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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 606 OF 2022
WITH
INTERIM APPLICATION (L) NO. 19148 OF 2023
IN
WRIT PETITION NO. 606 OF 2022
WITH
INTERIM APPLICATION (L) NO. 19146 OF 2023
IN
WRIT PETITION NO. 606 OF 2022

1. **Kamla Industrial Park Ltd,**
A company incorporated under the provisions of the Companies Act, 2013, having its address at registered address at Flat No: Unit No. 227, Floor No.2, Gundecha Industrial Estate, Akurli Road, Kandivali (E), Mumbai 400 001.

2. **Metalica Industries Ltd**
Plot No. 349-50-51-52, Government Industrial Estate, Opp Akhil Hotel, Charkop, Kandivali, Mumbai 400 067.

...Petitioners

~ VERSUS ~

1. **Municipal Corporation of Greater Mumbai,**
   5th Floor, Annex Building, Municipal Head Office, Mahapalika Marg, Dhobi Talao, Fort, Mumbai 400 001.

2. **The State of Maharashtra,**
   Mantralaya, Madam Cama Road, Hutatma Rajguru Square, Nariman Point, Mumbai 400 032.

3. **The Municipal Commissioner of Mumbai,**
   5th Floor, Annex Building, Municipal Head Office, Mahapalika Marg, Dhobi Talao, Fort, Mumbai 400 001.

4. **The Chief Engineer (Development Plan), Department, Government of Maharashtra**
   6th floor Terrace, Annex Building, Municipal Head Office, Mahapalika Marg, Dhobi Talao, Fort, Mumbai 400 001.

5. **The Secretary, Urban Development Department, Government of Maharashtra**
   Room No. 423 (Main), Mumbai 400 032, And 4th floor, Bhanushankar Yagnik Road, beside Escalator, Mantralaya, Churchgate, Mumbai 400 020.

...Respondents

APPEARANCES

FOR THE PETITIONER	**Mr Viraag Tulzapurkar, Senior Advocate,** *with Amir Arsiwala & FC Pardiwalla, i/b Amir Arsiwala.*
FOR RESPONDENTS NOS. 1, 3 & 4-MCGM	**Mr GS Godbole, Senior Advocate,** *with Shivraj Patne, Aditya Joshi & Pooja Yadav, i/b Sunil Sonawane.*
FOR RESPONDENTS NOS 2 & 5-STATE	**Mr Abhay L Patki, Addl GP.**
PRESENT IN PERSON	**Mr S Doke,** *Assistant Engineer (Building Proposal) and* **Mr R Pandit,** *Sub-Engineer (Building Proposal).*

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

DATED : 21st September 2023

ORAL JUDGMENT (*Per GS Patel J*):-

1. Rule.

2. Affidavits have been filed. Hence Rule is made returnable forthwith. By consent, the Petition is taken up for hearing and final disposal.

3. We have heard Mr Tulzapurkar for the Petitioners and Mr Godbole for the Municipal Corporation of Greater Mumbai ("**MCGM**") at considerable length. With their assistance we have considered the material on record including the authorities cited and the notes of arguments on behalf of the MCGM.

4. On a large tract of land spanning several CTS numbers at Kandivali (West), there now stands an extremely sizable commercial construction. The land was bought by the 2nd Petitioner, Metallica Industries Limited ("**Metallica**") many years ago, around 1976. Metallica was then an enterprise of one of the most notorious and errant developers and builders of this city, one Jitendra Jain and his associates and family. He was the moving spirit or guiding light behind the Kamla Group of real estate enterprises. Jain is now, and for a considerable period of time has been, incarcerated. Many criminal complaints and FIRs are filed against him including by the Economic Offences Wing. These offences relate to various real estate projects across the city. The present construction is just one of them.

5. At that time, a private limited company, Metallica acquired this property by a lease. It covers CTS Nos. 349, 349/1, 350, 350/1, 351, 351/1, 352 and 352/1 of village Kandivali. Twelve years went by and on 7th May 2008 Metallica submitted plans to the MCGM in

regard to a real estate project comprising industrial or commercial galas on this land. An Intimation of Disapproval ("**IOD**"), the typically negatively worded sanction, came to be issued by the MCGM to Metallica on 1st July 2008. A Commencement Certificate ("**CC**") followed on 21st October 2009 from the Executive Engineer (Building Proposals). This was extended on 6th June 2012 after some amended plans were approved for a ground plus one (service industrial unit) and second (part) to fourth floor (part) podium and third to fifth (part) service industrial units.

6. Between 2010 and 2011 Metallica sold industrial galas in the project to as many as 374 buyers.

7. We pause in the chronological narrative and take a step back to assess what is really being presented to us. This Petition at the instance of these industrial gala purchasers is really a salvage operation. It seeks to rescue within the framework of the law the galas that these persons purchased from Metallica. What the 1st Petitioner now seeks, and we will come to the history of how Metallica is joined as the 2nd Petitioner, is that the MCGM's insistence on payment of a 'penalty' for regularization or for regularizing illegalities committed by the Jains in the construction should be struck down or, at any rate, the gala purchasers should not have to pay this penalty.

