Corporation has taken action as per paragraph 3 in the order of the Government mentioned in Serial No. (3) herein above.

(4) The Municipal Corporation has recovered the amount received by the owner for acquisition of land. The land under reference is included in the residential zone as per Rule 13(5) of Land Development Control Regulations and thereafter an agreement was executed with the owner on 27th November 1996 and possession of the land at Lohagaon bearing Survey No. 261 Hissa No. 1/2 was taken on the same day on which the possession agreement was executed i.e. 27−11−1996 and the construction and development permission for the land under reference was given on 28−11−1996".

This information was also conveyed by Fax message on the same day to the State Government.

52. On May 6, 1998 Harihar, City Engineer of the P.M.C. addressed a letter to respondent No. 8 informing him that there was no urgent need for the Municipal Corporation to get the work of construction of school on the land at Lohagaon. Consequently, he was instructed to build a school at Dattawadi, Final Plot No. 550−B, TPS−III on 500 square meters according to the specifications of the P.M.C. being governed by the conditions imposed in the letter of the Commissioner of the P.M.C. dated April 27, 1998. He was also called upon to get the proposed construction plans from the City Engineer, P.M.C. and start the work of construction. Respondent No. 8 was finally informed that, as directed in the Government's letter dated September 3, 1996, further action would be taken with regard to FP−110. TPS−I, Erandwana.

53. On July 14, 1998 a proposal for incorporating the Lohagaon plot in residential zone was taken up before the Standing Committee of the P.M.C. The Standing Committee was not inclined to accept or approve the proposal and directed that the papers be filed.

54. On July 15, 1998 respondent Nos. 7 & 8 sent a letter to the P.M.C. that instead of the land at Survey No. 261, Hissa No. 1/2 at Lohagaon, they were

ready to offer land admeasuring about 3000 square meters at Survey No. 8/2/4/1 at Mundhwa which was already included in residential zone and also offered to pay for the construction cost of the school on 500 square meters of land as may be specified by the P.M.C. This offer was made in lieu of the obligation to construct and deliver a school on 500 square meters of land.

55. On July 18, 1998 the Additional Chief Secretary attached to the office of the Chief Minister took a meeting at Pune with the Commissioner of the P.M.C. with regard to the issue of FP−110, Erandwana. During this meeting he gave certain directions to the Commissioner of the P.M.C.

56. On July 21, 1998 by its letter reference No. 363, sent by Fax the Commissioner of P.M.C. referred to the meeting held on July 18, 1998 in his office with the Additional Chief Secretary in the secretariat of the Chief Minister and said. "In accordance with the directives given in the said meeting on the aforesaid subject, I am submitting the report of action taken to you". Along with the letter he forwarded a chronology of events pertaining to the grant of development permission regarding FP−110. He also indicated the action taken by the P.M.C. as to each point on which the Government had directed him to take action under order dated September 3, 1996. He pointed out that:

(1) The amount of compensation paid together with interest amounting to Rs. 19, 734,424 / has been recovered from the developer.

(2) A proposal was forwarded by the administration of the P.M.C. to the Standing Committee on 22−6−1998 for changing Survey No. 261 Hissa No. 1/2 Lohagaon, from agricultural to residential zone under section 37(5) of the M.R.T.P. Act, but the said papers have been filed by the Standing Committee.

(3) On 21−9−1996, the reservation for primary school on FP−110, Erandwana had been shifted to Lohagaon Survey No. 261, Hissa No. 1/2 in accordance with Development Control Rule No. 13.5 and while entering into an agreement the P.M.C. has already taken possession of the land at Lohagaon.

(4) That on 28−5−1998 the P.M.C. had addressed a letter to the Government for constructing a school on PF−550−B, TPS−III, Dattawadi instead of the plot at Lohagaon which had been taken possession of by the Corporation and that there had been no decision on the proposal forwarded by the Corporation. In the meanwhile, in response to a demand made by the Ward Corporator and Deputy Mayor and the Education Board of the P.M.C. instead of carrying out construction of a school on plot at Dattawadi it was decided in the meeting held that the developer may be called upon to carry out extension of the school on the land at a distance of 500 meters. Against that background he was of the view that it would be better not to construct the school on the plot at Dattawadi, but the Government may approve of the extension of the existing school at Dattawadi.

(5) In the order of the Government dated September 3, 1996 it was clearly specified that no completion certificate should be given for the construction on FP−110, Erandwana unless the work of constructing the school at Lohagaon is completed. However, there were discussions regarding directions to be given to the developer to construct a school at any other place on an area of 500 square meters as proposed by the P.M.C. and also regarding grant of completion certificate to the construction on FP−110, Erandwana if that was done. The issue of amended Government order in this connection was also discussed. It was requested that appropriate action be taken by the Government in this connection.

(6) There was discussion about the Corporation taking land in any other residential zone in lieu of the Lohagaon plot. If the developer forwards a suitable proposal and if the Government amends the order then the Corporation would take appropriate action. However, as the Lohagaon land is in possession of the Corporation if that land is to be handed back, the administration of the Corporation would have to take steps in accordance with the prescribed

procedure.

(7) The aforesaid information be brought to the notice of the Additional Chief Secretary to the office of the Chief Minister.

57. On July 23, 1998 the Commissioner of the P.M.C. addressed another letter No. DPC/51 by Fax to the office of the Chief Minister with copy by Speed Post to the Under Secretary, UDD. It was pointed out in this letter that out of the four conditions stipulated in the Government's letter dated September 3, 1996 Item Nos. 1 and 3 had been completed. As regards Item No. 4, though the land at Lohagaon had been transferred free of cost to the P.M.C. and development permission had been given in respect of the land at Erandwana, the work of changing the Lohagaon land from agricultural to residential zone in accordance with section 37(1) of the M.R.T.P Act had not been completed as already indicated in the previous letter. Since the subject proposed had been filed by the Standing Committee of the Corporation, this work to be carried out in accordance with the directions of the Government was likely to remain pending for indefinite period. The developer had by his letter dated July 15, 1998 suggested the following:

(a) Transfer of land at Mundhwa, Survey No. 8/2/4/1, residential zone admeasuring about 300 square meters to the P.M.C. free of costs.

(b) Instead of constructing a school at any other place as directed by the P.M.C. an appropriate amount equivalent thereto should be paid to the P.M.C.

The Commissioner of the P.M.C. felt that the first alternative would be better. Compared to the land at Lohagaon already handed over to the P.M.C. in green zone the alternative land at Mundhwa was already in the residential zone and there would be no need to make any change in the development plan. He also conveyed that even if the second suggestion of the developer that instead of constructing the school an appropriate amount should be paid towards it, is accepted, there was no likelihood of the P.M.C. being put to loss. It would be possible thereby to get a school constructed at an appropriate place in accordance with the needs of the P.M.C.

58. The Commissioner of P.M.C. pointed out that if the action had to be taken according to the demands of the developer, the following procedural steps would have to be taken:

(i) Following Rule 13.5 the reservation for school had already been shifted to Lohagaon. It would be necessary to take action under Rule 13.5 to cancel and shift the reservation to the land at Mundhwa.

(ii) The land admeasuring 3000 square meters in the residential zone at Mundhwa would have to be transferred to the P.M.C. free of costs and the land already taken possession of by the P.M.C. at Lohagaon would have to be returned to the developer by following the prescribed procedure.

(iii) If the reservation for school is shifted to the land at Mundhwa, there would remain no need to make any change in the development plan. Hence, it was necessary for the Government to take decision as to when the developer should be given a completion certificate with regard to construction at Erandwana.

The Commissioner requested the Government for its orders on the aforesaid issues.

59. On July 24, 1997 the file was put up before the Principal Secretary, UDD, K. Nalinakshan. Upon a review of the entire case the said officer went on record to say:

"1. On the aforesaid analysis at the moment department not to take decision on the issue. By the letter dated September 3, 1996 the decision of the Government has already been conveyed to the Commissioner of the P.M.C. With respect to the said Government decision and the interpretation of Rule 13.5, I feel that the use of Rule 13.5 in the matter in question is not proper and according to law. Even a bare reading of the rule makes it clear that the rule would apply if the reservation was to be shifted to a distance of 200 meters. Neither the Government nor the Commissioner of the P.M.C. appears to have the power to shift the reservation to a distance in excess of 200 meters. In such a matter it would have been more appropriate to take action in accordance with section 37 of the M.R.T.P Act. Now as indicated above, the P.M.C. has already started action. After the P.M.C. gave permission, it appears that the developer has also made construction. Now it has become a fait accompli. Therefore there is no alternative except to follow the action which has become fait accompli and take further actions in accordance with the Government's directions.

2. It is necessary to take action under section 37 and to include the land at Lohagaon, Survey No. 261, Hissa No. 1/2 into residential zone. Or, as suggested by the Commissioner of the P.M.C., the offer of the developer to construct a school on 500 square meters of land at any other place, where it is necessary for the P.M.C., might have to be considered. This issued will be independently examined by the department. In the meanwhile, it is necessary to complete the action under section 37(1) to bring the land admeasuring 300 square meters handed over by the developer to the P.M.C. into residential zone. After the conditions specified in the letter of the Government dated 3-9-1996 are complied with, it may be possible to give the developer occupation certificate. The note submitted by the department showing the factual position and other matters may be submitted to the Honourable Chief Minister for persual".

The Additional Chief Secretary to the office of the Chief Minister, when he received the file, made the following endorsement on the file on July 25, 1998:

"It appears that a new report has been received from the Commissioner of the Corporation on this subject. Kindly give your views thereupon".

60. On July 27, 1998, Deputy Secretary, Vidyadhar Deshpande made a file note for the purpose of obtaining final orders in the matter. The Deputy Secretary, UDD, pointed out that a Fax message from the Commissioner of the P.M.C. had been received on July 23, 1998 in the office of the Chief Minister, which was also forwarded for consideration. He also referred to the meeting held in the morning of July 27, 1998 between the Additional Chief Secretary and the Principal Secretary of the UDD during which a new proposal was given to them upon which the Additional Chief Secretary had instructed that the department's opinion be made available urgently. The Under Secretary, UDD, then referred to the meeting held on July 18, 1998 in the office of the Commissioner of the P.M.C. between the Additional Chief Secretary and the Commissioner of the P.M.C. He also pointed out that with regard to the reservation on the land presumably two-third of the reservation (FP-111 AND 112) had been implemented. Hence, by permitting development on FP-110 there was no deprivation of the benefits of the reservation. On the other hand at some other place in the city where the Corporation feels a need for a primary school there would be additional benefit available. The Deputy Secretary agreed with this view. 300 square meters of land would be available to the Corporation free of costs and there would be construction on 500 square meters without costs. The policy adopted in the case of Survey No. 39/1, Kothrud of shifting the reservation by following Rule 13.5 had also been adopted in the present case.

61. The note then points out that by letter dated September 1996 the P.M.C. had been instructed to take action. As indicated by the Principal Secretary (1), UDD, the P.M.C. had already given development permission and hence it had become a fait accompli. It would be necessary to take further action in accordance with the instructions of the Government. The note then referred to the Standing

Committee of the P.M.C. not approving of the proposal to include the Lohagaon plot in the residential zone. It also referred to details of the discussions between the developer and the Commissioner of the P.M.C. in the meeting of July 18, 1998 and the letter dated May 28, 1998 addressed by the Commissioner of the P.M.C. seeking permission to the proposal forwarded by his letter dated May 23, 1998.

62. After referring to details of the proposal received by Fax, the Deputy Secretary UDD pointed out that a copy of the letter of the developer dated July 15, 1998 had not been enclosed. Similarly, the map showing the transfer of the two lands had not been enclosed. The Deputy Secretary, UDD, therefore said "Nonetheless as indicated above, since the instructions are to submit a report without delay, it is placed on record. The report is being submitted without the said documents. Similarly in this entire matter nowhere was the opinion the Director, Town Planning taken. It would have been appropriate to take his opinion on the new proposal".

63. After referring to the proposals forwarded by the Commissioner of the P.M.C. by letter dated July 23, 1998 and the comment of the Principal Secretary, Nalinakshan the Deputy Secretary, UDD, expressed his opinion on the proposal as under:

"(1) The Commissioner of the P.M.C. should take action to cancel the partial shifting of reservation to Lohagaon under Rule 13.5 and by taking resort to the same rule should partially shift the reservation to Mundhwa.

(2) Before taking action in accordance with (1) above, even though the Commissioner of the P.M.C. has said that the land of 3000 square meters at Mundhwa suggested by the developer is proper, the Commissioner of the P.M.C. should ensure that the said land has the approach road of at least 12 meters width. After ascertaining this fact steps for taking possession of the Mundhwa land in accordance with law should be completed. After completion of such action it would be necessary to take action in accordance with (1) above.

(3) In accordance with the earlier instructions the P.M.C. has already entered into an agreement with the developer for construction on 500 square meters of land. Since the action at Lohagaon was incomplete the P.M.C. could not issue commencement certificate to the developer for construction of primary school on that land. This construction could have been carried out even on the land at Mundhwa. However, it does not appear from the letter of the Commissioner of the P.M.C. that he has given his decision whether, under present circumstances, it is necessary or not to have a school constructed on the land at Mundhwa. However, he has contended that as the developer is prepared to pay the costs of construction the Corporation would not be put to loss by asking him to pay to the Corporation an appropriate amount. Considering this issue on principle, there does not appear to be any objection to approve the recommendation of the developer’s proposal made by the Commissioner of the P.M.C. by keeping in view that the requirement of a school according to need would be met. Nonetheless, the P.M.C. shall be obliged to take the recommendations of the Education Committee of the P.M.C. as to where there is need for a school and where the construction has to be made and to expend the said amount for that purpose.

(4) Since the action in issue No. 3 above is between the Education Committee, P.M.C. and the Commissioner of the P.M.C., there is no point in the grant of occupation certificate to the developer being kept pending. Hence, the Government would have no objection if the P.M.C. grants occupation certificate to the developer after completion of his action as detailed in paragraphs (1) and (2) above by following and subject to all other rules.

If the above proposal is approved, as the proposal forwarded by the Commissioner of the P.M.C. under the present circumstances is of a superior

purpose than the conditions imposed in the earlier orders of the Government, there should be no objection principle to approve the proposal of the Commissioner of the P.M.C. subject to conditions indicated in the above discussion.

A draft of the letter to be issued in accordance with this is submitted. If the above proposal is approved it will be issued. Submitted for orders."

64. This file note was approved and signed by the Principal Secretary, Nalinakshan on July 27, 1998 and come to the Additional Chief Secretary at the office of the Chief Minister. The Additional Chief Secretary made the following endorsement on July 27, 1998:

"As the developer in this matter and the Honourable Chief Minister are related, it is requested that the Honourable Minister of State should take appropriate decision in accordance with Rules."

The file then was put up before Minister of State, UDD, (respondent No. 6) and on July 28, 1998 he made the following order thereupon: "Department proposal approved. Orders to be issued."

65. On July 30, 1998, the file noting of the Deputy Secretary, Deshpande shows that in accordance with the orders made by the Minister of State and as instructed by the Additional Chief Secretary and the Principal Secretary (1), UDD, an order had been issued and conveyed to the Commissioner of the P.M.C. by Fax on 29−7−1998. A copy of the said letter dated July 29, 1998 is at page 199 of Writ Petition No. 4433 of 1998 and correctly reproduces the Government's orders.

66. On August 3, 1998 respondent No. 8 deposited a sum of Rs. 25,00,000/ − with the P.M.C. and an agreement was immediately executed with the P.M.C. on the same day. The land at Mundhwa was also handed over to the P.M.C. On August 12, 1998 Writ Petition No. 4433 of 1998 was filed. Notices were served on the respondents. The Commissioner of the P.M.C. (respondent No, 2) and the Chief Minister (respondent No. 5) were served with notices on August 18, 1998. On August 3, 1998 the City Engineer, P.M.C. addressed a letter No. DPO/247 dated August 3, 1998 to P.M.C.'s Advocate Mr. R.G. Ketkar to immediately act on the instructions given in his letter dated November 19, 1996 for withdrawing the First Appeal. On August 17, 1998 Mr. Ketkar moved this Court for placing the matter on Additional Registrar's Board for withdrawal and the Additional Registrar of this Court by his order dated August 18, 1998 allowed the withdrawal of the First Appeal.

67. This Writ Petition No. 4433 of 1998 along with its companion Writ Petition No. 4434 of 1998 came up for admission before this Court on August 20, 1998 and rule Nisi was issued thereupon. On August 20, 1998 the Division Bench (Chief Justice M.B. Shah and Justice Y.S. Jahagirdar) was pleased to refuse interim relief because the construction, as contended on behalf of respondent No. 8, had started from March 1997 and was already complete. There was, however, a direction, to respondent No. 7 in Writ Petition No. 4434 of 1998 (Girish Vyas) not to create any third party interest. The P.M.C. was already directed not to grant completion certificate in respect of the building. Rule was made returnable on September 8, 1998. On September 8, 1998 a grievance was made by the petitioner that the statement of the respondent about completion of the construction was incorrect. The same Division Bench made an order directing the District Judge, Pune, to nominate a Court official to inspect and make a panchanama of the premises to see if any further construction was going on. The District Judge, Pune, nominated one K.R. Jagtap, Registrar, to visit the premises and make his report. K.R. Jagtap made his report dated September 17, 1998 about the state of the construction and also placed on record the plans as well as the Part−I occupation certificate granted by the P.M.C. to the developer. No further orders appear to have been passed by the Court after the

persual of the said report except that the hearing was fixed on November 4, 1998.

68. The daily "Sakal" Pune, in its issue dated March 28, 1998 carried a report about the controversy on the floor of the P.M.C. raised by certain Corporaters. The news item suggested that the Corporators were agitated about the building permission granted on FP–110 which had been reserved for primary school in the development plan. They also alleged that such per mission had been granted contrary to law and in abuse of power by the Government headed by respondent No. 5 only because–respondent No. 6 is his son–in–law.

LEGAL CONTENTIONS:

69. Mr. Vinod Bobde, learned Counsel for the petitioner in Writ Petition No. 4433 of 1998 and Mr. D.S. Bhonde, learned Advocate for the petitioner in Writ Petition No. 4434 of 1998 contend that the action taken by the State Government (respondent No. 1) of shifting the reservation for primary school on FP–110 by resorting to Development Control Rule No. 13.5 is wholly illegal and invalid. They contend that Rule 13.5 does not permit such action. It is contended that Rule 13.5 is only intended to shift reservation within the holding of the same owner on the same land as long as the reservation is shifted within distance of 500 meters. They contend that neither the State Government, nor the Chief Minister had any authority to relax the restriction contained in Rule 13.5 of the Development Control Rules. It is urged that the only manner in which the reservation could be shifted from one area to another is by following the provisions of section 37 of the M.R.T.P Act. Section 37 of the M.R.T.P Act would require a modification of the proposals in the development plan which could only be carried out by the planning authority taking steps in accordance with the said section. In the instant case the planning authority, the P.M.C., not having granted approval to such an action being taken by the Commissioner of the P.M.C., nor having forwarded any such proposal for modification of the proposals contained in the development plan, the entire action taken by the State Government is illegal. It is alleged that apart from being illegal the action is also mala fide and prompted by ulterior motive to favour respondent No. 8 who is the son–in–law of respondent No. 5 who was the Chief Minister of the State Government at the material time. The learned Counsel contend that mala fides are writ large on the face of the record and at every stage respondent No. 5 was not only in the know of the facts but was also monitoring the progress of the case. From the word go, it was the State Government which gave directions to the Commissioner of the P.M.C. to act in a particular manner and that manner expressly suggested bypassing the general body of the P.M.C. This action according to the petitioners is not only illegal but also indicative of mala fides in the matter. The action of the P.M.C. according to the petitioners was directed from above (meaning the administrative machinery of the State Government orchestrated at the instance of respondent No. 5) so as to achieve the goal of enabling the eighth respondent to get development permission from the P.M.C. The withdrawal of the First Appeal pending before this Court was a step prejudicial to the P.M.C. and has been taken without the express concurrence of the Standing Committee as required by section 481(1)(f) and (i) of the Bombay Provincial Municipal Corporation Act, 1949 (B.P.M.C. Act). It is contended that the whole formula of compromise was devised, not for larger public good but for achieving the immediate goal of providing gain to respondent No. 8. The exercise of powers vested in a public authority, the Chief Minister for the purpose of providing private gains in the instant case due to close relationship is nothing but gross abuse of power. Such exercise of power is also a criminal breach of trust and would amount to exercising of powers with a corrupt motive, in the submissions of the petitioners. The petitioners particularly draw attention of the Court to the fact that none of the respondents has even attempted to sustain the legality or the correctness of the orders of shifting of reservation and the consequent issue of commencement certificate for the construction. The respondents have contended that what ultimately came about was in the larger interest of public or that in any event

the construction was permissible and therefore the grant of commencement certificate was not illegal for any reason whatsoever. Finally, the learned Counsel for the petitioners contended that in a matter like this which arises in the nature of the public interest litigation the judicial conscience should be shocked at the manner in which power was abused by the people in authority invested with power to be exercised for the benefit of the public at large. Such actions should not to be treated as routine infractions of law but very seriously viewed and the Court should, if satisfied grant relief which would include demolition of the entire structure which has come up illegally and further direct sanction of criminal prosecution against the persons found to have abused power for corrupt motives, is the submission of the petitioners.

70. On the question of reliefs, however, the two petitioners appear to diverge. Mr. Bobde learned Counsel for the petitioner in Writ Petition No. 4433 of 1998, strongly urged that the Court should hold the construction to be totally illegal as a result of gross abuse of power for corrupt motives and order demolition of the construction and direct the P.M.C. to move this Court to revive its First Appeal. Mr. Bhonde, learned Counsel for the petitioner in Writ Petition No. 4434 of 1998 however, prayed that the Court, after making aforesaid findings, should not direct demolition of the structure, but should direct the P.M.C. to revive the First Appeal so that if the First Appeal succeeds, the land together with the structure thereupon would become the property of the P.M.C. without the necessity to pay any compensation other than the compensation which was initially determined in the Land Acquisition proceedings.

71. At the outset, we do notice that none of the respondents has attempted to justify the action of the State Government to resort to Development Control Rule 13.5. Nor does any respondent attempt to contend that the reservation in the development plan could have been modified without resort to section 37 of the M.R.T.P Act or by bypassing the general body of the P.M.C. Each of the respondents has adopted a different line of contention, the broad outline of which we shall indicate before dealing with them in depth.

CHIEF MINISTER:

72. Mr. K.K. Venugopal, learned Counsel appearing for respondent No. 1, contended that without going into the question whether the action taken by the State Government was right or wrong, in a public interest litigation the Court was concerned with whether the public at large had been benefited. He pointed out that on an over all assessment of the situation it would appear that public good had been achieved. The land in question (FP−110) was a part of a large piece of land on which there was reservation for primary school. This purpose of the P.M.C. was achieved by ensuring that primary school was established on FP−112. In addition, there is also a school for physically challenged sic handicapped persons on FP−111. Thus, the entire object with which the reservation was made having been fulfilled, the reservation itself came to an end, in the submission of the learned Counsel. The learned Counsel also contended that the present petitions being in the nature of public interest litigation, the Court need not go into other allegations made with regard to the conduct of respondent No. 5, if the Court was satisfied that there was no relief to be granted by way of public interest. Since public interest has already been advanced, nothing remains to be done and the petitions need to be dismissed, according to the learned Counsel.

PUNE MUNICIPAL CORPORATION (P.M.C.):

73. Dr. D.Y. Chandrachud, learned Counsel for respondent Nos. 2 & 11, contends that the circumstances of the case show that the Corporation had itself abandoned or withdrawn the acquisition proceedings. This, notwithstanding absence of formal expression of such intention on the part of the Corporation or State Government by a Notification, both of which were unnecessary in the submission of the learned Counsel. The learned Counsel contended that, because

of this deemed withdrawal from the acquisition proceedings, the reservation itself had lapsed and, therefore, it was perfectly legitimate for the State Government to direct the Commissioner of the P.M.C. to grant development permission in accordance with the provisions of the M.R.T.P. Act.

MINISTER OF STATE:

74. For the respondent No. 6 the contention is that all the decisions taken in different meetings held were the result of a consensus between the departmental officers and himself and all that the respondent No. 6 had suggested was a workable solution to the long pending issue. It is urged that it was the Commissioner of the P.M.C. who made certain proposals which were scrutinised by the department and after the departmental officers had expressed their views in the matter the papers were processed and finally resulted in the order of the Chief Minister (respondent No. 5) dated August 21, 1996. Since the department suggested that action could be taken in accordance with the Kothrud precedent by invoking D.C. Rule 13.5 and that in the case of FP–110, Erandwana, the restriction of 200 meters could be waived by the Chief Minister, after examining the Kothrud file and noticing the opinion therein of the Law and Judiciary Department, respondent No. 6 went along with the proposal which ultimately came to be dealt with by the Chief Minister (respondent No. 5) on August 21, 1998. It is, therefore, contended that this action of respondent No. 6 is neither indicative of mala fides, nor illegal. In fact, respondent No. 6 has gone on record to say that upto July 30, 1998 when he made orders on the file, he was not even aware of the fact that respondent No. 8 was concerned with the development of FP–110, Erandwana or that he was the son–in–law of the Chief Minister (respondent No. 5). With regard to the last order made by him on July 28, 1998, it is contended by the 6th respondent that, in view of the specific advice given by the Additional Chief Secretary that the developer being related to the Chief Minister (respondent No. 5), the order should be made in accordance with the rules by the Minister of State, he followed the advice and, after scrutinising the departmental proposals, approved the department's proposals. It is vehemently contended by Mr. P.C. Madkholkar, learned Counsel for respondent No. 6, that, irrespective of whether the final orders were legal or not, the conduct of respondent No. 6 does not lead to a conclusion that he acted to help respondent No. 8 because respondent No. 8 is the son–in–law of respondent No. 5. There is absolutely no evidence to indicate that respondent No. 6 had at any time acted at the behest of respondent No. 5, in the submission of the learned Counsel. Since the respondent No. 6 had all along taken action in accordance with the proposals of the department and after scrutiny of the opinion given by the Law and Judiciary in the Kothrud case, it is urged that, at the highest, and that too if the Court comes to the conclusion that the order is wrong, it could be argued that the 6th respondent erred in law. Apart from a misjudgment of legal position, nothing else could be ascribed to respondent No. 6.

BUILDER AND TENANTS:

75. The gist of the contentions on behalf of respondent Nos. 7, 8 and 12 to 35 (in Writ Petition No. 4433 of 1998) and respondent Nos. 7 and 9 to 32 (in Writ Petition No. 4434 of 1998 is that the commencement certificate having been issued in accordance with the town planning scheme which was already operative, there was no illegality in the issuance of the commencement certificate. They also contended that when there is already a sanctioned town planning scheme in operation, any modifications made in the development plan, either draft, final or sanctioned, which comes into operation subsequently, does not and cannot override the provisions of the town planning scheme and the planning authority would be perfectly justified in granting commencement certificate in accordance with the existing town planning scheme.

COMMISSIONER OF P.M.C.:

76. As far as respondent No. 10 is concerned the contention is that he was a

disciplined officer. In his view, section 154 of the M.R.T.P Act enabled the State Government to give appropriate directions to the planning authority for the implementation of the provisions of the Act; that with regard to a large number of actions to be taken under the Act, the planning authority's power vests in the Commissioner. This situation, taken in conjunction with the appellate powers of the State Government under section 47 of the M.R.T.P Act, led him to believe that it was perfectly legal for the Government to give directions to him to shift the reservation of Erandwana plot to Lohagaon plot by resort to Rule 13.5. He contends that his belief was supported by the precedent of such action already taken in Kothrud case. Further, in that case also the State Government had directed that it was not necessary to take approval of the general body of the Corporation. In the instant case also there were express directions to him from the State Government that it was not necessary to take the approval of the Corporation. Being a disciplined service officer he allowed himself "to legitimately veer around to this view" and implicitly obeyed the directions given to him. Even if the Court finds that the action taken by him is wrong and contrary to law, contends Mr. Rafiq Dada, learned Counsel for respondent No. 10, respondent No. 10 cannot be faulted to entertaining the firm belief that he was bound by the directions given to him by the State Government. Mr. Dada drew our attention to several documents in which the Commissioner of the P.M.C. had given his frank opinion in the matter that shifting of reservation could not be carried out unless the Corporation agreed to such a proposal. In these circumstances, no fault, if at all, but that of error of judgment in assuming the State Government to be the boss, could be found with respondent No. 10 urges the learned Counsel.

CHIEF MINISTER;

77. As far as respondent No. 5 is concerned, it is his contention that after the department had processed the file, the papers were submitted to him on which he merely endorsed, "all actions be taken in accordance with Rules and if it was so done he had no objection". He denies that he had in any manner interfered with or influenced the decision of the Government because respondent No. 8 was his son-in-law. Mr. Harish Salve, learned Counsel who appeared for respondent No. 5, strongly contended that no finding, which would affect the personal reputation of respondent No. 5, should be recorded by the Court unless it was an inescapable inference from the material on record. Mr. Salve contended that, regardless of whatever suspicion it may be raise, the material on record does not inescapably lead to the conclusion that respondent No. 5 had acted contrary to law in order to benefit his son-in-law (respondent No. 8). As to the legality of the order made by the Government under the signature of respondent No. 5, it is for the Court to decide and, even assuming that the Court holds it to be illegal, the said fact should not influence the Court to think that respondent No. 5 was knowingly responsible for it. When the final order was being made, under the advice of the Additional Chief Secretary, respondent No. 5 rescued himself from making the order though under the rules of business he was the head of the Urban Development Department, and the papers were sent to respondent No. 6 for appropriate decision in accordance with law. Finally, Mr. Salve contended that at no point of time, till the order dated August 21, 1998 was made by respondent No. 5 in his capacity as the Minister incharge of the portfolio of UDD, was respondent No. 5 "concerned" with the case and after the allegations appeared in the press against him he had chosen to rescue himself from making any further orders in the matter. For these reasons, it is contended on behalf of respondent No. 5 that all allegations against respondent No. 5 be dismissed and the petitioners be denied all reliefs they claim as against respondent No. 5.

78. Having broadly outlined the stand taken by each of the respondents, we shall now deal with the legal contentions urged in support of the respective stands. Before doing so, it would be necessary to advert to some of the salient provisions of the M.R.T.P Act as well as the B.P.M.C Act, in order to appreciate the legal contentions.

BOMBAY TOWN PLANNING ACT, 1951:

79. (a) To understand the spirit and the principles upon which the M.R.T.P Act proceeds, it is necessary to bear in mind certain historical developments and the background against which this Act was brought into force. Way back in the year 1951, the Legislature of the then Bombay Province enacted the Bombay Town Planning Act, 1951. A reference to the Preamble to the Act shows that the legislation was enacted so that the development of certain areas should be regulated for ensuring sanitary conditions, amenities and convenience to the people in the area falling within the Town Planning Scheme postulated thereunder.

(b) Chapter–I of the Act which contains the fasciculus of sections 1 to 7 broadly provides for formulation and bringing into effect a town planning scheme to make provisions for matters enumerated in Clauses (a) to (k) of section 3. We highlight Clause (d) which enables the Town Planning Scheme to provide for "the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets and public purposes of all kinds". Other Clauses of section 3 provide that a town planning scheme may make provisions with regard to construction of buildings, preservation of objects of historical interest or natural beauty and of buildings actually used for religious purposes or regarded by the public with special religious veneration and so on, with which we are not concerned. The broad scheme of the Act appears to be that the local authority, defined as the Municipality or its equivalent under the Bombay Village Panchayat Act, was given power to formulate and execute a town planning scheme. Section 4 empowered the local authority to refer to arbitration all disputed claims as to ownership of any piece of land included in any area in respect of which the town planning scheme is executed.

(c) Chapter–II of the Act lays down the manner of declaration of the intention of the local authority to make a town planning scheme, procedure with regard to preparation and publication of the draft scheme, for sanction to such draft scheme and lapsing of sanction. Section 11, gives the details as to what the draft scheme should contain. Clause (b) of section 11 provides that the draft scheme shall contain the particulars with regard to the land allotted or reserved under Clause (d) of section 3 with a general indication of the uses to which such land is to be put and the terms and conditions subject to which such land is to be put to such uses. Section 12 deals with reconstitution of plots, allotment of plot to an owner of dispossessed land in furtherance of the scheme and transfer of ownership plot from one person to another. Under section 13, the authority is required to consider the objections raised to the draft scheme, if lodged within a period of one month. Under section 14, the local authority is obliged to submit draft scheme with any modifications as might have been made together with all objections thereto to the State Government. The State Government, after consideration of all the material submitted to it, is empowered to sanction the scheme, after following the prescribed procedure. Section 15 enumerates the restrictions on development and construction which come into operation as a result of publication of declaration of intention to execute a scheme. There is a provision in this section that if the local authority does not refuse, or does not communicate the refusal within a prescribed period, the permission sought for shall be deemed to have been granted. Detailed provisions are made as to what action the local authority could take in case a person contravenes the provisions of the section and carries on unauthorised development. Section 15AA empowers the State Government to suspend any Rule having the force of law, Act or other provisions which is in force in the area proposed to be included in the scheme when a local authority publishes its intention to declare a scheme. Such an order would, however, cease to operate in case the State Government refuses sanction to the making of the scheme. This section requires the local authority to make a town planning scheme in built up areas.

(d) Chapter−III of the Act deals with the financing of the town planning scheme which, in our opinion, is irrelevant for the purposes of the present writ petitions.

