Ingale/Bhogale

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

PUBLIC INTEREST LITIGATION NO.65 OF 2013

Mr. Imran Suleman Qureshi
Building No. 97/A, Sukhlaji Street
Mumbai Central (east),
Mumbai – 400 008. .. Petitioner

Vs

1. Municipal Corporation of Greater
Mumbai Through Legal Dept.
B.M.C. Head office, Mahapalika Marg,
Mumbai 400 001.

2. Assistant Commissioner (Estates)
Municipal Corporation of Greater Mumbai
Shri Chhatrapati Maharaj Market Building,
2nd floor, Palton Road,
Mumbai – 400 001.

3. Nair Hospitals
Through Dean, Dr. Anandrao Nair Road,
Mumbai Central (East),
Mumbai – 400 011.

4. State of Maharashtra
Through Principal Secretary
Urban Development Dept.
Mantralay, Mumbai -400 032.

5. Rubberwala Developers Pvt. Ltd.
Rubberwala House, Dr. Anand Rao Nair Road,
Mumbai – 400 011.

6. Hindoostan Spinning & Weaving Mills Ltd.
Sir Vithaldas Chambers, 16,
Mumbai Samachar Marg,
Mumbai – 400 001. .. Respondents

WITH
INTERIM APPLICATION (L) NO.26540 OF 2022
IN
PUBLIC INTEREST LITIGATION NO.65 OF 2013

Nabi Shah Gaibu Shah Sayed .. Applicant

IN THE MATTER BETWEEN

Imran Suleman Qureshi .. Petitioner
Vs
Municipal Corporation of Greater Mumbai and ors. .. Respondents

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Mr. Aseem Naphade, Amicus Curiae present.

Mr. Girish S. Godbole a/w Ms. Kejali H. Mastakar for respondent nos.1 to 3-MCGM.

Mr. Himanshu B. Takke, AGP for respondent no.4-State.

Mr. Sharan Jagtiani, Senior Advocate a/w Mr. Mayur Khandeparkar, Mr. Anoshak Daver, Ms. Kausar Banatwala and Ms. Gauri Sakhardande i/b. Mr. Tushar Goradia for respondent no.5.

Mr. Yogesh Gaikwad a/w Mr. Ayaz Bilawala i/b. M/s. Bilawala & Co. for respondent no.6.

Mr. Shabhaz Khan S. Pathan a/w Mr. Hemant Sharma i/b. Mohd. Irfan Momin for Intervenor in IA(L)/26540/2022 in PIL/65/2013.

Mr. Amol Chaunpurge, Asst. Engineer (Maintenance) BP City, Mr. Tambe, AO (Estate), E-Ward, Mr. Sanjay Kamat, EE (DP) City, Mr. Prashant Kamat, Asst. Engineer (DP) City, and Mr. Ashish Desai, Asst. Engineer (Civil), Nair Hospital are present in Court.

CORAM : DIPANKAR DATTA, CJ. &
M. S. KARNIK, J.

HEARD ON : SEPTEMBER 29, 2022.
JUDGMENT ON : SEPTEMBER 30, 2022.

JUDGMENT (PER M. S. KARNIK, J.) :

1. In the present PIL petition filed under Article 226 of the Constitution of India, the petitioner prays for the following substantive reliefs:

> "(a) this Hon'ble court may be pleased to call for the records and proceedings of Intimation of Disapproval dt. 10.09.2008 in respect of C.S. No.1896 of Byculla Division and after perusal of the same the Impugned illegal Order dt. 06.03.2009 passed by the Commissioner of the Respondent No.1 may be quashed and set aside and the Respondent may be directed to implement the Order dt. 31.01.2009 passed by Dy. Municipal Commissioner (Zone-1) of the Respondent No.1.
>
> (b) that the Respondent No.5 may be directed to vacate the office premises constructed by the Respondent No.5 in place of the godown on C.S. No.1896 of Byculla Division and handover the possession of the same to the Respondent No.3 for the purpose of activities of its hospital."

2. Before proceeding further, we must place on record the order dated 24/03/2015 passed by this Court (Coram : A.S. Oka & A.P. Bhangale, JJ.) while issuing rule. The said order reads thus :

> ". Heard learned counsel appearing for the Petitioner, learned senior counsel appearing for the Respondent Nos. 1 to 3 and the learned senior counsel for the Respondent Nos. 5 and 6 as well as learned AGP appearing for the Respondent No.4.
>
> 2. *Prima facie* it appears to us that the transfer effected in favour of the fifth Respondent is illegal.
>
> 3. Hence, we issue Rule.
>
> 4. All concerned advocates on record appearing today waive service for the respective Respondents.
>
> 5. Prayer clause (b) is of very drastic nature. Therefore, interim relief in terms of prayer clause (b) cannot be granted in the facts of the case.
>
> 6. However, till the disposal of the Petition, the fifth Respondent shall not create any third party rights, in respect of the premises in question without prior permission of this Court.
>
> 7. Hearing of this petition is expedited.
>
> 8. The issue of locus of the Petition is kept open. We make it clear that even if there is some doubt about locus of the petitioner, this Public Interest Litigation deserves to be entertained as a *suo motto* Petition."

3. It is pertinent to note that on 21/03/2022, the PIL petitioner was duly represented by his advocate. Though the PIL petition was specifically fixed for hearing on 11/07/2022 at 2.30 p.m., none appeared on behalf of the petitioner. The matter was listed on 14/07/2022 at 2.30 p.m. In view of the observations of this Court in paragraph 8 of the order dated 24/03/2015, we entertained this PIL petition as a *suo motu* petition. Accordingly, Shri Aseem Naphade was requested to assist this Court as an *amicus curiae* which he graciously agreed. The hearing of the PIL

petition thereafter proceeded.

4. The facts of the case in brief are stated hereafter. The respondent no. 6-Hindutan Spinning & Weaving Mills Ltd. was the owner of the land bearing CTS Nos. 1896 and 1/1896 (hereafter "the said land", for short) with two godown buildings constructed thereon situated at Byculla Division, Dr. A.R. Nair Road, Mumbai Central, Mumbai. The development plan for Byculla Division was released in 1981, wherein the said land admeasuring 1558.92 sq.mts was reserved for extension of Nair Hospital. The development plan was for the year 1981-2000. On 22/02/1990, a notification came to be issued under section 126(2) and 126(4) of Maharashtra Regional Town Planning Act, 1966 (hereafter referred to as "MRTP Act, for short) read with section 6 of the Land Acquisition Act, 1894 for acquisition of the said land for a public purpose for which the land was reserved i.e. extension of Nair Hospital. An award was passed by the Special Land Acquisition Officer on 19/10/1992 determining the compensation of Rs.2,51,51,009/- for acquisition of the land. On 23/11/1992, the possession of the acquired land was taken. Thereafter, the possession of the acquired land was given to the representative of "E" ward of respondent no. 1-Municipal Corporation of Greater Mumbai (hereafter, "MCGM", for short) on 27/11/1992 for development and maintenance. The record reveals that one Nalini M. Amin was in occupation of godown nos. 4 and 5 (admeasuring

6712 sq.ft.) at Lal Chimney Compound which is adjacent and/or forms part of the Nair Hospital compound. The godowns of Nalini were required for constructing a hostel for nurses. Nalini was therefore, according to MCGM, entitled to permanent alternate accommodation as a project affected person. On record is an agreement of tenement dated 14/06/1996. By this agreement, Nalini accepted the terms and conditions that she was permitted to occupy the said godowns on leave and licence basis. Clause 5 of the said agreement stipulates that MCGM will be entitled to terminate the license at any time by giving Nalini one week prior notice in writing. Clause 6 contains a covenant that the said godown is given to Nalini for her own use. Nalini undertook not to allow any other person to use and occupy the said room or any part thereof without the prior permission of the MCGM. It is provided that in case of any breach of provision of Clause 6, Nalini shall be liable to be ejected summarily. Clause 7 contains a covenant that if Nalini fails to vacate the godown on the termination of a license, the MCGM or any competent municipal officer or servant shall be entitled to re-enter the room without being responsible for any loss or damage.

5. MCGM by a communication dated 16/05/1996 offered alternate accommodation to Nalini in lieu of her Lal Chimney compound premises to the extent an area admeasuring 4914 sq.ft in a part of the godown on the said land on various terms and conditions set out therein. Clause

2 of the said communication allowed Nalini to construct a portion wall on the part of the godown on an area admeasuring 4914 sq.ft allotted to her. Clause 7 of the said letter stipulates that Nalini shall not be allowed to sell or transfer or sublet or part with the area allotted to her without prior written permission from the Municipal Commissioner. An undertaking was to be submitted by her, which she did, by virtue of a document called agreement of tenement.

6. From 1996 to 2007, Nalini was in occupation of the premises. Nalini executed a document called "Deed of Assignment of Tenancy" dated 31/12/2007 in favour of Rubberwala Developers Pvt. Ltd i.e. respondent no. 5 (hereafter referred to as "the developer", for short). The assignment proceeds on the basis that Nalini is the tenant of MCGM in respect of the godown premises and that she has agreed to transfer the tenancy on "as is where is basis" to the assignee. Nalini declared that she is a lawful tenant of MCGM in respect of the said godown premises and tenancy rights to the same are valid and subsisting. In consideration of the transfer of tenancy, the developer paid a sum of Rs. 1.60 crores to Nalini being the total consideration for release and discharge of the tenancy rights of Nalini forever. Clause 5 of the assignment stipulates that on execution of the assignment deed, the developer shall use, occupy and enter upon the premises. Nalini in terms of clause 9 of the assignment executed an

irrevocable power of attorney (hereafter referred to as "POA", for short) in respect of the said premises so as to enable the developer to deal with and dispose of the premises in such manner as the developer deems fit at his own risk and cost. As agreed Nalini executed an irrevocable POA dated 22/04/2008 in favour of the developer.

7. The portion of the said land and the portion on which the developer was in occupation was needed by Nair Hospital for its extension. So far as the proposal for Dharmashala at Nair Hospital is concerned, a meeting of the officers of the Municipal Corporation was held on 25/09/2003. The minutes of the meeting dated 09/10/2003 recorded that the Deputy Chief Engineer informed the Assistant Municipal Commissioner that part of the godown under reference was allotted to two project affected persons. The ownership of the plot as well as the proposed building was to vest with the MCGM and the Dean of the Nair Hospital was requested to prepare a draft Memorandum of Understanding (hereafter "MOU", for short) and get it approved from the legal department. The minutes of the meeting dated 25/03/2004 reveals, it was proposed that 1/3 of the godown was to be allotted to project affected persons and 2/3 was to be used for constructing a Dharmashala.

8. The developer applied for the DP remark of the said land on 31/03/2008. The developer also sought line remark for the said land. The developer made an application dated

15/05/2008 for a no objection to grant permission for partial repairs and construction of a proposed loft in the godown, which came to be granted by the DP department. The developer then by the application dated 30/06/2008 addressed to the respondent no. 2- Assistant Commissioner (Estates) applied for transfer of tenancy from Nalini in its favour. This according to the developer was in compliance of the provisions of the transfer policy dated 11/01/1989 of the MCGM and in particular of Clause 7 of the allotment letter dated 16/05/1996.

9. The Executive Engineer (Building Proposals) City Ip informed the Architect of the developer that the proposals submitted for partial repairs and proposed loft on the premises cannot be considered as per prevailing repair policy as the structure under reference is being used as a godown. On 05/07/2008, the developer filed an application to MCGM submitting plans for obtaining the Intimation of Disapproval (hereafter "IOD", for short). On 13/08/2008, a report was prepared by Assistant Engineer, MCGM for change of activity from godown to IT office. A reference is made in the report to the request of the developer as regards the power of attorney executed by Nalini, on the basis of which the proposal for proposed change of activity from godown to IT office, flattening of roof, stilt for parking, additions and alterations of the existing structure is made. The proposal was approved by the Executive Engineer (BP) City Ip. The Assistant Engineer (BP) City Ip also approved

the proposal on 13/08/2008 and likewise the superior officers approved the proposals on various dates.

10. On 10/09/2008 the IOD under section 346 of the Mumbai Municipal Corporation Act, 2008 (hereafter, "MMC Act, for short) came to be issued in favour of the developer. Thereafter an application came to be made by the developer's architect on 18/09/2008 seeking NOC for change of activity repair, additions and alteration of godown premises. A sum of Rs.16,29,550/- was paid by the developer to MCGM towards transfer fee. A payment of Rs. 2,79,825/- and Rs. 1,950/- was made by the developer to MCGM on 27/10/2008 as penalty for late submission of transfer application.

11. The Administrative Officer (Estate) prepared a report dated 05/12/2008 recording that as per the rent demand register, the godown stands in the name of principal tenant Nalini (M/s. Maganbhai Amin & Company). The developer applied for transfer of godown in its name by producing various documents including the deed of assignment. On 20/12/2008, a legal opinion was given by the legal department of MCGM, whereby, after referring to the tenancy agreement and the deed of assignment, it observed that the developer is in occupation of the godown. The legal department opined that the application for transfer may be processed as per the prevailing policy upon obtaining approval from the competent authority.

12. The godown was demolished on 17/01/2009 and 18/01/2009 without the developer obtaining any permission/CC for demolishing the godown structure. The Dean of Nair Hospital submitted a report on 20/01/2009 placing on record that the godown belonging to the Nair Hospital which had been acquired as part of the extension to the hospital in 1992, was hurriedly demolished in two days. A stop work notice came to be issued by MCGM on 20/01/2009. The developer submitted an undertaking to the MCGM on 29/01/2009 undertaking to demolish excess area if constructed beyond permissible FSI shown on the documents. The developer undertook that no compensation will be claimed for the proposed work in respect of the structure as and when the property is acquired by MCGM.

13. On 31/01/2009, a meeting was held in the chamber of D.M.C (Zone-I) in the presence of the Dean, deputy Dean, AC-E Ward and EE-BP (City). A reference is made in the said minutes that as the Dean, Nair Hospital was insisting for construction of dharmashala for Nair hospital, the entire matter is required to be reviewed in favour of the MCGM and Nair Hospital in public interest. It was further recorded that Nalini illegally executed POA in favour of the developer in gross violation of tenancy condition and hence deserves action of eviction under section 105B of MMC Act. The AC, E-Ward was directed not to process the proposal for transfer and refund the charges accepted for transfer, if any, paid by the developer. The Joint Municipal Commissioner

was therefore requested: i) to cancel the tenancy of Nalini by issuing her notice under section 105(B) of MMC Act; ii) to issue instructions to Deputy CH. E. (BP) City to revoke the IOD issued to the developer; iii) to direct AC/Estates/Dy.Ch.E(BP) to restore the possession of the premises to the Nair Hospital; and iv) to conduct enquiry against the concerned staff of Building Proposal/Development Plan Department.

14. Thereafter, a meeting dated 10/02/2009 was held in the chamber of Additional Municipal Commissioner in the presence of the Member of Legislative Assembly (MLA) Mr. Yusuf Ambrahani, the developer, Deputy Municipal Commissioner and Assistant Municipal Commissioner (Estate) and Dean of Nair Hospital. The minutes of the meeting dated 10/02/2009 record that the Assistant Municipal Commissioner informed about the repair permission given to the shed by way of shifting in lieu of acquisition of land admeasuring 6712 sq.ft at Lal Chimney compound meant for nurses' quarters. The Assistant Municipal Commissioner informed that this was not a permanent allotment and whenever in the future, if the premises are required for hospital expansion or for any other purpose, possession of the same must be given back. It is pertinent to note that application for transfer of tenancy to the developer was not sanctioned at that point of time and even the Development Plan Department had asked NOC from Estate Department, which too was not issued.

From the minutes of the meeting it is seen that the developer agreed to hand over possession of land if required by the Corporation. The Dean, Nair Hospital objected as tenancy rights of the developer were in question. The Deputy Chief Engineer informed that the developer started the work of demolition without C.C. and that is why stop work notice came to be issued. He further informed that as per DP reservation, the land is reserved for expansion of Nair hospital and is in possession of the MCGM. Nonetheless, the Additional Municipal Commissioner directed Deputy Ch.Eng.B.P. (City) to ensure that no permanent structure should be erected at this plot. The minutes further records that on compliance of conditions of IOD of Building Proposal, CC shall be given as per law and further directed to incorporate the following conditions in IOD;i) confirm laws of tenancy rights; (ii) premises if allocated as per norms of MCGM rules and regulations then it will be handed over back to MCGM as when required within stipulated time as per existing policy; iii) permanent construction shall not be allowed under any circumstances. The matter was to be put up before the Municipal Commissioner for taking a decision.