8. During arguments, although Mr Godbole for the MCGM has strived to delicately skirt this aspect of the matter, one element presents itself to us very starkly. This construction was not and

could not have been done clandestinely or secretively. It was done in broad daylight. As the planning authority, the MCGM and its officers could not have been unaware of the many so-called irregularities by Jain and others involved in Metallica. At some point in the hearing, we felt compelled to ask Mr Godbole what it was that the MCGM thought fit to do while all this work was going on, as it were, right under the municipal nose. The answer from Mr Godbole was that the MCGM had issued a stop-work notice. That is all.

9. This presents to us another instance of a widespread and recurring problem in this city. Large scale irregularities and illegalities continue. The MCGM seems to believe that other than issue a stop-work notice it can do nothing. That is not the frame of the law at all. But we are equally mindful that for other and significantly more trivial changes done by individuals, the MCGM has no hesitation in employing and deploying the full panoply of all its very many and quite considerable powers and sends in demolition squads often accompanied by police personnel. The offending structure may be just a rooftop shed or a small covering but an entire squadron is required for this. Yet, when a mammoth construction of this kind goes on in admitted violation of sanctioned plans, we are asked to believe that a stop-work notice is the limit of municipal powers. Indeed, it seems to us that these stop-work notices are often devices of convenience so that the MCGM can say that it "took action". These observations are necessary because it is precisely in regard to these irregularities — those that the MGGM knew of and did nothing to prevent — that it now seeks to impose a penalty on not the original developer, not the promoter, but the third-party purchasers who have come together to form the 1st

Petitioner. We may have our own reservations about whether regularization for a fee should, as a matter of policy, ever be permitted. But this case presents a completely different perspective. The construction exists in the form that it does today not just because of what Metallica and Jain did *but also what the MCGM allowed them to do without effective steps to stop that work or to have it removed even as it was being done*. In other words, the MCGM now seeks to recover a penalty because it simply did not do its job. This is not just a question of application of municipal law or of this or that provision. It resolves itself also into a question of equity and whether the correct balance to be struck would ever permit a court of discretionary equity to allow the imposition of such a penalty.

10. Between January and September 2013 Metallica put up three additional upper floors, reaching the eighth floor. This was within the then permissible Floor Space Index ("**FSI**"), but was beyond the CC. It is at this stage the MCGM issued a stop-work notice under Section 354A of the Mumbai Municipal Corporation Act, 1888 ("**MCGM Act**"). It is also at this time, 10 years ago now, that Metallica's promoters (Jain *et al*) were found to have engaged in criminal activities. They were arrested in regard to other developments and in other cases.

11. MCGM's stop-work notice was of 7th September 2013. Metallica's architect at that time, one Khanolkar, replied on 13th September 2013 saying that an application for regularization was before the appropriate authority. Mr Khanolkar said that his clients, viz., the Jains, were willing to pay the penalty. The notice from the

MCGM was under Section 44 and Section 53(2) of the Maharashtra Regional Town Planning Act, 1966 ("**MRTP Act**").

12. Two years went by. The Jains were in jail. The construction was where it was. The MCGM was doing nothing. On 7th February 2015, Mr Khanolkar wrote again to the MCGM asking for regularization of the unauthorized construction.

13. Another three years passed. By now Metallica was within the embrace of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). A Corporate Insolvency Resolution Process ("**CIRP**") came to be initiated following a Petition filed by the State Bank of India. That Petition was admitted on 13th April 2018. Following the normal process of the CIRP, an Interim Resolution Professional ("**IRP**") stood appointed. He issued a public announcement to the creditors of Metallica. Then the Resolution Professional ("**RP**") published an expression of interest inviting bids or offers from those interested.

14. Interestingly, on 27th August 2018, the RP informed the MCGM of Metallica's admission to CIRP and asked the MCGM to submit its claim, if it had one. We are not troubling with any argument that MCGM was unaware of the CIRP process. That is indeed not how the arguments on penalty have proceeded before us.

15. Between 2019 to 2020, running in parallel to this particular narrative, but not applicable only to this case, the State Government in its Urban Development Department issued certain directives under Section 154(1) of the MRTP Act. The State Government, in

its wisdom and as part of furthering its policy to boost the construction and real estate industry perceived to be in need of financial succour, directed a reduction in premia payable for various permissions such as compensatory area, additional FSI, etc. These benefits were initially for a period of two years until 19th August 2021. We are asked to believe that the lockdown and pandemic had so adversely affected the construction industry that such a fillip was found necessary. We reserve further comment. These and similar benefits were extended until 31st December 2021. Then there was a Circular of 22nd February 2021 and by this, the MCGM said that the benefit of the 50% concession would be available only on amounts actually deposited in 2021, i.e., between 14th January 2021 and 31st December 2021. What was demanded was that the concessional premium be paid in full, i.e., part payments were not being accepted towards eligibility for the 50% concession. The time to deposit was periodically extended, first to 15th January 2022 and then finally to 31st January 2022.

16. Back in the National Company Law Tribunal ("**NCLT**"), the gala purchasers had come together and formed the 1st Petitioner, Kamla Industrial Park Limited ("**KIPL**"). KIPL submitted a resolution plan. This was to take over and "revive" Metallica, the 2nd Petitioner.