(e) Chapter−IV, containing sections 29 to 44, deals with appointment of arbitrator and the Tribunal of arbitrators, the consequences of orders made by the arbitrator, powers of the Tribunal of arbitrator, matters which could be considered by the President of the Tribunal and connected matters. Section 40 provides that after the whole gamut of arbitration and consideration by the tribunal of arbitration is over, the State Government may sanction the scheme or refuse to give such sanction or sanction it subject to such modifications as may be necessary for the purpose of correcting an error, irregularity or informality. A scheme which has undergone the process and obtained the imprimatur is styled as the 'final scheme' and the State Government is empowered to notify a date, not earlier than one month after the publication of such notification as the date on which all liabilities created by the scheme shall take effect and the final scheme shall come into force. Under sub−section (3) of section 40, on and after the date fixed in such notification a town planning scheme shall have effect 'as if it were enacted in this Act'. Section 40−A enables the withdrawal of the scheme and the conditions subject to which it can be done. Section 41 provides that on the day on which the final scheme comes into force, (a) all lands required by the local authority shall, unless otherwise determined in such scheme, vest absolutely in the local authority free from all encumbrances and (b) all rights in original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the arbitrator. Section 42 empowers the local authority to summarily evict any one who is not entitled to occupy any land after the final scheme comes into force. Section 43 empowers the authority, after following the prescribed procedure, to pull down or remove or alter any building or other work in the area included in the scheme which is constructed or done contrary to the provisions of the scheme or execute any work which is required to be executed under the scheme and for certain other incidental consequences.

(f) Chapter−V deals with certain miscellaneous matters like joint town planning schemes, vesting of property and rights of a local authority ceasing to exist or ceasing to have jurisdiction under sections 45 and 45−A. Section 45−B empowers the local authority to apply to the State Government for variation of the final scheme if it considers that the scheme is defective on account of an error, irregularity or informality. Under section 46 a town planning scheme may be varied or revoked at any time by a subsequent scheme prepared, published and sanctioned in accordance with this Act. Section 51 provides that the land needed for the purpose of a town planing scheme shall be deemed to be land needed for public purpose, within the meaning of the Land Acquisition Act. Section 51−A empowers the Government to acquire land included in the town planning scheme if it is needed for a public purpose other than for which it is included in the scheme and the steps to be taken for inclusion of such land. Section 52 empowers the State Government to make rules consistent with the provisions of this Act to provide for all matters not specifically enacted therein. The Bombay Town Planning Rules, 1951, were made in exercise of powers, by the then Government of Bombay, under section 52 of this Act.

(g) These are the broad outlines of the Bombay Town Planning Act, 1951, to the extent relevant for our consideration.

80. In exercise of the powers vested in it by the Bombay Town Planning Act, 1951, the local authority the Poona City Municipality (as respondent No. 2 then was) formulated a Town Planning Scheme, Poona, No. 1, which after having gone through the necessary legal procedure came to be notified by the arbitrator on March 14, 1929 (in fact it was styled as Town Planning Scheme, Poona−I (Final)). Under this Town Planning Scheme (Final), there was a subheading, "Allotments or Reservation of Sites for Public or Municipal Purposes", under which a number of reservations were made for public purposes such as Health Camp, Public garden,

Sanitary conveniences and so on. In order to properly implement and enforce the town planning scheme, a set of regulations were formulated and brought into effect. We shall have occasion to refer to the details of the scheme a little later.

BOMBAY TOWN PLANNING ACT, 1954:

100. The next historical development of which needs to be noticed is the Bombay Town Planning Act, 1954. A reference to the Statement of Objects and Reasons dated July 10, 1954 (published in the Bombay Government Gazette dated July 19, 1954) suggests that the Government had experienced certain difficulties in the working of the Bombay Town Planning Act, 1951 and intended to overcome them. Clause 2 of the Statement of Objects and Reasons as states:

"It has been made obligatory on the local authority to carry out the survey of the area within its jurisdiction and to prepare and publish within four years from the date on which this Act comes into force a development plan for the entire area for the sanction of Government. A ready made development plan will be useful whenever the local authority concerned desires to take up a Town Planning Scheme for a particular area as the plan will indicate the manner in which the development and improvement of the entire area within the jurisdiction of the local authority are to be carried out and regulated."

Consistent with the above objective the Bombay Town Planing Act, for the first time, made provisions with regard to 'development plans'. One entire Chapter, Chapter−II, in this Act is devoted to development plans. The short title of the Act says that It is an Act intended to consolidate and amend the law for making certain town planning schemes, but its preamble states.

"WHEREAS in order to ensure that town planning schemes are made in a proper manner and their execution is made effective, it is necessary to provide that a local authority shall prepare a development plan for the entire area within its jurisdiction."

Thus, it appears that the Legislature felt that there was a need to make provisions for 'development plan' for the entire area within its jurisdiction so that the town planning schemes were made with regard to different areas and their execution was effective.

(b) The expression "development plan" is defined in section 2(2) of this Act, as a plan for the development or redevelopment or improvement of the entire area within the jurisdiction of local authority prepared under section 3. Here again, the local authority would be a Municipality or Municipal Corporation and include such local authorities constituted under the B.P.M.C. Act.

(c) Chapter−II contains sections 3 to 17. Section 3 provides for a survey of the area within the jurisdiction of the local authority and casts an obligation on the local authority to prepare and publish in the prescribed manner, the development plan within its jurisdiction. It also empowers the State Government to give appropriate directions to see that this duty is properly discharged. Section 4 provides that before actually carrying out a survey of the local area, the local authority should make a declaration of its intention to prepare a development plan and send a copy thereof to the State Government for publication in the official gazette. The details with regard to the plan are also indicated in this section. Section 5 and section 6 deal with the manner of preparation of the development plan and power of entry for carrying out survey for preparation of the development plan.

(d) Section 7 is of importance and reads as under:

"7. Contents of development plan.−−−A development plan shall generally indicate the manner in which the development and improvement of the entire area

within the jurisdiction of the local authority are to be carried out and regulated. In particular, it shall contain the following proposals, namely:--

(a) Proposals for designating the use of the land for the purposes such as (1) residential, (2) industrial, (3) commercial, and (4) agricultural;

(b) proposals for designation of land for public purposes such as parks, playgrounds, recreation grounds, open spaces, schools, markets or medical, public health or physical culture institutions;

(c) proposals for roads and highways;

(d) proposals for the reservation of land for the purposes of the Union any State, any local authority or any other authority established by law in India; and

(e) such other proposals for public or other purposes as may from time to time be approved by a local authority or directed by the State Government in this behalf."

Section 8 provides for certain particulars including a report explaining the provisions of the development plan and regulations enforcing the provisions of the development plan and explaining the manner in which necessary permission for developing any land can be obtained from the local authority if to be forwarded to the Government. Section 9 provides for suggestions with regard to the development plan for consideration. Section 10 empowers the Government, after consulting the Consulting Surveyor, by notification in the official gazette to sanction the development plan submitted to it either with or without modification or subject to such modification as it considers expedient within the time prescribed. Such notification is required to be issued by fixing the date from which the final development plan is to come into force. Sub-section (3) of section 10 provides that if the development plan contains any proposal for the designation of any land for the purpose specified in Clause (b) or Clause (e) of section 7, and if such land does not vest in the local authority, the State Government shall not include the said purpose in the development plan unless it is satisfied that the local authority concerned shall be able to acquire such land by private agreement or compulsory purchase within a period of ten years from the date on which the final development plan comes into force. Section 11 empowers the local authority to acquire the land designated in the development plan for a purpose specified in Clauses (b), (c), (d) or (e) of section 7 either by agreement or under the Land Acquisition Act, 1894. Sub-section (3) of section 11 further says that if the designated land is not acquired by agreement within ten years from the date specified under sub-section (3) of section 10 or if proceedings under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve notice to the local authority and if within six months from the date of the service of such notice the land is not acquired or no steps as aforesaid are commenced for is acquisition the designation shall be deemed to have lapsed.

(e) Section 12 of this Act is important and reads as under:

"Restrictions on development work after publication of declaration of intention under section 4(1).---On or after the date on which a declaration of intention to prepare a development plan is published under sub-section (1) of section 4 in respect of any area, no person shall carry on any development work in any building or in or over any land within the limits of the said area without the permission of the local authority which shall be contained in the commencement certificate granted by the local authority in the form prescribed.

Explanation.---For the purpose of this section.---

(a) the expression "development" means the carrying out of building or

other operation in or over or under any land or the making of any material change in the use of any building or other land;

(b) the following operations or uses of land shall not be deemed to involve the development of any building or land, namely:---

(i) the carrying out of works for the maintenance, improvement or other alteration of any building being works which affect only the interior of the building or which do not materially affect the external appearance of the building;

(ii) the carrying out of works in compliance with any order or direction made by any authority under any law for the time being in force;

(iii) the carrying of works by any authority in exercise of its powers under any law for the time being in force;

(iv) the use of any building or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling house as such;

(a) when the normal use of land which was being temporarily used for another purpose on the day on which the declaration of intention to prepare the development plan is published under sub-section (1| of section 4 is resumed;

(vi) when land was normally used for one purpose and also on occasions for another purpose, the use of the land for that other purpose on similar occasions."

(f) Section 13 obliges the local authority to issue a written acknowledgment of receipt of an application for development and empowers it grant or refuse permission for development or grant it subject to such general or special conditions as may be ordered by the State Government. Sub-section (2) of section 13 says that if the local authority does not communicate its decision to the applicant within three months from the date of such acknowledgment, such certificate shall be deemed to have been granted to the applicant. This section also empowers the local authority to take action with regard to development work commenced without permission or contrary to the conditions imposed in the permission. Section 14 is a supplementary provision with regard to granting of permission. This section gives a supplementary power for change of use of land including the power to grant permission for the retention on land of any building or work constructed or carried out thereon before the date of publication of the declaration of intention to prepare a development plan under sub-section (1) of section 4 or for the continuance of any use of land instituted before that date. Section 15 is a consequential provision whereunder if change of user is refused or granted subject to conditions, and the owner of the land claims that the land has become incapable of reasonable beneficial use in its existing state or that the conditions are so onerous that the land cannot be rendered capable of reasonable beneficial use by carrying out the conditions, then, the owner of the land may serve a purchase notice on the local authority within a specified time. This section further provides that, where a purchase notice is served on the local authority, the local authority shall forthwith transmit a copy of the notice to the State Government and the State Government shall if it is satisfied that the conditions specified in paragraph (c) or (b) of sub-section (1), as the case may be, are fulfilled, confirm the notice, and thereupon the local authority shall be deemed to be authorised to acquire the interest of the owner compulsorily. Section 16 deals with sanction for subdivision of plot or layout of private street. Section 17 provides that at least once in every ten years from the date of last development plan came into force the authority, if so required by the State Government shall carry out a fresh survey of the area within its jurisdiction for revising the existing development plan.

(g) Section 18 (Chapter−III) deals with the making of town planning scheme, "subject to the provisions of this Act or any other law for the time being in force", the local authority may, "for the purpose of implementing the proposals in the final development plan", may make one or more town planning schemes for the area within its jurisdiction or any part thereof. Subsection (2) of section 18 deals with several details which are to be provided in the town planning scheme. Clause (e) which is of relevance to us, deals with the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets, green belts and dairies, transport facilities and public purposes of all kinds. Sections 19 and 20 are more or less on the earlier pattern, dealing with the disputed ownership and right of entry.

(h) Chapter−IV contains sections 21 to 30 and deals with declaration of intention to make a scheme and making of a draft scheme. Section 21 provides that a town planning scheme may be made "in accordance with the provisions of this Act" in respect of any land which is (a) in course of development, (b) likely to be used for building purposes, or (c) already built upon. Sub−section (2) defiles the expression, "land likely to be used for building purposes" as inclusive of any land likely to be used as or for the purpose of providing open spaces., roads, streets, parks, pleasure or recreation grounds, parking spaces, or for the purpose of executing any work upon or under the land incidental to a town planning scheme, whether in the nature of a building work or not. Section 22 empowers the local authority to pass a resolution declaring its intention to make a town planning scheme in respect of whole or any part of such land likely to be used for building purposes. It also provides for the procedure for publishing of such declaration of intention and specifying places where copies of the town planning scheme would be available for inspection by the members of the public. Section 23 deals with making and publication of draft scheme. Section 24 empowers the State Government to direct the local authority to make a town planning scheme in case the local authority fails to do so. Section 25 indicates the particulars to be contained in a draft scheme. Clause (b) of this section is relevant for our purposes since it provides that the land allotted or reserved under sub−clause (e) of Clause with a general indication of the uses to which such land is to be put and the terms and conditions subject to which such land is to be put to such uses. Section 26 deals with reconstitution of plots. Section 27 requires of hearing of objections to the draft town planning scheme. Section 28 requires the local authority to submit the draft scheme for its consideration, and the State Government is empowered to sanction the scheme and notify the scheme. Section 29 indicates that on and after the date on which the local authority’s declaration of intention to make a scheme under section 22 or the notification issued by the State Government under section 24 is published in the official gazette, there would arise several restrictions on the use of the land by the owner. Clause (a) prohibits any person from erecting or proceeding with any building or work or removing, pulling down, altering, making additions to, or making any substantial repairs to any building etc., unless such a person has applied for and obtained the necessary permission in the form of a commencement certificate to be granted by the local authority in the prescribed form. This section also deals with the manner in which the local authority should issue commencement certificate. This section also has a deeming provision that, if the local authority does not communicate its decision to the applicant within three months of the date of acknowledgment of the application, then, the permission sought for shall be deemed to have been granted. This section also makes provisions for action to be taken against the person contravening the restrictions under the section. Sub−section (3) provides that the restrictions imposed shall cease to operate in the event of the State Government refusing to sanction the draft scheme or the final scheme or in the event, of the withdrawal of the scheme under section 52.

(i) Chapter−V (sections 31−43) deals with the appointment of the Town Planning Officer and Board of appeal. The provisions contained therein need not detain us as they are not very material for the present purpose.

(j) The provisions in Chapter−VI from sections 44 to 61 with regard to splitting up of schemes into sections and preliminary schemes is not of relevance for the present purpose except that section 51 empowers the State Government after following the procedure to give sanction to the scheme sub−section (3) thereof provides as under:

"On and after the date fixed in such notification a town planning scheme shall have effect as if it were enacted in this Act." (k) Section 53 provides that: "On the date on which the final scheme comes into force,−−

(a) all lands required by the local authority shall, unless it is otherwise determined in such scheme, vest absolutely in the local authority free from all encumbrances;

(b) all rights in the regional plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the Town Planning Officer."

(1) Section 54 gives a power to the local authority to summarily evict any person continuing to occupy any land which he is not entitled to occupy under the final scheme. Section" 55 gives the power to the local authority to remove, pull down, or alter any structure which contravenes the scheme or in erection of which the provisions of the scheme have not been followed and the power to execute any work required to be done under the scheme where it appears to the local authority that delay in the execution of the work would prejudice the efficient operation of the scheme. Section 56 provides that, if the local authority considers that the scheme is defective on account of error, irregularity or informality, the local authority may apply in writing to the State Government for the variation of the scheme. If the Government is satisfied that variation required is not substantial, the State Government shall publish a draft of such variation in the prescribed manner and after hearing objections, the State Government may take steps to incorporate the variations in the scheme. Section 57 provides that notwithstanding anything contained in section 56 a town planning scheme may at any time be varied or revoked by a subsequent scheme made, published and sanctioned in accordance with this Act after making appropriate enquiries. Section 58 provides for compensation to be paid to any person who has incurred expenditure as a result of variation or modification of the scheme. Sections 59, 60 and 61 deal with incidental miscellaneous matters which are not relevant to our purpose,

(m) Chapter−VII (sections 62 and 63) deals with general joint planning schemes.

(n) Chapter−VIII (sections 64 to 77) deals with financing the costs of the town planning scheme. Section 78 deals with penalties for contravention of section 12.

(o) Chapter−IX (sections 79 to 89) deal with miscellaneous provisions.

Only sub−section (2) of section 90 is relevant for us and it reads as under:

"Notwithstanding the repeal of the said Act (Bombay Town Planning Act, 1951), any declaration of intention to make a scheme any application made to the State Government for sanction of the making of the scheme, any draft scheme published by a local authority, any application made to the State Government for the sanction of the draft scheme, any sanction given by the State Government to the draft scheme, any restriction upon an owner of land or building against the erection or re−erection of any building or works, any commencement certificate granted, any order of suspension of rule, by−!aw, regulation, notification or order made, any appointment made of an arbitrator, any proceeding pending before the arbitrator, any final scheme forwarded to or sanctioned or varied by the

State Government, any recoveries to be made or compensation to be given in respect of any plot under the repealed Act shall, in so far as it is not inconsistent with this Act, continue in force thereunder and provision of this Act shall have effect in relation to such publication, declaration of intention, draft scheme, final scheme, sanction variation, restriction, proceedings, suspension, recoveries or compensation."

(p) There were appropriate rules made under this Act known as Bombay Town Planning Rules, 1955, the details of which do not concern us for the disposal of the present proceeding.

MAHARASHTRA REGIONAL TOWN PLANNING ACT, 1966

81. (a) The next development in the law is the enactment of M.R.T.P. Act which came into force on January 11, 1967. The Statement of Objects and Reasons which prompted the Government to enact this law are indicated in the Statement of Objects and Reasons accompanying the Bill as under:

"At the present the Bombay Town Planning Act, 1954, extends to the whole of the State of Maharashtra excluding the City of Nagpur. This Act requires every local authority to prepare a development plan for the area within its jurisdiction. Under a development plan, a local authority can allocate land for different uses, e.g., for residential, industrial, commercial and agricultural and reserve sites required for public purposes, e.g., for schools, playgrounds, markets, hospitals, parks, roads and highways. The development plan proposals are executed by a local authority either by compulsory land acquisition or by preparing and executing town planning schemes for different parts of the town, so that when all the proposals are carried out, there would emerge 'a harmonious', well planned and properly developed town. Town planning schemes can be made in respect of any land, whether open or built up and incremental contribution e.g., betterments in land value, can be recovered from owners of plots benefiting from the proposals made in the scheme. In practice, however, some defects and deficiencies in the aforesaid Act have been noticed that the object of this Bill is to remove them and provide for certain new provisions which are considered essential to tackle the problems of planing and development of land as comprehensively and as effectively as possible. The important provisions of the Bill are explained below."

(b) This Act made an improvement over the 1954 Act by bringing in the concept of regional plan. The reasons for bringing in this concept through Legislation is indicated in paragraph 2 of the Statement of Objects and Reasons as under:

"2. Chapter–II ––– The Bombay Town Planning Act, 1954 has made planning of land possible only within the areas of local authorities. However, there is no provision to control development of land in the important peripheral areas outside Municipal limits. It is, therefore, not possible to exercise proper and effective control over planning and development of land in peripheral areas which are growing in an irregular and hap hazard manner. The evil results of such uncontrolled and haphazard growth and development have already become apparent in the vast areas outside Greater Bombay, Poona and other important urban centres. It is, therefore, necessary to plan and exercise effective control on the use and development of land, not only within such urban centres, but also in the surrounding areas which come within the social and economic influence of such urban centres. The object of regional planning is to facilitate proper planning of such extensive areas of land called. Regions in the Bill having common physical social and economic problems so that certain matters such as distribution of population and industries, roads and highways, preservation of good agricultural lands, reservation of green belts and preservation of areas of natural scenery, etc., can be dealt with and planned comprehensively on a regional level. With this object in view this Bill makes provision for establishment of Regional Planning Boards for specified Regions which would prepare regional plans for development and use of land in these

regions. The work of execution of Regional plans is left to Planning Authorities, Special Planning Authorities and New Town Development Authorities."

(c) Paragraph 3 of the Statement of Objects and Reasons indicates that the Act is also intended to improve on the provisions of the Bombay Town Planning Act, 1954, "in regard to preparation and execution of development plans so that such plans are made properly and expeditiously." Paragraph 3 reads as under;

"3. Chapter–III–– This Bill seeks to improve on the provisions of the Bombay Town Planning Act, 1954 in regard to preparation and execution of development plans so that such plans are made properly and expeditiously. Every Planning Authority is required to appoint a Town Planning Officer for carrying out surveys and preparing an existing land use map and formulating proposals of the Development plan within the framework of the Regional plan where one exists for the consideration of the Planning Authority. The Bill also empowers the State Government to appoint an Officer to prepare, publish and submit a Development Plan to State Government for sanction where a Planning Authority fails to do so. Provision is made for the preparation and publication of an interim Development Plan which will serve as a guide to both the public and Planning Authority for the purpose of granting permission for the use and development of land pending preparation and publication of the draft development plan. The State Government is also empowered to constitute where necessary, a Special Planning Authority for any area in the State for the purpose of preparation and execution of development plans."

(d) One of the salient features of this Act is that the concept of 'Development Plan', which was already introduced by the 1954 Act, is sought to be further advanced. Highlighting the changes sought to be made by the law in this regard and the reasons therefor, it is stated in paragraph 4 of the Statement of Object and Reasons:

"4. Chapter–IV–– The Bill includes a separate Chapter for the control of development and use of land included in Development Plans, which is an improvement on the provisions of the Bombay Town Planning Act, 1954, and seeks to make the control on use and development of land more effective. A provision has been made for appeal to the State Government or to an Officer not below the rank of a Deputy Secretary to the Government against the order of a Planning Authority granting permission for development subject to condition or refusing such permission. A provision has been made making it obligatory on Appropriate Authority to acquire land which is earmarked in the plan for its purpose, or for the development of which permission is refused or granted subject to certain conditions, so that the land becomes incapable of beneficial use. (See Clause 49). Where land reserved for a public purpose in the development plan is not required for the purpose by the Appropriate Authority, provision has been made for deletion of the reservation. (See Clause 50). The Planning Authority has been given powers to require removal of unauthorised development, to stop any unauthorised development in progress and to remove summarily any unauthorised development of a temporary nature, the penalty for unauthorised development or for use otherwise than in conformity with Development Plan, has been enhanced. Powers have also been taken to a Planning Authority to require removal of authorised development or discontinuance of any use of land in the interest of proper planning of areas in a development plan subject to payment of compensation for such removal or discontinuance."

(e) As far as the provisions in regard to preparation of town planning scheme, it is stated in paragraph 5 of the Statement of Objects and Reasons:

"5. Chapter–V––– The Bill follows generally the existing provisions of the Bombay Town Planning Act in regard to the preparation and execution of town planning schemes with few modifications. The bill empowers a Planning Authority to include additional area in a town planning scheme where necessary, and then, prepare a combined draft scheme for both the original and the additional area.

The designations of "Town Planning Officer" and "Board of Appeal" under the present Act have been changed to "Arbitrator" and "Tribunal of Appeal", respectively. Where the Arbitrator makes a substantial variation in a draft scheme involving an increase in the cost of more than 20 per cent or Rs. 2 lakhs, whichever is higher, on account of the provision of new works or reservation of additional sites for public purposes, he is required to obtain sanction of the State Government. The Tribunal of Appeal is empowered to hear appeals in respect of plots which are wholly acquired under the scheme. The Arbitrator is also empowered at the request of a Planning Authority to take, where necessary, possession of land in advance of sanction of the final scheme, after giving a hearing to the persons interested in the lands, and, if so permitted by the State Government. Where a Planning Authority fails to complete the works provided in a town planning scheme within the prescribed period, the Bill empowers the State Government to require the Planning Authority to complete the works within a further specified period or to appoint an officer to complete such works at the cost of Planning Authority."

(f) In para 7 of the Statement of Objects and Reasons, the changes made in the provisions of the law with regard to compulsory acquisition of the land are highlighted.

82. (a) Section 2(2) of the M.R.T.P Act defines the expression 'amenity" which would include primary and secondary schools, apart from several others. The expression "development" is defined in section 2(7) of this Act, inter alia, as the carrying out of the buildings, engineering, mining or other operations in or over or under, land or the making of any material change in any building or land or in the use of any building or land or any material or structural change in any heritage; building or its precinct and includes demolition of any existing building, structure or erection or part of such building, structure of erection; and reclamation, redevelopment and layout and sub-division of any land; and "to develop" is to be construed accordingly. Section 2(9) defines "development plan" as a plan for the development or re-development of the area within the jurisdiction of a Planning Authority and includes revision of a development plan and proposals of a special planning authority for development of land within its jurisdiction. Section 2(9A) defines "development right" as the right to carry out development or to develop the land or building or both and certain other things. "Local authority" is defined in section 2(15). So far as we are concerned, it includes any Municipal Corporation constituted under the B.P.M.C Act, which is permitted by the State Government for any area under its jurisdiction, to exercise powers of the planning authority under the Act. Section 2(27) defines "regulation" to mean a regulations made under section 159 of this Act and includes zoning and other regulations made as a part of a Regional Plan, Development Plan, or Town Planning Scheme.

(b) Chapter-II (sections 3 to 20) of the Act introduces the concept of Regional Planning. The State Government is empowered by section 3 to establish any area in the State by defining its limits, to be a 'Region' for the purposes of this Act. Sections 4 to 12 deal with constitution of Regional Planning Boards and the functioning of the Regional Planing Boards. Section 13 deals with survey of Region and preparation of Regional Plans. Section 14 provides the details of what the Regional Plan may provide for. Clauses (a) and (b) are of special interest. They read as under:

"(a) allocation of land for different uses, general distribution and general locations of land, and the extent to which the land may be used as residential, industrial, agricultural, or as forest, or for mineral exploitation;

(b) reservation of areas for open spaces, gardens, recreation, zoological garden, nature reserves, animal sanctuaries, dairies and health resorts."

Clauses (c) to (k) deal with several other matters for which provisions may

be made in the Regional Planning. Section 15 talks of the submission of Regional Plan to State Government for approval, publication of the Regional Plan in the official gazette and approval thereof with or without modification. Section 16 provides for the steps which are to be taken by the Regional Board in preparing and approving Regional Plans. Section 17 provides that as soon as Regional Plan is approved, the State Government should give appropriate notice to all affected persons and make available copies of Regional Plan at specified places and further that any such Regional Plan which has been brought into operation is called Final Regional Plan. Section 18 provides a restriction on the institution or change the use of any land for any purpose other than agricultural without the previous permission of the Municipal Corporation or Municipality or Collector after the publication of the notice that the draft Regional Plan has been prepared or after the draft Regional Plan has been approved. Section 19 provides for exclusion of claims for compensation for injurious affection as a result of restrictions of use of land. Section 20 empowers the State Government to revise or modify the Regional Plan.

(c) Chapter−III (sections 21 to 58) of the Act deals with development plan. Here the pattern of legislation followed is the same as in the 1954 Act with certain improvements. Section 21 deals with the obligation of the Planning Authority to carry out a survey, prepare an existing land use map and prepare a draft Development Plan for the area within its jurisdiction, in accordance with the provisions of a Regional Plan where such a plan is published in the Official Gazette and submitted to the Statement Government for sanction. If the Planning Authority fails to do so, within the specified period, it is open to the State Government to appoint a Special Officer in that behalf for carrying out the said work and submit a draft development plan. Subsections (b), (c) and (m) of section 22 read as under:

"(b) Proposals for designation of land for pubic purpose such as schools, colleges and other educational institution, medical and public health institution, markets, social welfare and cultural institutions, theatres and places for public entertainment, or public assembly, museums, art galleries, religious building and Government and other public buildings as may from time to time be approved by the State Government;

(c) proposals for designation of areas for open spaces, playgrounds, stadia, zoological gardens, green belts, nature reserves, sanctuaries and dairies;...

(m) provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location number, size, height, number of stories and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, the sub−division of plots the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and hoardings and other matters as may be considered necessary for carrying out the objects of this Act."

Section 22−A gives a definition of the expression "of a substantial nature" used in relation to the modifications of the development plan within the meaning of sections 29 or 31. For our present purpose, we may notice that deletion of a reservation or reduction thereof by more than 50% would be a modification of substantial nature within the meaning of this section. Sections 23 to 31 deal with the procedure to be followed in preparing and sanctioning the development plan. Here again, sub−section (2) of section 26 provides that notice be given by the planning authority and published under section 23 which shall indicate several particulars in relation to the draft development plan which should be

available for inspection by the public. Clause (iii) of sub-section (2) of section 26 requires that regulations for enforcing the provisions of the draft Development Plan and explaining the manner in which the permission for developing any land may be obtained from the Planning Authority or the Town Planning Officer as the case may be also made available for public by notice. Section 27 obligates the Planning Authority to be guided by the proposals made in any draft Regional Plan or final Regional Plan while preparing the draft development plan. However, if the Planning Authority or the Special Officer is of the view that any provision in the draft or final Regional Plan needs any modification, it may be carried out in the case of a draft Regional Plan, with the concurrence of the Regional Board and in the case of a final Regional Plan, with the approval of the State Government. Section 28 deals with the manner of calling for objections to the draft development plan and considering them. It also deals with the publication of the draft development plan. Section 29 provides that if the modifications made by a Planning Authority in the draft Development Plan are of a substantial nature, once again a notice is required to be published in the local newspapers inviting objections and suggestions from the persons interested. Section 30 requires the Planning Authority to forward the draft development plan along with all objections for the consideration of the State Government. Section 31 empowers the State Government to consider the draft Development Plan in the light of the suggestions after consulting the Director of Town Planning and approve it or without modifications. If the modifications to be made in the draft development plan are of substantial nature, the State Government is required to publish notice in the official gazette and also in local newspapers inviting objections and suggestions to the modifications. After considering all objections and suggestions the State Government has to notify the date on which the final development plan would come into operation. Sub-section (5) of section 31 is of some importance since it provides that the State Government shall not include in the development plan any proposal for the designation of any land for a purpose specified in (b) and (c) of section 22, if such land does not vest in the Planning Authority unless it is satisfied that the Planning Authority will be able to acquire such land by private agreement or compulsory acquisition not later than ten years from the date on which the Development Plan comes into operation. Sub-section (6) of section 31 says that a Development Plan which has come into operation shall be called the "final Development Plan" and shall, subject to the provisions of this Act, be binding on the Planning Authority. Section 32 deals with interim development pending the preparation of a draft development plan. Section 33 deals with the preparation of plans for areas of comprehensive development and section 34 deals with preparation of development plan for additional area. Section 35 is of some import. It provides that if any Planning Authority has prepared a development plan which has been sanctioned by the State Government before the commencement of the Act, then such Development Plan shall be deemed to be a final Development Plan sanctioned under this Act. Correspondingly, section 36 provides that if any Planning Authority has prepared a draft Development Plan for the areas within its jurisdiction before the commencement of this Act, such Development Plan shall be deemed to be a draft Development Plan for that area for the purposes of this Act, and thereupon, the foregoing provisions of Chapter-III would apply mutatis mutandis thereto. Section 37 provides the procedure to be adopted for modification of final development plan. If the proposal for modification is of such a nature that it would not change the character of the development plan, the Planning Authority, may, or when so directed by the State Government it shall publish a notice in the official gazette inviting objections and suggestions to the proposed modifications and after giving one month's time and hearing all persons concerned or affected, submit the proposed modifications to the State Government for sanction. If the Planning Authority fails to issue the notice as directed by the State Government, the State Government itself is empowered to issue such a notice. After making inquiry as it may consider necessary and after consultation with the Director of Town Planning, the State Government is empowered to issue a notification in the official gazette sanctioning the modifications with or without such changes and subject to such conditions as it may deem fit, or

refuse to accord sanction. If a modification is sanctioned, the final Development Plan shall be deemed to have been modified accordingly. Section 38 provides for revision of the development plan. Section 39 provides that where a final Development Plan contains proposals which are in variation, or modification of those made in a town planning scheme which has been sanctioned by the State Government before the commencement of this Act, the Planning Authority shall vary such scheme suitably under section 92 to the extent necessary by the proposals made in the final Development Plan. Section 40 deals with setting up a Special Planning Authority for developing certain notified areas and section 41 provides for the expenses of such Special Planning Authority. Section 42 deals with the implementation of plans and drafts and declares that, on the coming into operation of any plan or plans referred to in Chapter−III, "it shall be the duty of every Planning Authority to take such steps as may be necessary to carry out the provisions of such plan or plans".

(d) Chapter−IV (sections 41 to 64) deals with control of development and use of land included in development plans. Section 43 prescribes the restrictions on development of land and provides that after the date on which the declaration of intention to prepare a Development Plan for any area is published in the official gazette, no person shall institute or change the use of any land or carry out any development of land without the permission in writing of the Planning Authority. The proviso carves out certain exceptional cases with which we are not concerned. Section 44 obliges any person other than the Central or State Government or the local authority intending to carry out any development on any land to make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents as may be prescribed. We are not concerned with the situation contemplated by the proviso.

(e) Section 45 deals with the manner in which the Planning Authority has to deal with such application. When an application is received, the Planning Authority is required to make an order in writing and subject to the provisions of this Act, "grant the permission unconditionally or refuse the permission". The permission granted with or without conditions is required to be contained in a commencement certificate in the prescribed form. The order must state the grounds for imposing such conditions or for such refusal of the permission and is required to be communicated to the applicant in the manner prescribed by the regulations. Sub−section (5) also contains a provisions for deemed permission if the Planning Authority does not communicate its decision on the application within the prescribed period. In such an event, if an order granting or refusing the permission for development of the land is not communicated within a period of sixty days, the permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of the sixty days. By an amendment carried out by Maharashtra Act No. 10 of 1994, two provisos were added to subsection (5) of section 45 which are important. They read as under:

"Provided that, the development proposal, for which the permission was applied for, is strictly in conformity with the requirements of all the relevant Development Control Regulations framed under this Act or bye laws or regulations framed in this behalf under any law for the time being in force and the same in no way violates either the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under this Act:" and

"Provided further that, any development carried out in pursuance of such deemed permission which is in contravention of the provisions of the first proviso shall be deemed to be an unauthorised development for the purposes of sections 52 to 57."

(f) Section 46 appears to be an improvement on the provisions of the 1954 Act. It provides that on coming into operation any plan or plans, the Planning Authority in consideration application for permission shall have due regard to

the provisions of any draft or final plan of proposals published by means of notice submitted or sanctioned under this Act.

(g) Section 47 provides a right of appeal to an applicant aggrieved by refusal of permission or granting of permission under section 44 imposing onerous conditions. Such an appeal is to be made to the State Government or any officer of the State Government of the rank not below the rank of Deputy Secretary. The State Government or the Officer so appointed may after giving reasonable opportunity of being heard dismiss or allow the appeal by granting permission unconditionally or subject to the conditions as modified. Section 48 provides that 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. There is also a provision 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. It is further provided that such lapse shall not bar any subsequent application for fresh permission under this Act.