15. The report of the Assistant Commissioner (Estates) dated 11/02/2009 records that when the site was inspected by the concerned staff on 28/01/2009, it was noticed that the existing tenanted premises for which repairs are proposed is found demolished. It further mentions that the

acting Dean by his note dated 20/01/2009 pointed out that the demolition of the structure has also raised certain points related to the redevelopment of the said plot.

16. In the report dated 18/02/2009 prepared by the Additional Commissioner (Western Suburb), it is mentioned that the Deputy Chief Engineer (BP) had granted repair permission. The developer in the garb of repair permission, demolished the entire building and had proposed to raise a new construction which is not correct. The note mentions that the Additional Commissioner in accordance with the permission granted by the Deputy Engineer (B.P.) and in view of the IOD, recommended that the developer cannot be permitted to carry out the repairs. It is further stated that the permission is subject to the condition that there should be no permanent construction put up and in case the MCGM wants the premises in future, the same should be handed over back to the Corporation. Subject to these conditions, the grant of permission was recommended.

17. The Municipal Commissioner vide order dated 06/03/2009 stated that "we have already approved for flattening of roof along with strengthening of structure without changing the footprint as per repair policy. Hence, we may allow the party to go ahead with the repair as per IOD conditions and as recommended by Additional Municipal Commissioner."

18. The Assistant Engineer (Estates) conveyed its NOC to the Architect of the developer on 08/06/2009 to issue

Commencement Certificate for the proposed change of activity, repair, additional alteration as per the plan approved by the Executive Engineer dated 10/09/2008. On 09/06/2009, a Commencement Certificate is issued by MCGM to the developer for change of activity from godown to IT office.

19. The Dean of Nair Hospital submitted a report dated 14/01/2010 referring to the minutes of meeting dated 10/02/2009, wherein it was recorded that no permanent structure was to be erected and in future, if the premises is required for expansion of the hospital or any other purpose, possession of the same must be given back. It was further recorded by the Dean that at present on the said premises construction activities of a permanent nature are in progress by demolishing the existing shed. A request was made to the Deputy Chief Engineer to ensure that the construction activities may be as per the directions of the BMC and the office of the Dean may accordingly be informed. On 20/01/2010, the Architect of the developer requested the MCGM to allow them to put up RCC slab in lieu of ladi coba, which is permissible as per the repair circular. Further, a proposal was made for rotation of staircase and lift in view of the last approved plan.

20. Annexed to the petition is a notice issued on behalf of the original land owner M/s. Hindustan Spinning and Weaving Mills Ltd. (respondent no. 6) indicating that there is illegal misuse of land purportedly reserved and acquired

for a public purpose and converted into the private property for commercial exploitation by private individuals, by way of an arrangement, without inviting any public bids through an open tender process, or a public auction, as is required for appropriate disposal of any public land.

21. On 26/08/2011 a report was prepared by the Administrative Officer recording that the original transfer paper submitted for transfer of the tenancy in the developer's name was missing and sanctioned was sought to prepare duplicate file papers. On 14/06/2012 a circular came to be issued by MCGM for speeding up cases of transfer of tenancy. A file noting dated 12/07/2012 of the Deputy Municipal Commissioner recorded that the plan sanctioned by the Building Proposal Department is in the name of the developer, where the transfer has still not been completed. A report was prepared by the Deputy Chief Accountant of the MCGM in connection with the application dated 30/06/2008 made by the developer for transfer, recording that out of the total transfer fees of Rs.31,98,000/-, a sum of Rs.16,31,500/- is paid and the balance sum of Rs.15,66,500/- will be collected by the Administrative Officer (Estate). On 16/03/2013 a sum of Rs.15,66,500/- was paid by the developer to MCGM towards transfer fee. On 18/03/2013 "agreement of tenement" was entered into between MCGM and the developer, wherein, the developer was permitted to occupy as a licensee of godown nos.4 and 5, admeasuring 4914 sq. ft., the license

fee payable being Rs.11,756/- per month. On 18/03/2013, an indenture was entered into between the developer, MCGM and the Municipal Commissioner thereby recording that for transfer of tenancy, the written consent of the principal tenant is required, which the proposed transferee is unable to produce and the necessary indemnity bond was executed.

22. The present PIL petition was filed on 17/06/2013. A detailed affidavit in reply came to be filed by the developer on 28/11/2013. An affidavit in reply dated 25/11/2013 was filed by the respondent no.6-original owner of the land. The petitioner filed a rejoinder to the affidavit in reply filed by the developer and respondent no. 6 sometime in December 2013. The additional affidavit in reply came to be filed by MCGM on 07/01/2014 and 08/01/2014. Thereafter, on 12/08/2015 an affidavit in reply was filed by the MCGM placing on record circular dated 17/12/1994 for fees pertaining to transfer of tenement and circular dated 05/01/1995 for charging penalty for late submission of the application. On 24/08/2015, a letter was addressed by the the developer's architect to the Chief Engineer submitting the completion certificate in connection with the change of activity from godown to IT office. On 06/10/2015 a letter was addressed by the Executive Engineer to the developers' architect stating that the work completion certificate submitted was accepted. It is pertinent to note that on 25/02/2019 a plan was submitted by a developer to MCGM

for change of activity from IT to office building and even NOC dated 05/03/2020 was issued by MCGM for carrying out the work as per the amended plan submitted. Learned senior advocate Shri Jagtiani pointed out that the developer has not carried out any work in terms of the NOC dated 05/03/2020.

23. We have heard the amicus curiae. We have heard Mr. Godbole for MCGM and learned senior advocate Mr. Jagtiani, for the developer. An attempt was made by the learned counsel for the intervener to intervene in this PIL petition. An additional affidavit along with documents was tendered by the intervener. We find that the affidavit is of no assistance in deciding the issues which are subject matter of the present PIL petition. We therefore reject the intervention application.

24. We had requested the learned counsel to place their brief written submissions on record which we reproduce verbatim, forming part of this order as follows.

SUBMISSIONS OF LEARNED AMICUS CURIAE:

25. The respondent no. 5 has acquired the property in question in an illegal manner.

26. The "*Deed of Assignment of Tenancy*" dated 31/12/2007 entered into between Nalini M. Amin as Assignor and Rubberwala Developers Pvt Ltd (respondent no.5) as transferee is illegal:

27. Nalini M. Amin was a mere license of MCGM of the

property in question under a License Agreement dated 14/06/1996. She was neither a tenant nor had dispositive power qua the property. Under the License Agreement there was a prohibition on selling transferring or subletting without prior written permission from the Municipal Commissioner. No prior permission was obtained from MCGM for the purported transfer.

28. Latin maxim "*Nemo dat quod non habet*" – No person can convey what she does not have. In the present case, the creation of tenancy and its transfer are both illegal.

29. Section 7 of Transfer of Property Act, 1882. **Devkubai N. Mankar V/s. Rajesh Builders[1] -** Para 10. **Kavita Kanwar V/s. Pamela Mehta[2]-** Para 30.6**.**

30. The "*Agreement of Tenement*" dated 18/03/2013 entered into between MCGM and Tabrez Shaikh of Rubberwala Developers Pvt Ltd (respondent no. 5), is illegal:

31. The land was acquired under Section 126(2) and 126(4) of Maharashtra Regional Town Planning, 1966 ("**MRTP Act**") read with Section 6 of the Land Acquisition Act, 1894 for a public purpose *viz.* extension of Nair Hospital. The land acquired for a public purpose therefore cannot be put to private use. If it is put to private use then a Public Interest Litigation is maintainable. Reliance is

1 AIR 1997 Bombay 142
2 (2021) 11 SCC 209

placed on **(i) Royal Orchid Hotels V/s. G. Jayaram Reddy**[3], **(ii) Uddar Gagan Properties V/s. Sant Singh** [4] and **(iii) Felton Fernandes V/s. Union of India**[5].

32. Even assuming that MCGM was allowed to deal with this property it is settled law, that, a public body cannot deal with its property without inviting bids and conducing an auction. Reliance is placed on **MI Builders V/s. Radhey Shyam Sahu**[6] and (ii) **Sterling Computers V/s. M/s. M&N Publications**[7].

33. The Agreement is in respect of Godown Nos. 4 and 5 which were admittedly demolished on 17/01/2009 and 18/01/2009. No prior permission was obtained from MCGM prior to the transfer of the purported tenancy by Nalini M. Amin to respondent no.5. This agreement only seeks to legitimize respondent no. 5's illegal transaction with Nalini M. Amin.

34. Planning permissions obtained by respondent no. 5 are contrary to law.

35. MCGM has issued to respondent no.5 an Intimation of Disapproval dated 10/09/2008 and a Commencement Certificate dated 09/06/2009 for change of activity from godown to IT office. Eventually, on respondent no. 5’s application, MCGM has also issued a permission dated

3 (2011) 10 SCC 608
4 (2016) 11 SCC 378
5 (2018) 6 Bom. CR 217
6 (1999) 6 SCC 464
7 (1993) 1 SCC 445

05/03/2020 for change of activity from IT to office building. All these permissions are contrary to law.

36. The land was acquired under Section 126(2) and 126(4) of MRTP Act read with Section 6 of the Land Acquisition Act, 1894 for a public purpose *viz.* extension of Nair Hospital. The land therefore cannot be put to private use. If it is put to private use a Public Interest Litigation is maintainable.

37. In the development plan of 1981, the land is reserved for a public purpose *viz.* extension of Nair Hospital. No other construction activity can therefore be permitted.

38. Section 46 of the MRTP Act provides the planning authority while considering an application for carrying out construction has to have "*due regard*" to the development plan. In the present case, under the development plan the property is reserved for a public purpose *viz.* extension of Nair Hospital. Reliance is placed on **Nagpur Improvement Trust V/s. Bombaywala[8]-** Para 11.1.

39. As per Rule 6(2)(d) of the Maharashtra Development Rules, 1970 an application for permission to carry out development can only be made by the owner of the land. In the present case, it is not in dispute, that, MCGM is the owner of the land. Neither respondent no. 5 nor its predecessor (Nalini M Amin) even claim that they are the owners of the land. Hence, no application for construction

8 (2020) 12 SCC 401

could have been made by respondent no. 5.

40. Even assuming that the agreement dated 18/03/2013 between respondent no.5 and MCGM is valid, respondent no.5 at the highest has been permitted to occupy the godown for his own use and not permitted to carry out any construction. Clause 6/Pg. 155 provides that the premises are given only for use and occupation. Clause 1/Pg. 157 provides that the tenant shall not alter the premises. No permission is granted for using the premises for an IT office or for construction of an office building. Despite that, MCGM has allowed respondent no. 5 to convert the premises into an IT office and on 05/03/2020 has permitted respondent No. 5 to construct an office building.

41. The permission dated 05/03/2020 for constructing an office building ought not to have been issued in light of the order dated 24/03/2015 passed by this Hon'ble Court in the present PIL observing that prima facie the transfer of the property in favor of respondent no.5 was illegal.

42. A person without right, title or interest occupying a public property and/or a property acquired for a public purpose can be evicted under Article 226 of the Constitution of India.

43. A public property and/or a property acquired for a public purpose cannot be occupied by a person without any right, title or interest. Such a person can be evicted by the

High Court under Article 226 of the Constitution. Reliance is placed on **Bombay Flying Club V/s. Airport Authority of India**[9] and **Dina Nath V/s. State of Uttar Pradesh**[10].

BRIEF SUBMISSIONS/PROPOSITIONS OF MCGM:

44. The Nair Hospital and Topiwala Medical College is a Municipal Hospital and reservation for its expansion was provided in various development plans from the year 1967. A plot of land bearing C.S.No. 5/1887 and 7/1887 of plot area admeasuring 1953.19 sq.mtrs. called as Lal Chimney Compound was acquired by award dated 24/02/1968 and Municipal tenants' Demand Register shows that 38 tenements occupied by 38 existing tenants including Naliniben Amin, Proprietor of M/s. Maganbhai Amin and Co. were accepted as Municipal Tenants.

45. 19/10/1992 – Land owned by Hindustan Spinning and Weaving Mills Ltd. bearing C.S. No.1896 and 1/1896 totally admeasuring 1558.92 sq.mtrs. was acquired under Maharashtra Regional and Town Planning Act, 1966 (hereafter "MRTP Act", for short) for expansion of Nair Hospital, award was passed and possession was taken over on 23/11/1992.

46. 1996– Since the Lal Chimney Compound area was to be utilized for construction of residential quarters for Nurses, the occupants of structures were required to be shifted. Hence, Naliniben Amin was allotted alternate

9 (2018) SCC OnLine Bom. 451
10 (2010) 15 SCC 218

accommodation at part of Godown of Hindustan Mills with permission to carve out 4914 sq.ft. from existing acquired MCGM Godwon and allotment letter was issued on 16/05/1996 (Exhibit-A, Page-20 in the PIL Petition). Tenement Agreement as Licensee was also executed.

47. The other dates and events as indicated in the LOD submitted by the learned *amicus curiae* is not disputed.

48. Out of acquired land of Hindustan Mills only around 1/3rd portion is occupied by the 5th respondent and the remaining area is being used for Nair Hospital for storing its record and unused machineries. Photos of the Godown, recently renovated are annexed at Annexure-3 to the Note of brief submissions tender during course of argument.

49. The contention of the petitioners that the then DMC Zone-1 passed an order dated 31/01/2009 (Exhibit-J to PIL Petition) is factually incorrect. It is only a report seeking directions from the then Joint Municipal Commissioner (I) / Assistant Municipal Commissioner (W.S.)/ M.C. on the four proposals. This was followed by the AMC (WS) considering the various aspects in a meeting dated 10/02/2009 attended by various persons including DMC (Zone-1) and Dean, Nair Hospital wherein the representative of respondent no.5 specifically agreed to handover the possession of land if required by the Corporation. The then Dean of the Nair Hospital objected to the grant of tenancy rights to respondent no.5. Hence, the then AMC (WS) issued the directions incorporating a specific condition that

if premises are allocated, respondent no.5 will handover the same to BMC as and when required and no permanent construction will be allowed. This proposal was submitted for approval by the then Municipal Commissioner vide Note/ Sheet dated 18/02/2009 (Exhibit-M, Page -53-54). Even the then Municipal Commissioner's approval specifically incorporates the aforesaid conditions (Exhibit-O, Page-55).

50. In the affidavits filed in this Court also it is reiterated that the entire land and structure must be returned to MCGM as and when required for expansion of Nair Hospital by the licensee. Page-172. Even the latest affidavit of Mr. Amol M. Chaunpurge, A.E. (B.P) reiterates the stand of the Corporation even in the additional affidavit dated 29/08/2022 of Mr. Pravin Rathi, Dean (At pages-308-312), it is specifically stated in paragraphs 3(f) and 3(h) and in Para 4 that the condition that the respondent no.5 must handover the possession of the property without claiming any compensation or any other benefit is already incorporated and as and when the property is required for the Corporation, the same would be taken over. The fact that a proposal for expansion of Nair Hospital has been approved by Standing Committee Resolution No.33 dated 07/03/2022 and Work Order for Phase-I has been issued on 05/07/2022 has also been stated in the affidavit.

51. Section 92 of the Mumbai Municipal Corporation Act, 1988 (hereafter "MMC Act", for short) deals with the disposal of Municipal property. However, in the present case

there is no disposal of the property since proviso to Section 92(a) specifically excludes contracts for monthly tenancy. In this case, an undertaking is already obtained from respondent no.5 – Licensee – that as and when the Corporation requires the property for its purpose, the same would be handed-over. It is, therefore, submitted that in the present case there is no disposal of public property nor is it the case where the acquired property is not proposed to be used for the public purpose.

52. Hence, it is not a case where the municipal property is being permanently divested and according to the stage of the construction, the concerned property will be used by taking it back from respondent no.5 as per his undertaking and MC's impugned order when Phase-3 of the Project is implemented.

53. The contention of the Petitioner that the transfer is illegal and that the grant of building permission is illegal is also not correct. During the course of hearing on 29/09/2022 the copies of the Repair Policy and Transfer Policy of MCGM have been submitted along with the Note. The relevant portion marked thereof is as under :-

POLICY FOR TRANSFER OF MUNICIPAL TENEMENTS

> 1. 25.02.1975–The Improvements Committee of MCGM passed ICR No.600 regarding Transfer Policy of Municipal Tenements excluding those built under slum clearance scheme with Government Aid. The said Resolution was to be confirmed by the General Body of the Corporation. The said ICR No. 600

recommended that in so far as the properties acquired for specific public purpose are concerned, no transfer be permitted except by inheritance. In respect of the Staff Quarters and Tenements under eviction action also no transfer of any kind was to be permitted. In cases not covered by the above transfers were permitted, if the claimant had came in possession prior to 31.12.1972, certain other recommendations were also made by the Sub-Committee of the Improvements Committee. ICR No. 600 approved the various recommendations of the Sub-Committee.