17. The 2nd Petitioner was a single-project, single-asset enterprise. The construction at Kandivali was its only activity and its only asset. KIPL's resolution plan was, therefore, nothing but a legitimate effort within the framework of the IBC to take over that

asset, i.e., for the gala owners to come together as an association in corporate form, to acquire that which they had paid the Jains for. Mr Tulzapurkar, learned Senior Advocate for the Petitioner, says that this resolution plan made history in its own way. Never before had aggrieved purchasers or allottees taken this route of forming their own company and attempting to take over the solitary asset of the developer. KIPL was the resolution applicant, but the name masks, Mr Tulzapurkar says, the true identity, which is of the 374 gala purchasers. No such resolution plan had ever come before the authorities before. It may well serve as a model or template for future actions. In itself this is a distinguishing factor, argues Mr Tulzapurkar, for the resolution plan by KIPL not only tests the effectiveness and limits of the IBC, but in the context of failed or abandoned real estate projects, possibly pushes the envelope in the context of what can be done if one regards the construction as what is known in the financial sector a 'stressed asset'.

18. KIPL's resolution plan was approved. This resulted in a complete change in the management of Metallica, the 2nd Petitioner.

19. A significant part of Mr Tulzapurkar's presentation deals with aspects of the resolution plan and their consequences. We will return to this aspect of the matter a little later because it requires us to look at the statute and certain pronouncements of the Supreme Court in this regard.

20. This is when the narrative becomes truly interesting. The NCLT's approval of KIPL's resolution plan under Section 31 of the IBC is of 16th October 2019. On 19th February 2020, now that it had the asset in question, Metallica (now held by KIPL) submitted an application under Sections 44 and 69 of the MRTP Act read with Sections 45, 58 and Section 337 of the MCGM Act. It sought permissions regarding the commercial building. There was an application for regularization in June 2020. On 8th October 2020, an officer of the State Government wrote to the Law Officer of the November raising a query or a doubt about the applicability of Section 32A of the IBC to the real estate project in light of the illegal constructions by the Jains. It seems that the response from the MCGM's Law Officer on 19th November 2020 was that Section 32A of the IBC was squarely applicable. The Law Officer said that the old Metallica's liability, before the CIRP, to the MCGM was extinguished and therefore Metallica under its new management could legitimately and lawfully apply for completion of the building in accordance with law. We say this is interesting because Mr Godbole's instructions now are diametrically opposite; his effort has been to put a great deal of distance between his submissions today and the opinion of the Law Officer at that time.

21. On 12th May 2021, the MCGM issued a circular that purported to formulate a method for calculating what it called a 'regularization penalty'. This phraseology is most interesting. It seems to smash together two contrary concepts, but we will deal with this in detail a little later. This Circular is challenged in the present Petition. On 23rd June 2021, the MCGM issued a notice under Section 53 of the MRTP Act now requiring the demolition of

certain parts of the project and demanding compliance with plans approved 10 years earlier on 19th March 2011 or asking Metallica (under the new management) to apply under Section 44 of the MRTP Act for retention of the work. Why the MCGM did not wake up to this possible course of action earlier when the Jains were doing this construction is never explained.

22. On realizing that it would have to now conform to every aspect of municipal building law and regulations, KIPL/Metallica understood that they would need to purchase additional FSI in the form of transferable development rights. TDR are amongst the most expensive tradeable commodities in this city. The Petitioners bought additional TDR for about Rs 12 crores.

23. On 5th July 2021, the Petitioners replied to the MCGM's Section 53 notice. They requested that premium be accepted towards regularization and that the notice be withdrawn. On 18th August 2021 and 30th December 2021 came the demand notes that are impugned in this Petition. They were issued by the MCGM. The first of these of 18th August 2021 at Exhibit "E" demands an amount of Rs 48,37,24,109/- excluding penalty. The second of 30th December 2021 at Exhibit "H" at page 91 demands an amount of Rs 35,75,58,025/- excluding penalty.

24. In the first demand note there was a sum of Rs 21,68,97,700/- as a 'regularization penalty'. This is revised in the second demand note to Rs 21,19,11,300/-. We will round this off as a regularization penalty demand of roughly Rs 21 crores.

25. It might be appropriate at this stage itself to summarize as shortly as possible Mr Tulzapurkar's case on this regularization penalty demand. It is that this is in the nature of a fine or a penalty that occurs and arises only due to the various acts of omission and commission of the Jain Group of Promoters at the time when they controlled Metallica. It is attributable to the previous management. Any such claim or demand in law, Mr Tulzapurkar submits, stands extinguished as a result of the IBC process, and these are the words of the Supreme Court in interpreting the relevant sections. There is no possibility, in his submission of this kind of a levy of a penalty being imposed post the CIRP process on the new management. He points out that the CIRP process was known to the MCGM. The previous architect Khanolkar had a regularization proposal that was still pending. The MCGM did not submit a claim for the regularization penalty. It cannot make that claim now.

26. While we are here, we may as well note Mr Godbole's short answer (although he also has a long one) which is to say that the penalty attaches to the application for regularization irrespective of who put up the construction. It is a demand that relates to an application. If the Petitioners have applied for regularization, then the MCGM is entitled to raise that regularization penalty demand. If the regularization application goes, then there is no question of a regularization penalty. What that means, according to Mr Godbole, is that the construction must then be brought into conformity with the sanctioned plans. There is no possibility at all, he submits, that the irregular or unlawful construction as it now stands can continue without payment of the regularization penalty. This is an avenue unknown to law. There are only two options, in his submission:

either the entire structure must be brought into conformity with the sanctioned plan or, if regularizable, can be regularized on payment of all necessary demands including regularization penalty. There is no third option is his submission.