(h) Section 49 provides that the owner of the land or person affected by reservation is of the view that on account of reservation in the plan the land has become incapable of reasonably beneficial use in its existing state or that he is unable to sell it except at a lower price than that at which he might reasonably have been expected to sell if it were not so designated or allocated, may issue a notice called purchase notice calling upon the appropriate authority (the authority for whose benefit the land has been reserved) to purchase the said land. The Planning Authority is required to forward such purchase notice to the State Government. After consideration of the request made in the purchase notice, if the State Government is satisfied that the conditions specified in sub−section (1) of section 49 are fulfilled, and that the order or decision for permission was not duly made on the ground that the applicant did not comply with any of the provisions of this Act or rules or regulations, it may confirm the purchase notice, or direct that planning permission be granted without condition or subject to such conditions as will make the land capable of reasonably beneficial use. In any other case, the State Government may refuse to confirm the purchase notice after giving a reasonable opportunity to the applicant of being heard. If, within a period of six months from the date on which a purchase notice is served, the State Government does not pass any final order thereon, the notice shall be deemed to have been confirmed at the expiration of that period. Sub−section (7) of this section says that if within one year from the date of confirmation of the notice, the Appropriate Authority fails to make an application to acquire the land in respect of which the purchase notice has been confirmed as required under section 126, the reservation, designation, allotment, indication or restriction on development of the land shall be deemed to have lapsed and, thereupon, the land shall be deemed to be released from the reservation, designation, or as the case may be, allotment, indication or restriction and shall becomes available to the owner for the purpose of development otherwise permissible in the case of adjacent land, under the relevant plan.

(i) Sub−section (7) was not part of the Parent Act but was added by an amendment made by Maharashtra Act 14 of 1971.

(j) Section 50 provides that the Appropriate Authority, other than the Planning Authority, if it is satisfied that the land is not or no longer required for the public purpose for which it is designated or reserved or allocated in the interim or the draft Development plan or plan for the area of Comprehensive development or the final Development plan, may request the Planning Authority to sanction the deletion of such designation or reservation or allocation from the interim or the draft Development plan or plan for the area of Comprehensive development on the State Government to sanction the deletion of such designation or reservation or allocation from the final Development plan after making appropriate inquiry and satisfying itself that

such reservation or allocation or designation is no longer necessary in the public interest. Sub-section (3) provides that if such an order is made the reservation on the land shall be deemed to be released from such designation, reservation, or, as the case may be, allocation and shall become available to the owner for the purpose of development as otherwise permissible in the case of adjacent land, under the relevant plan.

(k) Section 51 is a special provision by which the Planning Authority is given the power of modification or revocation of the permission to develop, if satisfied "having regard to the development plan prepared or under preparation" that such permission should be revoked or modified. This section requires the Planning Authority to give an opportunity of being heard to the person affected. The proviso provides that if the development relates to carrying out of any building or other operation, no such order shall affect such of the operations as have been previously carried out, or shall be passed after these operations have substantially progressed or have been completed. It is further provided that where the development relates to a change of use of land no such order shall be passed at any time after the change has taken place.

(1) Section 52, provides for penalties for unauthorised development or for use otherwise than in conformity with Development plan. Section 53 empowers the Planning Authority to require the removal of the unauthorised development. Section 54 empowers the Planning Authority to stop unauthorised development when the unauthorised development is being carried out but has not been completed. Section 55 empowers the Planning Authority to demolish any development of temporary nature unauthorisedly carried out. Section 56 invests the Planning Authority with power to require removal of the authorised development or use also if it is of the view that it is expedient "in the interest of proper planning of its areas (including the interest of amenities) having regard to the Development plan prepared". Section 57 empowers the Planning Authority to recover the expenses of taking action under sections 53 to 56 from the person against whom the action is taken. Section 58 deals with the development undertaken on behalf of the Government. Under sub-section (4) the provisions of sections 44, 45 and 47 shall not, and section 46 shall mutatis mutandis and section 48 shall, as modified by section (3-A), apply to developments carried out under this section.

(m) Chapter-V (sections 59 to 112) deals with town planning schemes. Sections 59 to 71 deal with the subject of "making of town planning schemes". Section 59 provides, "subject to the provisions of this Act or any other law for the time being in force, a Planning Authority may for the purpose of implementing the proposals in the final Development plan, prepare one or more town planning schemes for the area within its jurisdiction, or any part thereof. Sub-section (1) Clause (b) provides that town planning scheme may make provision for any of the matters specified therein. Clause (i) is of some relevance to us since it deals with the same matters as are required to be specified in section 22 by the development plan. Sub-section (2) of section 59 is an enabling power of the Planning Authority in making provisions of the draft planning scheme to provide for suitable amendment of the plan with the approval of the Director, Town Planning, This provision was added by Maharashtra Act No. 6 of 1976. Section 60 provides for a resolution to be passed by the Planning Authority regarding declaration of intention to make a scheme and publication of such declaration in the official gazette and keeping of copies of the plan showing the area to be included in the scheme at specified places. Section 61 deals with making and publication of draft scheme by means of notice. Section 62 deals with inclusion of additional area in draft scheme. Section 63 empowers the State Government to require Planning Authority to make a town planning scheme. Section 64 provides that a draft scheme shall contain the specified particulars so far as may be necessary. We may notice here that Clause (b) of section 64 deals with reservation or acquisition or development of land as required in sub-clause (i) of Clause (b) of section 59 with a general indication of the uses to which such land is to be put and the terms and conditions subject to which, such land is to

be put to such uses. Section 65 deals with the reconstituted plots. Section 66 provides that where under sub-clause (i) of Clause (b) of section 59 the purposes to which the buildings or areas may not be appropriated or used in pursuance of Clause (m) of section 22 have been specified then the building or area shall cease to be used for a purpose other than the purpose specified in the scheme within such time as may be specified in the final scheme, and the person affected by this provision shall be entitled to such compensation from the Planning Authority as may be determined by the Arbitrator. Section 67 deals with objections to the draft scheme to be considered by the Planning Authority. Section 68 deals with the power of the State Government to sanction the draft scheme.

(n) Section 69 provides that on or after the date on which a declaration of intention to make a scheme is published in the official gazette, no person shall within the area included in the scheme, institute or change the use of any land or building or carry out any development, unless such person has applied for and obtained the necessary permission which shall be contained in a commencement certificate granted by the Planning Authority in the prescribed form. Detailed steps are indicated as to how the commencement certificate is to be obtained. It is further provided in Clause (b) as under:

"(b) the Planning Authority on receipt of such application shall at once furnish the applicant with a written acknowledgment of its receipt, and

(i) in the case of a Planning Authority other than a Municipal Corporation after inquiry and where an Arbitrator has been appointed in respect of a draft scheme after obtaining his approval; or

(ii) in the case of a Municipal Corporation after inquiry; may either grant or refuse such certificate or grant it subject to such conditions as the Planning Authority may, with the previous approval of the State Government, thinks fit to impose."

Sub-section (4) empowers the Planning Authority to direct such person by notice in writing to stop any development in progress, and after making inquiry in the prescribed manner, remove, pull down or alter any building or other development or restore the land in respect of which such contravention is made to its original condition. Sub-section (5) empowers the Planning Authority to recover the expenditure involved in such action from the defaulter. Sub-section (6), added by Maharashtra Act No. 6, is of some importance as it provides that the provisions of Chapter-IV apply mutatis mutandis in relation to the development and use of land included in a town planning scheme in so far as they are not inconsistent with the provisions of this Chapter. Subsection (7) provides that the restrictions imposed by this section shall cease to operate in the event of the State Government refusing to sanction the draft scheme or the final scheme or in the event of the withdrawal of the scheme under section 87 or in the event of the declaration lapsing under sub-section (2) of section 61.

(o) Section 70 empowers the State Government, on an application made by the Planning Authority, to suspend to such extent only as be necessary for the proper carrying out of the scheme any rule, bye law, regulation, notification or order made or issued under any law which the Legislature of the State is competent to amend. Such an order would cease to operate if the State Government refuses to sanction the scheme or withdraws the scheme, or in the event of coming into force of the final scheme or in the event of the "declaration lapsing under sub-section (2) of section 61.

(p) Section 71 deals with how the Planning Authority can deal with the issue of disputed ownership over a piece of land included in an area in respect of which a declaration of intention to make a town planning scheme has been made and for arbitration by an arbitrator. Sections 72 to 85 deal with the arbitrator and tribunals of appeal, their jurisdiction etc. and how they would deal with

the disputes arising under the town planning scheme. Section 86 provides that the State Government may within a period of four months from the date of receipt of the final scheme under section 82 from the Arbitrator or within such further period as the State Government may extend by notification in the official gazette, sanction the scheme or refuse to give such sanction provided that in sanctioning the scheme the State Government may make such modifications as may in its opinion be necessary, for the purposes of correcting an error, irregularity or informality. Sub−section (3) provides that "on and after the date fixed in such notification, a town planning scheme shall have effect as if it were enacted in this Act". Section 87 empowers the State Government to withdraw the town planning scheme at any time. Section 88 provides that on and after the day on which a final scheme comes into force all lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the Planning Authority free from all encumbrances. It further provides that all rights in the original plots which have been reconstituted shall determine, and the reconstituted plots shall become subject to the rights settled by Arbitrator and casts an obligation on the Planning Authority to hand over possession of the final plots to the owners to whom they are allotted in the final scheme. Sections 89 and 90 deal with the powers of the Planning Authority to evict summarily any personal who is continuing to occupy any land which he is not entitled to occupy under the final scheme and the powers to enforce the town planning scheme.

(q) Section 91 empowers the Planning Authority, if after the final scheme has come into force, the Planning Authority considers that the scheme is defective on account of an error, irregularity or informality or that the scheme needs variation or modification of minor nature, to apply in writing to the State Government for variation of the scheme accordingly. It is further provided in sub−section (7) that from the date of the notification sanctioning the variation, with or without modifications, such variation shall take effect as if it were incorporated in the scheme.

(r) Section 92 provides that notwithstanding anything contained in section 86, a town planning scheme may at any time be varied by a subsequent scheme made, published by means of notice and sanctioned in accordance with this Act. Proviso to this section says, "Provided that, when a scheme is so varied, the provisions of this Chapter shall so far as may be applicable, apply to such variation and making of subsequent scheme and the date of the declaration of intention of the Planning Authority to vary the scheme shall, for the purposes of sections 69, 70, 97, 98 and 100, be deemed to be the date of declaration of intention to make a scheme referred to in those sections". Section 93 to 107 are not of relevance to us.

(s) Section 108 invests power in the Planning Authority to make an agreement with any person in respect of any matter which is to be provided for in town planning scheme subject to the power of the State Government to modify or disallow such agreement and, unless it is otherwise expressly provided therein, such agreement shall take effect on and after the day on which the town planning scheme comes into force. We may for skip sections 109 to 125 from consideration as not material for this case.

(t) Section 126 empowers the Planning Authority or Developing Authority, after publication of a draft Regional Plan, a Development or any other plan or town planning scheme, if the land is required or reserved for any of the public purposes specified in any plan or scheme under this Act, to acquire such land by agreement by paying an amount agreed to or by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894. Sub−section (2) makes detailed provisions as to how the State Government can act to acquire the land by utilising the provisions of the Land Acquisition Act and how the market value is to be determined in different cases.

(u) Section 127 is an important section since it provides for lapsing of

reservation contained in any plan under this Act. This section provides that if any land reserved, allotted or designated for any purpose specified in any plan under this Act is not acquired by agreement within ten years from the date on which a final Regional Plan, or final Development Plan comes into force or if proceedings for the acquisition of such land under this Act or under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or as the case may be, Appropriate Authority to that effect and if within six months from the date of the service of such notice, the land is not acquired or no steps as aforesaid are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed, and thereupon the land shall be deemed to be released from such reservation, allotment or designation and shall become available to the owner for the purpose of development as otherwise, permission in the case of adjacent land under the relevant plan.

(v) Sections 128 to 151 are not material for our purposes.

(w) Section 152 indicates that the powers and functions of the Planning Authority for the purpose of certain specified sections may be exercised and performed by a Municipal Commissioner or such other officer appointed by him in the case of Municipal Corporation. We may emphasize here that section 37 is not one of the sections referred to in this section for this purpose. Section 153 is not of much relevance to us.

(x) Section 154 provides that every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act. Sub−section (2) provides that if in, or in connection with, the exercise of its powers and discharge of its functions by any Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority or Development Authority, and the State Government, the decision of the State Government on such dispute shall be final. We omit from consideration section 155 as not material to our discussion.

(y) Section 156 declares that notwithstanding anything contained in any law for the time being in force when permission for development has not been obtained under this Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has been obtained. Section 157 empowers the Planning Authority or Development Authority to make any agreement with any person with respect to any matter dealt with by this Act subject to the right of the State Government to modify or vary such agreement and also provides for consequences of such modifications made by the State Government. Section 157−A deals with authentication of plans and schemes and custody thereof. Section 158 empowers the Government to make rules to carry out the purposes of the Act. We are not materially concerned with the rest of the sections or the schedules of the Act.

83. Having completed a survey of the development of the law dealing with the planned development of towns through the three Acts in their chronological order, and keeping in mind the provisions of the law of the M.R.T.P Act, we shall now advert to the contentions advanced by the parties.

LEGAL CONTENTIONS:

STATE GOVERNMENT:

84. Mr. Bobde, learned Counsel for the petitioner (in Writ Petition No. 4433 of 1998) accentuates that even the State Government does not claim that the action taken by it was in accordance with law. A reference to the affidavit

filed by the State Government at this stage is called for to assess the correctness of the contention. After dealing with the facts in detail, the affidavit of Vidyadhar Deshpande, Deputy Secretary, Government of Maharashtra, Urban Development Department, states in paragraph 16 that FP−110 could not be developed for the purpose reserved in the development plan on account of its continued occupation by long standing tenants and the order of permanent injunction granted by the Civil Court against the State Government and the P.M.C. He further states:

"It was, therefore, felt in the public interest to negotiate with the developer to have an alternate site where school was needed and could be constructed. I say that the decision taken by the Government and the implementation thereof the Municipal Commissioner in this regard have served the public purpose taking into consideration that no better solution was available in the given circumstances. I further submit that the provisions of the Act, do confer powers upon the Government to sanction the deletion of reservation when the land is not or no longer required for a public purpose for which it is reserved. This provision would also apply in case where the reservation could not be implemented for the various reasons mentioned hereinabove. I submit that the action taken by the Government can be well justified and supported under the general scheme and the sprit of the provisions of the Maharashtra Regional and Town Planning Act, 1966."

Further, in paragraph 25, while denying the contention of the petitioner that the reservation in respect of FP−110 had been lifted without following the mandatory requirements of section 37 of the M.R.T.P. Act, the affidavit states as under;

"I submit that the deletion of the reservation can take place under the provisions of the Maharashtra Regional and Town Planning Act, 1966 in various eventualities and not necessarily only by following the procedure under section 37 of the Act. I say in this particular case the lifting of the reservation which was necessitated by various reasons including the ground realities has served larger public interest."

Again in para 30, Vidyadhar Deshpande, Deputy Secretary, UDD, contends:

"The contention of the petitioner that even if such opinion is formed then Planning Authority must follow the procedure under section 23 to 31 and 37 is not correct. I submit that under the provisions of the Act, the reservation lapses when the purchase notice is given and if not acted upon, it lapses under sections 49 and 127 of the Act and it stands deleted under section 50 and can be shifted under D.C. Rules."

85. Despite this stand taken by the Government in its affidavit in reply, Mr. Venugopal, learned Counsel for the State Government (respondent No. 1), did not contend that the action of the State Government was according to law. He was at pains to emphasise that the Court should objectively look at the end result produced by the Government’s action, and, if the Court is satisfied that public interest has been indubitably advanced and not prejudiced, then, irrespective of the legality of the action on the part of the Government, the Court should not interfere with such action. This, all the more in a public interest litigation where there is no strict adjudication of rights as such, but advancement of the interest of public at the hands of the Constitutional Court, urged the learned Counsel. In fact, he went so far as to urge that if the Court is satisfied that there was no overall prejudice to public interest, then all other issues raised in the writ petitions would pale into insignificance and it was not necessary for the Court to go into the issue of mala fides and abuse of power raised in the writ petitions.

86. Though the learned Counsel adroitly attempted to steer clear of the prickly question raised by the petitioners, in view of the stand taken up in the

affidavit in reply by the State Government, we think that it is necessary to examine its correctness for what it is, worth.

87. As far as the provisions of the M.R.T.P.. Act are concerned, the only sections which provide for modification or deletion of reservation of land for public purpose under a development plan (draft, interim or final) are 37 and 50. Section 37 provides that if a modification made in a final Development Plan is of such a nature that it will not change the character of such Development Plan, in order to effectuate such modification, it is necessary for the Planning Authority to be satisfied of the fact and make a proposal to the State Government, publish a notice in the official gazette inviting objections and suggestions from persons with respect to the proposed modification and after giving a hearing to any such persons and thereafter submit the proposed modification with amendments, if any, to the State Government for sanction. It is only thereafter that the State Government under sub−section (2) may make such inquiry as it thinks necessary and after consulting the Director of Town Planning sanction the modification with or without such changes or refuse to do so. Section 37 will come into operation, as we notice, only if the proposal is of such nature that it will not change the character of the Development Plan. In the instant case what was sought by the application made on November 20, 1995 by the owner of the land was a direction to the Planning Authority to delete the reservation in the development plan for primary school on the land FP−110, Erandwana. It is obvious that this would not fall within the ambit of section 22−A so as to be a change of "substantial nature" since this proposal would not have affected the total area of reservation in the development plan itself. Deletion of reservation of this nature on one single plot would not have amounted to a change in the character of the development plan itself. Under these circumstances, a change of this nature, viz., deletion of reservation with regard to a particular plot of land could only have been done by taking action in accordance with section 37 of the M.R.T.P. Act. It is nobody’s case, at least not that of the Government, that the provisions of section 37 have been followed. Section 37 would definitely have required certain action on the part of the Planning Authority. The conspicuous absence of reference to section 37 in section 152 of the M.R.T.P Act leads us to the conclusion that when the Act talks of ’Planning Authority’ under section 37 of the M.R.T.P Act, it means only the Planning Authority as defined in section 2(19) of the Act i.e. the local authority, in the instance case, the P.M.C. and that the Commissioner of the P.M.C. is not empowered to act or discharge the powers of the Planning Authority for the purpose of section 37. In fact, the carefully orchestrated action of the State Government in directing the Commissioner of the P.M.C. on more than one occasion that it was not necessary to take the approval of the P.M.C. (the Planning Authority) suggests that, at all points of time, there was no intention on the part of the State Government to comply with the provisions of section 37. We have no hesitation in coming to the conclusion that the provisions of section 37 have not been complied with while deleting and/or shifting the reservation for a primary school contained in the development plan in so far as it affected FP−110. As to the other sections under which deletion of reservation can be done, section 50 does not apply at all. This was not a case of the appropriate authority (then Planning Authority) acting for deletion of reservation. Turning to section 51, though it is possible to take the view that power of the Planning Authority under this section can be exercised by the Commissioner of the P.M.C. by virtue of section 152 Clause (1), factually no such action was taken by the Planning Authority as envisaged under section 151. Hence, we are of the view that the action of deletion/shifting of reservation carried out without compliance with the provisions of section 37 of the Act was wholly illegal.

88. Now we turn to the contention of Mr. Venugopal that the petition being a public interest litigation is liable to be dismissed because there is overall advancement of public interest and no prejudice has been caused to the public interest. The development plan reservation on FP−110−112 vide Item No. 8 in the schedule was for a primary school. The reservation was in respect of FP−110, 111 and part of 112. Since the P.M.C., after taking possession of FP−112, has

already leased out the said plot to Symbiosis in accordance with the provisions of this Act and Symbiosis has already constructed and is running a primary school thereupon, the purpose of the reservation must be deemed to have been fulfilled and come to an end. The abbreviations indicated in Annexure–I of the notification show that the letters "PS" in the Development Plan mean "primary school". In view of usage of the singular, Mr. Venugopal contended that what was contemplated in the reservation was that only one primary school would be established and the moment one primary school was established, the need for further reservation vanished. It is difficult to accept this contention. Merely because the legends or abbreviations in the plan are used in singular, it is not possible to postulate that the plan contemplated that there shall be only one unit of the amenity specified therein. It must be remembered that the development plan was formulated as a result of careful consideration of the developmental requirements of Pune city. It would be futile to suggest that, after following the procedure prescribed in the Act which requires consultation with the Director of Town Planning, hearing of objections from all persons concerned at several stages and, presumably careful application of mind by the State authorities, the reservation at Item No. 8 was effected in respect of entire area of FP–110, 111 and part of 112 though what was needed was only a single unit of the amenity. In fact, originally all the three plots were parts of a larger plot known as Plot No. 270 under the town planning scheme and came to be subdivided into FP–110, 111 and 112 after the application of the town planning scheme. The reservation which existed earlier in the sanctioned final development plan of 1966 was for a garden. In the final development plan of 1987, not only was the reservation continued, but it was also indicated that the development would allowed as per note 4. Note 4 specifically states that, in respect of sites designated for primary schools from Sector I to Sector VI as may be decided by the Pune Municipal Corporation, they may be allowed to be developed by recognised public institutions registered under the Public Charitable Trust Act, working in that field or the owners of the land. In our view, a reasonable way of construing the plan is that the reservation continued in respect of FP–110, 111 and part of 112 and it was open to the P.M.C. to permit one or more charitable trusts registered under the Public Charitable Trust Act working in the field of education or the owner of the land to develop one or more primary schools on the said plots. We are unable to accept the extreme contention of Mr. Venugopal that merely because one primary school was established on one of the plots subject to reservation, the need for further reservation came to an end. In fact, such a view would render nugatory the long and complicated process by which reservations are effected, changed and deleted under the Act. Apart from hearing objections from all persons entitled to object, two authorities have to be consulted in such matters–the Planning Authority itself, in the instant case, the P.M.C., and the Director of Town Planning. It is nobody’s case that these two authorities were consulted and were satisfied that the need for further reservation had come to an end. In the absence of such satisfaction by the expert bodies contemplated by the Act, it is not possible to accept the contention that the reservation on the other plots vanished the moment one plot was acquired and a Primary School was established thereupon. In our opinion, this is too simplistic a view to be accepted.

89. Mr. Venugopal then contended that the Court should take a practical view of the matter. Though it is true that in the sanctioned development plan all the three plots viz. FP–110, 111 and part 112 were affected by reservation, acquisition of all these plots would not have been within the reach of the P.M.C. Considering FP–110 by itself, the land was encroached upon upto about 50%; there were already sitting tenants on the land; purchase notice had been given by the owner of the land and the attempt to acquire the land was aborted on account of the suit filed by the tenants on the land which resulted in a decree of the Civil Court setting aside the acquisition proceedings and permanently restraining the authorities from acquiring the land. In these circumstances, the learned Counsel submits that the Government was entitled to take an overall view of the matter and balance the advantages and disadvantages of the situation and accept a solution which advanced public interest. It was

because of these considerations that the State Government decided to work out a compromise under which the P.M.C. would be rid of its problem (of having to re-house the tenants) and of having to construct a primary school and run it. The State Government's directives to the Corporation to shift the reservation from FP-110 to a plot at Lohagaon initially, and thereafter to Mundhwa, to enter into an agreement with the developer under which an alternative land of equivalent area was made available free of costs and the developer also deposited Rs. 25,00,000/- with the Corporation, amounted to triple benefits to the Corporation under the able guidance and direction of the State Government, in the submission of the learned Counsel. We find it difficult to accept the argument. We queried Mr. Venugopal as to why the appeal filed by the P.M.C. was directed to be withdrawn since it was the Civil court's decree which was the stumbling block in the acquisition of FP-110. We also pointed out to the learned counsel the provisions of section 128 and the judgments of the Supreme Court which took the view that the Civil Court had no jurisdiction to entertain a challenge to acquisition proceedings under the Land Acquisition Act, 1894. The learned Counsel replied that the judgments taking the said view are of doubtful validity and section 128 does not advance the case in favour of acquisition. In our view, both replies are extremely unsatisfactory, at least for the purpose of assessing the situation as to whether there was substance in the appeal. Prima facie section 128 seems to suggest that where any land is included in any plan or scheme as being reserved or allotted or designated for any purpose therein specified or for the purpose of Planning Authority or Development Authority or Appropriate Authority and the State Government is satisfied that the said land is needed for a public purpose different from any such public purpose or purpose of the Planning Authority, Development Authority or Appropriate Authority, the State Government may, notwithstanding anything contained in this Act, acquire such land under the provisions of the Land Acquisition Act, 1894. We are really not called upon to adjudicate whether the appeal which was withdrawn by the P.M.C. would have succeeded. Without indicating our final view in the matter, we only point out that this was a possible view on which the appeal could have been taken to its logical conclusion. There is also section 149 of the M.R.T.P Act which bars legal proceedings in respect of any order or direction issued by the State Government or order passed or notice issued by the Planning Authority under the Act. It was also possible to press section 149 into service to demonstrate that the Civil Court's decree was wrong. Finally, the Supreme Court in State of Bihar v. Dhirendra Kumar, , followed by two more judgments takes the view that the provisions of the Land Acquisition Act form a complete Code in itself meant to serve public purpose and that, by necessary implication the power of the Civil Court to take cognizance of the causes under section 9 of the Code of Civil Procedure stands excluded and that a Civil Court has no jurisdiction to go into the question of the validity or legality of a notification under section 4 of the Land Acquisition Act and declaration under section 6 thereof. These decisions indicate that a civil suit is barred for a challenge to proceedings under the Land Acquisition Act which could only be done by resort to Article 226 of the Constitution. It is surprising that, in the face of this legal situation (we are not pronouncing upon the question of law, but only indicating as to what the situation was), the State Government and the Commissioner of the P.M.C. decided to meekly withdraw the appeal and accept all the proposals made by the developer. We have anxiously perused the report of the Commissioner of the P.M.C. dated April 17, 1996 and we find no advertence therein to any such aspect regarding the sustainability of the decree of the Civil Court having been objectively considered. The unholy haste in action coupled with significant lack of advertence to material factors, is eloquent.

90. It also appears to us that in a matter of importance, the decision can only be taken after full consideration by the Corporation itself. That is why section 481(i) of the B.P.M.C. Act provides that approval of the Standing Committee is required while withdrawing a suit or claim or for compromising any suit or claim which has been instituted or made in the name of the Corporation or of the Commissioner. In the instant case, this provision appears to have been conveniently ignored. This wholesome provision is intended to keep a healthy

check on exercise of power by the Commissioner. Whenever such approval of the Standing Committee is sought, there is a debate on the issue by the elected Corporators who thereafter take the decision, as a body corporate, in the manner provided under the Act. It is only when the Corporation passes a resolution that the Municipal Commissioner becomes empowered to withdraw or compromise litigation. In fact, the facts on record suggest that nothing of this nature was done. Not only was the action of withdrawal of the appeal not placed before or approved by the Standing Committee of the P.M.C., hut in the matter of entering into a compromise with the developer the action was taken contrary to legal advice tendered by the legal adviser (a statutory authority) that the approval of the Corporation was necessary. In the face of these circumstances, we seriously doubt if public good has been advanced by the decision taken in the cloistered chamber of the Minister or the Secretary or the Commissioner. In fact, public interest would have required that such important issues be transmitted to the statutory authority and decided in a meeting as provided in the B.P.M.C. Act. The assessment of the diverse factors before entering into a compromise which resulted in the withdrawal of the appeal from this Court was not a matter to be decided between the Additional Chief Secretary and the Municipal Commissioner in a meeting held in closed chamber. It was obviously a matter which had to be debated and voted upon by the elected representatives of the Standing Committee, who were the only persons under the statute to decide what was 'public good' within the four corners of the B.P.M.C. Act. It is surprising that the Planning Authority was given a go–by and the decision secretly taken is sought to be justified in the name of "public good". We regret, we can hardly countenance this argument. In the first place, we are not satisfied that public good has really been advanced. Secondly, neither the State Government nor the Commissioner of the P.M.C. was empowered to take such a decision for 'public good'. For these reasons, we reject the contention of Mr. Venugopal. We may also point out here that on several occasions, right from the first file note made by the Under Secretary, Ghadge, on February 2, 1996, it was repeatedly emphasised that in order to take any decision the approval of the P.M.C. would be required. In the teeth of this view taken by responsible officers in the Mantralaya, the City Engineer of the P.M.C., and the Commissioner of the P.M.C. himself, there was a decision taken to suggest a mechanics which would obviate the necessity of going to the P.M.C. for approval. We have perused the so called precedent of the Kothrud case. It is not necessary for us to pronounce upon its correctness, but in passing we may say that the opinion of the Law and Judiciary which was given in the said case appears to be tailor–made to suit somebody's convenience. Having perused it carefully, we find there was hardly any discussion of law therein except an ex–cathedra opinion that Rule 13.5 of the Development Control Rules should be resorted to for shifting the reservation from one land to another even if it was situated farther than 200 meters. In the instant case, apart from referring to the precedent, there does not appear to be any further opinion given even by the Law and Judiciary Department. On a careful conspectus of the facts, we are unable to uphold the contention of Mr. Venugopal that "public good" has been advanced by the illegal action of the State Government.

91. Another issue which needs attention while considering whether public interest has been advanced, is purity of administration. This is a substantial issue which a Writ Court in the discharge of constitutional duty under Article 226, cannot ignore or bypass. In this land of Mahatma Gandhi, we cannot forget his teaching that purity of means is as important as the purity of goals. The learned Counsel, however, contends that, as Judges in Court of law, we must ignore all moral issues and go only by the law. We were reminded of our oath of office to do justice only by law. We demur. Oath of office does not obviate judicial conscience; the latter requires moral considerations also. In our view, a Judge ought not to uphold an action if he is satisfied that it is morally tainted; at least, in writ jurisdiction. We are not satisfied in this case that the means adopted were pure, or that the objective sought to be achieved was laudable. The means, we have already pointed out, was totally contrary to the provisions of law. Section 37 of the M.R.T.P. Act, which ought to have been

complied with, was not complied with and dubious short−cut via Rule 13.5 of the Development Control Rules was discovered based upon precedent in the Kothrud case of equally dubious distinction for the purpose of ensuring that the development permission, rejected earlier by the Standing Committee of the P.M.C., was granted to the developer. Interestingly, not a single learned Counsel argued in support of the dubious route adopted by the State Government via Rule 13.5 of the Development Control Rules for shifting reservation from FP−110 to Lohogaon in the first place and thereafter to Mundhwa. So much for the purity of means.

92. Turning next to the purity of the objective, we are even less satisfied on this ground. What after all was the objective of the whole exercise carried out by the State Government, contrary to the provisions of law? A recapitulation would be telling :

(a) The land was affected by reservation right from the year 1966 when the development plan came into being. For a long period, there does not appear any anxiety on the part of the owner of the land to press for his rights, till the purchase notice was given by him some time in December 1979. Even thereafter, the owner filed an abortive suit without complying with the provisions of section 80 and had it dismissed. In 1983 a Suit No. 966 of 1983 was filed by respondent Nos. 12 to 35 (in Writ Petition No. 4433 of 1998), the tenants of the structures on FP−110. Even at this stage, the owner of the land was not a plaintiff, but came to be added as party−plaintiff only on April 2, 1988.

(b) As far as the owner is concerned, the award dated May 12, 1993 was not disputed by him to start with. He filed Land Acquisition Reference No. 273 of 1983 for enhancement of compensation and in April 1985 compensation was pocketed by him, albeit under protest. On April 15, 1998, Land Acquisition Reference No. 273 of 1983 filed by the owner was dismissed by the District Court, though solatium was enhanced. All this time, the owner did nothing to assert his rights in the property, even after the Special Civil Suit No. 397 of 1988 was decreed by the Civil Court. There is a dramatic change in the situation from October 25, 1995. Respondent Nos. 7 and 8 enter into a development agreement with the owner−Murudkar virtually giving respondent Nos. 7 and 8 a carte blanche for development of FP−110. A Power of Attorney is executed in favour of respondent No.

7. On November 1, 1995 building plans are submitted on behalf of owner−Murudkar by an Architect. On November 6, 1995 the permission for development sought is refused by an order of the City Engineer, P.M.C. On November 20, 1995 the Chartered Accountant of the owner makes a representation to the Minister of State, U.D.D. All things and persons dormant till now, suddenly spring into action and the wheels of the official machinery begin to whirr.

(c) Even at this stage, the stand taken by the Government, both in the file noting of February 2, 1996 and in the meeting of February 3, 1996, is revealing. On February 2, 1996, the Under Secretary, U.D.D., goes on record to say that the departmental opinion was that the owner having received the compensation in respect of the land and the structures thereon, change of reservation of the land would not make any difference. He suggests that the Government should direct the P.M.C. to immediately take the matter to the High Court and finally concludes by saying. "There is no question of returning the land to the owner". We cannot but contrast this stand of the Government to what transpired subsequently. What began with a bang very certainly ended with a whimper.

(d) Even in the meeting of February 3, 1996, the attitude of the Secretary of U.D.D. is very negative. He questions the Chartered Accountant appearing for the owner as to whether he was pleading the case for the owner or the tenants. The Chartered Accountant replies that he appears for the owner. The Secretary, U.D.D., then wanted to know whether the tenants had objected. The answer is, "no". Finally, the Secretary, U.D.D., says, the land was not made available for

the tenants, how could it be made available to the owner. The City Engineer of the P.M.C. takes a more aggressive stand and virtually questions the jurisdiction of the Minister of State, U.D.D., to entertain the proceedings. He queries whether it is an appeal under section 47. If it was, the State Government has no jurisdiction to delete the reservation; if it was not, there was no question of granting any relief since the matter was subjudice. On behalf of the owner it is pointed out that the proceeding is not an appeal under section 47 of the Act, but only a representation. In the case of an ordinary citizen, with this stand taken by the City Engineer of the P.M.C., one would have expected the Minister of State to dismiss the proceedings without further ado. But, the attitude of the Minister of State, U.D.D., appears to be surprisingly benign. He suggests that if a school had already been developed on the adjoining plot, the P.M.C. should find out if there was any necessity for another school and whether the reservation could be partially or completely deleted. He brushes aside all contentions raised by the officers and instructs that the Commissioner of the P.M.C. should investigate and make a report as to whether deletion of reservation was possible. However, the file noting dated February 12, 1996 shows the Minister of State as saying, "if the P.M.C. has no objection for reducing the area of reservation, then the Government will give orders for taking action under section 37". Presumably, the learned Minister was saying, "do what is required by law", at this stage at least.