2. The Municipal Commissioner wrote a letter bearing No. MDG/3041/(Est. 24442 – AC) dated 3.3.1978 which seems to have been addressed to the Municipal Secretary for being placed before the Improvements Committee and the Corporation. This letter deals with the letter from K.B. Thanekar, Municipal Councillor dated 25.11.1976. The letters incorporates the transfer policy accepted by ICR No. 600 dated 25.2.1975 and quotes therefrom. Para 6 of this letter is important whereby the Commissioner has proposed rules for transfer of tenements other than staff quarters or of service quarters in the municipal properties.

3. 14th March, 1978 – The Improvements Committee of MCGM passed ICR No. 649 recommending to the Corporation that in continuation of I.C.R. No. 600 dated 25.2.1975, that, in supersession of the recommendations contained under ICR No. 611 dated 1.2.1974 and 600 dated 25.2.1975, sanction be given to the revised policy of transfer of tenements in the municipal properties other than staff quarters and service quarters as envisaged in para 6 of the Commissioner's aforesaid report (letter

dated 3.3.1978) and recommended to sanction the revised Policy.

4. 7.08.1980 – The General Body of MCGM passed CR No. 661 regarding the Transfer of Municipal Tenements. The Transfer Policy as recommended by the Municipal Commissioner in para 6 of letter dated 3.3.1978 as recommended by ICR No. 649 dated 14th March, 1978 was approved.

5. 18.03.1987 – ICR No. 683 was passed in respect of premiums to be charged for transfer (copy not available).

6. 28.09.1987 – CR No. 544 was passed in respect of premiums to be charged for transfer (copy not available)

7. 02..02.1988 – ICR No. 568 was passed in respect of premiums to be charged for transfer (copy not available).

8. 22nd July, 1988 – CR No. 241 was passed and sanction was granted for modification of the policy fixed by CR No. 661 dated 07th August, 1980 and the Fees for transfer were revised.

REPAIR POLICY

MCGM has prepared a policy for repairs and scrutiny of repairs proposals which is at Exhibit-H to the Affidavit of Respondent No. 5 at Pages – 120-129. The said Policy provides that tenantable repairs shall not include flattening of roof or repairing roof with different materials. Chapter-3 of the Policy contained guidelines for proposals of raising of roofs and sub-clause-4 provides for flattening of roof (Except Ground Floor Structure). The clauses provides that the existing pitched roof with habitable floor heights can be allowed to be flattened with a

slope of 1:10 and minimum heights at eaves level (height at ridge level gets reduced). Chapter-II provides for scrutiny of proposals for repairs and provides that the proposals shall be broadly categories in two categories viz. (i) partial repairs (less than 75%) and (ii) extensive repairs amounting to reconstruction (100% repairs). All partial repairs proposals are to be approved by the Executive Engineer. However, approval of Chief Engineer (D.P) or Director (E.S.& P) is required for allowing extensive repairs. Some Circulars are part of Repair Policy and the relevant Circulars are as under ;

1) Circular No. CE/15092/I dt. 8.9.1984, contains the policy for grant of repair permission for existing unauthorized structures of tolerated category by Ward Offices for unauthorized Structures prior to 1.4.1962 and residential structures prior to 17.4.1964. Para 1 deals with the scope and states that it will not be applicable to the proposals attracting the provisions of Section 337 and 342 of the BMC Act, 1888. Sub clause (iii) of para 1 states that the request for tenantable repair to the existing ground floor structures mentioned in the above category on reservations and those affected by sanctioned/proposed regular line, provided the same are not forming buttoned can be considered by Zonal Dy. Municipal Commissioner.

2) Circular No. CHE/5745/DP/BP of 17.11.1990 deals with flattening of pitch roof, (M.T. roof/A.C. sheet roof) by Ladi Coba roof over old multistoried building of island city. Para 2 provides that flat terrace roof in place of pitch roof will not be allowed and insisted the pitched roof will be allowed to be replaced by slopping roof with conventional materials with minimum slope of 1:10 and this can be allowed only in respect of roof of permanent multi storied buildings and not in respect of temporary/semi permanent single

storied sheds and such proposals are to be dealt with in accordance with policy in their behalf.

3) Circular No.CHE/142/DPBPC of 15.5.1996 divides the buildings in two categories. Category 1 is of building neither affected by the regular line for road widening nor by D.P. reservations. Category 2 affected by the R.L. for road widening and reservations and where construction vertical extension is feasible. In case of category I extremely dilapidated and dangerous buildings covered by DCR 33 (6) will be allowed to be reconstructed in RCC construction on regular basis subject to the provisions of DCR 33 (6) and NOC from MBR&RB/ M.C.G.M. as the case may be. Complete repairs/reconstruction will not be permitted either in RCC or in structural steel frame work with RCC slabs and not Ladi Coba Ladi flooring and the reconstruction will be permitted even with existing open spaces on site by condoning the deficiency considering 1.5 mt. as adequate open space by charging premium when it is not feasible to provide 5 ft. open spaces on any side. In respect of category 2 buildings, reconstruction will be insisted under DCR 33 (6). Except those buildings affected by setback of important roads from the point of view of their widening, in all other cases repairs in RSJ/RCC /Slope will be allowed inclusive of setbacks with usual registered undertaking. Repairs in RSJ and RCC slab will be allowed on sites under reservation, if the same is not under acquisition, subject to submission of registered Undertaking not to claim compensation as and when property is acquired. After the demolition of walls of Respondent No.5, the impugned order permits reconstruction without changing the footprint and without consumption of any additional FSI. Note :- In the present case, since the proposals was for flattening of the roof of the Ground Floor Structure, change of activity from

Godown to I.T. Office and construction of stilt, the proposal was forwarded to C.E.D.P., who approved the same on 18.08.2008 which was further approved by the Director (E.S.&P) on 20.08.2008. The draft plan was part of the proposal, only thereafter, IOD was issued on 10th September, 2008. (The proposal is at Pages-34-39). On 10th September, 2008 – IOD was granted whereby the draft plan was approved. The IOD is at Pages – 40-44 and the draft plan which was approved along with IOD is at Page -39 of compilation No.2 of Respondent No.5 and Page – 1 to 8 of compilation No.3 of Respondent No.5.

This contemplated flattening of roof construction of stilt with RCC slab, construction of a staircase and internal lift to approach the First Floor, change of activity from existing Godown to I.T. Office, construction of stilt, car parking and additions alterations full light lobby, toilet etc. Thereafter, on 06th March, 2009, the Hon'ble Municipal Commissioner passed the order permitting to go ahead with the work of repairs as per IOD. On 15.02.2010, pursuant to the order, Commencement Certificate was issued sanctioning the plan which had a minor change as compare to draft plan whereby instead of ladi-coba slab of stilt floor RCC slab was provided and orientation of lift and staircase changed. Pages – 9 and 10 of compilation No.3 of Respondent No.5. Thereafter, on 06th October, 2015, the MCGM issued Occupation Certificate subject to payment of penalty of Rs.68,500/- for occupying the premises without prior permission of Estate Department. Thereafter, on 06.10.2015, the Work Completion Certificate submitted by Architect/L.S. of Respondent No.5 was accepted by MCGM. Exhibit-B, Page – 270-272 by Additional Affidavit of Amol Chaunpurge of BMC. Thereafter, on 05th March, 2020, MCGM granted permission for change of

activity from I.T. Office to Business Office. It is thus, submitted that the Transfer Policy sanctioned by CR No.661 dated 7.08.1980, which permitted an application for transfer being considered after the transferee was put in possession, was applied. Consequently, the condition in the License given to Smt.Amin requiring obtaining of prior permission of the Commissioner for transfer was viewed in the light of the Transfer Policy, which provided for condoning the breach subject to payment of penalty, accordingly, penalty has been recovered.

4) Thus, though, there was an unauthorized transfer and illegal demolition; considering the Transfer Policy & Repair Policy of BMC, Respondent No.5 was accepted as Municipal Licensee (and not as tenant) and construction, was allowed without changing the footprint of original structure and subject to the conditions in the proposal / recommendation of AMC (W.S) and approval of the Municipal Commissioner. Thus, it was ensured that no equities are created in favour of Respondent No.5 nor can be claimed. There is no allegation of any FSI violations and while permitting construction a condition is imposed that permanent construction would be raised. This condition is in the context of nature of life given to the Licensee and not in the context of the material used for construction though the construction which is permitted is of a building, that being a substitute for a protion of the existing municipal building (Godown acquired from Hindusthan Mills); the Licensee has not been given any right of permanent occupation but it is a temporary right created by a License to occupy the premises till MCGM requires it for use for the purpose of Nair Hospital.

5) Hence, this is not a case where any proprietary rights of the MCGM or the statutory rights of the

MCGM are compromised. The Municipal Officers have acted bonafide in terms of the Extant Policies and considering absence of immediate need for expansion of Nair Hospital at that point of time.

SUBMISSIONS OF RESPONDENT NO. 5– DEVELOPER :

NOTE ON REPAIRS AND RESERVATION OF LAND FOR PUBLIC PURPOSE OF DHARAMSHALA:

54. Various Development Plans from the Year 1967 provided for reservation for expansion of Nair Hospital and Topiwala Medical College. [Para 3a/Pg.278 (R1 Reply- 29/08/2022)].

55. On 24/02/1968 vide an Award, a plot of land bearing No.C.S.No.5/1887 and 7/1887 admeasuring 1953.19 sq. mts. called 'Lal Chimney Compound' was acquired by respondent no.1. [Para 3a/Pg.278 (R1 Reply- 29/08/2022)]

56. 38 Tenements occupied by 38 Tenants, including Naliniben Amin, Proprietor of M/s. Maganbhai Amin & Co., were accepted as Municipal Tenants at Lal Chimney Compound. [Para 3a/Pg.278 (R1 Reply- 29/08/2022)]

57. On 19/10/1992, Land owned by Hindustan Spinning and Weaving Mills Ltd. bearing C.S. No.1896 and 1/1896 admeasuring 1558.92 sq. mts. was acquired by MCGM for expansion of Nair Hospital. [Para 3b/Pg.278 (R1 Reply- 29/08/2022)]. [Para 11a-b/Pg.77-78 (R5 Reply)].

58. Since Lal Chimney Compound Area was to be utilized for construction of residential quarters for Nurses, occupants thereof were to be shifted. [Para 3c/Pg.278 (R1

Reply- 29/08/2022)].

59. Naliniben Amin was allotted alternate accommodation at part of Godown at Hindustan Mills with permission to carve out 4914 sq. ft. from existing Godown. [Para 3c/Pg.278 (R1 Reply- 29/08/2022)].

60. On 16th May 1996, an Allotment Letter to Naliniben Amin of 4914 square feet godown on the larger property. [Ex.A/20 (Petition)].

61. Learned *amicus curiae* has submitted that Ms. Amin was therefore entitled to a permanent alternate accommodation as a Project Affected Person. [Sr.7 (Amicus LOD)].

62. Some of the relevant clauses of the Allotment letter reads as under:

> "1. That you shall have to execute the Leave & License agreement in Administrative Officer (Estates) 'E' ward office.
> 2. That you shall construct the portion wall on the part of Godown Hindustan Mill on an area admeasuring 4914 sq. ft. allotted to you at your expenses and or which you shall not claim any compensation or reduction of rent. The said work may be carried out as per the instructions from the office of Ward Officer 'E' ward.
> 7. That you shall not be allowed to sell or transfer or sublet for part with the area allotted to you without prior written permission from the Municipal Commissioner."
> "8. That you shall abide by all the rules and regulations, terms and conditions framed in this behalf

> from time to time and in case of any breach, default or dispute, Municipal Commissioner's decision shall be final and binding on the allottees and allottees shall submit an undertaking to that effect on Rs.20/- stamp paper duly signed before Notary."

63. On 10th June, 1996, possession of the said premises admeasuring 4914 sq. ft. was handed over to Naliniben Amin on the larger property. [Ex.B/22 (Petition)].

64. On 14th June, 1996, an 'Agreement of Tenement' entered into between MCGM and Naliniben in connection with 4914 sq. ft. Premises. [Ex.C/23 (Petition)].

65. On 25th September 2003, a Meeting was held between Additional Municipal Commissioner and other officers of respondent no.1, representatives of Nair Hospital, including the Dean, where plans for proposed Dharamshala were discussed where portions allotted to Project Affected Persons ('PAP') by respondent no.1 were excluded [Ex.A-1/100 (R5 Reply)]. representatives of Nair Hospital were present at this meeting. The relevant excerpt of the Minutes of Meeting state as under:

> "The papers were sent to Dy.C.E.(P&D) by A.C. (Estate) to work out the details. Dy.C.E.(P&D) then informed A.M.C.(W.S.) that, the part of the shed under reference has been allotted to two P.A.P.'s by A.C.(Est.) and that Dy.M.A.(City) has already prepared plans for the Dharamshala on the remaining portion of land"

66. On 25th March, 2004, Meeting held between representatives of respondent no.1 and Nair Hospital where

it was also recorded that 1/3rd Godown had been given to PAP and 2/3rd was to be demolished for construction of the Dharamshala/Atithi Gruha *[Ex.B-1/103 (R5 Reply)]*. Representatives of Nair Hospital were present at this meeting.

> "AMC (WS) inquired where the atithi gruha was to be located and what is the status of the property. Dean (N) informed that this property is a godown belonging to Nair Hospital and has been acquired as part of extension to Nair Hospital. One third of the godown has been given to a PAP (project affected person). It is desired to construct an atithi gruha by demolishing the remaining 2/3 part and constructing on it"

67. The submission of the amicus curiae that alleges fraud or illegality in the utilization of the Hindustan Mills Compound for *any* use other than that of the public purpose of Dharamshala (and the reliance on Section 46 of the MRTP Act) is irrespective of whether the occupant/licensee is the original PAP or a transferee. In other words, this submission of the amicus curiae is unrelated to the identity of the occupant/licensee of the subject premises.

68. The Minutes of Meetings noted above indicate that the premises allotted to Ms. Amin was never, at least initially, to be a part of the proposed Dharamshala. The suggestion that permissions for repair and the demolition and use of the above the godown on the land of Hindustan Compound has defeated or frustrated the purpose of the Dharamshala is not correct and belied by the aforesaid Minutes of Meetings.

The entire submission of the learned *amicus curiae*, as part of the overall submission that respondent no. 1/Mumbai Municipal Corporation has acted dishonestly to favour respondent no. 5, overlooks the fundamental fact that on the date of these Minutes of Meetings there was no assignment by Ms. Nalini Amin to respondent no. 5 (an event which took place about 3 years later).

69. This submission about the failure to develop the land for a Dharamshala overlooks another aspect. The allotment of tenements to PAPs in Hindustan Mills Compound, which may have been acquired for the public purpose of a Dharamshala also facilitated another important and more immediate public purpose, viz. the vacating of occupants from the Lal Chimney Compound that is part of or adjacent to the main Nair Hospital building so that that available space could be utilized to construct a Nurses Hospital. This is an admitted position. The submissions of the Amicus which proceed on the basis that allotting premises on Hindustan Mills compound was illegal or tainted by fraud or dishonesty overlooks the circumstances in which the allotments on an alternative site/location were made in the first place.

70. Thereafter, on 31/12/2007, a Deed of Assignment was executed by Naliniben in favour of respondent no.5, which was registered on 12/03/2008. [Ex.D/25 (Petition)].

71. On 15/05/2008, respondent no.5 made an Application for Office Acquisition Remarks and for no objection for

partial repairs and construction of proposed loft. [Para 11g/ 81 (R5 Reply)].

72. On 04/07/2008, a repair proposal submitted by respondent no.5 was not considered by Executive Engineer (B.P.) as the structure was a godown. [Ex.F/34 (Petition)].

73. It appears that another proposal was submitted on 05/07/2008, though the cover letter/application of the same is dated 23/06/2008. Vide this proposal, respondent no.5 applied for proposed change of user from Godown to Office, repairs to the structure, flattening of roof, and proposed stilt for parking. A copy of the application cover letter was tendered separately to Court on 22/08/2022. Thereafter, respondent no.5 made an Application through RTI for the documents referred to in the above application cover letter. The RTI Application sought for and obtained all documents in relation to the IOD bearing No. EB/3974/E/A. These are separately compiled in Compilation termed as Compilation-2. The process has been explained in an Affidavit dated 29/08/2022 which will be tendered with leave of the Court.

74. The said Application annexes Form 342 and 44/69 alongwith other documents. Whilst the Form does not provide any details about the nature of the work proposed, the same can be ascertained from the proposed plans/draft plans dated 10/09/2008 [Pg.1 (Compilation-3)], 01/02/2010 [Pg.9 (Compilation-3)] and 05/03/2020 [Pg.11 (Compilation-3)] which have also been obtained through the aforementioned RTI process.