27. On 18th August 2021, the Petitioners paid Rs 25,51,08,750/- against the first demand note for Rs 48,37,24,109/-. This excluded the penalty of Rs 21,68,97,700/-. It also excluded an amount of Rs 22,88,60,097/- because that Mr Tulzapurkar says has not yet fallen due. It is payable at the time of the fresh CC. Notably, these payments were made within the two-year period for which the concessions were originally extended under the Circular of 20th August 2019.

28. On 24th September 2021, the MCGM made a speaking order rejecting the Petitioners' representation. The MCGM directed the Petitioners to remove or restore the works that were the subject matter of the notice in compliance with the 19th March 2011 sanctions and approvals and to do so within 15 days. In default, the MCGM now threatened demolition.

29. So the story goes: no demolition when the Jains were constructing it. No demolition when the Jains were still out of jail and at large. No demolition threatened until the gala owners took over the asset. To say that the MCGM has much to account for in a matter like this is possibly an understatement.

30. On 31st December 2021, the deadline for paying the concessional premium ended. Realizing this, the Petitioners made payment towards the second demand note (of Rs 35,75,58,025/-, excluding penalty) under protest. They made payment of Rs 1,52,90,700/- to the Urban Development Department and issued pay orders to the MCGM. The pay orders were not encashed. An online payment through the ***E-GRAS portal*** of Rs 1,29,46,550/- was rendered impossible because the challan that had been generated was deleted. The balance amount of Rs 17,71,64,300/- is not yet due according to the Petitioners. It is payable against the application or issuance of a CC. In the aggregate, the Petitioners have paid a total of Rs 27,03,99,450/-. The amount is noted in a letter of Petitioner's architect. This is of 5th February 2022 and it says that the regularization was approved followed by a draft approval of the amended plans on 18th August 2021.

31. We may note that after this Petition was filed the MCGM has submitted a revised payment sheet. The amount demanded now is of Rs 1,11,73,90,437/- excluding the penalty of Rs 22,80,71,100/-.

32. The Petitioners say that they are entitled to the benefits of the concession circulars mentioned earlier. They have either paid or made valid tender of the amounts demanded in the demand notes at least to the extent of the amounts that were then due. All that has not been paid is the regularization penalty. The MCGM however insists that the Petitioners are not entitled to the benefit of the concessional circulars on the basis that the Petitioners have only

made part payment within the time frame provided, i.e., have not made full payment.

33. There is a pending demand of Rs 34,22,67,325/- approximately under the second demand note. Mr Tulzapurkar on instructions states that the Petitioners will pay this amount. Part of that controversy arises because when the Petitioners made the payment it was found that the online challans were deleted. The submission by Mr Tulzapurkar must be accepted that valid tender being made, it cannot be said that there was non-payment. If the amount was not collectable from the Petitioners, the challans ought not to have been generated in the first place. They could not have been deleted after valid tender was made.

34. Mr Tulzapurkar also points out that this entire project is being completed by the purchasers of the galas. Not only have they paid a sizeable amount each to the original developers, but they have, as the foregoing narrative shows, put in a very considerable amount of money towards regularizing the project. The only objection now is to the imposition of the regularization penalty demanded by the MCGM.

35. Before we proceed to a consideration of the submissions on law and the authorities cited, it is useful to summarise the opposing stands. Mr Godbole has instructions to state that a regularization proposal by Mr Khanolkar, the architect engaged by the Jains through Metallica, was rejected. There is no document on record addressed to Khanolkar explicitly stating such a rejection. Annexed

to the MCGM's second Affidavit in Reply at page 181 of the paper book is a communication to Mr Khanolkar of 7th October 2015 by the MCGM. It refers to Mr Khanolkar's 7th February 2015 representation. It says only that Mr Khanolkar's request to have plans approved would be considered on his submitting amended plans in accordance with the provisions of the Fire Act, 2006. On instructions, Ms Yadav says that there is no record of Mr Khanolkar ever having submitted amended plans in conformity with the Fire Act, 2006 and hence the regularization application by Mr Khanolkar stands rejected. This is a very interesting approach. If indeed there is a rejection of Mr Khanolkar's/Jain's regularization application, then no question arises of entertaining any regularization application at all by these Petitioners, let alone demanding any regularization penalty. The moment the MCGM even considers the Petitioners regularization application on merits (leaving aside non-payment of any amounts or premium) it necessarily means that the question of regularization is still at large. Otherwise, there would be no question of accepting the regularization application or of demanding a regularization penalty. We do not see how the MCGM can have it both ways, i.e., that a regularization application is rejected but somehow comes back to life on payment of a penalty demand or on demanding other premium. That simply cannot be.

36. A fundamental point is the question of penalty. On its own, the word necessarily implies a fine or a levy for some wrongdoing. It must, therefore, logically be linked to a wrongdoer. The structure in question is just a structure. It is the result of a wrongdoing. It is not the wrongdoer itself. Penalties are not paid by or demanded from a structure but from a person who built the structure or, in a given set