(e) The Commissioner of the P.M.C. carries out an inspection of the property and submits his report on April 17, 1996 in which he indicates the two alternative courses of action for bringing about the end result suggested by the Minister of State, U.D.D., in the meeting of February 3, 1996. He adds three significant riders : (a) The administration of the P.M.C. would have to take permission of the Corporation for giving up its rights on the concerned property; (b) Action would have to be taken under section 37 of the M.R.T.P. Act for deleting the reservation on the land; and (c) The approval of the concerned Committee of the Corporation would have to be taken for acquisition of the land as suggested in the second alternative. He confesses that this was a novel situation for him and that his previous experience in making a compromise with regard to the land under reservation under the development plan was limited, and finally declares that until further orders are made by the Government, the P.M.C. would carry on with the legal proceedings in the Court of law, meaning thereby that the First Appeal would be proceeded with.

(f) Till this time, probably the matter was being looked at by the Minister of State, U.D.D., with the aid and advice of his officers and the officers of the P.M.C. There was an attempt being made to resolve the thorny problem to the satisfaction of all, though in the direction as indicated by the Minister of State, U.D.D. Apparently, there is no involvement of the Chief Minister (respondent No. 5) in the matter till now.

(g) Then comes the note from the Minister of State, U.D.D., dated April 24, 1996, addressed to the Under Secretary, who was obviously in possession of the report of the Commissioner dated April 17, 1996. The note says that the Private Secretary (Chavan) to the Chief Minister had instructed him to obtain a copy of the Commissioner of the P.M.C.'s report for the perusal of the Chief Minister. This is promptly complied with on the same day by sending a xerox copy. This note is somewhat puzzling. Respondent No. 5 as the Minister in-charge of the Urban Development Department would be officially concerned with all matters decided by his department. However, one wonders why the Minister in-charge of U.D.D. should suddenly call for copy of a particular document in the file. Under normal circumstances, the order on the file could have made either by the Minister of State or by the Cabinet Minister in-charge of the department. Normally, the file would have travelled, gathering departmental notings along the way, from the Minister of State, to respondent No. 5 in his capacity as the Minister in-charge of U.D.D. Whatever order was required to be made thereupon could have been made by the Minister in-charge. One does not expect the Minister in-charge to be abreast of all the cases being dealt with by his department, or

of the existence of a particular document in the file, unless he is already apprised of the existence and developments of a particular case. Even then, we would have thought that respondent No. 5 would have asked for the entire file if he wanted to peruse the file and take some decision. This asking for a copy only of the report of the Commissioner of the P.M.C. is strongly suggestive of the respondent No. 5's keen interest in the matter. From this point onwards, things started going into top gear.

93. From this point onwards, there was only one direction in which the case moved. The representation dated November 20, 1995 travelled with speed unprecedented, that too in the department dealing with land. Fax messages flew back and forth. The Additional Chief Secretary attached to the office of the Chief Minister was given a brief to go to Pune and discuss various facets of the matter with the Commissioner of the P.M.C. He holds a meeting with the Commissioner of P.M.C. in his chamber at Pune, gives him certain directions which are on record in the letter dated July 21 and 23, 1998. These facets of the case leave no doubt in our mind that the objective, far from public benefit, was to ensure that development permission was granted to owner–Murudkar and vicariously to respondent No. 8 who held all the rights of development under the development agreement dated October 20, 1995. Considering the totality of the facts, we are unable to accept the contention so strenuously advanced by Mr. Venugopal that, never mind how it was done, it was done for public good.

94. Apart from his aforesaid submissions, Mr. Venugopal also adopted the very forceful arguments of Mr. Tulzapurkar, appearing for respondent Nos. 12 to 35 (tenants). We shall deal with and examine the validity of the arguments of the tenants at the end.

95. Mr. Venugopal relied on the judgment of the Supreme Court in the case of Forward Construction Co. v. Prabhat Mandal (Regd.), Andheri, . In this case there was a reservation on a plot in favour of Bombay Electric Supply & Transport Undertaking (BEST) bus depot. BEST decided to construct a depot and also a commercial complex on the said plot. This action was impugned as being contrary to the reservation in the development plan. The Supreme Court in paragraph 33 of the judgment was concerned with the interpretation of the proviso to Building Regulation 3, which, after indicating the user on different plots said, "provided that the above user may be changed by the Local Authority after modification of the development plan". The Supreme Court pointed out that change would necessarily mean the making or becoming different, to transform, or to convert. According to the Supreme Court if the user was to be completely or substantially changed to something other than that indicated in Building Regulation 3, only then prior modification of the development plan was necessary. In the facts of the case, the Supreme Court did not consider that the BEST had effected any change in the user of the plot so as to be inconsistent with the reserved user and took the view that building of the BEST bus depot together with additional structure for being let out to the public, on which revenue could be generated in favour of the BEST, did not turn the plot's user into anything inconsistent with the reservation. Hence, the Supreme Court took the view that the plot was still continued to be used as indicated in the Building Regulation 3 as it was being used for the purpose mentioned in the development plan and the additional structure was only to augment income for the Corporation which was also a public purpose. Hence, it was held that the word "change" used in the proviso had no application to the case and, therefore, the action could not be faulted. We are unable to appreciate the purpose for which this judgment is cited by the learned Counsel. This judgment would have applied and rendered aid, if the user on FP–110 was one of primary school plus something else. Unfortunately, there is no such user. The use to which FP–110 was put to is completely residential, having nothing common with the reservation for primary school. Hence, in our view, this judgment does not help in advancing the contention of the learned Counsel.

96. Another question which remains to be considered is whether Development

Control Rule 13.5 could be utilized for the purposes of the present case. The said rule reads as under :

"13.5. If the land proposed to be laid out is affected by any reservation/s or public purpose/s the authority may agree to adjust the location of such reservation/s to suit the development without altering the area of such reservation. Provided, however, that no such shifting of the reservation/s shall be permitted

(a) beyond 200 m. of the location in the Development Plan.

(b) beyond the holding of the owner in which such reservation is located, and

(c) unless the alternative location is at least similar to the location of the Development Plan as regards access, levels etc.

All such alterations in the reservations/alignment of roads shall be reported by the Planning Authority to Govt. at the time of sanctioning the layout."

Reading the Rule in the context and collocation in the Rules dealing with subdivision of land and layout, we are inclined to accept the contention of Mr. Bhonde, learned Counsel for the petitioner (in Writ Petition No. 4434 of 1998), that this Rule will come into operation only where the reservation affects the entire plot and only marginal adjustment is to be made by shifting of reservation within the prescribed distance of 200 meters within the holding of the owner of the land affected by reservation, and that too when the alternative site is similar to the site in the development plan as regards access, levels and so on. Even after this is done, there is an obligation on the Planning Authority to report the facts to the State Government at the time of sanctioning the layout. The view taken by the Government that, because the State Government was already apprised of the matter, Rule 13.5 could apply even in a situation where none of the conditions in clauses (a), (b) and (c) were fulfilled, is wholly erroneous. In the instant case, the reservation was shifted beyond 200 meters and beyond the holding of the owner of the land, for which there was no justification under Rule 13.5. We see nothing in the rule, or in the provisions of the M.R.T.P. Act, which enables either the Planning Authority or the State Government to relax any of the conditions prescribed in the Development Control Rules. Resort to this Rule was wholly misplaced and the reservation affecting FP−110 could not have been legally shifted to any other plot by resorting to this Rule. The learned Counsel for respondent No. 1, while inarticulately supporting the contention of the respondent−tenants, contended that the unreported judgment of this Court in Rusy Kapadia and others v. State of Maharashtra and others, Writ Petition No. 2087 of 1993, dated September 4, 1997, Per A.A. Desai and S.S. Parkar, JJ., which took the view that the provisions of the development plan held sway over the provisions of the Town Planning Scheme, was per incuriam because it had not considered two earlier binding judgments of benches of coordinate jurisdiction. The learned Counsel for respondent No. 1 also relied upon the decision in the case of K.C. Dora v. G. Annamanaidu, and the decision in the case of Yeshbhai v. Ganapat, . We shall have occasion to refer to these judgments in detail while dealing with the arguments of the learned Counsel for tenants, Mr. Tulzapurkar, whose arguments were merely adopted by Mr. Venugopal on this aspect.

PUNE MUNICIPAL CORPORATION AND ITS COMMISSIONER :

97. Dr. Chandrachud, learned Additional Solicitor General, on behalf of respondent Nos. 2 and 11 (the P.M.C. and the present Commissioner of the P.M.C.) attempted to persuade us that the assumption that there was a persisting valid reservation on FP−110 was itself misplaced. In the submission of the learned Counsel, the facts indicate an suggest an intention to abandon the reservation

on the part of the P.M.C. When we repeatedly asked Counsel the exact point of time when the reservation must be deemed to have come to an end, he said it must be deemed to have come to an end in April 1976. Counsel also contended that when a public authority resorts to acquisition proceedings under the Land Acquisition Act, 1894, it can resile and withdraw from such proceedings at any time without any formality. The learned Counsel also cited certain judgments in support of his argument.

98. Section 125 provides that when any land required, reserved or designated in a Regional Plan, Development Plan, or Town Planning Scheme for a "public purpose", the land shall be deemed to be needed for a public purpose within the meaning of the Land Acquisition Act, 1894. The legal import of this provision is that the notice to be given under section 4 of the Land Acquisition Act, 1894, declaring the requirement of land in any locality for any public purpose, is obviated by this section. Dr. Chandrachud cited the case of Municipal Corporation, Greater Bombay v. I.D.I. Co. Put. Ltd., in support. Even before the reservation is effected in the plan the process of issuing public notice and hearing objection is gone through. Hence, the Supreme Court pointed out that section 125 of the M.R.T.P. Act is really a substitute for section 4 of the Land Acquisition Act, 1894, and in a case falling within section 125 of the M.R.T.P. Act, the acquiring authority can straight away proceed to issue a notice under section 6 of the Land Acquisition Act, 1894, and carry on with acquisition proceeding thereafter. The argument of Dr. Chandrachud is that when the acquisition proceedings were being carried on to acquire FP 110 for the public purpose of a ’garden’, the revised development plan of 1987 intervened and changed the public purpose to one of ’primary school’. Consequently, it is contended by the learned Counsel, the initial public purpose was abandoned and, therefore, the reservation itself must be deemed to have come to an end. The learned Counsel referred to the judgment of this Court in Santu v. S.L.A.O., 1995 (1) Mh.L.J. 363 and pointed out that, of the two learned Judges who comprised the Bench of the Supreme Court delivering the judgment in appeal there against in Municipal Corporation, Greater Bombay, (supra], K. Ramaswamy and S.B. Majmudar, JJ., had agreed that the writ petition was to be dismissed for delay and laches. There was a division of opinion on the issue whether the acquisition started for one purpose could be changed for another public purpose even before the land had vested in the acquiring body. Hence, it is contended by the learned Counsel that the judgment under appeal i.e. the judgment in Santu v. S.L.A.O. (supra) would still hold the field since both the Judges of the Supreme Court were unanimous in holding that once the public purpose for which the acquisition proceedings commenced had ceased to exist there was no jurisdiction to continue the acquisition proceedings.

99. It, is difficult to accept the contention for more than one reasons. In the first place, we must point out that this has never been the stand of the P.M.C. In the affidavit filed on behalf of respondent No. 2 we do not find this argument even in an embryonic form. There are two affidavits filed on behalf of the P.M.C., one by Madhav B. Harihar dated September 11, 1998 and the other by the then Commissioner of the P.M.C., Ramanath Jha (Respondent No. 10). In neither affidavit is it contended that the reservation had itself lapsed. Secondly, we cannot lose sight of the fact that throughout the meetings held with the Minister of State, UDD, and in the different letters addressed by the P.M.C. through respondent No. 10 to the State Government it was nowhere suggested that the reservation itself had lapsed, though much thought was bestowed on how the reservation could be partially or fully deleted or shifted to another place. In our view, therefore, we would be justified in refusing to permit this contention of the learned Counsel at this stage. Nonetheless considering the importance of the matter, we shall deal with it on merits.

100. As to the contention of the learned Counsel that there can be implied withdrawal of acquisition proceedings, we find that this proposition is not supported either on statute or on precedent. Section 48 of the Land Acquisition Act, 1894, undoubtedly gives the Government or other authority the liberty to

withdraw from acquisition of a land of which possession has not been taken. It also provides for compensation to be paid to the owner for any damage he might have sustained during the interregnum as a result of the action on the part of the authorities. Dr. Chandrachud relied upon the judgment of the Supreme Court in the case of Amarnath Ashram Trust Society v. Governor of U.P., to support his contention that section 48 of the Land Acquisition Act requires no formal steps of any kind and that the acquisition proceedings can be withdrawn without any formal act on the part of the acquiring authority. In the case of State of M.P. v. Vishnu Prasad, , the Supreme Court took the view that there is nothing in the Land Acquisition Act to support the view that it is only a withdrawal under section 48 that puts the notification completely out of the way. The Supreme Court here was concerned with a situation where the circumstances indicated that section 4 notification had come to an end after the notification under section 6 came into effect.

101. In Special Land Acquisition Officer v. Godrej and Boyce , the State Government had issued an order under

section 48 of the Land Acquisition Act withdrawing the lands of a company from acquisition. The Supreme Court held that under the scheme of the Act the original owner of, or other person interested in the land is divested of his rights therein and the title of the land vested in the Government only upon possession of the land being taken. In this view of the matter, so long as there is no divesting of the owner of his rights and vesting of title in the State Government, section 48 gives liberty to the State Government to withdraw from the acquisition at any stage before possession of the land is taken by it since, by such withdrawal, no irreparable prejudice is caused to the owner of the land. If at all the owner has suffered any damage in consequence of the acquisition proceedings or incurred costs in relation thereto, he will be compensated therefor under section 48(2) of the Act. Hence, the view was taken that it was difficult to see why the State Government should at all be compelled to give any cogent reasons for its decision not to go ahead with the acquisition of any land. This judgment in Godrej (supra) came to be followed in a subsequent case in Amarnath Ashram Trust Society v. Governor of U.P., .

102. Then we have the subsequent judgment of the Supreme Court in Larsen & Toubro Ltd. v. State of Gujarat, . This

judgment was also concerned with the acquisition under Part VII of the Act. After considering the earlier two judgments, the Supreme Court noted, "A great deal of arguments were addressed if it was the requirement of law that a notification withdrawing from acquisition had to be issued and before that the beneficiary for whom the acquisition proceedings were initiated to be heard". After analyzing the provisions of the Land Acquisition Act, the Supreme Court said, "When sections 4 and 6 notifications are issued, much has been done towards the acquisition process and that process cannot be reversed merely by rescinding those notifications. Rather it is section 48 under which, after withdrawal from acquisition is made, compensation due for any damage suffered by the owner during the course of acquisition proceedings is determined and given to him. It is, therefore, implicit that withdrawal from acquisition has to be notified". In Larsen & Toubro Ltd. (supra) the observations in paragraph 30 are of a general nature and deal with requirements of section 48. The Supreme Court dealt with the situation before it by its observations in paragraph 31 of the judgment. Hence, we are unable to appreciate distinction drawn by the learned Counsel that the observation of the Supreme Court in Larsen & Toubro Ltd. (supra) deal only with acquisition under Part VII of the Land Acquisition Act. We are, therefore, of the view that the acquisition proceedings which were started pursuant to the confirmation of the purchase notice on December 5, 1997 could not be said to have come to an end by reason of an implicit withdrawal, admittedly there being no formal withdrawal notified under section 48 of the Land Acquisition Act, 1894. The learned Counsel highlighted the contents of the report dated April 17, 1996 submitted by the Commissioner of the P.M.C. to the

Government and the order of the Minister of State, U.D.D., dated September 3, 1996 and contended that the contents of these letters make it clear that the Government had decided to withdraw from the acquisition and, therefore, the acquisition must be deemed to have been withdrawn and lapsed. In the face of the law laid down by the Supreme Court in Larsen & Toubro Ltd. (supra), we are unable to accept this contention.

103. It is true that in Atmaram Marya v. Stole, , this Court took the view that in the situation of a reservation under a development plan, the public purpose for which the land was reserved, based on which notification under section 6 was issued, must continue until the proceedings terminate and the title in the land was transferred to the acquiring authority by possession being taken and that if the said public purpose is changed midway, then the award and all other steps taken for possession of the land are rendered illegal and without jurisdiction. This view of the Court was also followed in a subsequent judgment in Santu (supra). When the judgment in Santu (supra) was carried in appeal, there was clearly a division of opinion between the two learned Judges of the Bench of the Supreme Court. This Court while deciding the matter before it had come to two findings : (a) The acquisition proceedings were without jurisdiction and (b) the writ petition was liable to be dismissed for delay and laches. On the issue as to whether it was permissible for the authorities acting under section 126 of the M.R.T.P. Act to change the public purpose prior to completion of the acquisition proceedings resulting in possession being taken and title being transferred to the acquiring body, Ramaswamy, J., was of the view that the land acquired for a public purpose may be used for another public purpose and that the acquisition validly made does not become invalid by change of the user or change of the user in the Scheme as per the approved plan. (It would appear from the observations in paragraph 22 of the judgment that the learned Judge proceeded on the assumption that the possession of the land had been taken and it vested in the Bombay Municipal Corporation free from all encumbrances including tenancy rights if any, of the respondents and that possession and title validly vesting in the State become absolute under section 10 of the Act.) In the said paragraph, the learned Judge says. "It would not, therefore, be necessary that the original public purpose should continue to exist till the award was made and possession taken. Nor is it the duty of the Land Acquisition Officer to see whether the public purpose continues to subsist". The learned Judge also took the view, "It is equally settled law that a tenant cannot challenge the notification under section 4 and declaration under section 6 of the Act when the landlord himself had accepted the award and received compensation". The other learned Judge, Majmudar, J., however, disagreed with this finding as to the legality of the continuation of the acquisition proceedings even when the public purpose had been changed midway and also as to the rights of the tenant to challenge the acquisition proceedings. The learned Judge however agreed that writ petition ought to have been dismissed on the ground of delay and laches.

104. We, therefore, find that there is substance in the contention of Dr. Chandrachud that the law laid down by this Court in Santu (supra) still holds good. That does not, however, advance the case of respondent Nos. 2 and 11.

105. The M.R.T.P. Act itself indicates several methods by which reservation affecting land in a plan could come to an end. For example, section 49(7) provides that if the appropriate authority fails to take steps to acquire the land after confirmation of the purchase notice within a period of one year, the reservation on the land shall be deemed to have lapsed. Reservation also comes to an end under section 50 where, upon an application by the appropriate authority, planning authority or the State Government makes such an order. There are similar provisions with regard to reservations made under the town planning schemes in Chapter–V of the Act. In the face of these specific provisions providing modes for reservations coming to an end, it is not possible to accept the contention of the learned Counsel that by reason of the contents of the report of the Commissioner of the P.M.C. and the order of the Minister of State

dated September 3, 1996 the reservation itself had lapsed.

106. Another corollary urged by Dr. Chandrachud is that the view taken by the P.M.C., that the order of the Civil Court declaring the acquisition proceedings as invalid and permanently restraining the authorities from taking possession was one without jurisdiction, was erroneous. We have already said that we do not propose to pre−empt judgment on the correctness of the Civil Court's decree, particularly on its jurisdictional aspect. Suffice it to say that nowhere on the record has the Commissioner of the P.M.C. has considered this aspect. The Affidavits of Ramanath Jha (the then Commissioner of the P.M.C.) dated September 15, 1998 and December 1, 1998, do suggest that the decision to withdraw the appeal, as a part of an overall compromise with the developer, was prompted more by the directions given by the State Government which Jha considered to be binding on him. We have already pointed out that there was no compliance with the provisions of section 481 (f) and (i) of the B.P.M.C. Act and we shall have occasion to deal with this when we deal with the contentions urged on behalf of Ramanath Jha (respondent No. 10 in Writ Petition No. 4433 of 1998). For all these reasons, we are unable to accept the contentions urged by Dr. Chandrachud, on behalf of respondent Nos. 2 and 11.

CHIEF MINISTER

107. There are serious allegations made against the Chief Minister and Minister of State, U.D.D. in both the writ petitions. It may be mentioned here that Mr. Manohar Joshi (respondent No. 5 in Writ Petition No. 4433 of 1998 and respondent No. 2 in Writ Petition No. 4433 of 1998) was Chief Minister and in charge of Ministry of U.D.D. at the material time. In paragraph 2 of Writ Petition No. 4433 of 1998 it is averred that:

"The respondent No. 5 Shri Manohar Joshi is the Hon'ble Chief Minister and is also the Minister for Urban Development Department for the State of Maharashtra. The respondent No. 5 has been joined both in his capacity as the Minister of the Urban Development as also in his individual capacity since it is the claim of the petitioner that the respondent No. 5 that misused the executive has powers and Authority for the purpose of securing benefits for his near relatives viz., his son and two sons−in−law and while doing so, mandatory provisions of the Act have been flouted."

It is further averred in the same paragraph :

"It is the claim of the petitioner that on account of this close relationship, the executive powers vested in the State of Maharashtra have either been misused and/or actions which cannot be taken in exercise of the executive powers under the Act are presumably taken in purported exercise of such executive powers with a full knowledge that the actions are illegal and ultra vires the provisions of the Act."

Again, in paragraph 3 of the writ petition it is averred :

"...the blatant misuse of executive powers being made by the respondent Nos. 5 and 6 with the sole objective of ensuring a substantial monetary benefit for the respondent No. 7 firm of which the respondent Nos. 8 and 11 are reported to be partners and thus, in effect securing a substantial monetary benefit for the near relatives of Shri Manohar Joshi ... the actions of the respondent Nos. 5 and 6 will be required to be considered and tested in the light of the provisions of the Act and the Rules framed thereunder."

In paragraph 4 it is averred as under :

"...the respondent No. 5 tried to justify the illegal action and to the utter shock and surprise of the petitioner, for justifying the construction and raising of reservation without following the procedure prescribed under the Act,

reliance placed on 19 alleged similar instances of raising of reservation by the earlier political party in power."

It is averred in paragraph 9:

"The respondent Nos. 13 and 14 (renumbered respondent Nos. 10 and 11 i.e. Jha and Agarwal) have failed to perform their statutory obligations and duties and this must have been done at the instance of their political masters viz, respondent Nos. 5 and 6 with a view to please them. While doing so, the respondent Nos. 5 and 6 as also the respondent Nos. 13 and 14 are guilty of serious dereliction of their duties as Ministers and Commissioners respectively."

Again, in paragraph 10 it is contended :

"The fundamental and legal right of the Citizens of Pune of submitting objections and suggestions to any modification in the Final Development Plan under section 37 of the Act has been infringed and by use of personal influence and solely on account of the fact that the respondent Nos. 8 to 11 are the partners of respondent No. 7 firm and are also having close blood relation with the respondent No. 5 herein who in turn is the Minister for the Urban Development Department which controls the appointments of a Municipal Commissioner to a Corporation established under the B.P.M.C. Act, 1949."

108. Since personal allegations were made against respondent No. 5, Rule was issued against him so that he could have an opportunity of putting forward his explanation in the matter. In response to the Rule served on him, respondent No. 5 filed his affidavit dated September 21, 1998. While broadly denying all allegations made against him, he contends that allegations made against him are devoid of any particulars. He further states in para 2 of his affidavit, "Allegations have been made by the petitioner without so much as attempting to ascertain the true and correct facts and merely on the basis of unverified newspaper reports". In paragraph 3(1) he admits that Girish Vyas (respondent No. 8) is his son-in-law and that he is a B.E. (Mechanical) of 1987 and he has been in the construction business since the year 1991. In paragraph 3(ii) referring to the action taken with regard to FP-110, Shri Manohar Joshi says:

"In so far as the said Final Plot No. 110 is concerned, I was concerned with its proposed development only when a note dated 26th July 1996 was put up to me sometime in August 1996.

This note was prepared by the Under Secretary, Urban Development Department, Mr. P.V. Ghadge and it was read and signed by Shri Deshpande, the Deputy Secretary, Urban Development, Shri R.C. Sinha, the Additional Chief Secretary, Urban Development and the Minister of State for Urban Development Dr. Ravindra Mane before it was put up to me. After reading the note I made a noting at the bottom to the effect "all action be taken in accordance with law (to which) there is no objection. The note was in Marathi and my aforesaid noting was also in Marathi."

He then quotes the Marathi noting. He also avers in paragraph 3(III) that, "from about March 1998 onwards my political opponents started making all sorts of false allegations against me concerning the development of the said property by my son-in-law and ensured that the same got wide publicity in the media. I therefore, instructed my office not to put up any papers in connection with the development of the said plot No. 110 before me in future". After denying all allegations made in the petition, he states in para 4, "I say that to the best of my understanding and belief no illegal construction or development has been carried out. I deny that I prevented any statutory authority from performing its obligations or duties as insinuated". He has also enclosed with his affidavit, at Ex. A, a copy of the written clarification issued by his office on August 5, 1998 to deny the allegations against him carried out in newspapers.

109. As far as the second Writ Petition No. 4434 of 1998 is concerned, the allegations against Shri Manohar Joshi, respondent No. 2 therein, are made in paragraph 6. In paragraph 6 it is averred that :

"The Ministry of Urban Development Department is held by the Chief Minister, Shri Manohar Joshi. The daughter of the Chief Minister, Shri Manohar Joshi is the wife of the respondent No. 7, Shri Girish Vyas. The petitioner says that, thus, the respondent No. 7 being the son−in−law of the Chief Minister, was unduly favoured when the said appeal filed under section 47 of M.R.T.P. Act, 1966 was heard."

It is further averred that, "with a view to hide his involvement, the Chief Minister, Shri Manohar Joshi, did not hear the said appeal but the same was heard by Shri Ravindra Mane, the State Minister for Urban Development. The petitioner however, submits Shri Ravindra Mane had issued various orders at the dictation of the Chief Minister, Shri Manohar Joshi. The petitioner submits that various directions were issued in flagrant disregard to the provisions of Maharashtra Regional & Town Planning Act, 1966 and Development Control Rules, 1982 of the Pune Municipal Corporation." Again, it is contended in Ground No. (xvii) as under :

The City Engineer and the then Commissioner of the Pune Municipal Corporation Shri Ramanath Jha, have wilted under the pressure of the Chief Minister of the Maharashtra State and with a view to favour his son−in−law, Shri Girish Vyas, have acted illegally, mala, fide and have thereby caused huge loss to the Pune Municipal Corporation."

In paragraph 11 it is averred.

"Thus, the City Engineer, and the then Commissioner of Pune Municipal Corporation, Shri Ramanath Jha, have wilted under the pressure of the Minister and have acted in flagrant disregard to the provisions of the law."

111. It is contended by Mr. Salve, learned Counsel for respondent No. 5, that even after careful perusal of the averments made in the two writ petitions, it is difficult to discern what the precise allegations are. He contended that the rule as to construction of pleadings should be strictly applied in this case. We are unable to accept this contention that the strict rules as to con−struing of pleadings should be applied in a public interest litigation. In the first place, these writ petitions are not strictly governed by the provisions of the Code of Civil Procedure. Secondly, in the absence of a right to demand and freely obtain specific information (except of course in matters which are privileged under the law) the petitioner in a public interest litigation would necessarily be hamstrung and would have to support his case on the basis of facts as brought to light by the vigilant media as has happened in the present case. A number of facts were not within the knowledge of the petitioner and it is only after the Court called upon the State Government and the P.M.C. to make available the concerned official files that the full nuances of the case emerged. We are of the view that a public interest litigation cannot be viewed from the standpoint of an adversarial litigation. By nature, it has to be inquisitorial in character. A public interest litigation is not intended to establish any individual’s interests or seek relief for infraction of any individual’s rights. Its purpose is to draw the attention of the Court to certain state of affairs which exist. If, by examination of the said state of affairs, the Court is satisfied that there is no injury or prejudice to the public at large, the public interest litigation would fail. If, on the other hand, the Court’s judicial conscience is pricked and it feels that relief is due to the public at large, the Court cannot hesitate to exercise its ample powers in writ jurisdiction. Hence, we are unable to accept the contention that the strict rules of construction of pleadings should be applied and the petition should be dismissed as far as respondent No. 5 is concerned. We are also unable to accept

that in a public interest litigation, where allegations are made against public authorities, we should proceed as if it were a criminal trial. There is no right of silence granted to any one in such cases. On the contrary, our view is that a public authority against whom the slightest suspicion is expressed should go on record with his full version so that the Court is enabled to judge the allegations in the light of all facts including the version put forward by the public authority. Anything less would make a mockery of a public interest litigation which has been recognised, come of age, and come to stay in this country as an institution for vindication of public rights and relief to the inarticulate populace which would otherwise suffer injustice. We are fortified in our view since a public interest litigation could very well commence on a letter addressed to the learned Chief Justice pointing out irregularities or injustice caused to specific or a class of citizens. It is then a matter between the Court and the public authorities against whom allegations have been made. To scrutinise their conduct to the satisfaction of the judicial conscience is the Court's duty.

111–A. Mr. Salve, learned Counsel appearing on behalf of respondent No. 5, urged that his client was neither concerned with the fate of the action which has been taken by the State authorities, nor was he concerned about what happens to the building which had been constructed on the concerned FP–110. If the Court finds such action to be illegal for any reason, the Court may well give appropriate directions, but in the circumstances of the case there was no reason for the Court to make any adverse findings against respondent No. 5, is the crux of the submissions of the learned Counsel. Learned Counsel referred to a number of passages from "judicial Review of Administrative Action", By De Smith, Woolf and Jewell (5th Edition); Halsbury's "Law of England" (Fourth Edition Volume I) and "Administrative Law", by Bernard Schwartz (3rd Edition), and urged that these are well settled principles indicating the parameters of judicial review of administrative decisions. The learned Counsel contends that in judicial review the process of the decision making and not the ultimate decision which is reviewed. The administrative decision must, perforce, be left to the administrative authority vested with the statutory power to administer.

112. In "Judicial Review of Administrative Action" By De Smith, Woolf and Jowell (5th Edition), at page 553 , it is stated as under :

"The first category of unreasonable decision contains some defect in the process of arriving at the decision; in the way the decision was reached or in the manner by which it has been justified. The focus here is thus upon the factors taken into account by the decision–maker on the way to making the decision; on the motives and upon the factors or evidence by which the decision was influenced."

It is also stated that decisions could be bad for being infected with bad faith and for wrong balancing of necessary factors as well as being irrational. In the category of "Bad faith", the learned author says, vide Article 13–010, as under :

"...decisions should not be infected with motives such as fraud (or dishonesty), malice or personal self–interest. These motives, which have the effect of distorting or unfairly biasing the decision–maker's approach to the subject of the decision, cause the decision to be taken in bad faith or for an improper purpose (the term "improper" here bearing a connotation of moral impropriety). Some of the decisions based on bad faith will also violate the ground of illegality, as the offending motive may take the decision outside the "four corners" of the authorised power. Irrespective of whether this be so, any ingredient of bad faith may in itself cause a decision to be invalid."

The learned Counsel also emphasised the sentence in the same part which reads as under :

"A Court will not in general entertain allegations of bad faith made against the repository of a power unless bad faith has been expressly pleaded and properly particularized."

It is further stated :

"A Power is exercised fraudulently if its repository intends to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests."

In paragraph 13−013 it is also stated that cases involving fraudulent or dishonest motives include those where a local authority acquired property for the ostensible purpose of widening a street or redeveloping an urban area but in reality for the purpose of reselling it at a profit; or preventing the owner from reaping the benefit of the expected increment in lord values, or giving an advantage to a third party. The learned Counsel also quoted passages from Article 19−045 which lay down the provisions for determining the question of tortious liability for misfeasance of public office. In our view reliance on these passages is somewhat misplaced. This is not a suit brought against respondent No. 5 on the ground of misfeasance in public purpose, nor is there a necessity to compensate a plaintiff for that reason in the present proceedings. In our view, the observations from Article 19−045, however opposite for determining the issue of tortious liability for misfeasance in public office, afford no guidance to a Court exercising writ jurisdiction in a public interest litigation.

113. In paragraph 19−048 under the same head, the learned author says as under :

"Often there may be no direct evidence of the existence of malice, and in these circumstances the Court may make adverse inferences, e.g. from the fact that a decision was so unreasonable that it could only be explained by the presence of such a motive. A Court will not entertain allegation of bad faith or malice made against the repository of a power unless it has been expressly pleaded and properly particularied."

As to the specific of pleadings and particularization, we already indicated our view. As to the other aspects at the particulars, it would need an examination of facts.

114. In Halsbury’s "Laws of England" (4th Edition. I), on page 67 in paragraph 60, while dealing with subject "Abuse of Discretion or Jurisdiction" the author says.

"An alternative method of approach is to ask what was the dominant purpose for which the power was exercised; if that purpose was unlawful then the exercise of the power was invalid.

Where a prima facie case of misuse of power has been made out, it is open to a Court to draw the inference that unauthorised purposes have been pursued if the competent authority fails to adduce any grounds supporting the validity of its conduct."

115. In "Administrative Law" (3rd Edition) By Bernard (page 626, Article 10.1) the learned author, with the approach of the American Courts, says,

"Recent cases indicate an increased willingness by the courts to assume a more active review role. Judicial review, according to Judge Leventhol, has emphasized judicial restrain.

Now, he says, the reviewing Court must intervene if it "becomes aware... that the agency has not really taken a ’hard look’ at the salient problems, and

has not genuinely engaged in reasoned decision−making."