75. These plans are discussed below. In the draft plans as also in the first approved plan [Pg.8 (Compilation-3)], there is a denotation in the legend for demolition of the roof. It is correct that when the demolition was carried out by respondent no.5, in addition to the demolition of the roof, two of the walls forming part of the subject godown were also demolished [Para 5 (R5 Additional Affidavit- 29/08/2022)]. To this extent, the demolition was not reflected in the draft plans or approved plans. A penalty was paid for the demolition to the extent it was undertaken without permission [Pg.13 (Compilation-3)] [Para 5 (R5 Additional Affidavit- 29/08/2022)]. This was pursuant to a regularization policy of respondent no.1. However, thereafter respondent No.5 obtained a CC dated 09/06/2009 [Ex.O/Pg.143 (R5 Reply)] and has reconstructed the said premises in a manner consistent with the approved plans. A work Completion Certificate dated 16th August 2015 [Pg.7 (Compilation-1)] has also been granted.

76. Section 342 of the MMC Act provides that :-

> **"342.** Every person who shall intend—
> (a) to make any addition to a building 2[or change of existing user].
> (b) to make any alteration or repairs to a building involving the removal, alteration or re-erection of any part of the building except tenantable repairs:
> Provided that, no lowering of plinth, foundation or floor in a building shall be permitted.

Explanation.—" Tenantable repairs " in this section shall mean only,—

(i) providing guniting to the structural member or walls ;

(ii) plastering, painting, pointing ;

(iii) changing floor tiles ;

(iv) repairing W.C., bath or washing places ;

(v) repairing or replacing drainage pipes, taps, manholes and otherfittings;

(vi) repairing or replacing sanitary water plumbing, or electrical fitting;

And

(vii) replacement of roof with the same material but, shall not include,-

(a) change in horizontal and vertical existing dimensions of the structure;

(b) replacement or removal of any structural members of load bearing walls;

(c) lowering of plinth, foundations or floors;

(d) addition or extension of mezzanine floor or loft; and

(e) flattening of roof or repairing roof with different material.]

(c) * * * *

(cc) to make any alteration in a building involving—

(i) the sub-division of any room in such building so as to convert the same into two or more separate rooms,

(ii) the conversion of any passage or space in such building into a room or rooms, or]

(d) to remove or reconstruct any portion of a building abutting on a street which stands within the regular line or such street,

> shall give to the Commissioner, in a form obtained for this purpose under section 344, notice of his said intention, specifying the position of the building in which such work is to be executed, the nature and extent of the intended work, [the particular part or parts, if any, of such work which is or are intended to be used for human habitation] [and the name of the person whom he intends to employ to supervise its execution]"
>
> (emphasis supplied)

77. Therefore, Section 342, which deals with Repairs, in Sub Section (b) also contemplates 'alterations or repairs' as involving 'removal alteration or re-erection of a part of a building'. This provision forms no part of the Learned *amicus curiae*'s submissions. The proposed plans leave no manner of doubt that the work contemplated was more than just mere 'tenantable' repairs and that is why recourse was taken to this provision.

78. Importantly, the Form under which the application was made was also under Section 44 and Section 69 of the MRTP Act. These provisions read as follows:

> **"44.** (1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as maybe prescribed:

Provided that, save as otherwise provided in any law, or any rules, regulations or by-laws made under any law for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, incompliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under the Maharashtra Housing and Area Development Act, 1976.

(2) Without prejudice to the provisions of sub-section (1) or any other provisions of this Act, any person intending to execute 3[an Integrated Township Project] on any land, may make an application to the State Government, and on receipt of such application the State Government may, after making such inquiry as it may deem fit in that behalf, grant such permission and declare such project to be 1[an Integrated Township Project]by notification in the Official Gazette or, reject the application.]"

"69. (1) On or after the date on which a declaration of intention to make a scheme is published in the Official Gazette—

(a) 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;

(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.

(2) If a municipal corporation gives permission under clause (b) of sub-section (1), it shall inform the Arbitrator accordingly, and shall send him a copy of the plan:

Provided that, a municipal corporation shall not grant a commencement certificate for any purpose which is in conflict with the provisions of the draft scheme, unless the corporation first obtains concurrence of the Arbitrator for the necessary change in the proposal of the draft scheme.

(3) If a Planning Authority communicates no decision to the applicant within two months from the date of such acknowledgment, the applicant shall be deemed to have been granted such certificate.

(4) If any person contravenes the provisions contained in clause (a) or clause (b)of sub-section (1), the Planning Authority may 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.

(5) Any expense incurred by the Planning Authority under sub-section (4) shall be a sum due to the Planning Authority under this Act from the person in default or the owner of the plot.

(6) The provisions of Chapter IV shall, mutatis mutandis apply 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 the Chapter.]

(7) 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."

79. The scope of these provisions, which when applied to the application made by respondent no. 5, is to be understood with the meaning of 'development' in Section 2(7) of the MRTP Act, which reads as under:

"(7) "development" with its grammatical variations means the carrying out of buldings, 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 4[or any material or structural change in any heritage building or its precinct] 5[and includes6[demolition of any existing building, structure or erection or part of such building structure of erection; and] 7[reclamation,]

redevelopment and lay-out and sub-division of any land; and " to develop" shall be construed accordingly];"

80. Further, under the Repair Policies and Scrutiny of Repairs Proposals ("the Repair Policy") issued by the MCGM [Ex.H/120 (R5 Reply)]

a. Tenantable repairs require no permission of the MCGM.

b. For repairs other than tenantable repairs, Chapter II of the Repair Policy applies which deals with scrutiny of Proposals for Repairs.

c. Under Chapter II of the Repairs Policy, proposal for Repairs are categorized into (i) Partial Repairs (less than 75%) and (ii) Extensive Repairs amounting to reconstruction (100% repairs).

81. Some of the relevant clauses of the Repair Policy are as under:

(1) Reporting for approval:

The proposal shall be broadly categorized in two categories (i) Partial Repairs (less than 75%) and (ii)Extensive repairs amounting to reconstruction (100% repairs).

Existing FSI allowed with existing plinth.

All partial repair proposals to be approved by Executive Engineer.

Approval to be sent to Ch.E.(D.P.)/ Dir. (E.S.& Plaintiff) for

a. Allowing extensive repairs

b. Condoning deficiency in open space

c. Any other concessions as the case may be.

82. As mentioned above, under Chapter II of the Repairs Policy [Ex.H/120 (R5 Reply)], proposal for 'Repairs' are categorized into (i) Partial Repairs (less than 75%) and (ii) Extensive Repairs amounting to reconstruction (100% repairs). Therefore, it is clear that under the Repairs Policy, Repairs also include instances where complete reconstruction would be required. The only requirement for an Extensive Repairs amounting to reconstruction is that the same has to be sent for approval to Chief Engineer (D.P.)/ Director (E.S & P).Whereas for other partial repairs, the proposal is to be sent to Executive Engineer for approval.

83. The very making of the application and the proposed plan/draft plan submitted by respondent no. 5 is an indication of the fact that the work contemplated or proposed in the godown was beyond mere repairs or tenantable repairs. These provisions are intended to cover more expansive work, be it alterations, re-erection, removal and demolition too. It also covers a change of user.

84. The suggestion in the PIL [Para 14/Pg.7 (PIL)] and the arguments of Learned Amicus in relying on the nomenclature of the application as being 'for repairs', is based on a misreading of the aforementioned statutory

provisions, the repair policy and the documents on record or that are of matter of record.

85. On 13/08/2008, the Assistant Engineer (B.P.) City IV of respondent no.1 passed an Order approving proposal of respondent no.5 for change of activity from Godown to I.T. Office and approving further proposed work of internal additions and alterations, construction of stilt parking for car parking, flattening of roof, etc. [Ex.G/35]. The said Order was approved / endorsed by the following Officers on the following dates:

Dy.Ch.E.B.P- 13/08/2008

Asst. Eng. (B.P.) City IV – 13/08/2008

Dy.Ch.E.B.P.(City) – 21/08/2008

Dy. Ch. Eng. (B.P.) City 13/08/2008

Ch.E. (DP) – 18/08/2008

Dir (ES&P) - 20/08/2008

Ch.E. (DP) – 14/08/2008

86. The said Order provided, *inter alia*, that :-

> "1… Architect has submitted the proposal for proposed change of activity from existing Ground floor godown to I.T. Office and additions and alterations along with flattening of the existing sloping roof for the property bearing C.S. No. 1896 of Byculla Division. From the papers submitted the Architect, it is observed that the original plot and the godown over it belongs to Asstt. Commissioner, (Estates) of M.C.G.M. Architect has submitted

certified true copy of the letter issued by the office of the Asstt. Commissioner (Estates) under No Estates/1221/MC/AC dt. 16.5.1996 stating that the premises under reference has been allotted to Smt. Nalini Amin as an alternate accommodation in lieu of Lal Chimney Compound Mumbai as part of the godown and the area of the godown allotted was 4914 Sq. ft. Copy as at Pg C-47. From the above, it is seen that the godown which has been given as an alternate accommodation as a godown to Smt. Nalini Amin, the Prop. Of M/s. Maganbhai Amin & Co. is a tenanted property of M.C.G.M. Hence, the authenticity of the premises and the user of the premises is accepted."

2.Owners consent:

The proposal for change of activity is submitted by M/s. Rubberwala & Co. who are Regd. Power of Attorney holder of Smt. Nalini Amin, Prop Of M/s. Maganbhai Amin & Co. who is the tenant of the M.C.G.M. As the property belongs to Asstt. Commissioner (Estates) N.O.C. from the Asstt Commissioner (Estates) is necessary. As per the practice and procedure, Estate Deptt. will issue N.O.C. only after approval of plans by this office. Hence submission of N.O.C. from Estate Dept. will be incorporated as an I.O.D. condition to be complied with before C.C.

3c. Construction of the stilt for car parking in the premises.

3d. Flattening of the roof.

4. Open space deficiency:

The applicant is the tenant of M.C.G.M. and the premises is existing godown and handed over to the applicant as an alternate accommodation. As the plot is reserved for extension to Nair Hospital. The M.C.G.M. can shift the tenant whenever the plot is to be developed as an extension to the Hospital by M.C.G.M. Hence the open space deficiency may not be considered in this case.

6. R.L. & Reservation:

As per the S.E. (Survey)'s remarks as at Pg C-1 the plot under reference is affected by 120'0 wide A.L. Nair Road and same is reserved for extension to Municipal Hospital (Nair Hospital). The Architect has proposed change of activity along with additions and alterations to the existing structure. Further the property under reference belongs to A.C. (Estates) i.e., M.C.G.M. and allotted the same as an alternate accommodation to the appellant whenever Corporation developed the plot as an extension to Hospital applicant has to be shifted to other location as given by Asstt. Commissioner (Estates) therefore necessary Undertaking for not to claim any compensation for the proposed work will be insisted

as an I.O.D. condition to be complied with before C.C.

In view of above, Ex. Eng. (B.P.) City-II's approval is requested-

1. To allow flattening of roof proposed by Architect as explained in Point No. 3 (d) as at pg N-3

In view of above Ch. Eng. (D.P.)/Dir(E.S.&P)'s approval is requested

1. To allow change of activity proposed by Architect as explained in Point No. 3 (a) as at pg N-3.

2. To allow construction of stilt proposed by Architect as explained in Point No. 3 (c) as at pg N-3.

87. The exercise of this power or discretion by respondent no. 1 was consistent with the aforesaid statutory and policy framework. At any rate, no specific argument has been made on why the proposed grant of this permission by this order or the file notings were not within the ambit of applicable law. This order or file notings have been signed and endorsed by various officers. If an argument has to be countenanced that all of this is illegal and 'dishonest', this is an allegation of not just malice in law but malice in fact. The burden for such an allegation is very high and one that has not been satisfied in the present case.

88. The approval in the above order/notings is also, *inter alia*, to the change of user to IT office. The proposed plans / draft plans obtained through RTI indicate the nature

of the office that was to be constructed. The relevant part of the order of 13/08/2008, which considers and approves the change of user reads as follows:

> "3(a) change of activity:
>
> As per the papers submitted by Architect, it is observed that the existing user of the premises is godown. Architect has proposed to change this activity as I.T. Office. The premises under reference falls in the 'R' Zone and it is abutting to 60'0" wide Sane Guruji Marg and 120'0" wide Dr. Anandrao L. Nair Marg. This particular premise is having access from Dr. A.L. Nair Marg. As per regulation 51 (xviii) of DCR 1991, the I.T. establishment is permissible activity on the plot having fronting on the roads with width more than 12.00 Mtr. In the above referred case, the premises is having access from 120'0" wide Dr. A.L. Nair Road. Thereafter, this proposed activity of I.T. user is permissible. As the proposed user is I.T. office, Registration Certificate from Director of Industries as I.T. Office shall be submitted before C.C.
>
> Ch. Eng. (D.P)/Dir (E.S.& P.)'s approval is requested to allow change of activity as explained above.

89. This part of the orders/report dated 13/08/2008, though mentioned at Serial No.24 of the *amicus curiae's* List of Dates and Events, has been overlooked in the main submissions of the *amicus curiae* who has contended in paragraph no.3 / Page 3 that "…[n]o permission is granted for using the premises as an IT office or for construction of an office building…"

90. On 10/09/2008, IOD bearing No. EB/3974/E/A was issued by the MCGM under Section 346 of the MMC, Act [Ex.H/40 (Petition)].

91. Section 346 of the MMC, Act, provides that :-

> **"346.** (1) If the Commissioner disapproves of any building or work of which notice has been given as aforesaid or of any portion or detail thereof, by reason that the same will contravene some provision of this Act or some byelaw made hereunder at the time in force or will be unsafe, he may, at anytime within thirty days of the receipt of the notice or of plan, section, description or further information, if any, called for under section388,340 or343, as the case may be, by a written notice intimate to the person who gave the notice first herein before in this section mentioned his said disapproval and the reason for the same, and prescribed terms subject to which the building or work may be deemed to be approved by him.
>
> (2) The person who gave the notice concerning any such building or work may proceed with the same, subject to the terms prescribed as aforesaid but not otherwise at any time within one year from the date of receipt by him under sub-section (l) of the written notice in this behalf, but not so as to contravene any of the provisions of this Act or any bye-law made hereunder at the time in force."

92. Clause 17 of the IOD provides that:-

> "17. That the precautionary measures to avoid dust nuisance such as erection of G.I. sheet screens at plot boundaries upto reasonable height shall not be provided before demolition of existing structures at site."
>
> (emphasis provided)

93. Further, Clause 20 of the IOD provides that :-

> "20. That the G.I Sheet screens at plot boundaries upto adequate height to avoid dust nuisance shall not be provided before demolition of existing building."
>
> (emphasis provided)

94. Therefore, it is clear that the IOD granted under Section 346 of the MMC Act also contemplated demolition. To suggest that these are 'standard' terms and conditions is no answer to the fact that the nature of work and change of user was separately considered by respondent no. 1 and the IOD was issued in relation to those works.

95. On 20/01/2009, Dean of respondent no.3 addressed a letter to respondent no.1 contending a part of the above property had been demolished and requesting the matter be looked into on urgent basis [Ex.I/45 (Petition)]. It was, *inter alia*, claimed by the Dean of the respondent no.3 that

> "This is to bring to your notice that a property godown (previously Hindustan Mill compound) belonging to Nair Hospital which had been acquired as part of extension to Nair Hospital in yer 1992 measuring 1552 sq. mt. area (vide page No.7 marked 'A') was reported demolished hurriedly in two days on 17.1.2009 and 18.1.2009.
>
> As per plan record available at this office at initial stage after acquiring the said property, it was tentatively proposed to construct Dean's Banglow after demolishing the Hindustan Mill Compound godown.
>
> Later 1/3rd of this acquired property as part of extension of Nair Hospital was decided to be given to

> a PAP (Project Affected Person) and the remaining 2/3rd was proposed for AthithiGruha (Dharma Shala) for the patient's relatives of Nair Hospital, as per minutes of meeting with AMC(WS) held on 25.03.2004. (vide page 7 marked 'C')"

96. Petitioner had alleged on the basis of this letter, collusion between respondent no.5 and respondent nos.1 and 2.

97. It is submitted that the Dean of respondent no.3 would not have known about the applications made in accordance with the Repairs Policy and the IOD granted to the respondent no.5. Further, even according to the Dean of the respondent no.3, 1/3rd of the said Property was decided to be given to a Project Affected Person, and 2/3rd was proposed for Athithi Gruha.