of circumstances, seeks to undo the wrong on payment of a stipulated amount. In the first instance, it would be the developer who would be liable to pay any penalty for regularization. If that developer transferred the asset in an open arms-length transaction then the successor entitled would inherit the liability. There is really no quarrel on either side with the generality of this statement. But what Mr Tulzapurkar canvasses is, as he himself says, a completely unique situation, one that is the result of an operation of law. This is the CIRP process under the IBC. That Act has been amended. The amended provisions have been considered by the Supreme Court which examined the legislative purpose and intent from every perspective. The crucial words in the Supreme Court decision are "extinguished" and "clean slate". This means, Mr Tulzapurkar submits, that if there is a demand in the form of a penalty it has to be raised at the time when the resolution plan is being considered. It may be raised even as a contingent or conditional liability. But it must be raised. If that is not done, then any such demand, like even statutory and revenue demands including those from taxation, stands extinguished because the resolution applicant then proceeds on a clean slate. The purpose of the CIRP process under the amended IBC is to enable a resolution applicant to know precisely what bargain he is striking. In this particular case, had the MCGM mentioned the regularization penalty as even being likely, the 1st Petitioner might have had to take a call even on whether to proceed or not to proceed. When the MCGM did not make this demand, the resolution applicant was entitled to proceed on the footing that while its resolution plan, though it may have provided for other premia, concessions under the circulars, etc., were indeed payable, had no element of a regularization penalty, as none was raised or

claimed. Once the resolution plan was approved without this demand, there was no question of paying a regularization penalty.

37. We will proceed to the submissions on law immediately next, but at this stage it would be useful to set out the prayers in the amended Petition. There were originally prayer clauses (A) to (F). Prayer clauses (A1), (A2) and (A3) were added by an amendment. The full set of prayers is set out below:

> "(A) This Hon'ble Court may be pleased to issue a writ of mandamus or any other appropriate writ or Order directing the Respondent No. 1 to not charge any penalty for regularisation of the unlawful construction done on the Said Property prior to the 16th of October, 2019;
>
> (A1) That this Hon'ble Court be pleased to declare that the Circular bearing No. Ch.E./D.P/004477/Gen. Dated the 12th of May, 2021 issued by the Respondent No. 1 is ultra vires the provisions of the Mumbai Municipal Corporation Act, 1888, as well as the Maharashtra Regional and Town Planning Act, 1963, and be pleased to strike down and set aside the same;
>
> (A2) That this Hon'ble Court under the appropriate writ be pleased to quash and set aside the Circular bearing No. Ch.E./D.P/004477/Gen. Dated the 12th of May, 2021 issued by the Respondent No. 1;
>
> (A3) That this Hon'ble Court under the appropriate writ be pleased to declare impugned demand Notices dated 18th August, 2021 and the 30th of December, 2021, as null and void to the extent of them imposing penalty charges for regularisation of unauthorised structures;
>
> (B) That this Hon'ble Court may be pleased to issue a writ of mandamus or any other appropriate writ or order to the Respondent No. 1 directing it to extend the benefit of

the Circular dated 22nd February, 2021 (extended from time to time), to the Petitioners on account of the payment towards premium made by them on the 18th of August, 2021;

(C) That this Hon'ble Court may be pleased to issue an Order or appropriate writ declaring that the Petitioner No. 2 had made full payment under the Demand Notice at Exhibit E to the Respondent No. 1 prior to the stipulated date therein;

(D) This Hon'ble Court may be pleased to issue a writ of certiorari or any other appropriate writ or Order against the Circular dated 20th October, 2021 issued by the Respondent No. 1 and set-aside the Demand Note dated 30th December, 2021, since the MCGM has no right to recover the difference of that amount, once the amount is paid of that item as per prevailing policy at that time;

(E) That this Hon'ble Court may be pleased issue a writ of mandamus or any other appropriate writ or order against the Respondent No. 1 directing it to issue the requisite permission for the entire area pertaining to the plan, by taking necessary undertakings form the Petitioners;

(F) That this Hon'ble Court under the appropriate writ be pleased to declare that the Respondents cannot impose any penalty or seek recovery of any amount arising out of any act or omission of the Petitioner No. 2 prior to 16th of October, 2019."

38. The Petition is really directed to prayer clauses (A), (A-1), (A-2), (B), (C) and (E).

39. In the next part of this judgment, we propose first to deal with the provisions of the IBC and the rival submissions in that regard.

We will then proceed to consider some of the relevant provisions of the MRTP Act and the MCGM Act.

40. The principal submission from Mr Tulzapurkar arises under Chapter II of the IBC. This deals with the CIRP. It is not necessary in this case to examine the entire structure of the Code or every section of this Chapter. We are really concerned with four Sections, namely, Sections 30, 31, 32 and 32A. Section 30 deals with the submission of a resolution plan. Obviously, the resolution applicant must be one who is eligible under Section 29A. Sub-Section (2) then sets out the duties of the Resolution Professional. He is required to present conforming resolution plans to what is called Committee of Creditors ("**COC**") under Sub-Section (3). Then the COC under Sub-Section (4) may approve a resolution plan by a vote not less than 66% of voting share of the financial creditors but after considering its feasibility and viability. The resolution applicant is entitled to attend the meeting of the COC. Once a plan is approved, it goes to the adjudicating authority.

41. This takes us to Section 31 which speaks of the approval of resolution plans. We set this out in full:

> "**31. Approval of Resolution Plan**
>
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

PROVIDED that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1)—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

PROVIDED that where the resolution plan contains a provision for combination as referred to in section 5 of the Competition Act, 2022 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the Committee of Creditors."

(*Emphasis added*)

42. As the emphasized portions show, the approved resolution plan is compulsorily — the word used is 'shall' — binding not only on the corporate debtor and its employees, members and creditors but, and this is important, also on the Central Government, any State Government or any Local Authority to whom a debt in respect of payment of dues arising under any law for the time being in force is owed as also guarantors and other stakeholders.