Then, the learned author goes on to say :

"It is no longer enough for the courts regularly to uphold agency action "with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise." A more positive judicial role is demanded by the changing character of administrative litigation: "Courts are increasingly asked to review administrative litigation that touches on fundamental personal interests in life, health, and liberty... To protect these interests from administrative arbitrariness, it is necessary ... to insist on strict judicial scrutiny of administrative action."

Finally,

"Reviewing Courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise."

116. In paragraph 10.15 under the head "Abuse and Reasonableness", dealing with the discretion of an administrative authority it is pointed out :

"for discretion is a science or understanding to discern between falsity and truth, between wrong and right, ... and not to do according to their wills and private affections. Here is the common root from which Anglo−American courts derive their power to require discretion to be exercised reasonably.

Again,

"Abuse of discretion occurs when the power has been exercised in a manner that is, in the traditional phrase, arbitrary or capricious ,.. In both kinds of cases, however, reversals occur when the Court has concluded that the discretionary decision does not have a rational basis. Abuse of discretion is the rubric for discretion exercised unreasonably."

While dealing with "Abuse Cases" in paragraph 10.16, the learned author classifies them in six categories, viz., (1) improper purpose; (2) erroneous and extraneous considerations; (3) erroneous legal or factual foundation; (4) failure to consider relevant considerations; (5) inaction or delay; and (6) departure from established precedents or practice. Citing the case of Morrill v. Jones, the learned author states, "There is, in the first place abuse of discretion where the agency has exercised discretionary power for an improper purpose". Dealing with the case of Nader v. Bork, where the Acting Attorney General had issued an earlier regulation retrospectively in order to remove a Special Prosecutor, the Court struck down the action with regard to this action. The learned author says, "This turnabout, says the Court, was simply a ruse to permit the discharge of Cox −− a purpose that could not have been legally accomplished with the original regulation in effect."

117. The learned Counsel Mr. Salve, also relied upon locus classicus on judicial review of administrative action Associated Provincial Picture Houses, Limited v. Wednesbury Corporation, 1948(1) King's Bench 223. This decision lays down the by now famous 'Wednesbury Principle' with regard to judicial review of administrative decisions. Essentially, the principle is that where an authority has been vested with administrative discretion, it is not for the Court to substitute its judgment in the matter for that of the administrative authority. Though we are not concerned with such types of cases, the speech of Lord Greene M.R. needs to be highlighted. Says the learned Judge :

"Bad faith, dishonesty −− those of course, stand by themselves −− unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the

facts of individual cases, as being matters which are relevant to the question."

The learned Judge, after discussing the facts of the case finally concludes saying :

"The power of the Court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

118. After a conspectus of the authorities cited by Mr. Salve, our view is that the present writ petitions raise issues which fall very much within the parameters of judicial review enunciated in the above authorities. In fact, the case made out by the petitioners is that against the advice of all departmental officers, the Minister of State, U.D.D., and the Chief Minister resorted to the dubious route of deleting reservation by purporting to act under the Development Control Rule No. 13.5 by expressly directing the Commissioner of the P.M.C. not to take the matter before the Corporation. It is averred in the writ petitions that this was done at the behest of respondent No. 5 so that eighth respondent, his son−in−law, may gain pecuniary benefits. Whether these averments are established or not, is a matter of assessment of the material record; but, certainly, in our view, they do make out a case for judicial review within the accepted parameters, both in this country as well as in England and the United States of America.

119. Mr. Salve then contended that, even granting that in a public interest litigation the pleadings could conceivably be imprecise, upon scrutiny of the material on record against the background of the averments made in the writ petitions there is no material whatsoever to directly prove the charges alleged against respondent No. 5. Expecting direct evidence in such a case is asking for the impossible. In our view, the reasonable approach would be to assess all the material on record and see if the circumstances brought out before the Court bear out what is alleged against respondent No. 5. Mr. Salve, then contended that, even if the finding is to be reached on circumstantial evidence, no finding adverse to respondent No. 5 should be recorded by the Court unless it is the inescapable conclusion from the material on record. He cited a number of authorities in support of his contention, which we shall presently examine. It would, therefore, be convenient to deal with the authorities cited by the learned Counsel and in the light thereof to appraise the material on record and draw our conclusions.

120. In Secy., Jaipur Development Authority v. Daulat Mal Jain, , the Supreme Court was concerned with the case of

misuse of power by a public servant viz., a Minister (coincidentally, it was the Minister of Urban Development Department, Government of Rajasthan). The Supreme Court quoted the following lament of Edmund Burke on the corroding influence of corruption :

"Corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder, which loads us, more than millions of debt; which takes away from our arms wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our Constitution."

With regard to how and why Ministers should be held accountable for their acts, the Supreme Court had this to say :

"10. The Governor calls upon the leader of a political party/groups that command majority in the Assembly to form the Government and appoints him as Chief Minister. On the latter’s advise, he appoints other Ministers. Business of the Government gets allocated and is run as per business rules framed under

Article 166(3). The executive power of the State Government extends over which the legislature has power to make law. The Governor runs the Executive Government of a State with the aid and advice of the Chief Minister and the Council of Ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various departments and corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the law and the rules. The legal and moral responsibility or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or misconduct or misappropriation. The Council of Ministers are jointly and severally responsible to the legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties.

11. The Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed are public acts or duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio–economic democracy. The Executive Government should frame its policies to maintain the social order, stability, progress and morality. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions.

12. When a Government in office misuses its powers figuratively, we refer to the individual Minister/Council of Ministers who are constituents of the Government. The Government acts through its bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Government, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the 'purpose' and the end object of public welfare and not personal gain. The action cannot be divorced for that of the individual action. The end is something aimed at and only individuals can have and shape the aims to further the social economic and political goals. The ministerial responsibility there at comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the department of which he is the head. If the Minister, in fact, is responsible for all the detailed workings of his Department, then clearly ministerial responsibility 'must cover a wider spectrum than mere moral responsibility : for no Minister can possibly get acquainted with all the detailed decisions involved in the working of his department. The ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. He owes them moral responsibility. But for actions performed without his concurrence also, he will be required to provide explanations and also bear responsibility for the actions of the bureaucrats who work under him. Therefore, he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the department under his ministerial responsibility.

13. All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the department. All Government actions, therefore, means actions performed by individual persons to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions, social and economic democracy set down in the Preamble, Part 111 and Part IV of the Constitution. The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification.

14. The so−called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing of something improper. The essence of impropriety is replacement of a public motive for a private one. When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as corruption. The holder of a public office is said to have misused his position when in pursuit of a private satisfaction, as distinguished from public interest, he has done something which he ought not to have done. The most elementary qualification demanded of a Minister is honest and incorruptibility. He should not only possess these qualifications but should also appear to possess the same."

121. The Supreme Court then referred to the definition of "corruption" as defined in ’Encyclopaedia of Democracy’ by Seymour Martin Lipset, Vol. 1, p. 310, to the effect that corruption is an abuse of public resources for private gain. The Court then observed :

"The occasions for political corruption increase when control on the activity of public administrators are fragile and the division of power between political actors and the public bureaucrats, as well as between the Government and the middleman, is unclear. It is difficult to discover and punish cases of corruption. Research has shown that political corruption tends to be more widespread in authoritarian or totalitarian regimes and when public opinion and the press are unable to denounce corruption. Corruption develops because of confusion about the borders between State and society and between traditional and modern values. It can be expected to grow during phases of transition. Corruption should disappear in modern stable democratic societies. Instead, it is growing. Since State intervention in economic and social life has increased the occasions for political corruption, new technologies have increased the cost of electoral campaigns and the professionalisation of political careers has increased the number of those who have to make a living from politics rather than living for politics. Corruption has not disappeared. Corruption has dangerous consequences for politics. Although political corruption is more widespread in non−democratic regimes, it is particularly dangerous for democracy because it undermines two of the major principles on which democracies are based : the equality of citizens’ rights and the transparency of the political decision−making process. Bribes open the way for access to the State for those who are willing to pay and can afford the price. The situation may leave non−corrupt citizens with the belief that one ’counts’ only if one has the right personal contacts with those who hold power. Because of its illegal nature, corruption increases the range of public decisions that are made in secrecy. It was suggested that internal controls on public bureaucracies through administrative controls and accounting Procedures as well as ombudsman systems for public complaints, are remedies to control political corruption. The rules of Code of conduct for political executives, public servants and private entrepreneurs, emphasising merit and regulated system of appointment in State bureaucracy and stimulating pride in public service, would generate remedies for

political corruption."

The Court then indicated what was to be ascertained by the Court in a situation similar to the one faced by it. Says, the Supreme Court,

"The Court, therefore, would be required to consider whether the policy sought to be relied on and directed by the Minister was to further public good or was a means to fritter away the public property for personal gain or to misuse public power."

It was then pointed out that the public policy of the Government should only be to further the public purpose and issue of declaration is the conclusive proof of public purpose under section 6(1) or any other similar public purpose. Finally, the Supreme Court observed,

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised."

As to the Court's duly, the Supreme Court said in paragraph 30 of the judgment,

"There are two aspects of the matter. The first is that this Court has the duty to correct every obvious ultra vires or illegal exercise of power or misuse of the same. Failure to do so would send wrong signals that the Court legitimizes wrong actions."

122. In Pt. Chetram Vashist v. Municipal Corporation of Delhi, , the Supreme Court pointed out in paragraph 6,

"Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general."

123. In Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi, 1987(1) S.C.C. 228, the Supreme Court was confronted with a situation of drawing conclusions from circumstantial evidence. It was urged before the Supreme Court that the test to be adopted must be the same test that is adopted in a criminal trial where the evidence is purely circumstantial. Reiterating the ratio of its earlier judgment in Seth Gulabchand v. Seth Kudilal, , the Supreme Court in

paragraph 46 observed as under :

"It was well settled that where fraud had to be inferred from the circumstances and was not directly proved, those circumstances must be such as to exclude any other reasonable possibility. In other words, the criterion was similar to that which was applicable to circumstantial evidence in criminal cases. This Court observed that this Court was un able to agree with those observations. In that case this Court observed in respect of the allegation that a party had accepted bribe in a civil case did not convert it into a criminal case and ordinarily rule of civil cases would apply."

The Supreme Court clearly held that the test is not one of being proved guilty beyond reasonable doubt, but one of preponderant probability, as applied in a civil trial. The Supreme Court approved its observations in State of U.P. v. Mohammad Naim, , that adverse

remarks could be made against a party : (1) where a party whose conduct in question was before the Court had an opportunity of explaining or defending

himself; (2) where there was evidence on record bearing on that conduct justifying the remarks; (3) where it was necessary for the decision of the case as an integral part thereof to refer to that conduct; and (4) the observations must be judicial in nature. The Supreme Court concluded in paragraph 51 by observing,

"This Court cannot be oblivious that there has been a steady decline of pubic standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards in (sic is) an usually grave menace as the pollution of the environment. Where such situations cry out the courts should not and cannot remain mute and dumb."

124. In Bangalore Medical Trust v. B.S. Muddappa, , the Supreme Court had this to say about usurpation of reserved plots :

"The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens."

Commenting adversely on the illegal manner in which the reserved site had been leased out to a private party for different user under the orders of the Chief Minister of Karnataka State, the Supreme Court had this to say :

"Did the Division Bench commit any error of law? Was the conversion of site in accordance with law? Were any of the authorities aware or apprised of the provisions under which they could convert a site reserved for public part into a nursing home? Did the authorities care to ascertain the provisions of law or rules under which they could act? Was any precaution taken by the Chief Executive of the State to adhere to legislative requirement of altering any scheme. Not in the least. The direction of the Chief Minister, the apex public functionary of the State, was in breach of public trust, more like a person dealing with his private property than discharging his obligation as head of the State administration in accordance with law and rules. The Government record depicted even more distressing picture. The role of the administration was highly disappointing. In their notings even a show of awareness of law and fact was missing. This culture of public functionary, adorning highest office in the State of being law to himself and the administration acting on dictate, for whatever reason disturbs the balance of rule of law. What is more shocking is that this happened in 1976 and not even one out of various departments from which the papers were routed through raised any objection. And the statutory body like BDA with impressive members too succumbed under the pressure without, even, a murmur."

The Supreme Court was shown the provisions of section 15(3) of the Development Authority Act, 1976, under which the State Government was empowered to issue appropriate directions to the BDA. Commenting on this, the Supreme Court said,

"This main thrust of the provision of law was to keep a vigil on the local body but it cannot be stretched to entitle the Government to alter any scheme or convert any site or power specifically reserved in the statute in the Authority. The general power of direction to take up development scheme cannot be construed as superseding specific power conferred and provided for under section 19(4). The Authority under section 3 functions as a body. The Act does not contemplate individual action. That is participatory exercise of powers by different persons

representing different interests. And rightly as it is the local persons who can properly assess the need and necessity for altering a scheme and if any proposal to convert from one use to another was (sic not) an improvement for residents of locality such an exercise could not be undertaken by the Government. Absence of power apart, such exercise is fraught with danger of being activated by extraneous considerations."

The Supreme Court also pointed out,

"...Overall power reserved in Government to give such directions to the authority as it considers expedient for carrying out any purpose of the Act was another provision relied to support an order which is otherwise insupportable. An exercise of power which is ultra vires the provisions in the statute cannot be attempted to be resuscitated on general powers reserved in a statute for its proper and effective implementation. The section authorises the Government to issue directions to ensure that the provisions of law are obeyed and not to empower it itself to proceed contrary to law. What is not permitted by the Act to be done by the Authority cannot be assumed to be done by State Government to render it legal. An illegality cannot be cured only because it was undertaken by the Government. The section authorises the Government to issue directions to carry out purposes of the Act. That is the legislative mandate should be carried out. And not that the provision of law can be disregarded and ignored because what was done was being done by State Government and not the Authority. An illegality or any action contrary to law does not become in accordance with law because it is done at the behest of the Chief Executive of the State. No one is above law. In a democracy what prevails is law and rule and not the height of the person exercising the power."

We think that the strong observations of the Supreme Court in this case are most apt and applicable to the facts of the present writ petitions before us.

125. Mr. Salve, however, relied upon several authorities to contend that the Court should be slow in drawing inference of mala fides in such matters. We shall deal with those authorities now.

126. In Partap Singh v. State of Punjab, an argument was used before the Supreme Court that even if mala fides were established against the Chief Minister, in that case, still an order impugned in the petition could not be set aside. The Supreme Court rejected the contention by saying :

"Such an argument if right would mean even fraud or corruption leaving aside mala fides, would not be examined by a Court and would not vitiate administrative orders."

As Lord Denning said in Lszarus Estates Ltd. v. Beasley, 1956(1) All.E.R 341 at page 345, "No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud". The Supreme Court also referred to the observations of Pollock M.R. in Short v. Poole Corporation, 1926 Ch. 66 at page 85 :

"The appellants (represented before the Court by Maugham K.C. –– afterwards Lord Maugham) do not contest the proposition that where an authority is constituted under statute to carry out statutory powers with which it is entrusted if an attempt is made to exercise those powers corruptly –– as under the influence of bribery, or mala fides –– for some improper purpose, such an attempt must fail. It is null and void see (Reg v. Governors of Darlington School), 1844(6) G.B. 682 at p. 715"

The Supreme Court further observed.

"The Courts have, on occasions, resolved the difficulty by finding out the dominant purpose which impelled the action and where the power itself is

conditioned by a purpose, have proceeded to invalidate the exercise of the power when any irrelevant purpose is proved to have entered the mind of the authority see Sadler v. Sheffield Corporation, 1924(1) Ch 483 as also Lord Denning observed in Fitzwilliam's (Earl) Wentworth Estate Co. v. Minister of Town and Country Planning, 1951−2 K.B. 284 at p. 807. This is one the principle that if in such a situation a dominant purpose is unlawful then the act itself is unlawful and it is not cured by saying that they had another purpose which was lawful."

127. Mr. Salve, understandably, highlighted the observations of the Supreme Court in paragraph 8 where the Supreme Court said :

"Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose, or bad faith or personal ill−will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the appellant has to establish in this case, though this may sometimes be done see Edgington v. Fitzmaurice, 1884(29) Ch.D. 459. The difficulty is not lessened when one has to establish that a person in the position of a minister apparently acting in the legitimate exercise of power has in fact, been acting mala fide in the sense of pursuing an illegitimate aim. We must, however, demur to the suggestion that, mala fide in the sense of improper motive should be established only by direct evidence that is that it must be discernible from the order impugned or must be shown from the notings in the file which proceeded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts."

This judgment takes the view that mala fides, in the sense of improper motive, could be established by indirect evidence as long as it is discernible from the order impugned or from the notings in the file which preceded the order. The judgment also holds that bad faith can be deduced as a reasonable and inescapable inference from the proved facts. We will revert to this argument of "inescapable conclusion" advanced by Mr. Salve, after taking an over−view of the other authorities cited by him.

128. Mr. Salve relied upon the judgment of the Supreme Court in A. Periakaruppan v. State of T.N., , particularly on the observations in paragraph 15 of the judgment. This was a case where admissions to medical college were challenged on the ground certain candidates were given unduly high marks in interview. The allegation was that the Government manipulated the marks given in the interviews in such a way as to facilitate the selection of those students in whom the members of the party in power were interested. The allegations were of course denied by the respondents. An examination of the marks obtained did indicated that certain students had been given high marks in the interviews. It was contended that a scrutiny of the mark lists would, on their face, show that the interview marks were manipulated. It was said that marks were so given as to see that certain candidates got at least the minimum required for selection. Agreeing that there was some basis for criticism made by the petitioners, the Supreme Court took the view that there was insufficient material from which the Court could conclude that there was any manipulation in the preparation of the gradation list. The Supreme Court considered the circumstances as undoubtedly disturbing, but was of the view that the courts cannot uphold the plea of mala fides on the basis of mere probabilities by observing as under :

"We cannot believe that any responsible Government would stoop to manipulating marks. The Selection Committees consisted of eminent persons. Most of them are medical practitioners occupying responsible positions in life. It would be a bad day for this country if such persons take to manipulation of marks. Hence we cannot accept the contention that the interview marks were manipulated either by the Government or by the selection committees."

In the peculiar facts before it, taking notice of the fact that interviewing committees consisted of independent private practising medical professionals of high repute, in the absence of clear and clinching circumstances leading to the inference of manipulation by the Government, the Supreme Court was inclined to say that, in the case before it, it would be disinclined to draw an inference of mala fides. In our view, this decision in no way advances the argument of Mr. Salve.

129. Mr. Salve then cited the judgment of the Supreme Court in E.P.Royappa v. State of Tamil Nadu, in support. In the first place we may straight away point out that this was not a public interest litigation. This was a case where an officer of the State of the rank of Chief Secretary was impugning an administrative order made by the Government of Tamil Nadu. We hardly think that the Chief Secretary of a State Government is in any way hamstrung or estopped from getting information or documents on the basis of which he wants to make out a case of mala fides against any officer or public authority. We would read the following observations of the Supreme Court in paragraph 92, keeping this in view :

"Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up –– these considerations are wholly irrelevant in judicial approach but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent."

Further, the Supreme Court itself pointed out in paragraph 93 that the documents produced did not indicate a case of mala fide as alleged against respondent No. 2 therein. We do agree with Mr. Salve that a finding of mala fides against public authority, that too of the rank of Chief Minister of the State, should not be lightly drawn. It is quite a serious matter. But, if the Court is required to draw such an inference after examining the record, we feel that the Court cannot flinch from its duty.

130. We shall now test the argument of Mr. Salve that no inference of mala fides could be drawn unless it is the "inescapable conclusion" from the record, against the factual backdrop of this case. A public authority against whom allegations are made in a public interest litigation of this nature cannot take the position of an accused in a criminal trial and adopt silence as his defence. In our view, it is the duty of such public authority to advise the Court on affidavit his explanation in the matter and disclose fully before the Court all relevant material to which he alone has access. Anything short would make his conduct highly suspect and constrain the Court to make adverse inferences.

131. Let us now examine the facts of this case. Respondent No. 5 was served with a Rule in the writ petition. The crux of the case made out is that he had exerted pressure on his colleague, the Minister of State for U.D.D., and other State officers and the Commissioner of the P.M.C. to bring about a particular result viz., the shifting of reservation of FP–110 and granting of development permission sought by respondent No. 8 by proxy. Undoubtedly, respondent No. 5 generally denied all allegations against him. But, he did not stop there. He went on to give specific explanations in paragraphs 3 and 4 of his affidavit. First, he says that in so far as the said FP–110 is concerned, he was "concerned" with its proposed development "only" when a note dated July 26, 1996 was put up before him some time in August 1996. When an affidavit is filed before the Court, we expect a public functionary, that too holding the office of Chief Minister of a State, to be absolutely candid with the Court. We do not expect the Chief Minister to indulge in pettifogging or obfuscating of facts to mislead the Court. We regret to say that the statement of respondent No. 5 referred to above is fraught with less candour than what we would have expected from respondent No. 5. In fact, there would have been nothing surprising if respondent No. 5 had said that, as the Minister incharge of the department, the file had come to him several times for his orders. The attempt to throw dust in the eyes of the Court by suggesting that, till the crucial date of July 26, 1996, respondent No. 5 was not in any way "concerned" with the case pertaining to FP–110, is less than true. It would be well nigh impossible for a petitioner in a public interest litigation of this nature to know exactly when the file was scrutinised or perused by the Minister incharge. The note dated April 24, 1996 from the Private Secretary of the Minister of State, U.D.D., (respondent No. 5) to the Under Secretary, P.V. Ghadge, is significant. It suggests that the Minister in–charge of the department had, instead of officially summoning the file for his perusal, resorted to furtively calling for a copy of a vital document in the file. This request was promptly complied with and a xerox copy was made available. We assume that it was not mere idle curiosity on the part of respondent No. 5 which made him pick up a document at random from some file with which his department was dealing. In our view, this conduct of respondent No. 5 definitely leads to the conclusion that respondent No. 5 was very much interested in knowing the progress of the case pertaining to FP–110 and he wanted to apprise himself of the report dated April 17, 1996 made by the Commissioner of the P.M.C., indicating that respondent No. 5 was very much "concerned" with the case even before it came to him finally in the month of August 1996 along with departmental note dated July 26, 1996. When a person aware of the fact that he has sought copy of a vital document and called the same for perusal, conceals it from the Court, what inference does the Court draw? Was it mere idle curiosity, or nosing around? Or was it interest in a particular case? If it is that latter, then why were the Chief Minister and the Minister of State for Urban Development Department interested in one particular case? What momentous public policy decision was sought to be taken by perusing a random report of the Commissioner of the Municipal Corporation in the case about the existence of which respondent No. 5 feigns ignorance? We are afraid, unless the Court is naive and its credulousness is stretched to the extreme, the inference has to be that, not only was there an attempt on the part of respondent No. 5 to 'concern' himself with the file even prior to August 1996, but also that respondent No. 5 had taken an active interest in the case.

132. The next facet to be noted is that the action taken viz., deletion or shifting or reservation from FP–110 was against the advice tendered from the beginning by the officers of the department, the Commissioner of the P.M.C. and the City Engineer of the P.M.C. All of them were unanimous, to start with, that such action should not be taken without the approval of the Corporation itself. In fact, this was their stand in the meeting of February 3, 1996 held by the Minister of State, U.D.D. (respondent No. 6). It is difficult to believe that the file notings which contained this advice from the beginning till August 21, 1998 escaped the notice of respondent No. 5. An examination of the file notings indicates that, upto a certain point, all officials were opposed to the deletion

of reservation without the approval of the P.M.C. and it is only later on that the thinking changed at all levels. This change of heart, in our view, could not have been brought about except under pressure from the very top. Our reading of the situation is that the departmental officers at all levels put up resistance up to a certain point of time after which they resigned themselves to what was happening, taking the stand that the responsibility, if any, must be taken by the Chief Minister himself. In the file noting dated June 13, 1996. Under Secretary Ghadge clearly indicated that if Rule 13.5 of the Development Control Rules was to be used for shifting of reservation on FP–110, then the restriction of 200 meters had to be relaxed and it would be necessary to obtain the permission of the Chief Minister. The noting made by the Principal Secretary of the U.D.D. K. Nalinakshan, dated April 21, 1998 exudes a note of frustrated resignation on his part when he throws up his hands and says that though Rule 13.5 could not apply to the situation, and neither the Government nor the Commissioner of the P.M.C. had the power to relax the restriction of 200 meters, he finally states that since the matter had become a fait accomplis nothing could be done except following further directions of the Government.

133. Respondent No. 5 states in paragraph 3(III) of his affidavit that from about March 1998 his political opponents started making all sorts of false allegations against him with regard to the development of the property by his son–in–law and he, therefore, instructed his office not to put up any papers in connection with the development of the said FP–110 before him "in future". In other words, upto March 1998 there was no doubt that all papers were dealt with by him and it is only when the newspapers started making allegations against respondent No. 5 that he decided to recuse himself from the matter.

134. As to the order made by respondent No. 5 on August 21, 1996, Mr. Salve urged upon us to accept the interpretation thereof given by respondent No. 5 in his affidavit–in–reply. Literally translated, the endorsement of respondent No. 5 on the file notice, which he made on August 21, 1996, says, "All action be taken in accordance with rules. No objection". It is suggested by Mr. Salve that what was conveyed thereby was that respondent No. 5 had no objection to all action being carried on in accordance with law. This interpretation may be feasible, if the purpose of the note dated July 26, 1996 submitted by the Under Secretary Ghadge is ignored. We must keep the background of the case in mind. In the file note of July 26, 1996, Ghadge said that the relaxation of 200 meters restriction would require the permission of the Chief Minister. The file note suggests that there should be no objection to take action under Rule 13.5 to shift reservation from FP–110 to Lohagaon plot on Survey No. 261, Hissa No. 1/2 by relaxing the restriction as to 200 meters. Finally, paragraph 9 of the file note states that the proposal in paragraph 8 is submitted for approval. We cannot believe that respondent No. 5 did not understand the purport of the file note submitted to him on July 26, 1996. The file note was not merely asking for his blessings, but expected him to approve of the action proposed and authorize the relaxation of 200 meters restriction under Rule 13.5. We do not think that respondent No. 5 can seek absolution by endorsing on the file, "all action be taken in accordance with rules. No objection". The department had clearly brought to the notice of the Chief Minister that the reservation needed to be shifted from the land on Prabhat Road to a place in Lohagaon, a distance of about 15 kms. and that his approval for relaxing the restriction of 200 meters in Rule 13.5 was being sought. In these circumstances, we are inclined to read the endorsement of the Chief Minister as approving the proposal and authorizing the Government’s action as suggested in the file noting.

135. Another important facet we cannot overlook is that the wheels of the Government moved at unprecedented speed thereafter. We have to take judicial notice of the fact that, our experience, both at the Bar and on the Bench, shows that bureaucratic action usually moves at pachydermal pace. To believe that in the case of Murudkar, a nonentity whose file was one of the thousands of files gathering dust on the racks of Urban Development Department, respondent Nos. 5 & 6 took such personal interest only because of serendipity, strains our

credulousness to breaking limits.

136. Finally, we come to the argument of "inescapable conclusion" so strenuously canvassed by Mr. Salve. We would have expected respondent No. 5 to put forward a reasonably innocent explanation in the affidavit and, if it was an equally feasible one from the material on record as against the one postulated by the petitioners, then, perhaps, the argument of Mr. Salve might have succeeded. What do we find in the affidavit of respondent No. 5? Not any innocent explanation, but a total denial that he had any 'concern" with the matter till it was finally forwarded to him on August 21, 1996. There is no other explanation or hypothesis put forward which could equally foot the bill. We asked Mr. Salve, specifically, whether even in his submissions he could postulate a hypothesis or an explanation which could innocently account for the disturbing features which we had noticed on the record. He was not able to suggest any. In the result, there is no question of choice of conclusions. We are left with only one conclusion which we have to draw from the facts on record and, to quote the words of the petitioner, "the conduct of respondent No. 5 itself indicates that he had 'pressurized' the officials into taking an illegal action" and this, in our view, is certainly misuse of executive powers. The object to be gained thereby was that respondent No. 8, who incidentally happened to be the son−in−law of respondent No. 5, stood to gain in that the reservation on a plot in a prime area was waived and he became free to build thereupon. Once the reservation was waived, the Government machinery moved at tremendous speed and several obstacles in the way of granting development permission on FP−110 were overcome with extreme alacrity and ingenuity. First difficulty was that Lohagaon plot was in an agricultural zone and, unless it was included in residential zone, the reservation affecting FP−110. Erandwana, could not be transferred to Lohagaon. So, the Commissioner of the P.M.C. is directed to take action to see that the Lohagaon plot is included in residential zone. Papers move from him to the P.M.C. for approving the change. Unfortunately, at this stage, the Standing Committee of the Corporation shoots down the proposal, creating an impasse. Next solution mooted is that reservation may be shifted to some area in Dattawadi where a school was purportedly urgently needed. This solution runs into difficulty as respondent No. 8 appears reluctant to buy a plot in Dattawadi. He suggests that he will give a plot at Mundhwa. That plot had to be transferred to the P.M.C. and under the original conditions imposed by the order dated February 3, 1996 building permission could not have been granted unless a school was constructed at the alternate site. Construction of School obviously could not be done overnight and would require considerable time. Perhaps, time was of the essence in the matter. So comes another alternative proposal from respondent No.

8. He suggests, waive the condition as to construction of the school and accept Rs. 25,00,000/−, as equivalent amount for construction of the school. This suggestion finds ready acceptance at all levels. The Commissioner of the P.M.C. even writes to the State Government and sends a letter by Fax suggesting that this last proposal of the developer be accepted. All heads nod in agreement. Instructions go by return Fax that the conditions had been relaxed and the last proposal is accepted. With electric speed, building permission is granted. Now, are we to believe that all this unexpected alacrity on the part of the bureaucracy was purely fortuitous or are we left with the only explanation put forward by the petitioners? Regretfully, we feel constrained to accept the latter.

137. Mr. Salve emphasised that the final order made in the case was not that of respondent No. 5 at all. He urged that any person interested in bringing about a result as suggested by the petitioners would not give up the game half way. He would continue to make all orders till the end and see that the goal is achieved. The fact that respondent No. 5 readily accepted the suggestion for refusal made by the Additional Chief Secretary on July 27, 1998 that the Minister of State should take an appropriate decision since the developer was related to the Chief Minister, is indicative of the bona fides of respondent No.

5, contends Counsel. He points out that, because of this endorsement, respondent No. 5 recused himself from the matter and the file was forwarded to respondent No. 6 for his orders which he made on July 28, 1998. The difficulty in accepting this argument is that the policy decision to pursue the action of shifting of reservation by following Rule 13.5 was certainly taken with the imprimatur of the order of the respondent No. 5 dated August 5, 1996. Take away this order and no further orders could have been passed. It is only because of this order that subsequent direction came to be given to the Commissioner of the P.M.C. by the Government in its order dated September 3, 1996. The wheels of the State machinery gained high momentum only because of and after the order dated September 3, 1996 giving clear directions to the Commissioner of the P.M.C. which was itself based on the order of respondent No. 5 dated August 21, 1996. It is true that, thereafter, the issue became controversial and the newspapers raised an uproar about it some time from March 1998, as respondent No. 5 says. Merely because thereafter respondent No. 5 recuced himself and refrained from passing any further orders in the matter, he is not absolved of his participation in and responsibility for all that happened upto and including the order dated September 3, 1996. The argument of Mr. Salve is too ingenuous to appeal to us. It is also incorrect factually, for the adverse criticism appeared in newspapers, even according to respondent No. 5, some time in March 1998. If he was stung by adverse criticism we would have expected him to recuse himself from that point onwards and instruct the officers accordingly. It appears from the file note dated July 27, 1998 that even that file note was intended for his approval and orders. Fortuitously, it was handled by the Additional Chief Secretary who stated that as the developer was related to the Chief Minister, the order should be made by the Minister of State, U.D.D. The preparation of the file note indicating the Chief Minister’s name thereupon is not suggestive of any instructions for recusal having been given to the department. For all these reasons, we are unable to accept the submissions and the contentions canvassed by Mr. Salve, learned Counsel for respondent No. 5.

MINISTER OF STATE :

138. As far as respondent No. 6 is concerned, we must take note of the fact that he was the second highest authority in the Urban Development Department to take decisions since he was the Minister of State, U.D.D. The petitioners aver that being the colleague of respondent No. 5 he was also party to the misuse of the executive powers which were ultimately intended for private gain of respondent No. 8.

139. Respondent No. 6 has filed two affidavits in reply. In fact, there is a running controversy between respondent No. 6 and respondent No. 10, as to who is ultimately responsible for the order made. By the affidavit of Madhav B. Harihar, City Engineer of P.M.C., dated September 11, 1998, the Corporation gave its version of what transpired in the chambers of the Minister of State, U.D.D. (respondent No. 6), when the representation dated November 20, 1995 was taken up for discussion. We also have before us the minutes in the form of a file note made by the Under Secretary P.V. Ghadge. We also have the affidavit of Ramanath Jha (respondent No. 10) stating how the instructions were given to him. A conjoint reading of these affidavits indicates that the initial departmental stand was that there was no question of surrendering the land to the owner, nor was there any question of shifting of reservation on the representation or appeal. It was the Minister of State, U.D.D. (respondent No. 6) who took the stand that the Commissioner of the P.M.C. should first of all make a personal inspection of the land with a view to see if the reservation could either by reduced in area or altogether shifted. The Commissioner of the P.M.C. says that this was exactly his brief and he made his report dated April 17, 1996. Even the affidavit filed by V.V. Deshmukh, Deputy Secretary, U.D.D. suggests that it was the Minister of the State, U.D.D. who directed the Commissioner of the P.M.C. to survey the said plot, submit a report as to whether the said plot was still required by respondent No. 2 for a school. In fact, this affidavit is consistent with the file notes containing the minutes of the meeting. Respondent No. 6 has

filed an affidavit dated September 23, 1998 in which he says, "I have carefully read the affidavit filed by Shri Vidyadhar Deshpande, Deputy Secretary, Urban Development Department in respect of the above petition. I agree and endorse the averments made by Shri Vidyadhar Deshpande in his affidavit in reply to the said petition". He however, strongly denied that he had acted under the instructions and/or pressure from either Chief Minister or his secretariat and maintained that he had consulted the Commissioner of the P.M.C., City Engineer of the P.M.C., Director of Town Planning as experts and certain officers in the U.D.D. and took decisions from time to time in larger public interest. Surprisingly, he said that during the consideration of the application of Shriram Karandikar and the proposal from the Municipal Authorities, he had no idea whatsoever that the property was being developed by respondent No. 7 firm and respondent No. 8.