98. Notings on the said letter of Executive Engineer (BP) City [Pg.46] state that matter be seen personally, IOD and ownership documents be examined carefully and Stop Work Notice be issued till matter is clarified and put up to Municipal Commissioner.

99. On 31/01/2009 [Ex.J/47 (Petition)], a meeting was held between the representatives of respondent no.1 and respondent no.3, where, *inter alia*, certain observations were made qua the transfer and stating that Building Proposals Department had issued IOD but not CC to allow demolition of the said structure. In the Minutes, certain Orders were requested for from Jt.M.C.(I)/A.M.C.(WS)/M.C.,

inter alia, requesting for cancelling tenancy of Naliniben, revoking IOD, restoration of possession and enquiry against certain staff.

100. It is submitted that these observations were made without hearing the respondent no.5 and respondent no.5 was not present. The Application made as per prevailing policy for transfer of tenancy was not noticed at this Meeting. None of the Orders requested for in the said Meeting came to be passed by respondent no.1.

101. Thereafter, on 10/02/2009, a Meeting was held in the presence of the representative of respondent no.5 wherein, *inter alia*, it was recorded that request for transfer of tenancy was pending, but had not yet been sanctioned. In this meeting, Additional Municipal Commissioner (WS) directed Dy. Chief Engineer (B.P.) (City) to ensure no permanent structure were erected on the plot and on compliance with IOD, CC to be given as per law, including two additional conditions, i.e.:

a. Premises allocated to MCGM rules and regulations will be handed over to MCGM as and when required as per existing policy.

b. Permanent construction would not be allowed under any circumstances.

102. Thereafter, on 11/02/2009 [Ex.L/52 (Petition)], the Asstt. Commissioner (Estates) of respondent no.1 addressed a letter to the Dy. Ch. Eng (B.P.) City and noted the Application received for proposed change of activity,

proposed repairs, additions and alterations. It was also noted, *inter alia*,

> "Sub: Sudden demolition of part structure of Hindustan Mill Compound acquired property of Nair Hospital.
>
> Please find enclosed herewith photocopy of note received in this office from Ag. Dean (N&T) at page 1 alongwith other related documents at pg.3 to 11
>
> In this case, this Office has received application from Architect M/s Shaikh Associates for proposed change of activity, proposed repairs, Addition, alteration to the existing municipal tenanted structure situated at plot bearing C.S. No.1896 of Byculla division at Dr. A.L. Nair Road in 'E' ward. The Architect has submitted certified copies of IOD and plan approved & issued by E.E. (B.P.) City u/no. EB/3974/E/A dtd. 10/09/2008. The proposal for NOC from this Office is still under scrutiny.
>
> Meanwhile, site was inspected by this office concerned staff on 28/01/2009 when it is noticed that the existing tenanted premises for which repairs are proposed is found demolished.
>
> Now, Ag. Dean (N&T) vide note at page 1 u/no. NDN/1136 dtd. 20/01/2009 has pointed out this demolition of structure & has also raised certain points related to the redevelopment of the said plot.
>
> You are therefore requested to take immediate

necessary action for demolition of the municipal structure without obtaining C.C from your office i.e. E.E.(B.P.) City & N.O.C. from Estate Deptt., Asstt. Comm. 'E' Ward. Dean of Nair Hospital who is user Department in present case. You are also requested not to grant any permission/ commencement certificate to the above proposal unless specific remarks & N.O.C. are obtained by the applicant from concerned Authorities.

You are further requested to inform Ag. Dean (N&T) Nair Hospital about the course of action taken by your office under intimation to this Office & other concerned authorities please.

Asstt. Commissioner (Estates)
Dy.Ch.Eng. (B.P.) City

103. Thereafter, on 18/02/2009 [Ex.M/53 (Petition)], a Note was issued by Additional Municipal Commissioner (W.S.) stating that information had been received from the Superintendent, Nair Hospital that the shed in the Hindustan Mill Compound, Nair Hospital was demolished on 19/01/2009 without giving any prior notice. It was stated that information was obtained by the Additional Municipal Commissioner (W.S.) from Dy. Chief Engineer, Building Proposal, City, Shri Saste, who also ordered "Stop Work Notice" be given to further permanent construction. It was noted that in the meantime, after the possession holder of the concerned shed made a representation to the Hon'ble

Commissioner in this context, the Hon'ble Commissioner verified the actual facts and passed order that action be taken as per the rules. It was noted that Hon'ble MLA, Shri Yusuf Abrahani had made a request that the said land had been acquired by M/s. Rubberwala Developers as alternative land and they be allowed to carry out the said construction. The Meeting of 10/02/2009 was referred to. It was noted that it was wrong that in the name of repairs, the entire shed had been demolished and new construction work was started. Thereafter, the Additional Commissioner (WS) referred to starting work subject to IOD. This note suggested the grant of permission to start work subject to three conditions i.e.,

a. repair work be carried out in strict compliance with given permissions and IOD;

b. no permanent construction be carried out; and

c. in the event, the premises are required back by MCGM, the same be handed over in accordance with law.

104. Therefore, it is submitted that even if there was demolition without a Commencement Certificate, the same was addressed by directions to issue a Stop Work Notice by respondent no.1 and requiring any further permissions/commencement certificate unless specific remarks and NOC was obtained from concerned authorities. Further, the Note of the Additional Commissioner (WS) also

granted permission subject to IOD and on the condition of no permanent construction, which would have to be understood in the context of the proposal on the basis of which the IOD had been granted. Further, it is submitted that in any case even the precise nature of the material that we wanted to use was the subject matter of a later application of 2010.

105. In this light, on 6/03/2009 [Ex.N/Pg.55 (Petition)], an Order was passed by Municipal Commissioner of respondent no.1 allowing respondent no.5 to go ahead with repairs as per the portion identified as 'X' in the minutes/report of 18/02/2009. The order of 6/03/2009 reads as under

> "Order
>
> We have already approved for flattening of roof along with strengthening of structure without changing the footprint as per repair policy.
>
> Hence we may allow the party to go ahead with the repair as per IOD conditions & as recommended by Additional Municipal Commissioner (W.S)
>
> Yes, As per 'X'
>
> Sd/-
> 06.03.2009
> Municipal Commissioner

106. The sequence of events including the reports, orders and notings from time to time were duly considered in the short order of 6/03/2009. This order is cognizant of the approval to the repairs (which would also include reconstruction). It also takes into account the demolition

that was carried out without a Commencement Certificate and therefore, reiterates the conditions stipulated in the order of 18/02/2009 [Ex.M/Pg.53 (Petition)], as identified as 'X' [Pg.54 (Petition)]. Those conditions in turn seek strict implementation of the IOD conditions and provide for no permanent construction.

107. Although the demolition of a part of the subject structure was not contemplated in the proposed plans and the demolition was done before the issuance of the CC, the consequences for that need not have been that permissions and approval otherwise granted for repairs or additions and alterations as per the proposed plans are liable to be cancelled in toto. The order of the Municipal Commissioner therefore, seeks to give effect to the approvals already granted as per law and as per the repair policy whilst at the same time addressing the issues raised in the orders of 18/02/2009 [Ex.M/Pg.53 (Petition)] and 11/02/2009 [Ex.L/ Pg.52 (Petition)].

108. The reconstruction/re-erection of the subject premises was done thereafter upon obtaining a CC, as noted below. It is neither the case in the Petition nor the case as argued by the *amicus curiae* that the premises as constructed was contrary to the plans as approved or the order of 13/08/2008 [Ex.G/35 (Petition)] first granting the permission for certain additions and alterations as also for change of user.

109. It is also nobody's contention that in the reconstruction of the premises, respondent no.5 has consumed any additional FSI or has added any areas to the premises beyond the area that was allotted to the predecessor of respondent no.5.

110. In light of the above facts and orders, in accordance with the Regularization Policy of respondent no.1, on 8/06/2009, the respondent no.5 paid a penalty for the demolition to the extent it was undertaken without permission [Pg.13 (Compilation-3)] [Para 5 (R5 Additional Affidavit- 29.08.22)].

111. On 8/06/2009, NOC to issue Commencement Certificate was issued by the Estates Department through the Assistant Engineer Estates of the MCGM, *inter alia*, for proposed repairs, addition, alteration [Ex.O/56 (Petition)]. The text of this NOC issued by the Estates Department states that

> "… there is no objection to issue Commencement Certificate for the above mentioned work as per the plans approved by EEBP City under No.EB/3974/E/A dated 10th September 2008 on following terms & conditions…"

112. The approved plans referred to in this NOC are part of Compilation III filed by respondent no.5. [Pg.1 (Compilation-3)]. These plans bear the same date as of the IOD.

113. The Learned *amicus curiae* had submitted that no NOC was obtained with regards to the work to be carried out by respondent no.5. It is submitted that the said submissions is contrary to the said document which gave NOC to commence work.

114. On 9/06/2009, Commencement Certificate was issued by MCGM [Ex.O/143 (R5 Reply)]. Commencement Certificate was issued under Section 347 which provides that

> **"347.** (1) No person shall commence to erect any building or to execute any such work as is described in section 342—
>
> (a) until he has given notice of his intention as hereinbefore required to erect such building or execute such work and the Commissioner has either
>
> intimated his approval of such building or work or failed to intimate his disapproval thereof within the period prescribed in this behalf in section 345 or 346;
>
> (aa) until he has given notice to municipal 2[city engineer] of the proposed date of commencement. Where the commencement does not take place within seven clear days of the date so notified, the notice shall be deemed not to have been given];
>
> (b) after the expiry of the period of one year prescribed in sections 345 and 346 respectively, for proceeding with the same.
>
> (2) If a person, who is entitled under section 345 or 346 to proceed with any building or work, fails so to do within the period of one year prescribed in the said

> sections, respectively, for proceeding with the same he may at any subsequent time give afresh notice of his intention to erect such building or execute such work, and thereupon the provisions hereinbefore contained shall apply as if such fresh notice were a first notice of such person's intention."

115. The very existence of there being both an IOD and CC, without any submission identifying, which if any portion of the work was either contrary to law or contrary to the permissions granted, is an indication that the work that was done was properly applied for and completed. Even if the demolition work was without a CC, that would not render the work thereafter done pursuant to a CC as illegal or warrant the serious allegations made against the respondents. As noted below and also placed on record in the Affidavit of respondent no. 1 dated 14/07/2022, whenever any work was carried out or a change of user was applied for and granted, respondent no. 1 has issued a work completion certificate.

116. On 20/01/2010, respondent no.5 applied for changing material from ladicobaladi to RCC and for rotation of staircase and lift without changing footprint of structure [Para 11r/85 (R5 Reply) Ex.Q/59 (Petition)]. It is submitted that the same was an amendment to the approved plans.

117. On 01/02/2010 [Ex.P/145 (R-5 Reply)], Executive Engineer (BP) City II made reference to Chief Engineer (D.P.) & Director (ES&P) of respondent in respect of respondent no.5's proposal.

a. Serial No.1 of the proposed amendment plans was to include rotation of staircase, lift and Serial No.2 was proposed ladicobaladi flooring into RCC and that the proposal does not increase the FSI being within the footprint of the structure.

> "1. Rotation of staircase lift
>
> Architect has proposed rotation of staircase / lift with respect to last amended plans for better planning. However, the same will not increase F.S.I. since the same is within the footprint of the structure. Hence, the same can be allowed."

b. Serial No.2 records that it will be easier to demolish the structure without affecting rest of the structure at the time of widening of the road.

> "2. Proposed Ladicobaladi flooring into R.C.C..
>
> Architect in his representation as at Pg.C/71 has proposed to construct R.C.C. floor instead of ladicobaladi flooring. The structure under reference comes under Category 2 of the repair policy i.e. affected by road setback and reservation of extension to Nair Hospital. However, since then M.C. has allowed repairs to the structures on the same foot print, the structure may be deemed to have been considered as Category I of the repair policy. As per category 1 (b) complete repair / reconstruction is permissible either in R.C.C. or in structural steel frame work with R.C.C. slabs and not ladicobaladi flooring. Further

> owner has undertaken to surrender the portion of structure in setback without claiming any compensation as and when road under setback needs widening. Further, Architect has proposed RSJ frame structure with R.C.C. slab and also provided construction joint between the portion of structure in setback and rest of the structure. Hence, it will be easier to demolish the structure without affecting rest of the structure at the time of widening of road."

118. The stamp and signatures of Dy. Ch. Eng. (B.P) City (02/02/2010); Ch. Eng. (D.P) and Dir. (E.S.& P) (18/02/2010) are endorsed at the bottom of the page [Pg.146 (R5 Reply)] showing that the same was approved by the appropriate authorities under Repairs Policy for Extensive Repairs amounting to reconstruction (100% repairs). The amended approved plans reflecting these amendments are produced at [Pg.9 (Compilation-3)].

119. On 27/04/2015, the proposal for NOC to OC of completed addition/alteration, flattening of roof, stilt for parking and change of activity from Godown to IT office was approved. [Ex.A/266 (R1 Reply14.7.2022)].

120. On 15/05/2015, an NOC to OC issued. [Ex.A/266 (R1 Reply 14.7.2022)].

121. On 16/10/2015, Work Completion Certificate issued under Section 353A of the MMC Act, which reads as follows

> "[**353A.** (1) every person who employs a licensed surveyor or person approved by the Commissioner to

erect a building or execute any such work as is described in section 342,shall, within one month after the completion of the erection of such building or the execution of such work, deliver or send or cause to be delivered or sent to the Commissioner at his office, notice inwriting of such completion, accompanied by a certificate in the form of Schedule T signed by the person employed under section 344A,who is hereby required immediately upon completion of the work and upon demand by the person employing him to sign and give such certificate to such person, and shall give to the Commissioner all necessary facilities for the inspection of such building or of such work: Provided that—

(a) such inspection shall be commenced within seven days from the date of receipt of the notice of completion, and

(b) the Commissioner may, within seven days from the date of commencement of such inspection, by written intimation addressed to the person from whom the notice of completion was received, and delivered at his address as stated in such notice, or, in the absence of such address, affixed to a conspicuous part of the building to which such notice relates-

(i) give permission for the occupation of such building or for the use of the building or part thereof affected by such work, or

(ii) refuse such permission in case such building has been erected or such work executed so as to contravene any provision of this Act or of the bye-laws.

(2) No person shall occupy or permit to be occupied any such building, or use or permitted

> be used the building or part thereof affected by any such work, until-
> (a) the permission referred to in proviso (b) to sub-section (1) has been received, or
> (b) the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate as aforesaid his refusal of the said permission]."
>
> (emphasis supplied)

122. On 19/08/2017, the Licensed Surveyor had submitted the proposal for regularization for work of further addition/alteration of IT building. The same was approved. [Ex.B/270(Para 2 (i))(R1 Reply14.7.2022)].

123. On 25/02/2019, an Online submission of Application for change from IT to Office Building. [Pg.46 (COD)].

124. On 05/03/2020, Approval granted from IT to Office Building under Regulation 34(3.1) (3.2) (Table C) Sr. 25 of the DCPR, 2034.[Pg.46 (COD)].

125. This, like many others, are documents produced by respondent no. 5 itself as part of a Compilation of Documents (Compilation I). Contrary to the submission, at this stage there was no further work but only a change of user to a regular office from a previous user that was for IT. It was allowed. Again, no provision has been cited to contend that it was either procedurally or substantively illegal. It is not.

126. Also, it was contended that this approval is an indication of the malafides of respondent nos. 1 and 5

because it was after the interim order dated 24/03/2015 passed in the above Writ Petition. This submission is misplaced especially when one reads the interim order that states:

> "6. However, till the disposal of the Petition, the fifth Respondent shall not create any third-party rights, in respect of the premises in question without prior permission of this Court."

127. The interim order is specifically restricted to no third-party rights. It says nothing of change of user. This also stands to reason because the prima facie view expressed in the interim order has nothing to do with the aspect or issue of repairs or the land being for a public purpose but only in relation to the aspect of transfer of the license/tenement, that too at a time when the policy supporting such transfers with subsequent approvals was not on record before this Court at that time.

128. Respondent no.1 has filed various Affidavits in this PIL confirming that the additions and alterations that were carried out and the change of user that was implemented in respect of the subject premises is in accordance with law and legal. In these Affidavits, quiet of few of the important aspects have been referred to.

129. In fact, in the first affidavit of respondent no.1 dated 07/01/2014, and more particularly in paragraph No.1, aa reference is made to the proposal received by respondent no.1 from respondent no.5 on 05/07/2008 (referred to

above). The same Affidavit refers to, *inter alia*, the proposal as approved by the Municipal Commissioner on 06/03/2009, the grant of CC on 09/06/2009 and the amendment to the approved plan on 20/01/2010 [Paras 8(g) (i) (j) (k) (R1 Reply – 07.01.14)].