43. The inclusion of the government authorities was by an amendment of 2019 with effect from 16th August 2019. While on this aspect of the matter we must note that Section 30(2)(b) was also inserted by the 2019 amendment. This tells us that the resolution plan must provide for the payment of debts of operational creditors in such manner as may be specified by the board and then prescribes a minimum. Then there are two explanations that follow. A resolution plan must provide for the management of affairs of the corporate debtor after approval of the resolution plan.

44. The Code itself says that a creditor means any person to whom a debt is owed and this includes a financial creditor, operational creditor, a secured creditor, an unsecured creditor and a decree holder. Section 5 has the definition in the context of corporates and an operational creditor is defined as a person to whom an operational debt is owed and includes an assignee or a transferee of such debt.

45. Now, if we put Section 31 and its amended portion together with Section 30, it is clear that the resolution plan had to provide for

known dues to the Central or State Government *or any local authority*. These had to form part of the plan. But this also means that if the plan was approved without provision being made for any amounts due to the Central or State Government or local authorities, then that approved resolution plan without those approved debts would also be binding on those authorities, i.e., those would not be amounts recoverable. Thus, the MCGM as the local authority would have had to make its demand for a regularization penalty known as part of the CIRP process. If it did not do so, then by an operation of law the MCGM would be bound by the resolution plan. There is no possibility of the MCGM as a local authority standing outside, as it were, the approved resolution plan.

46. In the context of our brief preceding discussion regarding penalty, Mr Tulzapurkar then invites our attention to Section 32A, the whole of which was added by the 2019 amendment with effect from 28th December 2019 and this is how it reads:

> "**Section 32A: Liability for prior offences, etc.**
>
> (1) **Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31**, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

PROVIDED that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

PROVIDED FURTHER that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) **No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by**

> **the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—**
>
> (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
>
> (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.
>
> (3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."
>
> (*Emphasis added*)

47. The submission in this regard is that there can be no prosecution for an offence committed prior to the commencement of the CIRP if the resolution plan results in a change in management or control of the corporate debtor to a person covered by sub-clauses (a) or (b). Sub-Section (2) says that no action can be taken against the property of the corporate debtor in relation to an offence committed prior to the date when the property is covered by a

resolution plan and which has resulted in a change in control of the corporate debtor.

48. So far as the extinguishment of liability is concerned, Mr Tulzapurkar draws our attention to the decisions of the Supreme Court starting with *Essar Steel India Ltd., Committee of Creditors v Satish Kumar Gupta & Ors.*[1] In paragraphs 40, 41, 99 and 107, the Supreme Court made it clear that the past liabilities of a corporate debtor cannot be carried forward. The resolution applicant starts on a clean slate. *Essar Steel* was reaffirmed, and the findings expanded in *Ghanshyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Co Ltd & Ors.*[2] Paragraphs 2, 93 to 102.3 and 149 to 157 are relevant. The Supreme Court in *Ghanshyam Mishra* considered the effect of the 2019 amendment to Section 31. The expression used by the Supreme Court is that all claims that were not part of the resolution process 'stand extinguished' on approval of the resolution plan.

49. We think it is pointless to contend that the regularization penalty is not a 'claim' properly so called but is a demand dependent on whether regularization is sought or is not sought. That the built structure required regularization was clear from the beginning. That the MCGM did absolutely nothing to remove the non-conforming parts of it was also clear. Therefore, somebody was bound to seek its regularization. Whether this was the Jain group through Mr Khanolkar or was the present Petitioners after the CIRP process, is immaterial. The moment the regularization application was an

1 (2020) 8 SCC 531.

2 (2021) 9 SCC 657.

inevitability, it followed that if the MCGM was to make a demand, that would have to be a claim that was required to be incorporated in the resolution plan before it was submitted and before it was approved. Nothing actually ever prevented the MCGM from making this submission. Indeed, we have no explanation at all as to why such a submission was not made.

50. On the question of Section 32A and the liability for prior offences, Mr Tulzapurkar correctly draws our attention to the Supreme Court decision in *Manish Kumar v Union of India & Ors.*[3] In paragraphs 317 to 329, the Supreme Court considered a challenge to the validity of Section 32A. It was held to be intra vires. Then there is the decision of a Single Judge of this Court in *Dewan Housing Finance Corporation Ltd v Union of India* along with associated matters.[4] The judgment is of 16th November 2021. The Single Judge, held, in our view, correctly, that Section 32A provides immunity. It opens with a non-obstante clause and this is broadly worded. Notwithstanding anything contained in the Code or any other law for the time being in force, it grants immunity post approval of a resolution plan to the corporate debtor because it says that the corporate debtor shall not be prosecuted, and also to the successful resolution applicant.

51. Mr Godbole takes very serious exception to this formulation. The argument from Mr Godbole is that the regularization penalty could not possibly have been part of the resolution plan. He attempts to put this in a time frame. The regularization penalty

3 (2021) 5 SCC 1.

4 2021 SCC OnLine Bom 3926 : (2022) 230 Comp Cas 360.

would be demanded, in his submission, from he who seeks regularization. The present Petitioners could not seek that regularization until their resolution plan was approved; therefore the regularization penalty could not be part of a regularization plan. Consequently, it cannot be extinguished nor is it a claim that could be covered by the approved or sanctioned resolution plan.