140. Mr. Madkholkar, learned Advocate appearing on behalf of respondent No. 6, vehemently contended that whatever be the Court's finding with regard to respondent No. 5, respondent No. 6 is totally innocent in the whole affair. With regard to the endorsement on the representation dated November 20, 1995, directing the Director Town Planning and the Commissioner of the P.M.C. and the Secretary of the Department to personally remain present in the Chambers of the Minister of State, U.D.D., for a meeting on the given date, Mr. Madkholkar contended that this was the usual style of functioning of respondent No. 6. This may be so, and it is conceivable that respondent No. 6 is conscientious in the exercise of his powers and does not brook bureaucratic delay in disposal of files. But, what puzzles us is that respondent No. 6, who took the stand in the said meeting of February 3, 1996 that if the P.M.C. had no objection for reducing the area of reservation on the plot then the Government would give orders for taking action in accordance with section 37 of the M.R.T.P. Act, changed tack somewhere along with line when the file note dated June 26, 1996 came into the picture. The Departmental proposals were for shifting reservation by application of Rule 13.5 (by relaxing the restriction of 200 meters). With regard to the change of reservation on FP–110, the departmental note purported to follow Rule 13.5 and put forward the precedent of Kothrud case which according to the department indicated that it was not necessary to take the approval of the P.M.C. for changing the reservation from FP–110 to the plot at Lohagaon. But, for incorporation of the Lohagaon plot in residential area, the note suggested following the procedure in section 37(1) of the M.R.T.P. Act. We find it strange that all officials, including respondent No. 6, who had taken a principled stand in the previous meeting seem to have changed their stand by now. All seem now to be agreed that action can be taken under Development Control Rule 13.5 and, for that purpose it was totally unnecessary to go back to the P.M.C. The explanation given by Mr. Madkholkar for this change of stand is that in the file note itself it is suggested that papers of the Kothrud case were put forward along with the file of FP–110 and upon reading the opinion given by the Law and judiciary Department, respondent No. 6 concurred with the view that was being canvassed by the department. Since this aspect of the matter was crucial to the stand of respondent No. 6, we have perused the file pertaining to shifting of reservation of Land Survey No. 39/1, at Kothrud, Pune, and the so called opinion of the Law and Judiciary Department contained in the file to which a reference was made by respondent No. 6. Apart from referring to fact that the Government had already informed the Commissioner of the P.M.C. that he should act as per Rule 13.5, the Law and Judiciary Department does not appear to have given any opinion that such action could be taken or that, for changing the reservation, approval of the Corporation was not necessary. It appear to us that this opinion merely takes post facto note of what had already transpired and does not give any advice after consideration of the provisions of law as to what ought to be done. It merely takes notice of what had been done and attempts to rationalize it, but does not say that Corporation's approval was not necessary. We find it, therefore, difficult to accept the justification of the stand put forward by respondent No. 6, if we were to accept the statement of respondent No. 6 that he had no knowledge of Murudkar's connection with respondent No. 8, the son–in–law of respondent No. 5, the then Chief Minister. It is difficult to account for the anxiety of the Minister of State, U.D.D. to

find out some solution to either reduce the area of reservation or shift it to a new place. Only tenable explanation is that it was a design to ensure that the representation made by Murudkar on November 20, 1995 was allowed. It is not being suggested by any one that respondent No. 6 was personally interested in the proposal or that he had any particular interest in seeing that this proposal was sanctioned. We, therefore, have to fall back on the inference that respondent No. 6 was under pressure from respondent No. 5.

141. An interesting development in this case is that after respondent No. 6 went on record citing the Kothrud case, Ramanath Jha, the then Commissioner of P.M.C., filed an affidavit on December 1, 1998 denying the correctness of the version of the meeting dated February 3, 1996 as placed on record by respondent No. 6. In fact, the affidavit of Jha goes so far as to suggest that he had urged upon the State Government the need to follow the process of law enjoined by section 37 of the M.R.T.P. Act, as borne out by the minutes of the meeting dated February 3, 1996 and his report dated April 17, 1996. He says:

"I persuaded myself to veer legitimately round the view that State Government whilst issuing the said order had examined by interpretation of law emphasising the need to follow the process of law enjoined by section 37. I also thought it futile to further contend with it, in view of the said earlier precedent of Kothrud. The code of my official conduct and the hierarchical discipline of my office warranted my unqualified compliance with the said decision of the State Government."

In other words, Jha is telling the Court that he persisted up to a certain point after which he threw up his hands and let the Government do what it wanted. Jha perhaps was prompted to file this second affidavit because it was suggested in the affidavit of respondent No. 6 that all decisions were taken at the instance of the Commissioner of the P.M.C. i.e. Jha himself. By this second affidavit, Jha specifically stated that the decisions were taken at the instance of respondent No.

6. Having had the benefit of available official files, including the Kothrud case file and the affidavits of the City Engineer, Harihar, and the two affidavits of Jha, we are not inclined to accept the assertions made by respondent No. 6 to the contrary. The affidavit made after the issue landed in the Court may differ in content and emphasis; but the official file notes made contemporaneously do not support the contention of respondent No. 6.

142. We also cannot forget that the Government’s order made in the case was pursuant to the order of respondent No. 6 dated July 28, 1998. We assume that, at least after reading the endorsement on the file note by the Additional Chief Secretary that the developer was related to the Chief Minister, respondent No. 6 had become aware of the proximity of the developer to the Chief Minister. If what was being done was contrary to his conscience, we find no expression of disapproval on the part of respondent No. 6 anywhere on the file. On the other hand, his endorsement on the file is, "department proposal is approved. Orders may be issued". Taking into view the departmental note and the somewhat cynical comments made by the Departmental Secretary on the file on July 24, 1998, we are unable to accept the contention of respondent No. 6 that he was innocent or that he just made the endorsement only because the department wanted it. Nor are we inclined to give credence to his stand that he had absolutely no knowledge that the land was being developed by respondent No. 8 who was the son−in−law of the Chief Minister respondent No. 5. There is no doubt that the orders made by him were contrary to law. All that we can say is that there is nothing on record to suggest that he had any other personal motive in the matter. We, therefore, infer that respondent No. 6 must have done it to oblige his senior colleague i.e. the then Chief Minister, respondent No. 5.

THEN COMMISSIONER OF P.M.C. :

143. We then turn to the stand taken by the tenth respondent, Ramanath Jha, the then Commissioner of the P.M.C. In the first affidavit filed by Jha, he frankly took the stand that he had all along acted under directions of the Minister, starting from the first meeting of February 3, 1996. Despite the stand taken by respondent No. 6 on the position of law and the need to get the proposal ratified by the Corporation, respondent No. 6 instructed him to first go and make a personal inspection of FP–110 with a view to find out if there could be partial or total deletion of reservation affecting the said plot. This, the said officer did faithfully. He then forwarded his report dated April 17, 1996. Perhaps, by this time he had realised that there was pressure to work out the brief given to him to find out the alternatives as suggested by the Minister of State (respondent No. 6). In the anxiety to work out the brief, he forgot or did not take notice of the fact that at least two renowned educational institutions i.e. Symbiosis and Maharashtra Education Society had asked for FP–110 for running a school thereupon. The Corporation had taken the stand that they were not in possession of the plot and, therefore, it was not possible for them to give them the plot. To suggest in his report dated April 17, 1996 that there was no need of a school, that there was no likelihood of any private individual developing a school on the plot, was therefore, far from truth. We are also not happy with the attitude he took in the matter since respondent No. 6 appears to be a conscientious officer and well aware of the legal position, since he quotes in paragraph 5 of his first affidavit dated September 15, 1998 the observations of Lord Radcliffe as reaffirmed in Tayabhai M. Bagasarwalla v. Hind Rubber Private Limited Industries, 1997(4) Bom.C.R. 312(S.C.). We would have expected respondent No. 6 to have taken the precaution of protesting a little vigorously if he was satisfied that what was being asked of him was illegal. As to his thinking that section 154 of the M.R.T.P. Act mandates the Corporation and the Commissioner to do whatever the State Government directs, we would only point out the observations of the Supreme Court in Bangalore Medical (supra) that such provision as section 154 does not empower the State Government to give directions to the subordinate authorities to act contrary to law. That he has acted as a loyal soldier, perhaps more loyal to king than king himself, there is no doubt. Every letter written by him to the Government faithfully records that he was acting as directed by the Government. The correspondence carried out with the Government leaves no manner of doubt that he thought that he was bound by all the directions given to him by the Government and tried to implement them to the best of his ability. At times, we do see an anxiety on his part to see that the proposal of the Government to shift the reservation fructifies. This, perhaps, was due to an anxiety to please his bosses and nothing more. His contention that he had specifically raised the issue as to consultation with and approval of the P.M.C. was necessary and that the State Government had specifically overridden him on this issue, is also correct and borne out by the record.

144. While we may not attribute any motive to respondent No. 10 for his actions, we cannot approve of the actions taken by him. We have already pointed out that the action of withdrawing the appeal was wrong. In our view, respondent No. 10 would have served the interests of the P.M.C. better if he had placed his dilemma before the P.M.C. and sought a resolution thereof, particularly when he believed that the Government was issuing him instructions contrary to law, which he believed to exist. But, perhaps, this might not have been clear to him at the time when he acted to please his masters. While holding that the actions taken by the tenth respondent were contrary to the provisions of the B.P.M.C. Act, M.R.T.P. Act and Development Control Rule No. 13.5, we find it difficult to accept the suggestion in the writ petitions that he was a willing party to the process of abuse of executive powers.

BUILDER AND TENANTS :

145. That leaves us with respondent Nos. 7 & 8 and 12 to 35. Respondent Nos. 7 & 8 are identical since respondent No. 8 is the sole proprietor of respondent No. 7–firm. Respondent Nos. 12 to 35 are the tenants of the original structures

on FP−110 which was demolished and presently owners of flats which were given to them by respondent No. 8 in lieu of surrendering their possession and tenancy rights. For the sake of convenience we will refer to respondent Nos. 7 & 8 as "the builder" and respondent Nos. 12 to 35 as "the tenants". The contention of the builder and the tenants is identical upto a certain point after which there is a slight deviation in the legal contentions advanced. Basically, the builder and the tenants contend that, irrespective of what happened at the level of the Government, the developer was entitled to construct the building by virtue of a building permission validly granted in accordance with section 45 of the M.R.T.P. Act. It is contended that if the building permission could have been legally and validly sanctioned by following the provisions of law, the fact that an illegitimate, devious route or dubious provisions of law were resorted to in granting permission does not render it illegal and, therefore, there is no reason for this Court to hold that the development permission was illegal or to grant any consequential relief. Both, Mr. Manohar, learned Counsel for the builder, and Mr. Tulzapurkar, learned Counsel for the tenants, strongly canvassed the theory of tracing the source of power, which essentially means that, if there is power under the law to legitimately take action, the fact that the public authority invested with the power resorts to another provisions, where he had no power, cannot detract from the validity of the action.

146. While Mr. Tulzapurkar concedes that there could be a situation of conflict between the provisions of the sanctioned development plan and the provisions of a town planning scheme framed in exercise of the powers under the Act, Mr. Manohar urged that there could never be a conflict and the conflict situation was purely chimerical. In the submission of Mr. Manohar, the development plan and the town planning scheme operate in different planes which never intersect. Since there is no intersection, there is no collision and no inconsistency between the two.

147. Both were again ad idem that assuming there is a possible situation of inconsistency between what is provided in a development plan and in a town planning scheme which is already in existence, then the provisions of the latter would prevail over the provisions of the former. It is contended that, in the present case, the town planning scheme was brought into existence under the Bombay Town Planning Act, 1915, kept alive under the Bombay Town Planning Act, 1954, even varied once in 1979, and was in existence on January 11, 1967 when the M.R.T.P. Act came into force. Though the M.R.T.P. Act repealed the Bombay Town Planning Act, 1954, section 165 thereof specifically keeps alive all actions taken under the provisions of law including a town planning scheme already existing and sanctioned under the previous provisions of law. This is so even if such provisions are inconsistent with the provisions of the M.R.T.P. Act. Certain other provisions of the Act are also highlighted to carry forward this basic argument of both Counsel.

148. In a possible situation of conflict between the contents of the Development Plan and a town planning scheme, which should prevail, is an issue which appears to have been already answered by the Division Bench of this Court in Rusy Kapadia and others v. State of Maharashtra and others, Writ Petition No. 2087 of 1993, dated September 4, 1997, Per A.A. Desai and S.S. Parkar, JJ. The Division Bench in paragraph 8 of its judgment observed as under :

"One of the submissions canvassed by the learned Counsel is that before the development plan came into being, some time in 1943, the land in question was shown in the Town Planning Scheme of Pune. The Town Planning Scheme under section 86 was sanctioned some time in 1989. According to the learned Counsel this is subsequent to the sanction of Development Plan and as such the Town Planning Scheme will prevail over the development Plan. Initially this submission was canvassed by the learned Counsel for the Government, Mr. Zambre. However, they could not pursue it. It was then reiterated by Mr. Anturkar with more force that the Town Planning Scheme will have sway over the Development Plan. We heard and also perused the provisions with the assistance of the

learned counsel for the parties. Town Planning Scheme is provided and dealt with Chapter V of the Act. This Chapter has beginning with section 59 and opening of the section itself refers that the provisions of this Chapter are subject to the provisions of the Act. The provisions precedent to section 59 are from section 1 to section 58 which include section 31, sub−section (6) which proclaims that the Draft Plan is final and binding on the Planning Authority. As such the binding force would carry even when they any way deal with the Town Planning Scheme. Beside this section 39 and section 42 of the Act unequivocally indicate that the Development Plan has to definitely prevail over anything and everything including the Town Planning Scheme. In view of this the submission is without any merit."

We would have thought the issue was no longer res integra in this Court. But, Counsels' ingenuity knows no bounds. Mr. Tulzapurkar drew our attention to two other unreported judgments of this Court. In H.J. Rathi and others v. The Competent Authority under the Urban and Ceiling Act, Pune and others, Writ Petition No. 3816 of 1982, dated July 15 and 16, 1983, Per Chandurkar, Ag.C.J. and Pendse, J. and in Col. J. C. Bhave and others v. Pune Municipal Corporation and others, Writ Petition No. 8 of 1997, dated August 6, 1997, Per Ashok Agarwal and S.D. Gundewar, JJ. It is contended by the learned Counsel that these two earlier judgments had already held a contrary view and, therefore, the judgment in Writ Petition No. 2087 of 1993 must be treated as per incuriam. The judgment of this Court in Yeshbhai v. Ganpat, was cited in support, emphasising the observations in paragraphs 27 to 30. Mr. Tulzapurkar went a step ahead and contended that, in case the Court feels that the judgments rendered earlier had not clearly laid down the law contrary to what has been held in Writ Petition No. 2087 of 1993, then this Court should not be hide bound by the doctrine of precedent, should consider the issue afresh and decide it in the light of the submissions made. He cited the judgment in K.C. Dora v. C. Annamanaidu, , the observations of V.R.

Krishna Iyer, JJ., in paragraph 75 where the learned Judge has quoted with approval the observations of justice Cardozo, who in turn quotes Wheeler, J., in Dwy v. Connecticut Co., 89 Conn 74, 99 to say, "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors".

149. Before embarking into a discussion on whether the doctrine of precedent applies or not, it is necessary to appreciate what exactly was decided in the two earlier cases. From all the judgments cited at the Bar, the issue canvassed by Mr. Tulzapurkar does not appear to have been touched upon in any case other than the three cited above. Hence, we must either find an answer within the three judgments, or, if we agree with Mr. Tulzapurkar, then we should independently decide the issue.

150. Chronologically speaking, the first judgment is the one in H.J. Rathi and others v. The Competent Authority under the Urban Land Ceiling Act, Pune and others, Writ Petition No. 3816 of 1982, dated July 15 and 16, 1983, Per Chandurkar, Ag.C.J., and Pendse, J. In this case the respondents owned a vacant plot of land (incidentally, in Pune, and very near the place which is the subject matter of the controversy in the present writ petitions). The land was situated on a narrow road and in an area reserved for residential purpose under the town planning scheme applicable to Pune city. The owner of the land made an application to the authority under the Urban Land (Ceiling and Regulation) Act, 1976, for exemption under section 20(1) of the said Act as the respondents desired to construct a building to start a Lodging and Boarding House. This application was considered by the State Government and an order of exemption was made on May 16, 1980. After the work was carried on for some time, some of the owners and occupants of adjacent plots complained to the Commissioner of the P.M.C. that the plot in question was situated on a road which had a width of only 20 feet, that the area was purely residential and permission to run a hotel

would result into heavy traffic and cause great nuisance to the residents of the locality. The complainants received no satisfactory answer and so moved this Court. The grievance in the petition was that the permission granted was not in public interest and that the permission granted under Rule 5 of the Pune Municipal Corporation Building Rules and Bye-Laws, 1979, was not valid as no permission for running a hotel could be granted under that rule. Two contentions were advanced before the Court. First, that the order made under section 20(1) of the Urban Land (Ceiling and Regulation) Act, 1976, was not in public interest and also that it suffered from non-application of mind as the Development Control Rule framed by the Pune Municipal Corporation prohibiting running of a hotel in residential zone was overlooked. The permission was also challenged on the ground that it was in contravention of the Development Control Rules as the permission for running a hotel could not be granted in exercise of the powers under Rule 5 of the Development Control Rules. This Court rejected the submission of the petitioners that the order of exemption was not in public interest and that the authority concerned had acted in contravention of the powers conferred under section 20(1) of the Act. Addressing itself to the second contention that the Government overlooked the Development Control Rules which prohibit setting up a hotel in the residential zone, the Court rejected it by saying that it was "without any substance". Another corollary of the submission was that the Pune Municipal Corporation was in error in sanctioning the building plans under Regulation 5 of the Rules. The Court rejected this submission also by pointing out that Rule 5 clearly provided that, in the area included within the scheme and intended for residential purpose, Lodging and Boarding Houses could be erected. We have perused the entire judgment with anxious expectancy, hoping that the thorny problem presented before us would have been anticipated and resolved somewhere on this judgment. We find no solution therein for us. We are unable to take the view that this judgment resolves the controversy raised before us.

151. The next judgment is in Col. J. C. Bhave and others v. Pune Municipal Corporation and others, Writ Petition No. 8 of 1997, dated August 6, 1997 Per Ashok Agarwal and S.D. Gundewar, JJ. This judgment too does not answer the issue. In this case a plan for development of land was sanctioned by the P.M.C. for construction of a hotel. The petitioners impugned it in an appeal to the State Government under section 47 of the M.R.T.P. Act. The appeal was dismissed. The matter was then carried to this Court by way of a writ petition. The Court found that the petition had been belatedly filed when the entire hotel had already been constructed. The contention that the plot of land was situated in a purely residential zone under the Development Control Rules and, therefore, a hotel could be constructed was rejected on the ground that the Development Control Rules were not applicable to the property in question which fell within the town planing scheme No. 1. Reliance was placed on Rule 1.3 of the Development Control Rules which provides, inter alia, that all other Development Control Rules and Bye-Laws are overridden except the regulation in the town planning scheme which shall prevail until the scheme was varied. The Court took the view that Regulation 5 of the Town Planning Scheme No. 1 would apply and it provided for construction of hotel. Hence, by a speaking order the writ petition was summarily dismissed at the stage of admission. We may point out that this order suggests in paragraph 4 that the law laid down in H.J. Rathi and others v. The Competent Authority under the Urban Land Ceiling Act, Pune and others. Writ Petition No. 3816 of 1982 was being followed. We find it difficult to accept the submission of the learned Counsel that this judgment is an authority for the proposition canvassed.

152. We are of the view that the proposition, that in the event of a conflict between the provisions of the development plan and the town planning scheme, the former would prevail, is clearly laid down in the judgment in Rusy Kapadia and others v. State of Maharashtra and others, Writ Petition No. 2087 of 1993, dated September 4, 1997. Per A.A. Desai and S.S. Parkar, JJ. and not in the two authorities to which our attention was drawn. We, therefore, reject the contention of the learned Counsel that the judgment in Rusy Kapadia (supra) is

per incuriam. In our view, it is not necessary to go into the principles as to when a judgment could be said to be per incuriam and carry on the exercise to discover the nuances and limitations of the doctrine of precedent. Despite our view that the judgment in Rusi Kapadia (supra) has answered the issue canvassed, we shall prefer to answer the issue anew on a consideration of all the arguments urged before us.

153. When we keep in perspective the historical background of the evolution of the law on the subject, we notice that prior to 1915 development of cities was somewhat haphazard and depending on convenience as there were only Municipal bye laws and regulations to control development and construction within the areas of the Municipalities. For the first time, Bombay Town Planning Act, 1915, attempted to bring a semblance of order into town planning. The Act, therefore, made detailed provisions for preparation of draft schemes, publication thereof, manner in which the draft schemes should be implemented, consequences of implementation of the draft schemes, objections to the draft schemes, sanctioning of draft schemes and the restrictions that should be put upon development of land after such draft schemes were notified. For the first time, we have section 15 putting restrictions on building work after the local authority had published the intention to make a town planning scheme, unless necessary permission had been granted in the form of a commencement certificate. As to the contents of the scheme, section 3 indicates that a town planning scheme may make provisions for the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets and public purposes of all kinds. Thus, at this stage, the law contemplated that, for proper implementation of town planning scheme, it would be necessary to indicate in the town planning scheme reservation of land for certain public purposes as indicated in the Act. Undoubtedly, there was provision in the Act for variation of the scheme. The 1915 Town Planning Scheme for Pune, as brought into force, indicates that there were allotments or reservations for public or other purposes. In fact, a long list of such plots is indicated in the body of the scheme itself. Along with the scheme, regulations controlling the development were also brought into force. These regulations were existing laws and specially declared that, in case of conflict between the Town Planning Regulations and any other law or bye−law made by any authority excepting an Act of Parliament, or an Act of the Government of India, the provisions of the town planning scheme regulations shall prevail. Clause 14(e) of the Town Planning Scheme , 1915, reads as under :

"The area included within the scheme is intended mainly for residential purposes only, and excepting in the area hereinafter named no building except dwelling houses with the outhouses, stables and garages necessary for reasonable convenience of the main building, shall be erected and no building shall be otherwise used within the area of the scheme, excepting only that the Municipality may permit the erection of a shop or shops, where they consider it done for the convenience of the public and provided that in their opinion the erection of such shop or shops will not detrimentally affect adjoining property. No shop shall, however, be erected on lands fronting Ganeshkhind Road, areas excepted in the clause :−−−

(a) ...

(b) ...

(c) ...

(d) ...

(e) Those lands which are allotted for a public or quasi−public purpose and lands which are used or may be acquired or allotted for the purposes of education or philanthropy on which no trade, manufacture or daily display goods for sale is allowed and lands which are used, acquired or used for business of

Government or the convenience of the public service."

These regulations, therefore, suggest that, when there is a reservation for a public purpose, the land has to be used only for that purpose and for no other purpose.

154. The next stage in the evolution of the law is the Bombay Town Planning Act, 1954. As the preamble itself suggests, the Act was brought into existence to provide that the local authority shall prepare a development plan for the entire area in order to ensure that the town planning schemes are made in an appropriate manner to be more effective. The Statement of Objects and Reasons also indicates that under a development plan, a local authority can allocate land for different uses, i.e. residential, industrial, commercial and agricultural, and reserve sites required for public purposes, i.e. for schools, playgrounds, markets, hospitals, parks, roads and highways. The development plan proposals were to be executed by a local authority either by compulsory acquisition of land or by preparing and executing town planning schemes for different parts of the town, so that when all the proposals are carried out, there would emerge "a harmonious, well planned and properly developed town". The 1954 Act introduces the concept of development plan. Chapter−II deals with the subject. All the restrictions contained therein are said to be in the interest of 'proper planning of an area in the development plan'. With regard to the provisions dealing with town planning schemes, the Act suggests that the provisions which were there in the earlier Act were generally being followed. We have already noticed that the M.R.T.P. Act carried forward the concept of planning one level higher and introduced the concept of regional planning in addition to the development plans and the town planning schemes which were already formulated under the earlier law.

155. Some of the provisions in the M.R.T.P. Act do give an indication that the planning has to be made at the regional level and executed at the town planning level so that there is harmonious and planned use of the land all over the region and the jurisdictions of different planning authorities and also in different towns in respect of which town planning schemes are formulated. As to the concept of reservation of land for specific public purposes, we notice sections 14, 22 and 64. Each of these sections talks of reservation in respect of specific public purpose. The regional plan may provide for any of the matters specified in clauses (a) to (k) of section 14. The regional plan also may be implemented by stages and not necessarily at one shot. Section 14 imposes a restriction on development of land when a notice of preparation of a draft regional plan is published without the previous permission of the Municipal Commissioner and enjoins upon the Municipal Corporation that it shall not grant permission otherwise than in conformity of the provisions of the draft or the final regional plan. The requirement in section 22 is that a development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. Clauses (b) and (c) provide for proposals for designation of land for specific public purposes, Once the intention to prepare a draft plan has been declared by notification under section 23, the restrictions on the use of land in Chapter−IV come into force. Section 44 provides that, after the declaration of the intention to prepare a draft plan is notified in the concerned area, any person may make an application in writing to the Planning Authority for permission in the prescribed form. Section 45 deals with the jurisdiction of the Planning Authority and powers for granting or refusing such permission. We notice one difference here between section 45 and 18(2). While in the case of regional planning, Municipal Corporation or Municipal Council is totally prohibited from granting any permission for development contrary to the regional planning, there is a certain amount of change in the situation when the authority exercises powers under section 45 to grant permission for development. Mr. Tulzapurkar highlighted this difference and pointed out that this difference in the approach of legislature is indicative of the legislative intent that, while the provisions of regional

planning are absolutely binding, the provisions of development plan are not so, particularly when a town planning scheme is already in operation in the concerned area. We have several other sections to notice before we can appreciate the import of this contention.

156. Section 39 of the Act contemplates a situation of a development plan containing proposals which are in variation or modification of those in a town planning scheme which has already been sanctioned before the commencement of the Act. In such a situation, section 39 obligates the planning authority to alter such town planning scheme suitably under section 92 "to the extent necessary by the proposals made in the final development plan",

157. Then comes section 42 which provides that, when any draft sanctioned plan has come into operation, it shall be the duty of every planning authority to take steps to carry out the provisions of such plan or plans. We were pointed out one change in the law as contrasted to the situation which existed under the 1954 Act regarding the concept of deemed permission. Under the 1954 Act, section 12 deals with restrictions consequent to the notification of declaration of intention to prepare a development plan. Section 13 of the 1954 Act speaks of the manner in which the authority is required to give permission for development. Sub−section (2) of section 13 specifically provides that if the local authority does not communicate its decision to the applicant within three months from the date of such acknowledgment, commencement certificate shall be deemed to have been granted to the applicant. This provision has its parallel in section 45(5) of the M.R.T.P. Act. The M.R.T.P. Act as originally enacted did not have the two provisos to sub−section (5) of section 45. These provisos were added by Maharashtra Act No. 10 of 1994. The main body of section 45 provides for the same rule of deemed permission in case the authority does not grant or refuse it within a prescribed period. The two provisos added to sub−section (5) of section 45 are of great importance and their import has to be fully realized. The two provisos read as under :

"Provided that, the development proposal, for which the permission was applied for, is strictly in conformity with the requirements of all the relevant Development Control Regulations framed under this Act or bye laws or regulations framed in this behalf under any law for the time being in force and the same in no way violates either the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under this Act :

Provided further that, any development carried out in pursuance of such deemed permission which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorised development for the purposes of sections 52 to 57."

In our view, the import of the first proviso is that, even in a situation of an applicant being deemed to have been granted permission by reason of the failure of the authority to grant or refuse permission for development within the prescribed period, any development carried out must comply with the relevant Development Control Regulations framed in this behalf and should not in any way violate the provisions of any draft or final plan or proposals published by means of notice submitted for sanction under this Act. The second proviso declares that any such development carried out even pursuant to such deemed permission, which is in contravention of the provisions of the first proviso, shall be deemed to be unauthorised development for the purposes of sections 52 to 57. In our considered judgment, the net effect of these provisos is that, even in a situation of deemed permission, the development should not violate either the provisions of any draft or final plan or proposals therein. Even in a case of deemed permission, the development shall be subject to all restrictions in the draft, final or sanctioned development plan. In our view, the same intention is reflected by the words "subject to the provisions of this Act" used in the opening part of sub−section (1) of section 45.

158. Then comes section 46 which enjoins that the planning authority in considering an application for permission "shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under this Act." In our view, section 46 plainly enjoins upon the planning authority to be conscious of and act within the provisions of the development plan.

159. Section 51 empowers a planning authority to revoke or modify a permission expressly granted or deemed to be granted under the provisions of this Act. This means that even if express permission has been granted, or permission is deemed to be granted, it is open to the planning authority to revoke or modify the permission granted. What then is the consideration on which planning authority acts under section 51 if permission has already been granted or is deemed to be granted by virtue of sub-section (5) of section 45? In our view, section 51 is intended to take care of a situation where the plan overtakes the existing permission. Even if the planning authority has already granted sanction, the -planning authority is bound to take notice of the proposals in the draft, final or sanctioned plan and consider whether it is necessary to revoke the permission. With regard to deemed permission, subsection (5) ensures that no deemed permission would operate contrary to the provisions of the development plan. Section 41 contains detailed provisions with regard to what would happen if there is permission already granted, or deemed to be granted and not hit by the proviso, and the planning authority decides to modify or revoke the permission already granted.

160. Section 56 is another indicator of legislative intent. It provides that, even when authorised development or use of land is resorted to, if the planning authority thinks that it is expedient in the interest of proper planning of its areas, having regard to the development plan prepared that there should be a change or discontinuance of the authorised development or that the authorised development should be put to further conditions or the structures already put up on the land should be dismantled, then the planning authority is empowered to do so, subject, of course, to the right of appeal and the right to compensation as dealt with in the section. We are of the view that the Division Bench of A.A. Desai and S.S. Parkar, therefore, rightly observed that the opening words of section 59 "subject to the provisions of this Act" necessarily meant subject to the gamut of provisions of sections 1 to 58 of the Act. In fact, it would appear to us that, barring the solitary provision in section 39, there is no other provision in the Act dealing with the situation as to what happens when there is already an existing town planning scheme and a final development plan containing proposals in variation or modification of those contained in the existing town planning scheme is made. This section is also an indicator, in our view, since it unhesitatingly declares that it shall be the duty of the planning authority to alter the existing scheme suitably by resorting to section 92 "to the extent necessary by the proposals made in the final development plan,"

161. Thus, we see throughout the M.R.T.P. Act the intention that the development plan (in fact, in certain other states a development plan is called "Master-Plan', and perhaps, that terminology would have explained it better) has to be implemented via the power of acquisition of land granted under section 126 or by the formulation and implementation of a town planning scheme which also would have the same end result. We also cannot lose sight of section 125 of the Act which declares that any land required, reserved or designated in a Regional plan, Development plan or town planning scheme for a public purpose or purposes, including plans for any area of comprehensive development or for any new town, shall be deemed to be land needed for a public purpose within the meaning of the Land Acquisition Act, 1894.

162. Mr. Tulzapurkar strenuously urged that if we contrast the provisions of Chapter-IV to Chapter-V of the M.R.T.P. Act, the legislative intent to subject the provisions of the development plan to an existing sanctioned town planning scheme becomes evident. This argument faces two difficulties. One, under section

42, and the other, under section 6. When it was pointed out to Mr. Tulzapurkar that while granting development permission under section 45 the planning authority is enjoined by law to "have due regard" to the provisions of the draft, final or sanctioned plan, Mr. Tulzapurkar contended that the expression "have due regard" has been judicially construed and does not mean that the object to which due regard has to be paid is mandatory, but it is only a word of caution. Mr. Tulzapurkar cited the judgment of the Supreme Court in Southern Pharmaceuticals & Chemicals v. State of Kerala, which in turn follows the judgment of the

Privy Council in Ryots of Garabando v. Zamindar of Pariakimidi . The judgment of the Privy Council is of moment since its ratio was approved and followed by the Supreme Court in Southern Pharmaceuticals & Chemicals (supra). The Privy Council was concerned with a situation where the Board of Revenue had fixed the increase in rent under certain Revenue Laws. The proviso to section 30(1)(b) provided:

"Provided ..... that no enhancement under this clause shall raise rent by more than two annas in the rupee of the rent previously payable for the land."

The increased rent was much more than what was indicated in the proviso. There was also section 168 of the Madras Estates Land Act, 1908 which enjoined that in settling rents under the section the Collector shall presume, unless the contrary is proved, that the existing rent or rate of rent is fair and equitable and shall 'have regard' to the provisions of the Act for determining rates of rent payable by a ryot. Considering the terms of the Act which were present before them, their Lordships of the Privy Council said,

"In these circumstances their Lordships think it impossible to say that the duty to have regard inter alia to the prohibition contained in proviso (b) of cl. (1) of section 30 is a duty to keep rigidly within the limit there imposed for cases to which the section of its own force applies."

Then the judgment goes on to say :

"The expression "have regard to" or expressions very close to this, are scattered throughout this Act, but the exact force of which phrase must be considered in relation to its context and to its own subject matter. Any general interpretation of such a phrase is dangerous and unnecessary. but it is fairly clear as a matter of English that the view taken by the majority of the Collective Board is nearer to the ordinary meaning of the phrase "have regard to" when it appears in a statute than is that of the dissentient member."