130. On 08/01/2014 respondent no.1 has filed another Affidavit explaining the circumstances leading to relocation of the tenant to the subject structure in the Hindustan Mills Compound. This Affidavit also refers to the Application already made by respondent no.5 for transfer of tenancy in its favour pursuant to the executed Deed of Assignment of Tenancy. It proceeds to record that after considering the Application and the papers submitted, the tenancy was transferred in the name of respondent no.5 as per the prevailing policy of the Corporation and after following due process.

131. The policy applicable to transfer of residential as well as commercial tenements was then placed on record by respondent no.1 vide its affidavit dated 12/08/2015.

132. Thereafter, on 14/07/2022, respondent no.1 has filed another Affidavit referring to various approvals and permissions that were granted including after the filing of the Petition.

133. The above record and applicable legal provisions and policies indicate that even if there was an irregularity in the manner in which the work of repairs/reconstruction was

carried out at some point of time during the process, it has thereafter been cured or regularized by orders and permissions issued after the act of demolishing a part of the structure without a CC and without that part of the demolition being reflected in the proposed plans and approved plans. It is not correct to contend that this work of repairs, additions, alterations and reconstruction was without any permissions. Neither is it correct to understand the reference to 'repairs' as it appears in some of the reports / minutes / orders as being mere internal repairs.

134. Respondent no.5 has been in substantial compliance with the procedural requirement of submitting an Application with a proposed plan; obtaining approval which is been endorsed by multiple officers; getting plans approved; obtaining an IOD; obtaining an NOC for CC; obtaining a CC; obtaining a work Completion Certificate; and obtaining amendments to the approved plans. For these reason respondent no.5 submits that no action ought to be taken in terms of the reliefs prayed for in this PIL on this ground.

135. For all of these reasons it is respectfully submitted that the PIL Petition is without any basis and does not warrant the far-reaching reliefs it seeks.

NOTE ON TRANSFER OF THE TENEMENT IS IN ACCORDANCE WITH APPLICABLE POLICY:

136. On 11/01/1989, respondent no. 1 framed a Transfer Policy. It applies to the transfer by persons of premises that

are owned by respondent no. 1. The application of this Policy would be the same regardless of whether the nature of occupation is described a 'licensee' or a 'tenant'. It applies to all transfers of premises of respondent no. 1. The vires or legality of the Transfer Policy is not under challenge in this PIL. This Policy is not shown to be contrary to any mandatory provision of the MMC Act, MRTP Act, DCR 1991 or any rules applicable to respondent no. 1 in relation to disposal of premises. The terms of the Transfer Policy are considered below. Significantly, this Transfer Policy was not on the record of these proceedings when a prima-facie finding of illegality of the subject transfer was observed in the Order dated 24/03//2015.

137. On 19/10/1992, a larger property adjoining Nair Hospital was acquired by the Special Land Acquisition Officer. The said larger property was a godown admeasuring around 15,000 square feet (the larger property). [Para 11a-8/77-78 (R5 Reply)].

138. Respondent no.1 was the owner of Lal Chimney Compound. On the compound, there was an occupant named Naliniben M. Amin" of a godown admeasuring 6712 square feet. The occupant, has been described by respondent nos. 1 and 5 as a tenant. [Para 8(c)/169 (R1 Reply dated 08.01.14)] respondent no.1 wanted to construct a nurse's hostel in Lal Chimney Compound.

139. Respondent no.1 shifted Naliniben M. Amin from her godown admeasuring 6712 square feet in Lal Chimney

Compound feet and allotted to her 4914 square feet godown in the larger property. The larger property was one single godown admeasuring 15000 square feet. [Para 11a-b/78 (R5 Reply)] Out of that, 4914 square feet godown was allotted to Naliniben M. Amin as a tenant.

140. On 16/05/1996, an Allotment Letter to Naliniben Amin of 4914 square feet godown on the larger property. [Ex.A/20 (Petition)].

141. The *amicus curiae* has also sought to submit that the Allotment to Ms. Amin was as a 'licensee'. It was submitted that as a mere 'licensee', Naliniben Amin could never have transferred the 'license' to occupy the premises at all because of the very limited nature of the right that it creates. Reliance was placed on the principle that a person cannot transfer a better title than he/she has.

142. A separate and distinct question, addressed in this note is: Whether the nature of Naliniben Amins right in the premises could be transferred with ex post facto approval/permission after the Deed of Assignment was entered into? That question will be addressed later, but for the present the submission answers the first submission of the learned *amicus curiae* that the right/license of Naliniben Amin was not transferable at all.

143. Although many allegations and arguments of illegality and fraud were made, the learned *amicus curiae* did not impugn the legality of the allotment letter between

Naliniben Amin and respondent no. 1. Its terms are a complete answer to the 'license' of Naliniben Amin being non-transferable, *per se*, as was contended by the learned *amicus curiae.*

144. Clause 1 of the allotment letter contemplated execution of a leave and license agreement. Clause 7 provided that allottee shall not be entitled to sell, transfer or sub-let without prior written consent of Municipal Commissioner. The relevant clauses of the Leave and License Agreement read as under:

> *"1. That you shall have to execute the Leave & License agreement in Administrative Officer (Estates) 'E' ward office."*
>
> *"7. That you shall not be allowed to sell or transfer or sublet for part with the area allotted to you without prior written permission from the Municipal Commissioner."*
>
> *"8. That you shall abide by all the rules and regulations, terms and conditions framed in this behalf from time to time and in case of any breach, default or dispute, Municipal Commissioner's decision shall be final and binding on the allottees and allottees shall submit an undertaking to that effect on Rs.20/- stamp paper duly signed before Notary."*

145. The Allotment Letter and in particular Clause 7 clearly establishes that the nature of the right in the premises, even if taken as that of a 'licensee', was transferable with prior permission. This negates any suggestion that being a license no transfer was permitted at all. The legality of this

Allotment Letter has not been challenged. For that matter the legality of the Transfer Policy, alluded to below, has also not been challenged. Thus, the first limb of the learned *amicus curiae's* submissions fails by reason of the Allotment Letter alone.

146. It is submitted that there is nothing in the Leave & License Agreement to show that this Allotment was temporary. There is no material on record to show that if this was not the permanent alternate accommodation, then what was.

147. On 10/06/1996, possession of the said Premises admeasuring 4914 sq.ft. was handed over to Naliniben Amin on the larger property. [Ex.B/22 (Petition)].

148. On 14/06/1996, agreement of tenement entered into between MCGM and Naliniben in connection with 4914 sq. ft. Premises. [Ex.C/23 (Petition)]. Some of the important terms were:

> "(6) The said godown is given to me for my own use and for use and occupation. I undertake to not allow any other person to use and occupy the said room or any parts thereof without your permission. In case of a breach of the provision of his clause, I shall be liable to be ejected summarily.
>
> (10) I also hereby agree to vacate the said tenement/godown and handover vacant and peaceful possession of the same to the Corporation as and when the same is required by the Corporation for any development whatsoever upon service of 7 day's notice in writing by the Municipal Commissioner or any

other Officer authorized on that behalf."

149. The title of this agreement as being an Agreement of Tenement is suggestive of the nature of the right that Naliniben Amin had over the premises. It is, however, made clear that whatever may be the nature of the right, there was a right to occupy the premises and to transfer the premises.

150. Although this Agreement of Tenement does not use the expression of transfer, it is clearly suggestive of an assignment of the right by another person being in possession with permission. Significantly, in this context there is no reference to such permission being 'prior permission'.

151. On 31/12/2007, a Deed of Assignment executed by Naliniben in favour of respondent no.5 on terms and conditions set out therein for a consideration of Rs.1,60,00,000/-. The said Deed was registered on 12/03/2008. [Ex.D/25 (Petition)]. Some of the relevant clauses of this Deed of Assignment are :-

"WHEREAS

1. The Assignor is a tenant of the Municipal Corporation of Greater Mumbai in respect of the godown premsies admeasuring 4914 square feet in a part of Hindustan Mill at Dr. A. Nair Road, Mumbai 400 011 upon terms set out in the letter No.Estate/221/MC/Ac dated 16th May 1996 issued by the Ward Officer (Estates).

2. The Assignor has agreed to transfer the tenancy in respect of the said godown premises on as "as is where is" basis to the Assignee."

NOW THIS …

1. The Assignor hereby transfers and assigns unto the Assignee the tenancy in respect of all those godown premises admeasuring 4914 square feet in a part of Hindustan Mill bearing C.S. No. 1896 of Byculla Division at Dr. A. Nair Road, Mumbai 400 011 (hereinafter referred to as "the said Premises") on "as is where is" basis and the premises constructed prior to the year 1960 and more than 50 years old.

2. The Assignor declares that the Assignor is a lawful tenant of the Municipal Corporation of Greater Mumbai in respect of the said godown Premises and the tenancy rights to the same are valid and subsisting.

6. The Assignor states that the said godown Premises were allotted to the Assignor upon the Assignor handing over possession on 22nd June, 1996 of Godown bearing No.4 & 5 at Lal Chimney admeasuring 6712 square feet for development purposes by the Corporation, i.e. construction of Nurses Hostel Type Building ("the Original Premises").

7. The assignor agrees that if in future, the Municipal Corporation and/or a developer or purchaser of the said godown Premises offers alternate premises

in place and in lieu of the said godown Premises and/or the Original Premises and/or compensation for the same, the Assignee alone shall be entitled to receive the same and the Assignor shall not claim any benefits, rights or otherwise in or about or upon and/or against the same and/or any part thereof.

8. On execution hereof, the Assignor has handed over vacant and peaceful possession of the said Premises to the Assignee."

152. The argument by the learned *amicus curiae* that the assignment or transfer is tainted by fraud and is illegal has been made without a proper consideration at all of the Transfer Policy. Moreover, a minor point to consider is that the assignment has been done in a completely transparent manner as a registered document. Usually, if a person wants to occupy premises illegally and contrary to law parties contrive to devise a system where the premises remain in the name of original tenant/licensee and the new occupant is de facto in use and occupation. The fact that the entire transaction of transfer was open and registered and as demonstrated below after payment of premiums to respondent no. 1 militates against an allegation, based on conjecture and surmise, of fraud.

153. On 12/03/2008, an Irrevocable Power of Attorney issued by Naliniben in favour of respondent no.5.

154. On 30/06/2008, respondent no.5 made an application to respondent no.2 for transfer of tenancy from Naliniben to

respondent no.5 relying on the registered Deed of Assignment of Tenancy.

155. Respondent no.5 paid Rs.16,29,550/- to respondent no.1 as Transfer Fee for which receipt was issued by respondent no.1 on 23/09/2008 [Ex.I-1/133 (R5 Reply)]. Thereafter, on 27/10/2008, respondent no.5 had paid Rs.1,950/- to respondent no.1 for which receipt was issued by respondent no.1 [Ex.J-1/135 (R5 Reply)]. On the same date, respondent no.5 paid Rs.2,79,825/- by way of penalty charged by respondent no.1 for late submission of Transfer Application for which Receipt was issued by respondent no.1. [Ex.K-1/137 (R5 Reply)].

156. It is submitted that the said Application was made in accordance with Transfer Policy dated 11/01/1989 [Ex.G/113 (R5 Reply)] and Clause 7 of the Allotment Letter.

157. In its relevant part the Transfer Policy [Ex.G/113 (R5 Reply)] reads as follows:

> "1. The Transferee should be in exclusive possession of the premises.
> 10. Transfer Fee is charged on area basis as per prevailing transfer policy."
> 11. Penalty is charged, in legal heir cases also, if the occupant fails to come get the tenancy transferred in his/her name within the period of six months from the date of his/her occupation."

158. On 31/01/2009 [Ex.J/47 (Petition)], Meeting held between the representatives of respondent no.1 and respondent no.3, where, *inter alia*, certain observations

were made *qua* the transfer in favour of respondent no.5 being illegal on account of alleged demolition without permission of MCGM Estate Department.

159. It is submitted that these observations were made without hearing the respondent no.5. Further, the Application made as per prevailing policy for transfer of tenancy was not noticed at this Meeting. None of the Orders requested for in the said Meeting came to be passed by respondent no.1.

160. On 10/02/2009, a meeting was held, *inter alia*, where the representative of respondent no.5 was present. It was recorded that request for transfer of tenancy was pending, but not yet sanctioned. In this meeting, Additional Municipal Commissioner (WS) directed Dy. Chief Engineer (B.P.) (City) to ensure no permanent structure were erected on the plot and on compliance with IOD, CC to be given as per law, including 2 additional conditions, i.e.

a. Premises allocated to MCGM rules and regulations will be handed over to MCGM as and when required as per existing policy.

b. Permanent construction would not be allowed under any circumstances.

161. On 15/03/2013 [Ex.O/147 (R5 Reply)], respondent no.1 sanctioned the Transfer of Tenancy in accordance with the Transfer Policy.

162. On 16/03/2013, respondent no.5 paid Rs.15,66,500/-

to respondent no.1 in lieu of transfer fees for which respondent no.1 issued a Receipt. [Ex.R/154 (R5 Reply)].

163. As noted above, respondent no.5 had earlier paid Rs.16,29,550/- to respondent no.1 as Transfer Fee for which Receipt was issued by respondent no.1 on 23/09/2008 [Ex.I-1/133 (R5 Reply)]. Further, on 27/10/2008, respondent no.5 had already paid Rs.1,950/- to respondent no.1 [Ex.J-1/135 (R5 Reply)] and on the same date, respondent no.5 had already paid Rs.2,79,825/- by way of penalty charged by respondent no.1 for late submission of transfer application for which Receipt was issued by respondent no.1. [Ex.K-1/137 (R5 Reply)]. It is submitted that in total, by this date, respondent no.5 had paid Rs.31,33,000/- to respondent no.1 as transfer fees. Additionally, Rs.2,79,825/- as penalty for late submission of transfer application.

164. On 18/03/2013, respondent no.5 executed an Indenture in favour of respondent no.1 for completing the formalities of transfer and paid security deposit of Rs.40,000/-. [Ex.S/155 (R5 Reply)]

165. On 30/03/2013, respondent no.5 executed an Agreement of Tenement with respondent no.1 and deposited 3 months' rent [Ex.S/155 (R5 Reply)].

166. The entire case in the Petition and the submission of the *amicus curiae* does not adequately deal with and address the fundamental fact that under the applicable

Transfer policy, framed much prior to the present transfer, the grant of subsequent and ex post facto permission is contemplated. The delay in applying for such permission resulted in a penalty. The transfer was transparently done and applied for, and premiums paid to respondent no. 1.

167. Had there been no transfer, the erstwhile occupant would have been in occupation of the same premises and would have perhaps been paying an insignificant amount, if at all, as occupation charges or license fees or rent. Thus, by receipt of these premiums respondent no. 1 has benefited. If such transfers are held to be illegal across the board, then several instances of transfers in accordance with the Transfer Policy will be invalidated with a liability of restitution. This submission of the Learned Amicus would have far-reaching consequences especially when the Transfer Policy is not under challenge.

168. Mr. Jagtiani relied upon the following citations.

1) **Muni Suvrat-Swami Jain S.M.P. Sangh vs. Arun Nathuram Gaikwad and others.**[11]

2) **Syed Muzaffer Ali and ors. Vs. Municipal Corporation of Delhi**[12]

3) **Fairmount Textile India Pvt. Ltd. Vs. Municipal Corporation of Greater Bombay**[13]

4) **Mohammed Kasam Vs. MCGM, Greater Bombay**[14]

11 (2006) 8 SCC 590
12 1995 Supp. (4) SCC 426
13 2009 (3) Mh.L.J. 752
14 2014 (1) All MR 182

5) **Mehmood Merchant & ors. Vs. Maharashtra Housing and Area Development Authority & ors.**[15]

6) **The Treasurer of Charitable Endowments Vs. S.F.B. Tyabji**[16]

7) **John Nadjarian vs. E.F. Trist**[17]

8) **Basrat Ali Khan Vs. Manirulla**[18]

9) **Jamshedpur Cements Ltd. (In Liquidation), In re Hi-Tech Chemicals P. Ltd. Vs. Adityapur Industrial Area Development Authority and anr.**[19]

10) **Graphite India Ltd. and anr. Vs. Durgapur Projects Ltd. and others**[20]

11) **Central Mumbai Developers Welfare Association and another Vs. State of Maharashtra**[21]

SUBMISSIONS ON JUDGMENTS:

169. Muni Suvrat-Swami Jain S.M.P. Sangh (supra)

a. This issue arose in the context of BMC Act, 1888.

b. The issue before the Court was whether an order of demolition was to be invariably followed if a construction was illegal or unauthorised (paragraphs 11/594, 14/595 and 25/596).