52. We believe this argument to be over simplistic, perhaps even in the extreme. The question is not of who applied for regularization or when, but whether regularization was, as we have pointed out above, an inevitability. Let us consider either of the two possibilities that Mr Godbole's argument raises. Either the resolution plan was approved, or it failed. If it failed the regularization penalty would be demanded from whoever acquired successor title to the asset, i.e., the construction at Kandivali. If the resolution plan succeeded, that asset passed into the hands of the resolution applicant which took over the corporate debtor and the regularization application would be made by the newly taken over Metallica Industries, the 2nd Petitioner. Either way a regularization application was bound to happen. It was inescapable. It was inevitable. This was all the more so since the MCGM had done nothing in exercise of its powers to stop the irregular construction at the time that it was being constructed nor taken any action towards removal of the non-conforming portions until date.

53. This only meant that MCGM was entitled to recover a regularization penalty from a successful resolution applicant. To test it differently: the amount of regularization penalty was known.

Could the MCGM recover the regularization penalty from the corporate debtor in CIRP? Clearly not. Therefore, the recovery had to be from the successful resolution applicant. Therefore, the regularization penalty demand had to be included in the resolution plan. And, therefore, the MCGM was bound to make that claim or submit it to the Resolution Professional.

54. This is an aspect the importance of which cannot be emphasized strongly enough: this was a single project enterprise with a solitary asset. Therefore, and all the more, a regularization application was bound to follow in respect of the only object of this entire exercise. The argument therefore that Section 32A will not aid the Petitioners nor will the amended Section 31 cannot be accepted.

55. We note incidentally that the argument from Mr Godbole does not address the wording of Section 32A(2) which speaks of the property of the corporate debtor being granted immunity in regard to an "offence committed prior to the commencement of the corporate insolvency resolution process". What was the offence here? It was the irregular construction. When was that "offence" committed? Prior to the commencement of the CIRP. Consequently, it follows that no action is possible against the property of the corporate debtor, i.e., this particular asset where that asset is covered by a resolution plan that has been approved under Section 31.

56. Frankly to our mind, this should end the matter. There is very little need to examine it further because as we can see the entire question of penalty covered by prayer clause (A), the MCGM circular of 12th May 2022 covered by prayer clause (A2), the State Government UDD Circulars covered by prayer clause (B) are all within the sweep of the present discussion.

57. Mr Godbole has for reasons that are not immediately clear to us invited our attention to a very great deal of town and country planning and municipal corporation law including various sections of the MRTP Act and the MCGM Act. But it is nobody's case that the structure in question when put up by the Jains did conform to the sanctioned plans. That is the starting point of the discussion in the first place. Had that not been so, the Petitioners would not have had to spend the kind of time and energy that they did going through a CIRP process. The question therefore is not whether there is power in law to regularize (or in the words of the MRTP Act, claim retention) of a structure or of the procedure to be followed but whether a demand in the nature of a penalty can be levied in facts and circumstances such as these.

58. It is not Mr Tulzapurkar's case that in no circumstances can a regularization penalty be recovered at all. The Petition contains no challenge to that. What Mr Tulzapurkar contends is that the demand for a regularization penalty falls entirely outside the frame of the approved resolution plan and, therefore, cannot be made. To that extent we have found in favour of Mr Tulzapurkar and we do not think it is necessary to examine that aspect of the matter further.

59. Mr Godbole has drawn our attention to the Maharashtra Town Planning Compounded Structures Rules, 2017. Broadly, these allow for certain unauthorized constructions to be declared compounded structures, i.e., to permit their retention or continuance. Incidentally, we note from Mr Godbole's written submissions, the rather perfunctory reference to Section 354A and Section 475A of the MCGM Act. These are important to highlight that it was fully within the powers of the MCGM to halt the illicit and non-conforming construction happening and being done in brazen defiance of and contrary to sanctioned plans and planning laws. We do not see how the MCGM can derive monetary benefit from what is, essentially, its own failure to perform its statutory functions to the fullest. No public authority can monetize its own defaults. We asked what action the MCGM took when the construction was going on contrary to the sanctioned plans. The only answer was that the MCGM had issued a stop-work notice, as if that is the limit of its power in law. Nothing explains to us how when a private individual without the Jains' means and reach puts up a small shed, the entire machinery of the MCGM swings into action, complete with JCBs, hammers, and police protection, but a mammoth construction like this only receives a stop-work notice.

60. Mr Godbole has placed before us many authorities including *Rajeev Mohan Mishra v CIDCO & Ors,*[5] *Abhishek Builders and Developers v CIDCO,*[6] *Pratibha cooperative Housing Society Ltd. v*

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5 2017 SCC OnLine Bom 1699 : (2018) 2 Mah LJ 116..

6 2012 SCC OnLine Bom 760 : (2012) 5 Mah LJ 413 : (2012) 4 Bom CR 573 : (2012) 114 (4) Bom LR 2369.