The learned Judges also agreed with an earlier English case with regard to a similar provision in law. The thing that strikes us most in this judgment is that the Privy Council has been very cautious in indicating that the expression "have regard to" would necessarily have to be interpreted with reference to the context and collocation of the provisions of a statute.

163. In the judgment in Southern Pharmaceuticals & Chemicals (supra), on which Mr. Tulzapurkar placed heavy reliance, we find illustrations of this principle. The case arose under section 12−A of the Abkari (Amendment) Act, 1967 which amended the Kerala Abkari Act. The relevant provision prescribed that no preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self−generated during such process shall be manufactured in excess of the quantity specified by the Commissioner, provided that in specifying the quantity of a medicinal preparation, the Commissioner 'shall have due regard' to the total requirement of that preparation for consumption or use in the State. Dealing with this provision, and against the background of the Act, the Supreme Court had to consider the meaning of expression "shall have due regard to" as used in section 12−A of the Abkari (Amendment) Act, 1967. The Supreme Court then referred to Ryots of

Garabandho (supra) and took the view that in the scheme of the Kerala Abkari Act the expression "shall have regard to" meant that the Commissioner shall keep in mind the restrictions imposed by section 12−B and did not mean that the Commissioner was absolutely prohibited from doing anything to the contrary. We may at once point out that this was a case where the impugned provision had been challenged as hit by section 19(1)(g) of the Constitution and the Supreme Court had to carry a constitutional interpretative exercise all the while assuming the constitutional validity of the impugned provision of law.

164. The expression "have regard to" has been the subject matter of several other decisions of the Supreme Court. In Union of India v. Kamalabai, the Supreme Court was considering the

restrictions imposed on a mandate of Requisitioning and Acquisition of Immovable Property Act (30 of 1952). The Supreme Court said that Clause (b) of sub−section (3) of section 8 left the arbitrator no choice of assessing the value in terms of Clause (a) even if he was of opinion that the mode fixed thereunder afforded a just equivalent of the property to its owner, he had to make his assessment in terms of Clause (b). The expression "have regard to" in sub−clause (e) of sub−section (1) of section 8 therefore did not give the arbitrator any freedom of considering the two modes laid down in sub−section (3) and accepting the one which he thought fair. The Supreme Court held that the words of subsection (3) were mandatory and compelled the arbitrator to accept only the smaller figure arrived at after assessment on the two modes of valuation. In V.K. Verma v. Radhey Shyam, the Supreme Court was concerned with the construction of the expression "shall have regard to" the provisions of this Act as used in the Delhi Rent Control Act, 1958. The Supreme Court took the view that these words merely meant that where the provisions of old Act of 1952 and new Act were similar with slight modifications, those modifications should be applied. In I.T. Commr. v. G.B. and Co. (P.) Ltd., , a case under the Income Tax Act, 1922, while interpreting section 23−A of the Act which used the expression that the Income Tax Officer "shall have regard to" the losses incurred by the company or the smallness of the profits made, the Supreme Court pointed out that the duty cast on the Income Tax Officer was to apply the yardstick of a prudent businessman. The reasonableness or the unreasonableness of the amount distributed as dividends had to be judged by business considerations like the previous losses, the present profits, the availability of surplus money and the reasonable requirements of the future and similar others. An overall picture of the financial position of the business, had to be taken.

165. Mr. Tulzapurkar relied on the judgment of the Supreme Court in the case of Karam Singh v. Pratap Chand, and pointed out that the expression "shall have regard to" used in the Delhi Rent Control Act was the subject matter before the Supreme Court and the Supreme Court, by majority, had upheld the view of the Punjab High Court holding that the provisions of the Act would apply, and where the new Act has slightly modified or clarified the previous provisions, these modifications and clarifications should be applied. He also highlighted that this judgment was by a majority of two to one.

166. A discussion of these judgments indicates that the salutary rule enunciated in Ryots of Garabandho (supra) has been approved and followed by the Supreme Court and depending upon the scheme of the statute needing interpretation, varying shades of meaning have been given to the expression "have regard to", "shall have regard to" and "shall have due regard to" from the directory to the mandatory, and in between. Thus, it is not possible to accept the contention of Mr. Tulzapurkar that the expression "shall have regard for a development plan" used in section 46 of the M.R.T.P. Act was merely intended to generally draw the attention of the planning authority to the development plan. We are of the view that there is greater purpose behind it, particularly when we read it in conjunction with the provisos of sub−section (5) to section 45.

167. Chapter−V of the M.R.T.P. Act deals with the town planning schemes and

makes detailed provisions as to what the town planning schemes may contain, how the town planning schemes is to be prepared, including reservation and allotment of the land required under Clause (b) of sub-section (1) of section 59 and any of the matters specified in section 22 of the Act. Mr. Tulzapurkar contends that, by reason of section 86(3), after the town planning scheme is finally sanctioned, it shall have effect as if it were formulated in the Act. Mr. Tulzapurkar urges that this is indicative of the fact that the legislature intended to accord higher status to the town planning scheme. The absence of such a provision when dealing with the development plan is a clue to the legislative thinking in the submission of the learned Counsel. Mr. Tulzapurkar cited the judgment of the Supreme Court in State of Karnataka v. Ranganatha Ready, . The Supreme Court was here considering the provisions of section 6 of the Karnataka Contract Carriages (Acquisition) Act, 1976. After laying down the manner of determining of the amounts payable to the Contract Carriage, Clause (e) of section 6 of the Act provided that the arbitrator shall, after hearing the dispute, make an award determining the amount which appears to him just and reasonable and also specifying the person or persons to whom the amount shall be paid, and in making the award he 'shall have regard' to the circumstances of each case and the provisions of the Schedule so far as they are applicable. In paragraph 23 of the judgment, the Supreme Court referred to the observations of Romer, C. J., to several English judgments and also to its own judgment in Saraswati Industrial Syndicate Ltd. etc. v. Union of India, , where it was held. "The expression "having regard to" only obliges the Government to consider as relevant material to which it must have regard". In our view this discussion does not carry us forward at all. Undoubtedly, looked at from any point of view, the planning authority must have regard to the provisions of the development plan. But does it, in the context of the M.R,T.P. Act, mean that only token attention needs to be paid to the provisions of the development plan, they being ignored while granting development permission? For reasons already indicated viz., that the provisions of section 39 and the two provisos in sub-section (5) of section 45, we are inclined to take a contrary view. In our considered judgment, "shall have due regard" as used in the M.R.T.P. Act, when considered in the light of the scheme of the Act, suggests more than mere token service to the development plan. This is particularly so when we consider the concept of development plan in the development of town and cities.

168. Mr. Tulzapurkar then highlighted sub-section (3) of section 86 and raised an interesting contention. He contends that under sub-section (3) of section 86, after the date fixed in such notification, a town planning scheme shall have effect as if it were enacted in the Act. This provision confers higher status on the town planning scheme, according to the learned Counsel. In the submission of the learned Counsel, a town planning scheme becomes a part and parcel of the Act itself, while development plan continues to retain its character as subordinate legislation and, therefore, if at all there is a situation of conflict the provisions of the town planning scheme would prevail. In support of this contention Mr. Tulzapurkar cited the judgments of the Supreme Court in Chief Inspector of Mines v. K.C. Thapar, and State of Kerala v. K.M.C. Abdulla & Co.,

. In Chief Inspector of Mines v. K.C. Thapar,

the Supreme Court was considering the effect of

repeal of regulation of 1926 made under section 29 of the Mines Act, 1923 which was repealed and re-enacted with modifications as the Mines Act, 1952. The question posed for the consideration of the Supreme Court was whether subordinate legislation like Regulations or Rules framed under the statute which provided that they would have effect as if enacted in the Act, would outlive the Act itself. Section 24 of the General Clauses Act was pressed into service to urge that when any Central Act is repealed and re-enacted with or without modification, then unless it is otherwise expressly provided, any rule made or issued under the repealed Act shall, so far as it is not inconsistent with the

provisions reenacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted unless and until a contrary intention appears under the provisions so re-enacted. Section 31(4) of the 1923 Act contained a specific provision that the regulations made thereunder on publication shall have the same effect as if they were part of the Act. It was then contended that the regulations being part and parcel of the Act, would survive the Act itself. The Supreme Court answered the contention in paragraph 16 by pointing out that if the words of section 31(4) are construed to mean that the regulations became part of the Act to the extent that when the Act is repealed, the regulations also stand repealed, a conflict at once arises between section 31(4) and the provisions of section 24 of the General Clauses Act. The Supreme Court observed,

"However efficient the rule-making authority may be, it is impossible to avoid some hiatus between the coming into force of the re-enacted statute and the making of regulations. Often, the time log would be considerable. It is conceivable that any legislature, in providing that regulations made under its statute will have effect as if enacted in the Act, could have intended by those words to say that if ever the Act is repealed and reenacted, (as is more than likely to happen sooner or later), the regulations will have no existence for the purpose of the re-enacted statute, and thus the re-enacted statute, for some time at least, will be in many respects, a dead letter. The answer must be in the negative. Whatever the purpose be which induced the draftsmen to adopt this legislative form as regards the rules and regulations that they will have effect "as if enacted in the Act", it will be strange indeed if the result of the language used, be that by becoming part of the Act, they would stand repealed, when the Act is repealed. One can he certain that that could not have been the intention of the legislature. It is satisfactory that the words used to not produce that result."

In paragraph 14 the Supreme Court considered the arguments of Counsel for the petitioners based on the observations of the Lord Herschell, L.C., in Institute of Patent Agents v. Lockwood, 1894 A.C. 347. Lord Herschell had said :

"I own I feel very great difficulty in giving to this provisions that they 'shall have of the same effect as if they were contained in the Act' any other meaning than this, that you shall for all purposes of construction, or obligation or otherwise, treat them, as if they were in the Act,"

The Supreme Court rejected the argument of the Counsel that the phrase "for all purposes of construction or obligation or otherwise" used in Lord Herschell's judgment indicates that once a status of the Act was given to the subordinate legislation, it became part of the statute for all purposes. The Supreme Court pointed out that in the very same judgment Lord Herschell had said :

"No doubt, there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best as you may. If you cannot, you have to determine which is the leading provision and which is the subordinate provision, and which must give way to the other. That would be so with regard to enactments and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule is subordinate to it."

Finally, the Supreme Court expressed its opinion in paragraph 20, thus :

"The true position appears to be that the Rules and Regulations do not lose their character as Rules and Regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as

subordinate rule is not lost. Therefore, with regard to the effect of a repeat of the Act, they continue to be subject to the operation of section 24 of the General Clauses Act."

In our view, this judgment does not really lay down the proposition that the learned Counsel canvasses.

169. State of Kerala v. K.M.C. Abdulla & Co., is

another judgment pressed into service for the same proposition. The Advocate General for the State of Kerala contended that Rule 14−A was validly made in exercise of the powers under section 19 and that in any event the Rule having by sub−section (5) of section 19 the effect 'as if it is enacted in the Act', it was not liable to be declared invalid. The Supreme Court repelled the argument and observed :

"The rules made under section 19 and published in the Government Gazette have by the expression provision to have effect as if enacted in the Act; but thereby no additional sanctity attaches to the Rules. Power to frame rules is conferred by the Act upon the State Government and that power may be exercised the strict limits of the authority conferred. If in making a Rule, the State transcends its authority, the rule will be invalid, for statutory rules made in exercise of delegated authority are valid and binding only if made within the limits of authority conferred. Validity of a rule whether it is declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised."

Despite the provisions contained in sub−section (3) of section 86, in our view, the halo of sub−section (3) does not turn subordinate legislation into an Act of Legislature and it continues to be subordinate legislation for all purposes. If a development plan is subordinate legislation, so is a town planning scheme; reference to sub−section (3) of section 86 does not resolve the problem posed.

170. Mr. Tulzapurkar strongly relied upon the provision of "mutatis mutandis" in sub−section (6) of section 69 to get over the difficulties posed by the provisions of Chapter−IV. He contends that sub−section (6) clearly indicates that the provisions of Chapter IV would apply in so far as they are inconsistent with the provisions of Chapter−V.

171. We have already pointed out that the entire Chapter−V is intended to come into operation when a town planning scheme is to be brought into existence. This is consistent with the view we have expressed that the town planning scheme has to follow the lead given by the development plan. That is why in sub−section (2) of section 59 there is a provision for a modification being made in the development plan itself if the town planning scheme need to deviate from the proposals made in the development plan. We have also noticed that section 59 starts with the opening words, "subject to the provisions of this Act", which make clear the legislative intent. Mr. Tulzapurkar contended that sub−section (6) of section 69 gives an indication to the contrary. In the first place, section 69 itself starts by saying, "on or after the date on which a declaration of intention to make a scheme published in the official gazette and then proceeds to describe restrictions on use and development of land after declaration of intention to make a town planning scheme. In other words, this section is intended to operate when a town planning scheme is being formulated and the intention of making such a scheme has been notified. In the collocation of this section, sub−section (6) would, therefore, operate only at the last level. Mr. Tulzapurkar, however, would have us hold that sub−section (6) is an independent provision which runs like a golden thread throughout Chapter−V and applies its touch of Midas to all sections in Chapter−IV as a result of which the Court should read the expression "town planning scheme" for the expression "development plan" used throughout Chapter−IV. We confess that the novelty of

the argument itself made us sit up and take notice. However, after careful and critical evaluation, we are unable to accept the correctness of the contention.

172. Mr. Tulzapurkar relied upon the judgment in London Rubber Co. v. Durex Products Inc., to contend that sub-section (6) of section 69 must be read independently of its collocation in section

69. In this case Supreme Court was concerned with the interpretation to be given to section 10(2) of the Trade Marks Act, 1940. Sub-section (1) of section 10 provides that, save as otherwise provided in sub-section (2), no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or which so nearly resembles such trade mark as to be likely to deceive or cause confusion. Sub-section (2), however, carves out an exception and says that in case of honest concurrent user or of other special circumstances which, in the opinion of the Registrar, make it proper so to do, he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other in respect of the same goods or description of goods, subject to such conditions and limitations, if any, as the Registrar may think fit to impose. The Supreme Court held that:

"The mere fact that sub-section (1) is made subject to the provisions of subsection (2) cannot justify the narrowing of the scope of the language used by the Legislature in sub-section (2). The provisions of sub-section (2) of section 10 are by way of an exception to the prohibitory provisions of the Trade Marks Act. Those provisions are contained in section 8(a) and section 10(1). The condition for the applicability of sub-section (1) of section 10 is undoubtedly the existence of an identical or similar mark on the register. But it is not correct to say that it is only when this condition is satisfied that the ban upon registration imposed by sub-section (1) can be lifted under sub-section (2), further the provision in section 8 does not override the statutory effect of section 10(2) of honest concurrent use and an objection under section 8(a) may be disposed of if there is evidence that the trade mark has been honestly used without confusion resulting."

In our view, this judgment cannot advance the argument of the learned Counsel. It is well known that the law as to trade marks was envolved as a result of case law till it was codified in the Trade Marks Act both in England as well as in this country. During the process of such evolution, 'honest and concurrent user' was always recognised as a defence to an action to restrain a similarly appearing trade mark on the ground that it was likely to cause deception or confusion. In view of this well known exception, which was available in common law, the Supreme Court took the view that, in the collocation of sub-section (2) of section 10 of the Act, the import of the principle laid down by it, viz. that of a defence to the general rule of prohibition against similar trade marks, must be upheld. Such is not the situation, when we interpret M.R.T.P. Act. There is no such common law principle required to be considered while interpreting sub-section (6) of section 69 of the Act. In our view, sub-section (6) of section 69 does nothing more than to indicate that, once the intention to make a town planning scheme is notified, the restrictions in the section against use or development of law falling within the scheme come to surface and further that, while interpreting such restrictions, the provisions of Chapter-IV have to be read mutatis mutandis with regard to restrictions contemplated by section 69. After careful consideration, it is not possible to accept the contention of the learned Counsel that by reason of sub-section (6) of section 69 it would be possible to hold that, whenever there is a town planning scheme already in existence, while interpreting all restrictions on development and use of such lands, they must be considered only in the light of the restrictions, if any, under the town planning scheme by completely ignoring the similar provisions, if any, under the development plan, draft, final or sanctioned.

173. Mr. Tulzapurkar urged that if a person had a right to develop the property in a particular manner by virtue of the town planning scheme, such a right could not be said to be overridden by a subsequent reservation made in the development plan, unless such intention was clearly borne out by the Act. Here again, it is difficult to accept the contention. All that the town planning scheme does is to impose restrictions on the user of the land to the extent indicated in the town planning scheme. It confers no positive right to the developer. In a situation, where a town planning scheme has already been sanctioned and is in operation, the user of the land falling within the area of that town planning scheme would be subject to restrictions contained in the town planning scheme. If there is a subsequent development plan, the restrictions by way of reservation on the same plot of land would, in our view be an additional restriction on the development and the use of the land and cannot be treated as inconsistent with the provisions of the town planning scheme. We think that the entire argument about inconsistency between reservations under the town planning scheme and the development plan is wholly misconceived. At any rate, it has not been shown to us that there was any reservation under the town planning scheme No. I inconsistent with the reservation under the sanctioned development plan of 1987 affecting FP–110. It is true that, under the earlier existing town planning scheme which has been saved under the 1966 Act, FP–110 fell within the residential zone. A reference to the Town Planning Scheme Regulations indicates that this land was capable of being used for residential use and, if there was reservation for a public purpose, only for such public purpose. We cannot lose sight of the fact that this town planning scheme was formulated in 1937 when the 1954 and 1966 Acts dealing with development plans were not even conceived of. During the period when the Bombay Town Planning Act, 1915 as in operation, the said Act conceived of reservation for public purposes being prescribed only by the town planning scheme itself. This intention is clearly reflected in the regulations.

174. Mr. Tulzapurkar and Mr. Manohar tried to contend that, theoretically, there could be a situation where the town planning scheme may make conflicting provision with the development plan. Even assuming this to be theoretically possible, we need not go into this hypothetical issue, for no such issue arises before us. All that is demonstrated before us is that, while in the existing town planning scheme FP–110 was in the residential zone, the development plan which came subsequently reserved it for primary school. This, we do not treat as a situation of conflict at all, but a situation of additional restriction on the development of the land.

175. In our opinion, the view we are inclined to take of the provisions of the Act also derives support from section 51 itself. As we have already noticed, section 51 empowers the planning authority to revoke and modify the permission for development already given. In our view, this provision is intended to operate precisely in much the same situation, where there is already development permission granted in accordance with the existing town planning scheme and subsequent restriction arises on account of provisions contained in the development plan which have become enforceable under the Act. Section 51 empowers the planning authority to modify the permission already granted or even go to the extent of revoking it. Section 51 empowers restrictions on development even where construction of a building has already substantially progressed or where the development causes change of use. Sub–section (2) of section 51 is intended to take care of such a situation and empowers the owner of the land to claim compensation under the provisions of the Act. This sub–section need not, however, detain us. In the instant case, the situation is not one where building permission had been validly granted and was overtaken by the development plan restrictions. This is a case where the planning authority has granted development permission, under pressure of the State Government, by resorting to what we have already styled as a dubious and illegal process in the teeth of the reservation contained in the development plan. The contention of the learned Counsel, therefore, cannot be accepted.

176. Mr. Tulzapurkar and Mr. Manohar both referred to two judgments in Paresh Chandra v. State of Assam, and Ashok Service Centre v. State of Orissa, in order to emphasise the meaning of the expression "mutatis mutandis" when used in a statute. In our view, the principle laid down in these judgments does not affect the interpretation of sub−section (6) of section 69 in the view we have taken of its construction.

177. Another contention advanced by Mr. Tulzapurkar is that the 1967 scheme was itself varied in 1979 and that, at that point of time, despite presence of 1954 and 1966 Acts the provisions of the earlier town planning scheme were allowed to continue and this supports his arguments, that the town planning scheme was immune to the restrictions, if any, arising under the development plan. As a matter of fact, the variations made in the town planning scheme in 1979 did not pertain to reservations at all. They pertained to certain subsidiary issues. There was no change made in the town planning scheme 1979 pertaining to the reservations affecting FP−110. In any event, in the view which we take regarding the construction of the statute, the fact that the town plan scheme was varied in 1979 makes no difference to the situation. Even before it was varied in 1954 under the first development plan of 1966, and after its variation under the 1987 development plan, FP−110 was always subject to reservations formulated in the development plan.

178. Mr. Manohar, learned Counsel for the builder adopted the tine of arguments of Mr. Tulzapurkar but with a slight variation. He also contended that the expression mutatis mutandis used in sub−section (6) of section 69 would introduce a legal fiction and relied upon the judgment of the Supreme Court in Harish Tandon v. Addl. District Magistrate, and in State of Tamil Nadu v. M/s Arooran Sugars Ltd., . In both these judgments the Supreme

Court has reiterated the felicitous words of Lord Asquith as under:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

In our view, the statute does not at all say what the learned Counsel contends. Hence, there is no question allowing our imagination to boggle. We have answered the question on the basis of the construction of sub−section (6) of section 69 in the collocation in the statute leaving our imagination intact and unboggled at all times.

179. Mr. Manohar changed track and contended that there can be no situation of conflict between the provisions of a development plan and the town planning scheme which is in operation. This contention is undoubtedly correct and appeals to us. We also think that there cannot be any such conflict; there is none, at least in the present case.

180. Mr. Manohar contended that if a public authority had the power to grant an application under a particular provision of law validly, the fact that it chose another erroneous provision of law to do that which could have been legitimately done, does not distract from the validity of the action. The doctrine advanced by the submissions of the learned Counsel is supported by the judgment in P.R. Naidu v. Govt of A.P., , V.L. & Co. v. Benett Coleman & Co,

and Harish Tandon (supra). The rub is that we are not at all satisfied that the action taken by the planning authority was otherwise legal and justified. We are of the view that, even apart from the dubious route adopted of Development

Control Rule 13.5, the development permission could not have been granted in the manner in which it has been done. We say so in view of the fact that the sanctioned development plan contained a reservation which restricts the user of the land to a public purpose specified in the development plan viz., a primary school. The planning authority could have permitted the primary school to be constructed on FP–110 either by the owner himself or by any other charitable institution active in the field of education. Barring this, the planning authority had neither discretion, nor power to sanction development of a private building for any purpose other than the reserved public purpose. 181. Mr. Manohar drew our attention to section 73 of the Act and pointed out that except in matters arising out of Clauses (iv) to (xi) both inclusive, and Clauses (xiv), (xv) and (xvi) of section (3) of section 72, every decision of the Arbitrator shall be final and conclusive and binding on all parties including the planning authority. There is no difficulty in accepting this. But from this provision of law, we are unable to deduce the proposition that an existing town planning scheme is entirely immune from the operation of the rest of the provisions of the Act.

182. Mr. Tulzapurkar, then referred to the judgment of the learned Single Judge in B.C. Co–op. Hsg. Society v State of Mah., 1996(2) Mh.L.J, 550. This was a case where a contention was advanced before the learned Single Judge that whatever be the designation of reservation of the land under the provisions of the development plan, section 39 of the Act indicates that, without variation in the existing town planning scheme, a reservation for a public purpose could not introduced in the development plan. In our view this judgment lays down the law correctly, though it does not fully consider the contention advanced before us since such a contention was not advanced before the learned Single Judge. Reliance placed on Central Coalfields Ltd. v. State of M.P., , far from supporting the contention advocated by the learned Counsel for the tenants and the builder, in fact, supports the view which we are inclined to take, viz. that the restrictions on development by the development plan are supplementary to and do not supplant restrictions existing under the town planning scheme.

183. Reliance was placed on the judgement in Meherbai v. U.L.C. & R. Act, . There, a conflict between the existing Building Rules made by the Collector and the provisions of the development plan, in so far as they affected the Koregoan Park area in Pune, were brought to the fore. The contention advanced was that there was a conflict between the provisions of the Building Bye–Laws and the Regulations in the development plan. The Court was of the view that there was no such conflict as the Building Bye–Laws of the P.M.C. as they were applicable to areas other than those which were governed by the rules. The Court also rejected the extreme contention advanced that once a draft plan had been notified, section 46 necessitated the authority to look only at the draft plan and ignore the existing rules. This was a case where the building plans did not comply with Collector’s Rules which were to operate and hence the Court quashed the building plans and directed the parties to resubmit the plans for approval of the Corporation and also held that section 51 of the Act would take care of the situation with regard to work which had already commenced. In our view, this judgment does not touch the controversy sought to be raised presently. In the view, which we have taken, the town planning scheme must be read in conjunction with the additional restrictions imposed by the development plan. In fact, Mr. Tulzapurkar was fair enough to contend that, at least for some purposes, the Development Control Regulations introduced by the development plan must be held to operate even in a situation where a town planning scheme was already in existence. We are of the view that the reservations in the development plan have also to be taken into consideration before the planning authority can think of granting permission to development under section 45 of the Act.

184. Thus, we are unable to accept the contention advanced by the learned Counsel for the tenants and the builder that the building permission was validly granted and is otherwise sustainable in law. We are of the view that the building permission has been granted contrary to the provisions of the Act by

completely ignoring the reservation on FP−110 in the development plan of 1987.

185. Mr. Tulzapurkar urged that the provision of Rule 1.3 of the Development Control Rules itself make it clear that the Development Control Rules supersede all earlier Development Rules, Regulations and Bye−laws except regulation made under the prevailing town planning schemes until they are varied. Rule 1.3 of the Development Control Rules reads as under:

"These rules shall supersede all Development Control Rules and bye law framed and sanctioned under the Maharashtra Regional and Town Planning Act, 1966, The Bombay Provincial Municipal Corporation Act, 1949 except regulations in the Town Planning Schemes which shall prevail until the schemes are varied."

The learned Counsel contends that, as a result of the provisions of Rule 1.3, the Development Control Rules would not apply in an area where the Town Planning Scheme Regulations apply. Mr. Bobde, learned Counsel for the petitioner, rejoined that, if nothing in the Development Control Rules applied to the case of respondent No. 8, then probably the building details would contravene height and length restrictions contained in the Town Planning Scheme Regulations. To this, the reply of Mr. Tulzapurkar is that with regard to the nature of development, the Development Control Regulations will apply; but with regard to the user of the land, the town planning scheme would apply.

186. Before we examine the correctness of this contention, we have to take one more fact into consideration. Simultaneously, when the sanctioned development plan was brought into force, the Government of Maharashtra issued a directive to the Commissioner of the P.M.C. on January 6, 1987. By the said directive the P.M.C. was directed to implement the development plan in proper manner for the purpose of which certain guidelines were formulated and sent to it. The P.M.C. was requested to follow the guidelines. The letter also says that the Development Control Rules are an integral part of the development plan which is also sanctioned by the Government and was to come into force within the jurisdiction of the P.M.C. This letter goes on to say as under.

"However, since certain areas included in the Town Planning Schemes, which were sanctioned by the Government previously, have certain different rules which may differ from the rules now sanctioned. With a view to bring uniformity in the rules, Government hereby, gives directive under section 154 of the Act that these new sanctioned Development Control Rules will be made applicable with immediate effect to all the Town Planning Scheme areas within Municipal Corporation limits. The Pune Municipal Corporation is requested to take immediate action to suspend the Town Planning Schemes Rules following the required procedure stipulated under section 70 of the Maharashtra Regional and Town Planning Act, 1966, and suitably take up minor variation to all the sanctioned Town Planning Schemes under section 91 of the Act, and submit these Schemes to the Government for final sanction."

Annexure I to this letter contains the guidelines. The guidelines for implementation of the revised development plan of Pune. Paragraph 1.1 and 1.2, which are material for our purposes, read as under:

"1.1 In case of sites designated for Primary schools which are fully encumbered or in rented premises, the Pune Municipal Corporation may al−low the owner/Institutions etc. to develop the site as per notes 1 or 2 attached Sector wise booklet as the case may be,

1.2 In case of sites designated for Primary Schools, which are already under acquisition, Pune Municipal Corporation may decide after verifying the stage of acquisition and legal issues involved whether to continue the acquisition or to allow the development of sites as per note 1 or 2, if owner/s come forward."

Pursuant to these directions, a notification was issued in the Official Gazette on October 15, 1987 which refers to the final sanction to the town planning scheme which had already been made (in the instant case on August 15, 1979) and the directive issued under section 154 by the State Government. Finally, the notification said:

"Now, therefore, this notice is hereby given that any person desirous of raising objection and suggestions to the said variation should lodge in writing with the Secretary to Government Urban Development, Department, Mantralaya, Bombay 32 and copy thereof to the Commissioner, Pune Municipal Corporation within one month from the date of publication of this notice in Maharashtra Government Gazette.

A copy of Development Control Rules for such draft variation on this aforesaid schemes is available for inspection in the office of Pune Municipal Corporation during office hours on working days."

This notice was also published in local newspapers English as well as Marathi) on October 16, 1987, Rule 21 of the Town Planning Schemes Rules, 1974 provides that any planning authority making an application for variation under sub−section (1) of section 91 shall publish the draft variation plan in the manner required in Rule 22. Rule 22 requires that the notice should indicate that the draft variation is kept at the Head Office of the planning authority during office hours and also invite objections to such variation. Section 91 of the Act empowers the planning authority to alter a town planning scheme after the final scheme has come into force, if it considers that the scheme is defective on account of an error, irregularity or informality or that the scheme needs variation or modification of a minor nature by following the procedure in the said section. Section 92, however, provides that, notwithstanding anything contained in section 86, a town planning scheme may at any time be varied by a subsequent scheme made, published by means of notice and sanctioned in accordance with this Act.

187. The issue urged for our consideration is, whether by means of a notice dated October 15, 1987 the planning authority could have validly acted under section 91 so as to bring into effect variation in the town planning scheme?. Mr. Tulzapurkar contends that to the extent a reservation is changed, the change is not of a minor nature and, therefore, State Government could not have acted under section 91. He, therefore, contends that the policies notified by notice published in the gazette on October 15, 1987 cannot be deemed to have taken effect so as to vary the existing town planning scheme No. 1, with effect from August 15, 1987 or, if at all, the modifications only of a minor nature which would affect only the extent of user could be said to have come into force as a result of the said notification. In our view, this is not a proper way of looking at it. It is no doubt true that the notification refers to section 91. As far as the power of the planning authority is concerned, section 92 empowers the planning authority to vary an existing town planning scheme by a notice and sanction in accordance with the Act. We are inclined to read the notice notified in the official gazette on October 15, 1987 and published in the local newspapers as a notice in exercise of powers under section 92, notwithstanding the reference to section 91 in the notification. Once this is so done, then the proviso to section 92 prescribes that the date of notification shall be the declaration of intention to vary the scheme, for the purposes of sections 69, 70, 97, 98 and 100. Mr. Tulzapurkar contends that, even assuming that the notification can be considered to be a notification within the meaning of section 92, it never having been sanctioned, the restrictions contained on development of land even under the said notification must be deemed to have come to an end by virtue of sub−section (2) of section 61 since it was not sanctioned within a period of one year. In our view, this contention cannot be accepted. The provisions of section 61 are intended for the purpose of dealing with a situation where a draft scheme is sought to be notified. The provisions of section 92 are independent and intended to operate in a situation of variation

of an existing town planning scheme. It is true that, in both situations, upon the notification being declared, certain restrictions come into play. But thereby it cannot be postulated that the provisions of sub−section (2) of section 61 would also apply in a situation governed by section 92. Finally, it appears to us that even if the notification is treated as a declaration of intention to vary within the meaning of section 92, with effect from the date on which it was notified i.e. on October 15, 1987, the restriction on development of land contemplated by sections 69, 70, 97, 98 and 100 came into effect. Even if the provisions of section 69 were to apply on the date on which the application for building permission was made, or the date on which it was sanctioned, the Development Control Rules would be applicable to the situation and obviously the permission granted would be contrary to the provisions of the Development Control Rules.

188. There is another aspect of the matter highlighted by the petitioners, namely, that the original order dated November 6, 1995, refusing the development permission was at no time set aside. This also is an aspect of the matter to be borne in mind. The order made pursuant to the application/ representation dated November 20, 1995 at alt times directed shifting or deletion of the reservation on FP−110 and the said order must be held invalid for reasons which we have already adumbrated. Even if such representation were to be treated as an appeal under section 47, assuming it was entertainable, there was never an order setting aside the refusal to grant development permission or substituting it by another order.

189. Mr. Bobde, learned Counsel raised two further contentions. One, that the development permission granted is contrary to the provisions of Urban Land (Ceiling and Regulation) Act. He contends that the permission for retention of excess vacant land under the Urban Land (Ceiling and Regulation) Act, 1976 was applied for by the respondent No. 8 under section 22 of the said Act after demolishing the existing structure of the tenants which was granted on April 8, 1997. Section 22(2) mandates that redevelopment can only be "in accordance with Master Plan". The word "Master Plan" is defined in section 2(h) of the Act and would clearly apply to FP−110. Mr. Manohar and Mr. Tulzapurkar, both urged that we should not permit a new contention which was not raised by the petitioners in the petitions. Though Mr. Bobde contended that the petitioners were not even aware of the manner in which the Urban Land authorities had sanctioned the permission under section 22(2) for redevelopment and that this fact became known to the petitioners only when the detailed affidavit of the builder respondent No. 8 was placed on record, considering that permission to raise this contention would necessitate an opportunity to file fresh affidavits and delay the ongoing matter, we have refused permission to raise this contention here. The petitioners shall be at liberty to raise this contention in any other proceedings, if they so desire, and if they are entitled to.

190. For similar reasons, we have also declined permission to urge the contention that the building plan sanctioned by P.M.C. is contrary to the provisions with regard to dimensional restrictions contained in the town planning scheme itself. This is not a matter which can be examined by the Court in the absence of precise particulars which are totally absent in the present case. With regard to this contention, however, we decline to grant any leave to urge it in any other proceedings.

191. For the aforesaid reasons, we are of the view that the building permissions granted by the P.M.C. are not only affected by mala fides to the extent indicated earlier, but are also not sustainable independently on the provisions of law affecting the development permission. They would, therefore, have to be revoked.

Shafi Parkar, J.