15 2017 SCC OnLine Bom 2679
16 AIR 1948 Bom 349
17 1944 BLR 209
18 1909 Vol. XXXVI, Calcutta Series 745
19 2011 SCC OnLine Cal 1098
20 (1999) 7 SCC 645
21 2015 SCC OnLine Bom 3798

c. The Supreme Court held that even if the construction of any building or execution of any work is commenced contrary to the provisions of the Act, it is left to the Commissioner's discretion as to the nature of order to be passed (paragraph 57/611, 612).

d. The Supreme Court held that mere departure from the authorised plan or putting up of a construction without sanction does not *ipso facto* and without more necessarily and inevitably justify demolition of the structure. There are cases where some of such unauthorised constructions are amenable to compounding (paragraph 59/612).

e. The Supreme Court reversed the High Court's decision and directed the Municipal commissioner to decide the matter again (paragraph 25/596 read with paragraph 57/612 read with paragraph 62/612).

170. Syed Muzaffar Ali & Ors. (supra)

a. The court observed, against the Petitioners, that they had carried on 'construction' which was unauthorizedly made as held by the Assistant Engineer (paragraphs 2 - 3/pg.427).

On this ground, the SLPs were dismissed.

b. However, the Court further stated that the mere departure from the authorized plan or putting up a construction without sanction does not ipso facto and inevitably justify demolition. Some such cases of unauthorized construction are amenable to compounding and some may not be (paragraph 4/pg.427)

c. It was held that, these are matters for authorities to consider having regard to the nature of transgressions. The court gave liberty to the Petitioners to file a plan indicating the unauthorized construction and to seek regularization, if permissible under law (paragraph 5/pg.427).

171. Fairmount Textile India Pvt. Ltd. (supra)

a. The court upheld the view of the Authority that a mezzanine floor had been constructed or erected without any permission and that the notice under Section 351 is therefore valid.

b. However, the court followed the approach that if the construction is capable of being regularized, the Petitioner may submit a formal application for regularization and that till the application is disposed of, no precipitative action should be taken (paragraphs 5 – 7/pgs.753-754)

172. Mohammed Kasam (supra)

a. The trial court, after considering documents, came to the conclusion that the structure was unauthorized based on the evidence on record. It also concluded that the construction was without any sanction plan and therefore a decision was taken to demolish the structure. (paragraph 8)

b. However, the court gave the Petitioner an opportunity to apply for regularization of the structure and relied upon the view taken by the Supreme Court that whatever unauthorized construction can be regularized according to the Rules may be regularized on payment of penalty and fine. (paragraph 9)

c. The court observed that MCGM would have to consider the regularization proposal in light of instances cited for regularization as also in light of prevalent policy decisions and circulars of the municipal corporation. (paragraph 10)

173. Mehmood Merchant & Ors. (supra)

a. This judgment takes the view that the work of demolition can be carried out even on the basis of IOD and did not grant the ad-interim relief to stop some part of the demolition (*paragraphs 1/Pg. 1, 2/1, 3/2, 5/2, 9/3, 11/3, 14 to 16/4 and*

5); findings at paragraph 17/5, 18/5, 21/6 and 22/7.

174. The Treasurer of Charitable Endowments (supra)

a. The question before the Court was whether on an Assignment of Lease, the lessee continues to remain liable to the lessor in respect of his covenants, even if the privity of estate comes into existence between the lessor and the lessee (*page 95*).

b. The Court considered generally the law in respect of assignment of leases. In that context, a submission was made that where the lease contained an express covenant, then the lessee was not entitled to transfer the land leased in any way without a letter from the lessor giving necessary permission (*page 99*).

c. Chagla, CJ, however, agreed with the view that in a situation where the Assignment of Lease requires the necessary permission of the lessor but where the lease did not contain a provision with regards to the rights of re-entry, the assignment without permission was operative notwithstanding the covenant.

175. John Nadjarian (supra)

The assignment was operative notwithstanding

the covenant not to assign without the consent of the lessor. (pg.213)

176. Basrat Ali Khan (supra)

The assignment was operative notwithstanding the covenant not to assign without the consent of the lessor (pg. 748)

177. Jamshedpur Cements Ltd. (In Liquidation), In re Hi-Tech Chemicals P. Ltd. (supra)

a. The challenge in this case was to the sale of property by the official liquidator without the previous consent of the lessor, i.e., Adityapur Industrial Area Development Authority (paragraph 6/Pg.2).

b. There was an express clause requiring previous consent (paragraph 3/Pg.1).

c. While the Court did hold that in the absence of a prior permission by Adityapur, the OL had no title at all to sell the property. It also then said that where such sale is confirmed long ago and the purchaser / assignee has paid the entire consideration and made use of the property, the attempt of the Court would be to regularize the act of the official liquidator then to defeat it. Such regularization can be made by obtaining ex-

post-facto permission of Adityapur, which Adityapur was prepared to do. In this regard, the Court relied upon *Graphite India Ltd. vs Durgapur Projects Ltd.*, (1999) 7 SCC 645 (paragraph 29/7).

178. Graphite India Ltd. & Anr. (supra)

a. Although this pertains to subsequent permission granted and the effect in the continuation of electricity by the legislation (*paragraph 15/659*), the Court generally discussed a situation in which ex-*post-facto* permission would be valid and recognized. It recorded that there are situations in which it may validate the previous act. It relied upon a judgment in the case of *Lord Krishna Textile Mills Ltd. vs Workmen*, AIR 1961 SC 860, which *inter alia* stated that once the approval is given, all the previous acts done or actions taken in anticipation of the approval get validated (paragraph 17/660-661).

b. In that case, the Court held that where the State Government, the application relates back or would be effective from a prior date (paragraph 18/661).

179. Central Mumbai Developers Welfare Association & Anr. (supra)

a. The Petitions, inter alia, challenged the constitutional validity of the Mumbai Municipal Corporation (Amendment & Validation) Act, 2011 by which the State Government inserted Section 92(dddd) to the MMC Act with retrospective effect from 22nd June 1993. (paragraphs 4 and 6/ pg.2)

b. The judgment refers to the validating provision for validating any levy, demand or collection of premium on account of transfer fees before the date of commencement of the aforesaid Amendment Act (which was gazetted on 14th August 2012). (paragraph 5)

c. Rule was issued in these Petitions. (paragraph 10/pg.3)

d. The Petitioners relied upon Section 108(j) of the Transfer of Property Act, 1882 to contend that in view of this position, neither the lessee nor the assignee is required to obtain permission for transferring the lease nor is the assignee or transferee required to pay any higher lease rent than the rate already recommended. (paragraph 20/pg.5) Whilst there is no discussion on the interpretation of Section 92(dddd), as such, it

can nevertheless be gathered from the judgment that the consequence of not obtaining prior permission for transfer of leases of immovable property is a monetary demand made by MCGM and not recovery of the property or resumption of the property. (paragraphs 22-23/pg.5)

e. In fact, the court granted interim relief against recovery of enhanced lease rent.

f. Significantly, the court issued a direction to the Municipal Corporation to consider the pending applications for grant of NOC by Estate Department and to take decision on pending applications for building permissions, occupation certificates in accordance with law. (paragraphs 24-25/pg.5)

g. There is no final order and judgment in the above Writ Petitions. There are subsequent interim orders dated 23rd April 2015, 17th October 2015 and 28th June 2017, amongst others. These orders also indicate that the issue is in respect of recovery of higher lease rent and other charges and not one of resumption of possession.

h. This judgment is mentioned here in relation to the section to which this Hon'ble Court drew our

attention. However, any reference to this judgment is strictly without prejudice to the submission that Section 92(dddd) has no application to the present case which concerns transfer of a tenement occupied as a license and not transfer of leases of immovable property.

SUBMISSIONS AS TO THE RELEVANCY OF THE JUDGMENT AT SR. NOS. 1 TO 4 TO THE PRESENT CASE:

180. This supports the submissions of respondent no.5 that even if the entire structure or part of the structure is illegal, it does not require an order of demolition or cancellation of permission. In this case, the breach by a historical demolition was penalized and subsequent permissions have duly been obtained. The structure has been put up thereafter and the work continued under the approved plans and it has been completed. This is supported by granting approvals to the amended plans and application and regularization and further change of user as approved.

SUBMISSIONS AS TO THE RELEVANCY OF THE JUDGMENT AT SR. NOS. 5 TO 10 TO THE PRESENT CASE:

181. These judgments show that even under the general law of Transfer of Property Act, an assignment of lease for an interest in land even though required to be done with prior permission does not render the transfer or assignment

void or illegal. An assignment without prior permission, unless there is a specific covenant of re-entry/forfeiture in such assignment, is operative notwithstanding the covenant of prior permission. These judgments also support the view that in a situation such as this, ex-*post-facto* or subsequent permission can be obtained to validate the assignment of transfer consistently with the MCGM policy of 1989 which allows for assignment or transfer and the assignee being put in possession and thereafter for permission to be applied for.

182. This is the policy that is duly applied in this case, but the judgments show that even de hors the policy a subsequent approval to such an assignment or approval to transfer would not be illegal as it would be permissible for ex post-facto such an assignment upon payment of necessary charges of premium.

CONSIDERATION:

183. Let us now consider the challenge raised in the PIL petition. The land in question belonged to respondent no.6-Hindustan Spinning and Weaving Mills Ltd. It comprised of two godowns. On 23/11/1992, after following the proper procedure, the land along with the godowns was acquired for public purpose viz. extension of Nair Hospital. The possession of the land was handed over to the MCGM by the State Government. Nalini was in occupation of godown nos.4 and 5 at Lal Chimney Compound which were required

for constructing a nurse's hostel. According to the MCGM, Nalini was therefore entitled to a permanent alternate accommodation as a project affected person. It is pertinent to note that Nalini was accommodated as a project affected person in the godown which was acquired by the MCGM for a public purpose. She was permitted to occupy 4914 sq.ft. of the Hindustan Mill godown as a licensee by virtue of a leave and license agreement dated 14/06/1996. Clauses 6 and 7 clearly stipulated as under :-

> "6. The said godown is given to me for my own use and occupation. I undertake not to allow any other person to use and occupy the said room or any parts thereof without your permission. In case of a breach of the provision of this clause, I shall be liable to be ejected summarily.
>
> 7. If a fail to vacate the godown on the termination of the license, you or any other competent Municipal Officer or Servant shall be entitled to re-enter the room without being responsible for any loss or damage."

184. We can appreciate the action on the part of the MCGM to the extent, that in the godown which was acquired for a public purpose of extension of Nair Hospital, the MCGM needed to rehabilitate Nalini as a project affected person. We go to the extent of saying that rehabilitating Nalini could be said to be a public purpose. It must be borne in mind that the allotment was not on a permanent basis where all

the rights, title and interest of the MCGM in the godown came to be transferred in favour of Nalini. A leave and licence agreement came to be executed duly accepted and acknowledged by Nalini pursuant to which she occupied the premises. The leave and license agreement dated 14/06/1996 ordains Nalini to obtain written permission of the Municipal Commissioner before allowing any other person to use and occupy the said godown. In case of breach, the consequence of summary ejection is provided for. The Dean, time and again, requested that the portion allotted to Nalini was required for Nair Hospital. We find from the minutes of the meeting dated 25/03/2004, that the Assistant Municipal Commissioner asked the Dean 'what was the necessity for constructing the Dharmashala for the relatives of the patients of the Nair Hospital'. Curiously, the land was acquired and even the DP plan for the year 1981-2000 indicated that the land in question is reserved for a public purpose viz. extension of Nair Hospital. It is really surprising that the MCGM and its Officers were then asking questions about the purpose of the acquisition and/or its utility. It would be appropriate to reproduce the minutes of the meeting held in the office of the AMC (WS) on 25/03/2004 to appreciate the manner in which the matter was approached. The minutes make an interesting reading, as we find that it is the AMC who is virtually delving on as to what is in the best interest of Nair Hospital, completely ignoring the request of the Dean, who in our

opinion was best suited to opine on what activities/utilities are in the best interest of Nair Hospital, moreso when the acquisition was for a public purpose viz. 'extension of Nair Hospital'. The minutes read thus :-

> " Minutes of Meeting held in the office of AMC (WS) on March 25, 2004 regarding construction of a Atithi Gruha for patients of Nair Hospital and their relatives.
>
> The following officers were present:-
>
> Shri S.K. Singh – A.M.C. (W.S.)
>
> Dr. S.G. Damle Jt. M.C. (ME & Health)
>
> Dr. G.V. Koppikar – Dean (Nair)
>
> Shri Nagwekar, C.A. (F)
>
> Shri Haldankar, Dy. C.E.(DP)
>
> Shri Ghag, Dy. M.A.
>
> Shri Malandkar, Law Officer
>
> Dr. S.A.Kamath Prof. of Medicine
>
> Shri Potdar – A.E.(Civil)
>
> AMC (WS) inquired where the atithi gruha was to be located and what is the status of the property, Dean (N) informed that this property is a godown belonging to Nair Hospital and has been acquired as part of extension to Nair Hospital. One third of the godown has been given to PAP(project affected person). It is desired to construct an atithi gruha by demolishing the remaining 2/3 part and construction on it.
>
> AMC(WS) asked Dean (N) what was the necessity of constructing an atithi gruha for the relatives of patients of Nair hospital. He expressed that MCGM Hospitals should cater basically to patients of Mumbai only. Dean (N) explained that Nair Hospital has the only Radiotherapy unit in MCGM. Patients require radiotherapy for many sessions. These patients and their relatives require a place to stay

during these sessions. Many of these relatives stay in Nair Hospital premises, bath, wash and dry their clothes and make the hospital premises unhygienic. Dean(N) informed that the Atithi Gruha will be constructed through finances from donation. It will be run by a Charitable Organisation that is already doing the same work of running dharmashalas in Mumbai. There will be no financial burden on the MCGM, Dean (N) also informed that a nominal charge will be accepted for stay in the Dharmashala.

AMC(WS) expressed that construction of Atithi Gruha is not a hospital activity, he asked Chief Engineer (DP) whether this can be allowed under the DC regulations, CE(DP) answered that in 1992, 1552 sq.m was given as extension to Nair Hospital. There is no objection to 25-50% of the total area being given to ancillary usage. Dormitories should be built so that misuse does not occur.

Law Officer Mr. Malandkar expressed that terms and conditions should be suitably framed taking into consideration the MCGM act. There should be no claim on ownership CA(F) Mr. Nagwekar referred to the MCGM circular No. FBM/809 of 12th November 1964. He also pointed out other two clauses in that circular that the project may be named after the donor if the officer covers at least 50% of the cost of the project or in case the amount of donation offered in less that 50% of the cost of a project, a suitable portion only of the project viz. a ward etc. He said that donations should not be received if onerous conditions are imposed by the donor. He suggested that the entire money of the donation should be deposited so that there is no withdrawal of the donor from the donation. AMC(WS) decided that atithi gruha may be constructed. The construction of the atithi gruha should be liability free. There should be no financial liability, no recurring or even one-time expenses or asking for extra establishment. The water and electricity charge payment also should not be incurred by MCGM. The charges for stay in Atithi Griha should

be such that water and electricity charges included.

Subject to above we don't have problem in approving the same. Dean (N) to work on details and submit formal proposal.

26/03/2004

Sd/- Sd/-

Dr. G.V. Koppikar Shri S.K. Singh

Dean A.M.C.(WS)"

(emphasis ours)

185. It is pertinent to note that even a decision was taken to prepare the plans for extension of Nair Hospital and in fact the plans were also prepared. One would have expected the MCGM to process the plans and proceed with the fulfillment of the public purpose for which the land was acquired by taking an informed decision in active consultation with the Dean. The Dean of Nair Hospital though called for the meeting, it appears that his stand was completely ignored, unmindful that the acquisition was for the purpose of extension of Nair Hospital. It may be that the municipal authorities were concerned that there should be no misuse of the property. We get an impression that the MCGM was just not interested in the interest of public.

186. At this stage itself we may refer to the decisions of the Supreme Court in the case of **Royal Orchid Hotels Limited and another** (supra), **Uddar Gagan Properties Ltd.** (supra) and **Felton Fernandis and others** (supra), wherein it is held that a property acquired for a public purpose cannot be permitted to be put for a private use. It

is also necessary to make a reference to the decision in **Nagpur Improvement Trust and others** (supra). The MCGM completely cold shouldered the request made by the Dean of Nair Hospital for using the land for its extension on one pretext or the other.