State of Maharashtra,[7] *Friends Colony Development Committee v State of Orissa,*[8] *Rajendra Thacker v Municipal Corporation of Greater Mumbai,*[9] *West Coast Builders Pvt Ltd v Collector of Bombay,*[10] *Bombay Environmental Action Group v Bombay Municipal Corporation,*[11] *Kaalkaa Real Estates (P) Ltd v Municipal corporation of Greater Mumbai,*[12] *Divgi Metal Wares Pvt Ltd v Municipal Corporation of the City of Pune,*[13] *Mahendra Baburao Mahadik v Subhash Krishna Kanitkar,*[14] *Ajay Kumar Radheshyam Goenka v Tourism Finance Corporation of India Ltd*,[15] all to the effect that the Courts will frown upon the tendency to raise unlawful constructions. That may be true, but this does not answer why, if the MCGM can cite these judgments before the High Court, it feels that it is not bound by these judgments when the time comes for taking action against the offending structures. Every one of these decisions contains a salutary prescription against rampant illegality and unauthorized construction. None of these judgments excuse municipal inaction or, as we have found in this case, *studied* municipal inaction. At least one decision of this Court speaks of the condition or recognises the condition of the unwary purchaser. We accept that there are

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7 (1991) 3 SCC 341.

8 (2004) 8 SCC 733.

9 2004 SCC Online Bom 401 : (2004) 4 Bom CR 1 : (2004) 106 (4) Bom LR 598.

10 1994 SCC OnLine Bom 54 : (1995) 4 Bom CR 200.

11 1994 SCC OnLine Bom 512 : (1995) 2 Mah LJ 440 : (1995) 2 Bom CR 233.

12 2022 SCC OnLine Bom 2536 : (2022) 6 AIR Bom R 275 : (2023) 1 Bom CR 126 : AIR 2023 (NOC 209) 77.

13 2019 SCC OnLine Bom 797 : (2019) 5 Mah LJ 484 : (2019) 3 AIR Bom R 712.

14 (2005) 4 SCC 99.

15 2023 SCC OnLine SC 266.

decisions of this Court which have rejected the argument of the so called innocent flat purchasers specially in a city like Mumbai, but we believe the times may have changed and in fact in situations like this developers have begun to masquerade their constructions as being legitimate. They hold out all manner of temptation and inducement to purchasers. It is only much later in the day that the purchaser finds out that what was promised was a dream, but what was delivered was a nightmare. That is precisely what seems to have happened in this present case.

61. On the question of the exercise of discretion, it is well settled by a long series of judgments that our jurisdiction under Article 226 is both discretionary and equitable. We believe that what Mr Godbole asks us to do is to abandon all considerations of equity and to refuse to exercise our discretion. We are sought to be blindsided by the blank application of a policy, rule, a bye-law or a statute that does not answer fundamental and fundamentally disturbing questions.

62. One of the most distressing aspects of this case has been the conduct of the MCGM and its officers and how this has gone completely unremarked on and unexplained as if it is perfectly alright for municipal officers to stand by, watch illegalities being committed, do nothing at all to stop that although knowing that those illegalities will definitely affect third party purchasers and then to demand large amounts as "penalty" as if to suggest that payment to the MCGM will wash away or efface all the sins of municipal inaction. We have repeatedly commented on the impermissibility of

unauthorized constructions. But this is a case where we must also comment on the impermissibility of municipal inaction when the planning authority is fully aware of the irregularities and illegalities being committed. It is inconceivable and patently inequitable that municipal inaction can result in some form of recovery or reward to the municipality by collection of penalty. It is unthinkable that our discretionary and equitable jurisdiction should be sought to be circumscribed without a tenable explanation for municipal inaction in the face of such illegality.

63. We are not presently inclined to examine the larger question of whether there is an express conferring of power under municipal corporation law to charge such penalties and premia in the first place, for it seems, prima facie, that there is no deviation or contravention that, under the present municipal and planning law, cannot be condoned by paying a hefty premium. That aspect is best left for another matter. We part with this portion by expressing our prima facie grave reservations as to whether illegalities can ever sought to be cured by paying money like this. That would make a mockery of the entire planning process and will only tell us that everything that the planning process prohibits can be purchased if the price is met.

64. Perhaps we have saved the best for the last. The original construction was under the old Development Control Regulations of 1991. They were irregular under that regime. The DCPR 2034 has considerably liberalised the planning regime. One facet of this matter that is not contentious is that the entire structure, portions of

which were irregular under DCR 1991, *are now fully within the frame of DCPR 2034 if applied*. We need not go further into this aspect of the matter except to note the quite delicious irony that results because a regularization penalty is now sought to be demanded for something that was irregular in 1991 but is now entirely permissible under DCPR 2034.

65. We have only noted this because we are not required to go further into the aspect of the matter. We accept Mr Tulzapurkar's statement that the balance amounts due at the time of the CC will be paid. Any other charges of the MCGM that are legitimately payable in accordance with law will be addressed. What we are striking down just now is the imposition of the regularization penalty in respect of and only of this particular project having regard to the very peculiar facts and circumstances of the case.

66. Rule is accordingly made absolute in terms of prayers clauses (A), (B), (C) and (E) of the Petition set out above. In the facts and circumstances of the case, it is not necessary to consider the prayer clauses (A1), (A2) and (A3).

67. The two Interim Applications are infructuous. We note the statement made on Affidavit by and on behalf of the Petitioners on 15th September 2023 at page 219 that the Petitioners undertake to pay the amount of Rs. 16,51,03,025/- and the remaining amount of Rs. 17,71,64,300/- to the 1st Respondent upon receipt of the IOD as a pre-condition to the issue of the CC. All amounts already deposited will of course have to be adjusted against these demands.

68. The Petition is disposed of in these terms. No costs.

(Kamal Khata, J) **(G. S. Patel, J)**

Note: This order is modified by an order dated 19th October 2023 passed on a praecipe. Corrections are shown in bold and italics.