192. I have heard an elaborate and 1 must say a very comprehensive judgment

delivered by my esteemed Brother, both on the points of facts and law, which arose in these petitions and I do not think there is any need to elaborate it further or that I can usefully add to it. Yet, with a view to put my imprimatur on it, not merely by subscribing my signature, which is open to me under the procedure followed, but by expressing my opinion, though peripherally, on the legal issue which was raised in these petitions and on which lengthy arguments were advanced by the Counsel on both sides.

193. I had the dual advantage of not only hearing the learned arguments advanced by a galaxy of Counsel who appeared in the matter, but also of listening to the erudite judgment dictated for the Bench by my learned brother, Justice Srikrishna. There is, in fact, no need to dwell upon the matrix of facts, which have been extensively dealt with in the main judgment, except with regard to the point which I am going to deal with hereafter.

194. Mr. Tulzapurkar appearing on behalf of the tenants/occupants, subsequently added as respondent Nos. 12 to 35 in Writ Petition No. 4433 of 1998 and respondent Nos. 9 to 32 in Writ Petition No. 4434 of 1998, contended that though the authorities have not complied with the procedure laid down in the Act for shifting the reservation and granting the owner permission for development of the plot in question i.e. Final Plot No. 110, the impugned action of issuance of the commencement certificate for the building is not illegal as it can be supported on the ground that the earlier TP Scheme framed for Pune Town in the year 1931 under the provisions of the then Act of 1915 was not varied till this date following the procedure which is prescribed by the present Act. The basis of contention of Mr. Tulzapurkar is that the plot in question was to be used for residential purpose under the Scheme of 1931 and the variation of the said Scheme which was made final in the year 1979 did not change the user of the said plot. According to him until the new Scheme is framed varying the earlier scheme and is sanctioned by the State Government, which is not the case here, the earlier Scheme shall be in operation. The main thrust of his argument is that the Development Plan hovers over the land and does not become effective or applicable to the land unless and until a Scheme is framed and is sanctioned under the Act in pursuance of the Development Plan and until this is done the earlier Scheme operates and, therefore, the commencement certificate granted for the purpose of development cannot be faulted. He relies on the provisions of two subsequent enactments i.e. section 90 of the Act 1954 and section 165 of the present Act i.e. the Act of 1966 which save the earlier Scheme which had become final and had not been varied. In order to support his contention he relied on and took us through the various provisions of the present Act and argued that the Development Plan is a creature of the Act and operates under the Act, whereas the Scheme, by virtue of sub−section (3) of section 86, becomes a part of the Act, and therefore, supersedes the Development Plan in case there is any inconsistency between the TP Scheme and the Development Plan. He also pointed out the absence of provision like section 18(2) for a Development Plan as in the case of Regional Plan, under which the permission can be granted for the development of the land unless it is in conformity with the provisions of the Draft or Final Regional Plan. He relied mainly on the provisions like sections 39, 59(2), 69, 73, 86(3), 91 and 92 and contended that the legislative intention was that till the scheme was varied finally in accordance with the Development Plan after following the procedure prescribed under the Act, the earlier final Scheme overrides the subsequent Development Plan. He also relied on the provision contained in sub−section (6) of section 69 of the Act to indicate the supremacy of the Scheme.

195. It is difficult to accept the arguments advanced by Mr. Tulzapurkar. As we were taken through the provisions after provisions of the three Enactments in the field and also the D.C. Rules and the T.P Schemes, we could never reconcile ourselves to the idea of there being possibility of any conflict between the Development Plan and the T.P. Scheme or that in case of any conflict between the two, the T.P. Scheme would prevail. On the contrary after the perusal of the various provisions of the three Enactments, D.C. Rules and the T.P. Scheme we

are reinforced in our view that the Act has given primacy to the Development Plan in the Scheme of things and there is no question of there being any conflict between the Development Plan and the T.P. Scheme. We are further convinced that should there be any conflict between the two the Development Plan must prevail over the T.P. Scheme.

196. The first Enactment in this respect is the Town Planning Act of 1915 which had introduced only the concept of Town Planning Scheme. After the Independence, when the earlier Enactment of 1915 was replaced by the Act of 1954, the concept of Development Plan was for the first time introduced in the Act. The third Enactment in this regard, that is the present Act of 1966, which came into force from January, 1967, introduced yet another concept i.e of Regional Planning. So far as the Development plan is concerned it regulates and is concerned with the planning for a township while the T.P. Scheme is framed in order to implement the Development Plan. The Regional Plan, however, goes beyond the boundaries of a township which was introduced for the first time in the present Act of 1966.

197. If we consider the scheme of these three enactments, and particularly latter two enactments, by which emphasis was laid on a Development Plan we would at once notice that section 3 of the Act of 1954 and section 21 of the present Act of 1966, mandated the Planning Authorities to carry out a survey, prepare an existing land–use–map and thereafter prepare a draft Development Plan for the areas within its jurisdiction during the prescribed period. Section 22 of the present Act corresponding to section 7 of the Act of 1954 lays down what should be the contents of the Development Plan. Perusal of Clauses (a), (b) and (c) of section 22 shows that the Development Plan can create zones like residential, industrial, commercial, agricultural and recreational and designate the land for public purposes such as schools, colleges etc. The primacy given to the Development Plan in the scheme of things is manifestly clear from Chapters III and IV of the present Act.

198. To begin with, section 39 mandates the planning authority to vary the earlier scheme suitable in case Final Development Plan contains proposals which are in variation or modification of those made in the existing Town Planning Scheme. Section 42 of the Act makes it obligatory on the Planning Authority to take such steps which are necessary to carry out the provisions of Development Plan. Section 43 carves out a restriction on development of land after declaration of intention to prepare a Development Plan for any area is published in the Official Gazette. Once any land is affected by the Development Plan the permission will have to be sought for the development of that land, not from the authorities ordinarily empowered to do so but from the Planning Authority which is empowered under section 45 to grant or refuse the permission for the development of the land subject to the provisions of the Act. Under section 46 the Planning Authority is bound to have regard not only to the provisions of any final but also draft Development Plan before granting permission for the development of the land for which the permission is sought. Section 51 empowers the Planning Authority even to revoke or modify the permission which was already granted, presumably validly granted under the Old Scheme. Section 59, which is the first section dealing with the Town Planning Scheme under Chapter V. enables the Planning Authority to prepare a Scheme for the purpose of implementing the proposals in the final Development Plan. This has to be done subject to the provisions of the Act which would certainly include the mandatory provisions to implement the Development Plan. Sub–section (2) of section 59 enables the Planning Authority to provide for suitable amendments to the Development Plan in case it is inconsistent with the draft Town Planning Scheme which is prepared under these provisions. This provision coupled with section 39 of the Act would mean that the Town Planning Scheme has to be framed in order to implement the Development Plan and the T.P. Scheme should be brought in line with the Development Plan and vice versa to rule out the possibility of inconsistency between the two. The Act makes it obligatory on the Authorities to implement Development Plan either by acquiring the land or by framing and implementing the

T.P. Scheme in accordance with the Plan. The object of mandatory provisions would be lost if they are to be acted upon by the authorities at their sweet will or whims. The implementation of the Plan cannot be made dependent on the compliance or otherwise of the provisions of the Development Plan by the authorities at their arbitrary discretion, and allow them to defeat the Development Plan when they are, in fact, under an obligation to implement it.

199. It is, therefore, not possible to accept the submission made by Mr. Tulzapurkar on the basis of certain decisions cited before us that the application for development can be granted merely after bearing in mind the provisions of the draft or final plan. I am afraid, that cannot be the intention of the Legislature when the authorities are mandated to have due regard to the provisions of any draft or final plan. If the phrase "due regard" in section 46 of the Act were to mean simply 'bearing in mind' the provisions of the plan without necessity of implementing them it would make the said section ineffective though couched in mandatory terms. The authorities cited by Mr. Tulzapurkar in this regard were not decided in the background of the provisions of the M.R.T.P. Act, 1966 and the said construction may be possible in the context of the provisions of the Enactments which were under consideration in those cases. For instance Mr. Tulzapurkar relied on the observations of the Supreme Court in the case of Southern Pharmaceuticals and Chemicals v. State of Kerala, to support this contention that the words "shall have due regard to the provisions of any draft or final plan" in section 46 should mean merely to "take into consideration" or "take into account". That was a case where the Supreme Court was considering the words "shall have due regard to the total requirement" in section 12−A of Abkari (Amendment) Act, 1967. The Supreme Court in that case relied on the decision of the Privy Council in the case of Ryots of Garabandho v. Zamindar of Parlakimedi, . The Privy

Council in the said case was considering the expression "have regard to "in Madras Estates Land Act of 1908. At page 180 of the report the Privy Council has observed thus:

"The expression "have regard to" or expressions very close to this, are scattered throughout this Act, but the exact force of each phrase must be considered in relation to its context and to its own subject matter. Any general intereretation of such a phrase is dangerous and unnecessary."

200. In the case of Karam Singh v. Pratap Chand, the Supreme Court was concerned with the expression "shall have regard to the provisions of this Act" occurring in Delhi Rent Control Act and Delhi and Ajmer Rent Control Act. In that case also the expression was interpreted by reference to the aforesaid Privy Counsil decision. Similarly reliance placed by the Counsel on the decision of the Supreme Court in the case of State of Karnataka v. Rangnath Reddy, would not be of any

assistance to him as there the Court was concerned with similar words in respect of Karnataka Contract Carriages (Acquisition) Act, 1976. Thus the words "having regard" or "due regard to" were interpreted by the Supreme Court in the context of those enactments and the said interpretation will not be applicable in the context of the MRTP Act as the said phrase must be considered, to use the words of the Privy Council in Ryots of Garabandho's case, "in relation to its context and to is own subject matter". i.e. M.R.T.P. Act in this case, which is altogether different. In my view, the scheme of the provisions of this Act does not warrant the interpretation" on the words "due regard" as canvassed by Mr. Tulzapurkar, which, in my view, would render the very Development Plan ineffective, otiose and idle. It is in fact difficult to imagine that the Legislature had intended to allow the object of the M.R.T.P. Act to be defeated by the inaction on the part of the authorities, either deliberate or otherwise.

201. Mr. Bobde appearing for the petitioner had, in this connection, brought to our notice the Statement of Objects and Reasons which was prepared when the

Bill for the Act of 1966 was in introduced in the State Legislature on 28th July, 1966. He also relied on certain Regulations made in the Town Planning Scheme Pune 1 (varied) and (Final) which I shall advert to presently. Paragraph 3 of the Statement of Objects and Reasons concerning Chapter III of the Act states as follows:

"Provision is made for the preparation and publication of an interim Development Plan which will serve as a guide to both the public and Planning Authority far the purpose of granting permission for the use and development of land pending preparation and publication of the draft development plan."

202. In paragraph 4 of the Statement of Objects and Reasons it is stated as follows:

"The Bill includes a separate Chapter for control of development and use of land included in Development Plans, which is an improvement on the provisions of the Bombay Town Planning Act, 1954, and seeks to make the control on use and development of land more effective."

It further states:

"A provision has been made making it obligatory on Appropriate Authority to acquire land which is earmarked in the plan for its purpose, or for the development of which, permission is refused or granted, subject to certain conditions, so that the land becomes incapable of beneficial use"

(Underlining supplied throughout).

The aforesaid Statement of Objects and Reasons makes it abundantly clear that the Development Plan has been given primacy in the scheme of the Act.

203. Reliance was also placed by Mr. Bobde on the Regulations about the provisions of Town Planning Scheme, Pune No. 1 (Varied) (Final). Clause (i) of the Regulation defines "Building plot" as follows:

" " Building plot" means a continuous portion of land held in single or joint ownership other that land used, allotted or reserved for any public or municipal purposes"

This would mean that a plot, though otherwise available for building, cannot be used except to fulfill the objective of the reservations whenever the plot is reserved.

204. In this connection it would also be useful to quote Regulation 5 which is as follows:

"5. The area included within the scheme is intended mainly for residential purposes and as such dwelling houses, tenement houses, chawls, lodging boarding houses together with out−houses, stables, garages necessary for the reasonable convenience of the main buildings shall only be erected and the use thereof as also any other already existing buildings restricted to residential only except that−

(i) Godowns, workshops, small factories would be erected and used for the specific purpose in the areas marked for this purpose and shown coloured in orange wash on Plan No. 5.

(ii) Shops, business premises and shopping and business user would be permitted in the areas marked for this purpose and shown coloured in blue wash on Plan No. 5.

(iii) Building of the nature of public buildings only shall be constructed,

on plots reserved, allotted or acquired for public purposes and no trade, manufacture or display of goods for sale shall be permitted."

(Underlining supplied).

Under the above Regulation even when the and is intended mainly for residential purposes, it cannot be utilised for dwelling houses if the same is reserved, allotted or acquired for public purposes, in which case it can be used for the construction of public Building only. Thus the Regulations on which reliance is placed by the learned Counsel for the tenants/occupants themselves make a provision for the reservation for public purpose and, therefore, although the area in question like Final Plot No. 110 is allocated for residential use, the same cannot be utilised for residential purposes when there is reservation in respect of the said plot for public purpose like primary school.

205 Similarly Appendix–M under Rule 14.2 of the D.C. Rules makes a provisions that a plot Jailing purely under residential zone shall be permitted to be used for the purpose of educational building including hostels for students. This makes it absolutely clear that building for primary school can be constructed as per the reservation in the Development Plan on Plot No. 110 which falls purely under residential zone as per the old sanctioned scheme.

The above provisions of the Town Planning Scheme thus cannot be said to be inconsistent with the Development Plan.

206 As pointed out earlier, under section 22 of the Act the land can be allocated for different purposes by creating different zones like residential, industrial etc. and within a particular zone the plot can be designated for the public purpose. Even section 64 of the Act laying down the contents of the draft Scheme makes provision for reservation to be made in the T.P. Scheme itself. Section 68 of the Act makes it obligatory on the Planning Authorities to submit the Scheme for sanction of the State Government. In this case it is not disputed that the Scheme had been published and submitted for the sanction of the State Government and was pending at that stage. Moreover, if any permission is sought for the development of a reserved land like the plot in question, the authorities are bound to consider under section 46 not only the final Development Plan but even the Draft Development Plan and, in my view, permission for the development, inconsistent with the reservation of the land in final or even in Draft Development Plan, cannot be granted by the authorities rendering the Development Plan and the mandatory provisions of the Act meaningless. Thus the contents of the T.P. Scheme can never be inconsistent with the Development Plan and defeat the object of this Act.

207 The reliance by Mr. Tulzapurkar on sub–section (3) of section 86 would not make the matter worse so far as the Development Plan is concerned. When sufficient primacy has been given in the foregoing provisions of the Act to a Development Plan there was, in fact, no need to raise the Development plan to the status of an Act as is done in the case of T.P. Scheme. The provisions with regard to the Town Planning Scheme commence with section 59 of the Act. Section 59 provides for the preparation of Town Planning Scheme which has to be made subject to the provisions of the Act which would include the earlier provisions contained in Chapters III and IV of the Act pertaining to the Development Plan. Sub–section (2) of section 59 enables the Planning Authority to make suitable amendments to the development Plan so as to bring it in line with the T.P. Scheme. Thus Planning Authority shall either vary suitably the T.P. Scheme under section 39 to bring it in accord with the variation in the Development Plan or amend the Development Plan suitably under section 59(2) to remove the inconsistency with the T.P. Scheme. In other words the Act does not permit any inconsistency to prevail between the Development Plan and the T.P. Scheme.

208. The Constitution Bench of the Supreme Court in paragraph 20 of the judgment in the case of Chief Inspector of Mines v. K.C. Thapar , which was

cited by Mr. Tulzapurkar

himself, holds unequivocally that the Rules and Regulations do not lose their character as such and continue to be rules subordinate to the Act, though for certain purposes they are to be treated as if contained in the Act. Moreover, in my view, the significance attached to a sanctioned town planning shceme by treating it as if it were enacted in the Act by virtue of section 86(3) is lost when the same is subject to variation at any time by a subsequent scheme as provided by section 92 of the Act.

209 Reliance by Mr. Tulzapurkar on the absence of the provision like subsection (2) of section 18 for Development Plan, as in the case of a regional plan which restricts the change of user or development of land except in conformity with the draft or final Regional Plan will also be of no assistance to support his contention. The Regional Planning was for the first time introduced by the Act of 1966 and except for sub−section (2) of section 18, there is no other provision in the Act attaching any importance to the Regional Planning whereas the Development Plan seems to be the basis of the planned development of a town, enforcement of which is made mandatory by several provisions in the Act to which reference is made earlier.

210. Similarly sub−section (6) of section 69 to which reference is made by Mr. Tulzapurkar cannot be of any assistance to hold that earlier T.P. Scheme unless varied shall supersede the subsequent Development Plan. The said provision does net lay down that the provisions of Chapter V. relating to Town Planning Scheme will prevail even though they are inconsistent with the provisions of Chapter IV dealing with the Development Plan.

211. The reliance by Mr. Tulzapurkar on the unreported decision of this Court in Writ Petition No. 3816 of 1982 decided on 15/16th July, 1983 by the Division Bench of this Court (Coram: Chandurkar and Pendse, JJ.) will be of no help to him either. The point which is argued in these petitions by Mr. Tulzapurkar was not at all taken up in the said writ petition nor the Court was called upon to answer the question as to which of the two would prevail in case of inconsistency between the Development Plan and the T.P. Scheme. When the challenge was made to the permission granted for the development of lodging and boarding house, Regulation 5 was cited to indicate that an area which comes under residential zone could be, under the Rules or the Regulations/Scheme framed under the Rules, utilised for the purpose of construction of a lodging and boarding house. Similarly the Division Bench of this Court in Writ Petition No. 8 of 1997 (Coram: Agarwal and Gundewar, JJ.) decided on 6th August, 1977 was not dealing with the question which is raised in this petition. In that case also the reliance was placed on Regulation 5 under which lodging or boarding house could be permitted to be constructed in a residential zone and, therefore, it was held that the permission was rightly granted for the construction of a hotel.

212. The only judgment on the point cited before us is the judgment of the Division Bench of this Court in Writ Petition No. 2087 of 1993 in Salisbury Park case Rusy Kapadia & others v. State of Maharashtra and others, decided on 4th September, 1997 to which I was a party. In that writ petition the precise question which is raised in this petition was considered and decided after reviewing the scheme of the Act. Incidentally in that case also reliance was placed on the earlier T.P. Scheme sanctioned for Pune City, as done in this case, and contended that said T.P. Scheme would prevail over the reservation in subsequent Development Plan. Since the said question did not precisely arise for consideration in Writ Petition No. 3816 of 1982 decided by the Bench of Justice Chandurkar and Justice Pendse, the judgment in Salisbury Park case, in my opinion, cannot be said to be per incuriam.

213. As stated earlier the concept of Development Plan was introduced since the year 1954 and none of the officials who had been dealing with or were

concerned with the implementation of the said Act or the present Act have read the provisions of the Act to mean that there could be scope for inconsistency between the Development Plan and the Town Planning Scheme and if there was one the T.P. Scheme would prevail. In fact when the impugned action was taken the services of the best of the experts could have been and must have been made available for the purpose of finding a way out. The entire machinery of the Government was available to find out the solution but no one in his wisdom ever suggested, and rightly so, that T.P. Scheme of 1931 was still alive and on that ground the impugned permission could have been given to the developers or the owners nor is it the case of the Pune Municipal Corporation or the State Government in these petitions. This is not to suggest that it had any impact on our thinking or guided us or moulded our decision in any way. On the contrary we welcomed all assistance in this regard to satisfy ourselves about the correct position in law. We, therefore, gave full latitude to Mr. Tulzapurkar and allowed him to argue this point fully, uninhibited by constraints of time and heard him at length in rejoinder also, even in the teeth of justifiably strong opposition from Mr. Bobde.

214. It may not be out of place here to refer to some of the earlier decisions of this Court and the Supreme Court of India in which, though, the point which is raised in this petition was not taken, it was observed, while dealing with the provisions of this Act, that the permission for development of land could not be granted in contravention of the Development Plan. Reference may be made in this regard to the decision of the Division Bench of this Court in the case of Digambar Sakharam Tambolkar v. Pune Municipal Corporation, in which, incidentally, Mr. Tulzapurkar himself appearing for the petitioners had challenged the revocation of the permission given validly under section 51 of the M.R.T.P. Act. That was a case which illustrates the provision contained in section 51 of the Act of 1966 under which permission validly granted also could be revoked by the Planning Authorities in case the same appeared to be inconsistent with the Development Plan prepared subsequently. Similarly, in the decision of the Constitution Bench of the Supreme Court of India in the case of R.L Gupte v. The Municipal Corporation of Greater Bombay, , the challenge was made

to the Constitutional validity of certain provisions of the 1954 Act which gave primacy to the Development Plan. While dealing with the Constitutional validity the observations of the Supreme Court in paragraphs 29 and 34 of the judgment make it explicitly clear that once a Development Plan was made for a town, the issue of the commencement certificate depended on the provisions of the Development Plan and the same could not be granted unless it was in consonance with the provisions of the Development Plan. It was observed in paragraph 34 of the judgment as follows:

"After a development plan was prepared, the question was a simple one as to whether the commencement certificate could be given without doing any violation to the development plan."

It was further observed.

"The Authority must therefore look into all material available to it including the tentative plans and the final development plan and then make its mind as to whether a commencement certificate should be granted or not."

It was then observed.

"If the provisions of the Act are borne in mind and the rules framed thereunder complied with, as appears to have been done in these cases, there was little or no scope for the local authority acting arbitrarily under section 13 of the Act."

In my opinion the Development Plan does attach to the land and comes into

operation as soon as it is made and not after the scheme is framed pursuant thereto and sanction is accorded by the Government, as argued by the Counsel for the tenants.

215. It is said that where there is a will there is a way. There was of course a strong will but no way out except to adopt the procedure laid down under section 37 of the Act which, being thorny, was feared to tread. But the will being too strong to be given up a new plan seems to have been conceived in 'Mantralaya' and a scheme was framed to implement the will through hazy path by resort to Rule 13.5 of the D.C. Rules, catching a straw from Kothrud precedent which itself was too fickle to carry the load of the new plan envisaged. The officials, who were consulted, had given their candid opinion initially in the matter, as if in chorus, that approval of Pune Municipal Corporation was necessary by resort to the mode prescribed under section 37 of the Act, probably not knowing then, who was who. Some went on record even saying emphatically that there was no question of return of the land to the owner. However, soon they started 'veering round' the new plan by playing the tune as per the tone set by the Minister of State in the meetings held in his chamber on 3rd February, 1996 and on subsequent dates, which were headed and chaired or to use the phraseology suggested by his Counsel Mr. Madkholkar "presided over", by him. From the mass of documents and official papers it is crystal clear that every attempt was made to shun the mode prescribed under section 37 of the Act for obtaining approval of the Pune Municipal Corporation, for obvious reasons. At first the suggestion had come from the developer himself that he was willing to give alternate premises, at a site as far away as 15 Kms. at Lohgaon for shifting the reservation. That alternate site happened to be in an agricultural zone and required, under the Rules, N.A. permission from the Pune Municipal Corporation. The concerned officials, however, approached the Pune Municipal Corporation for conversion of land into N.A, not only in respect of the alternate site, where the reservation was sought to be shifted, but for the entire land in the agricultural zone, obviously, so that Corporation would not know the purpose of all the exercise which was undertaken. When that move was defeated by the Corporation the other site was proposed by the Developer at Mandva and before even the authorities had resorted to Rule 13.5 or obtained any permission thereunder, the impugned Commencement Certificates were granted in respect of the disputed plot. The Counsel for the tenants, however, had in fairness candidly argued that if he succeeded to carry home the point which was raised by him, the commencement certificate in respect of both the buildings would be valid and conversely if he failed to satisfy the legality of the point or the contention raised by him, the construction of both the buildings would be rendered illegal and then consequences should follow.

216. For these additional reasons I hold that the impugned Commencement Certificates were illegally granted.

RELIEFS:

217. With regard to reliefs, Mr. Manohar urged that section 59 indicates the maximum relief that can be granted in such a case. He contends that, under the proviso to section 51, where the development permission is with regard to construction of a building, if the building is already substantially constructed, there cannot be a revocation of building permission. This may be so with regard to action to be taken by the planning authority. In the instant case, the building permission was granted contrary to the provisions of law. In any event, this is not an appeal against the order of the planning authority under section 51 where jurisdiction would be circumscribed by the section. The jurisdiction we are called upon to exercise is under Article 226 of the Constitution, the limits of which are only self−imposed by requirements of justice, equity and good conscience, as long as exercise thereof is not contrary to statutory provisions. What is required to be done in a situation like this is indicated in the judgment of the Supreme Court in Dr. Khajuria v. Delhi Development Authority 1995(5) S.C.C. 762. In paragraph 10 Supreme Court says;

"Before parting, we have an observation to make. The same is that a feeling is gathering around that where unauthorised constructions are demolished on the force of the order of courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This, however, seldom happens. Secondly, to take care of the injustice completely, the officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite."

Further, the judgment of the Supreme Court in Pratibha Co–op. Housing Society v. State of Maharshtra, is intended to

discourage rasing of unlawful constructions by builders in violation of the rules and thereafter pleading that the constructions are fait accomplis and should not be demolished. Observes the Supreme Court in paragraph 6.

".....raising unlawful constructions by the builders in violation of the rules and regulations of the Corporation was rampant in the city of Bombay and the Municipal Corporation with its limited sources was finding it difficult to curb such activities. We are also of the view that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings."

We too respectfully reiterate and follow the observations of the Supreme Court.

218. We are not inclined to agree with the plea of Mr. Manohar that, even if all else fails, the building need not be demolished as it would amount to a waste of national resources when this aspect of the matter was urged, he specifically called upon Mr. Venugopal to state whether the State was prepared to take over the building as it stands without compensation to the builder and use it for any public purpose. However, the learned Counsel, stated that he had no such instructions from the State. The argument of waste of national estates is met by the equally powerful argument of the petitioners that taking strict action in such cases would be proper and just and not taking action against dishonest activity would destroy the moral fibre of society, which is a national asset of greater value.

219. We are not inclined to accept the argument of Mr. Manohar that there is any principal of estoppel as laid down in Express Newspapers Pvt. Ltd. v. Union of India, which could make it

binding on the authorities to permit and tolerate the offending construction. In our view, the principle of estoppel cannot be applied in a situation like this where, as held, the rules have been flouted from beginning to end, action taken contrary to the Act, and for the sole object of enriching the builder for reason of proximity to the highest executive of the State.

220. Finally, Mr. Manohar urged that the delay and laches on the part of the petitioners should defeat relief. He pointed out that the petitioners, who claim

to be vigilant citizens, could have seen the building coining up right from November 1996. He contends that the petitions have been filed only in August, 1998 and, therefore, the petitioners allowed grass to grow under their feet. They cannot successfully appeal to the Court to bring about a drastic change in the situation by way of a demolition order. There are several hurdles in the way of accepting Mr. Manohar's contention. First, merely because a construction has come upon a plot in the area, a citizen cannot assume that the construction is illegal. Even if the petitioners were aware of the reservation for primary school affecting FP–110, the mere fact of noticing a construction thereupon would not have made them aware of the fact that the construction permission had been obtained in a manner contrary to law. Second, the petitioner in the Writ Petition No. 4434 of 1998, when he applied to the P.M.C. as a Corporator for information with regard to the construction coming up on FP–110, was met with a cryptic reply which claims that the information could not be made available under the relevant rules. In fact, we are not shown that there are any such rules. Third, it is not disputed by the builder that the petitioners are not residents of the same locality. In these circumstances, we are unable to accept the contention of delay and laches. In our view, acceding to such arguments in the peculiar facts and circumstances of the case would merely be a matter of condoning something that happened contrary to the law only on the ground that it was fait accomplis. As a matter of fact, even the first building viz, the building to house tenants was actually said to have commenced only in March, 1997.

221. Hence, for all the above reasons, we are of the view that the building must come down. The P.M.C. and the Commissioner of the P.M.C. must be directed to cancel the two building permissions dated 28–11–1996 and 20–12–1997. Respondent authorities must be directed to call upon respondent Nos. 7& 8 to restore the land to the position in which it stood prior to the date of the building permission, within a specified period failing which the respondent authorities should themselves be directed to take action for doing so and recover the costs from respondent Nos. 7 & 8.

222. At this stage, Mr. Desai, learned Advocate for the proposed intervenors in Civil Application No. 482 of 1999 sought permission to address us. Though we had not granted, and do not propose to grant, the application for intervention, we did given him a hearing on the question of relief since it was the' only issue he desired to address us on.

223. The contention of Mr. Desai is that it matters not how the building has come into existence. The bank had scrutinised all documents including the permissions by the several authorities such as Urban Land Ceiling Authority and the P.M.C. for carrying out the construction and, in their opinion, they were satisfied that the developer had good title to the property and that agreements between the developer and the tenants made it feasible for the developer to build a structure for housing the tenants and thereafter built a ten storied building as proposed. Considering all these factors, Mr. Desai submits that the bank took the view that the transaction was a perfectly legitimate transaction and advanced a large sum of Rs. 1,50,00,000/– against security of two flats, i.e. Flat Nos. 402 and 403, in the proposed ten storeyed building. He, therefore, contends that the Court should not direct demolition of that building. Apart from wastage of building material, it would also extinguish the security of the bank which might put the loan itself into jeopardy. This would have a prejudicial effect to the public interest in the submission of the learned Advocate.

224. We have considered the arguments of Mr. Desai carefully. It is not as if the bank was not aware of the reservation on the plot in the development plan. In fact, the application for loan itself in terms says in para 1 l(E)(b) that the bank had apprised itself of the reservation affecting the plot under the development plan. If this be so, we cannot accept the contention of the bank that it was not aware of any illegality on the part of the developer. We may

only say that the bank would have been better advised if it had taken into consideration that, in the teeth of a reservation affecting the concerned plot, the P.M.C. could not have granted commencement certificate. Not having considered the matter in depth, the bank fell into an error of judgment which would cost the bank the loss of the security created for the loan advanced by it to the developer.

225. Turning to the issue of public interest, in the first place, the debt owed by the developer to the bank is not going to be extinguished by the order of demolition of the illegally constructed building. At the highest, it might extinguish the banks security with regard to two flats in the buildings. Assuming that this does affect public interest to some extent, since the bank had advanced money of its constituents and share holders, in our view, this would be a situation of two conflicting public interests which would have to be harmonized. In this view of the matter, we are not inclined to accept the prayer of the learned Advocate.

226. Another factor which persuades us to reject the contention of Mr. Desai is that, right from March 1998 the newspapers had carried out sustained propaganda with regard to the illegality of the whole transaction. All kinds of allegations were made against the sanction granted, right from 1998. The newspaper cuttings are on record. It is not conceivable that the bank had innocently advanced money to the developer in spite of the serious allegations made in the newspapers. It is not possible for us to believe that a responsible and vigilant bank would have continued to advance money in the face of such serious allegations. Secondly, the mortgage itself has been executed on August 13, 1998 though the first Writ Petition No. 4433 of 1998 was filed on August 12, 1998. The mortgage itself appears to have been lodged for registration on August 19, 1998. The notice of moving of the writ petition appears to have been served on respondent No. 8 on August 18, 1998. In these circumstances, we are not in a position to accept the submission of Mr. Desai that no order for demolition of the building be passed.

227. Hence, we make the following order :

(a) The Pune Municipal Corporation and its Municipal Commissioner (respondent Nos. 2 and 11 respectively in Writ Petition No. 4433 of 1998) are directed to cancel Commencement Certificates dated November 28, 1996, May 3, 1997 and July 3, 1998 and Occupation Certificate (Para I) dated December 20, 1997 issued to respondent Nos. 7 and 8 in Writ Petition No. 4433 of 1998).

(b) The Pune Municipal Corporation and its Municipal Commissioner are directed to call upon respondent Nos. 7 and 8 in Writ Petition No. 4433 of 1998 to restore the FP−110, Erandavana, Pune, to the position it was prior to the date of the earliest of the above Commencement Certificates within a specified time, failing which the said authorities are directed to take necessary action by demolishing the construction upon FP−110, Erandavana, Pune, and restore the said plot to the status quo ante prior to the earliest of the aforesaid Commencement Certificates and recover the costs of such action from respondent Nos. 7 and 8 in Writ Petition No. 4433 of 1998.

(c) The Pune Municipal Corporation is directed to move an application before this Court for restoration of its First Appeal (Stamp) No. 18615 of 1994 before this Court.

(d) The prayer of the petitioner in Writ Petition No. 4434 of 1998 that only a direction for revival of First Appeal (Stamp) No. 18615 of 1994 be made without demolishing the existing structure is rejected.

(e) As far as prayer for directing prosecution against respondent Nos. 5, 6 and 10 is concerned, after considering the facts and circumstances of the case we are not inclined to grant this relief. Nonetheless, we direct the first

respondent to make appropriate investigations through an impartial agency and, if satisfied that any criminal offences have been committed by the aforesaid respondents in the discharge of their duties, to take such action as is warranted in law.

(f) Petitioners in the first petition are entitled to a sum of Rs. 10,000/– each from respondent Nos. 1, 2, 5, 6, 8 and 10. We are not directing costs to be paid by the other respondents.

228. Rules are accordingly made absolute with costs as directed aforesaid.

229. On the application of Mr. Manohar and Mr. Tulzapurkar, operative part of our order which would have the effect of demolishing the two buildings in question shall stand stayed upto June 30, 1999, considering that there is an intervening summer vacation. This stay shall, however, be subject to the following conditions :

(i) Respondent No. 8 and respondent Nos. 12 to 35 in Writ Petition No. 4433 of 1998 shall not create any third party interest in the property concerned. Respondent No. 8 has already placed on record an affidavit indicating the names of all the tenants and the flat purchasers.

(ii) Respondent No. 8 shall not carry out only further construction work of any nature until further orders.

(iii) No application shall be granted by the authority in respect of the building known as "Sun Dew" apartments until further orders of this Court or the Supreme Court.

230. Oral application made by Mr. Manohar and Mr. Tulzapurkar for leave under Article 133(i)(a) and (b) of the Constitution of India is refused.

231. Issuance of certified copy expedited.