187. Thereafter, what we find is that Nalini executed a deed of assignment of tenancy dated 31/12/2007 in favour of the developer. The events from this stage onwards make it apparent as to how a property acquired for a public purpose is allowed to be used by a private developer for his own private gains at the cost of public interest. The developer is virtually allowed to have his way by the MCGM. Something that should not be done directly is done indirectly by the developer even without the permission of the Commissioner. On the basis of a tenancy agreement entered with Nalini, the developer systematically legitimizes his claim in a property which was acquired for a public purpose. The public purpose, a noble one, viz. extension of Nair Hospital, which lakhs of common citizens facing medical and health issues are desperately in need of.

188. Nalini was only a licensee of the premises. However, what is assigned by her vide the deed of assignment in favour of the developer are tenancy rights in respect of the godown premises in her occupation. Nalini declares that she is a lawful tenant in respect of the godown premises and the tenancy rights to the same are valid and subsisting. The POA obtained by the developer in March 2008 itself from

Nalini, states that Nalini is a tenant of the MCGM. The developer immediately occupies the premises on the strength of the tenancy agreement without any written permission of the Municipal Commissioner, a clear breach of the leave and license agreement. Not only the developer from 27/03/2008 onwards started applying for repair permissions to the MCGM, but the MCGM entertained such permissions. Let us see how step by step the developer gets over every legal hurdle in his way.

189. On 04/07/2008 the Executive Engineer informs the Architect of the developer that as per the prevailing repair policy, the structure being a godown, the proposal cannot be considered. Undoubtedly, the MCGM has a power to deal with and dispose of its property but the same has to be in consonance with the MMC Act and the rules framed thereunder. Section 105B of the MMC Act provides a power to evict a person from Corporation premises. Section 105B(1)(b) provides that where the Commissioner is satisfied that any person is in unauthorised occupation of any Corporation premises, he can order an eviction after following the procedure prescribed thereunder. Unlike other licensees, Nalini's occupation in the Corporation premises was in her capacity as a PAP to rehabilitate her which may be regarded as a public purpose. On noticing that Nalini had assigned her rights in the premises without any written permission of the Municipal Commissioner in breach of the leave and license agreement, it was expected of the MCGM

to have proceeded against the developer with eviction proceedings, having regard to the fact that Nalini was inducted as a PAP and Nair Hospital was desperately in need of the premises. This is where we find that the decision making authorities approached the matter from the point of view of the interest of a private developer instead of safeguarding public interest. We must appreciate that some of the Officers of the Corporation were bold enough to place on record the correct position, but the manner in which the officials in the higher echelons of the MCGM acted, leaves much to be desired.

190. Even without awaiting a decision on the application made by the Developer for transfer of the tenancy, the MCGM entertains the repair permission at the Developer's behest; in his capacity as a POA of Nalini. The tenancy agreement Nalini executed makes it clear that she already had transferred her rights and permitted the Developer to occupy the premises for a whopping consideration, all this without the permission of the MCGM. The request for repair permission made by the Developer was approved by the Additional Municipal Commissioner and the Municipal Commissioner despite the DMC (Zone 1) clearly recording in the minutes of the meeting dated 31/01/2009 as under :-

> " Municipal Corporation of Greater Mumbai
> Sub : Illegal demolition of godown in the premises of Nair Hospital
>
> A meeting was held in the chamber of D.M.C.(Zone I) today i.e. 31.1.09 wherein Dr. Rannaware, Dean and

Dy. Dean Dr. Shah of Nair Hospital, AC E – Ward Shri P. Patil and E. E .BP (City) Shri Anaokar were present.

The structure under reference was a godown adjoining the premises of Nair Hospital and it was being used as Storage for records since last so many years. Somewhere in 1992, the structure was acquired by Nair Hospital for the purpose of Quarters for Dean and Dharmashala for the Nair Hospital. Subsequently in 1996, the part godown was given to one Shri Madanbhi Amin as PAP tenancy. Till 17.1.2009, the status of the structure remained unchanged. All of a sudden on 17.01.2009, Dy. Dean Dr.Shah pointed out demolition of the structure and he enquired about the same with E-Ward staff. After knowing that the structure was being demolished under IOD issued by EEBP on 10.9.08, Dy.Ch.E.(BP) City and his EEBP were directed to make a report to A.M.C.(WS) being incharge of the Health Department.

In today's meeting, it was pointed out by AC–E-Ward that the transfer proposal of the same structure is under process by virtue of sale deed executed before the Sub–Registrar of Mumbai dated 12.3.08. According to the documents filed before the Sub–Registrar of Mumbai the said premises have been sold to M/s Rubberwalla Developers Pvt. Ltd. by tenant Smt Naliniben Amin. This clearly revealed that the tenant, without the permission/NOC from the MCGM's Estate Department, has sold the premises in question to Rubberwalla Developers Pvt. Ltd. in gross violation of conditions of tenancy.

On the other hand, Rubberwalla Developers had filed an application before the EEBP for the change of user on the strength of Power of Attorney given to him by Smt. Naliniben Amin.

It is stated by EEBP that the Building Proposal Department has issued IOD but has not issued CC and did now allow the demolition of the said structure. Incidentally, it may be mentioned here that the land under question is reserved in DP for Extension to Nair

Hospital, it is not understood how DP and BP Department could process such proposal for addition/ alternations, construction of stilt etc for making IT user and issue IOD for the same. It is seen from the above information that the tenant has illegally given Power of Attorney to Rubberwalla Developers in gross violation of tenancy conditions and hence it deserves action of eviction under Section 105 (b) of the MMC Act.

Since the Dean, Nair Hospital is insisting for the construction of Dharmashala for the Nair Hospital, the entire matter is required to be reviewed in favour of MCGM and Nair Hospital in public interest.

In the meantime, AC, E–Ward is directed not to process proposal for transfer and refund the charges accepted for transfer, if any, paid by the applicant.

In view of above , JT. M.C.(I) A. M.C. (WS)/M.C.'s orders are requested:

1. to cancel the tenancy of Smt. Naliniben Amin by issuing her notice to under Section 105 (B) of the MMC Act.

2. to issue instructions to Dy. Ch. E. (BP) City to revoke the IOD issued to M/s Rubberewalla Developers Pvt. Ltd.

3. to direct AC/Estates/ Dy. Ch. E. (BP) to restore possession of the premises to the Nair Hospital.

4. To conduct enquiry against the concerned staff of Building Proposal/Development Plan Department.

Submitted please.

sd/-

D.M.C.(Zone-I)

31/01/09"

(emphasis ours)

191. The minutes of the meeting dated 31/01/2009 clearly reveals that the Dean of Nair Hospital was insisting for construction of Dharmashala for Nair Hospital and it was recommended that the entire matter is required to be reviewed in favour of the MCGM and Nair Hospital in public interest. It also observes that Nalini had illegally given POA to the Developer in gross violation of the tenancy condition and hence deserves action of eviction under Section 105(B) of the MMC Act. It states that the tenant without permission/NOC has sold the premises in question to the Developer.

192. We have already noticed that on 04/07/2008 the Executive Engineer regretted considering the proposal of the Developer for partial repairs and proposed loft as the structure was a godown. Immediately thereafter, the Developer in its capacity as a POA holder of Nalini submitted a proposal for change of activity from godown to IT office, flattening of roof, stilt for parking and additions or alterations of existing structure. In the communication dated 13/08/2008 (page 35 of the PIL petition), it is mentioned that a proposal is moved for change of existing user of the premises from godown to IT office. Approval was therefore requested to allow change of activity proposed by the architect and to allow construction, which was approved at different levels. The IOD then came to be issued on 10/09/2008. It is pertinent to note that the proposal was for repair permission of the existing structure

in accordance with the repair policy of the Corporation.

193. The Developer even without a CC for demolition, demolished the godown in question on 17/01/2009 and 18/01/2009. The IOD for commencement of work upto the plinth level was earlier issued on 10/09/2008. The report of the acting Dean dated 20/01/2009 clearly mentions that pursuant to the demolition, what exists is a vacant plot. That such a demolition is carried out is reflected from the DMC (Zone 1) report dated 31/01/2009 wherein orders were requested by him in terms of the minutes of the meeting dated 31/01/2009.

194. In the minutes dated 10/02/2009, in the presence of MLA, the Developer, DMC (Zone 1), Dean Nair Hospital, the Additional Municipal Commissioner records that the Developer agreed to hand over the possession of the land if required by Corporation. It is recorded that Dean, Nair Hospital objected as tenancy rights of the Developer are in question. The Deputy CE informed that the Developer started the work of demolition without CC and that is why stop work notice was issued. He further informed that as per DP reservation, the land is reserved for expansion of Nair Hospital and is in possession of the Corporation. Despite these materials on record, the Additional Municipal Commissioner directed Deputy Chief Engineer to ensure that no permanent structure is erected at this plot, further recording that on compliance of the conditions of IOD of building proposal, CC shall be given as per law and further

directed to incorporate the following two conditions in the IOD, confirming laws of tenancy rights :

> "Premises if allocated as per norms of MCGM Rules and Regulation then it will be handed over back to BMC, as and when required within stipulated time as per existing policy.
> Permanent construction shall not be allowed under any circumstances. The additional Municipal Commissioner (WS) informed that he will put up the case before the Municipal Commissioner. Again on 11.02.2009 the Assistant commissioner (Estate) records that the existing tenanted premises for which repairs are proposed is found demolished. The Acting Dean's objections are recorded."

195. The Additional Municipal Commissioner (Western Suburbs) having noticed the irregularity on the part of the Developer in demolishing the premises without permission and having noticed that under the garb of repairs, the Developer wanted to put up a new construction, yet goes on to recommend that in view of the permissions granted by the Deputy Chief Engineer and the IOD having already been issued, the repair should be carried out. He further records that there should be no permanent construction and in future if the Corporation needs the land, an undertaking to that effect has to be obtained from the developer. On 06/03/2009 the Municipal Commissioner ordered that the Developer may go ahead with the repair as per IOD conditions and as recommended by the Additional Municipal Commissioner (WS).

196. We find that the Municipal Commissioner granted repair permission on the basis of an application made by

the Developer as a POA holder of the principal tenant. On the one hand, the Developer applied as a POA holder of the principal tenant and on the other hand, claims to have acquired tenancy rights by virtue of the deed of assignment executed by Nalini, all this without the permission of the Municipal Commissioner. Nalini without the written permission of the Commissioner allowed the Developer to occupy the godown premises. The repair permissions are considered even before the application for transfer of tenement in favour of the Developer is decided. Nalini acted in complete breach of the leave and licence agreement. Nalini accepted consideration of Rs.1 crore 60 lakhs without obtaining any prior permission. Without permission Nalini surrenders her rights in favour of the Developer and puts him in possession contrary to the leave and licence agreement knowing fully well that she is only a licensee governed by the terms of licence. We probably would have looked at the matter from a different perspective had the premises not been a property acquired from a private person for a public purpose. The public interest subsisted and on the contrary increased manifold over the years. MCGM conveniently overlooked the overwhelming public interest by allowing all the breaches committed by the Developer to be regularized. MCGM overlooks noble public interest, then overlooks that private land was acquired for a public purpose, then overlooks that in public interest a PAP was accommodated, then overlooks that the PAP surrenders

the tenancy rights in favour of a private developer without prior permission of MCGM, then overlooks that private developer is put in possession of a property needed for a public purpose without permission of MCGM, then overlooks that even before the application for transfer of tenancy could be processed the repair permissions are granted to such a developer, then overlooks that repair permission is granted even though the developer demolishes the building without CC, then overlooks that contrary to the repair permission a new building is constructed, all this at the cost of public interest. We find that not only the breaches on the part of the Developer are condoned at every stage, but every irregularity is brazenly regularized in the garb of exercising the powers conferred by the municipal laws. We have no hesitation in saying that present is a case where there has been gross abuse of powers at the cost of overwhelming public interest. The only inference that we can draw is that the Developer's personal interests have been advanced in the process. The public interest was staring at the MCGM despite which MCGM chose not to initiate eviction proceeding against Nalini and the Developer under section 105(B) of the MMC Act. It is surprising that the agreement Nalini executed was for transfer of tenancy in favour of the Developer, which was impermissible, as Nalini was only a licensee, despite which the MCGM accepts the Developer as a licensee. We have no hesitation in holding that permitting such a transfer is in gross abuse of

powers.

197. Mr. Jagtiani, learned senior advocate for the Developer submitted that a post facto approval can always be obtained for a tenancy and in order to support this contention, relied upon various decisions; that of the Supreme Court in **Graphite India Ltd. and another** (supra), the decisions of the Bombay High Court in the case of **John Nadjarian** (supra), **The Treasurer of Charitable Endowments** (supra), the Calcutta High Court decision in **Jamshedpur Cements Ltd. (In Liquidation), In re Hi-Tech Chemicals P. Ltd.** (supra). He submits that in fact the tenancy agreement was entered into between the Developer and the MCGM on 18/03/2013 thereby permitting the Developer to occupy the premises as a licensee. No doubt a post facto approval can always be obtained for a tenancy. This is a case where we are dealing with a fact situation in respect of premises acquired in public interest, occupied in public interest by a PAP and during the subsistence of the public interest and in the garb of exercising the powers conferred by municipal laws transferred to a private developer for private gains. The decisions cited by Mr. Jagtiani therefore cannot have any application in the facts of the present case. The impression that we gather is that the Municipal Commissioner as well as the Additional Municipal Commissioner were more concerned about the private interest of the Developer than the public interest of its own wing i.e. Nair Hospital. It is not

as if all the facts were not placed before the Additional Municipal Commissioner or the Municipal Commissioner. In every meeting, the Dean of Nair Hospital pointed out the dire need of the land for extension of the Nair Hospital. The MCGM, in the written submissions stated that, though, there was an unauthorized transfer and an illegal demolition, the MCGM on the basis of the transfer and repair policy of BMC, accepted the Developer as a licensee. We find that the MCGM considered the matter not from the stand point of the public interest involved, but was more concerned about protecting the rights of the Developer in terms of the transfer and repair policy even before the application for transfer of tenancy was considered.

198. Some of the authorities below the level of the Additional Municipal Commissioner of the MCGM on a correct assessment of the situation recommended that the Developer should be evicted and Nair Hospital be handed over the premises. After the IOD was issued on the proposal of the Developer to carry on repairs of the existing godown, the godown was demolished even without waiting for the CC. A report is on record that what was in existence is a vacant land. Despite noticing all this, the Additional Municipal Commissioner and the Municipal Commissioner, shockingly, granted repair permission in respect of a structure which was not even in existence. The Additional Municipal Commissioner thought it appropriate to condone the defaults of the Developer by imposing a condition that

there shall be no permanent construction. All this after the structure is demolished. We wonder why the top officials of the MCGM have been so kind to the Developer at the cost of Nair Hospital. Here is a Developer who enters into MCGM premises acquired for a public purpose without written permission of the Commissioner, then secures an IOD for repairs of the existing godown, demolishes the same without CC and then goes on to construct a new building on the vacant piece of land contrary to the order of the Municipal Commissioner could still get himself recognized as a licensee. The Additional Municipal Commissioner did not pay any heed to the request of the Dean, who was time and again requesting for the possession of the land which was acquired for the public purpose of extension of Nair Hospital. We can only say that the State Government having acquired the land from the respondent no.6, a private owner for a public purpose, which was then handed over to the Corporation, obviously for utilization of the public purpose viz. extension of Nair Hospital as per the reservation in the DP, is then licensed to a private developer putting the public interest to peril. It is disturbing to note that such gross irregularities in the matter of transfer of tenement, are sought to be regularized in a manner which has an effect of defeating public interest. This is a matter where instead of safeguarding public interest, the interests of a private developer are sought to be safeguarded by not only condoning and overlooking the gross material

irregularities, but tried to be justified by MCGM on the ground that the permissions are granted in accordance with the repair policy and the Developer has agreed to abide by the terms of the transfer policy.

199. We list below the upshot of the above discussion in brief, which reveals how the Developer prevailed at every stage over the MCGM for its private gains and at the cost of public interest.

(a) The DP of 1981 to 2000 reserved the land belonging to respondent no.6 for a public purpose viz. extension of Nair Hospital.

(b) The State Government acquires the land for a public purpose viz. extension of Nair Hospital and hands it over to the MCGM.

(c) Being a project affected person, Nalini is allotted part of the godown premises on the acquired land by virtue of leave and license agreement.

(d) Leave and license agreement prohibits Nalini from parting with the possession or creating any interest in the godown without written permission of the Municipal Commissioner. For any breach she was liable for action of eviction under Section 105B of the MMC Act.

(e) Nalini executes the deed of tenancy in favour of the Developer. The Developer pays a sum of Rs.1,60,00,000/- to Nalini. Developer occupies the premises and the tenancy is transferred without any

written permission of the Commissioner, though Nalini was in occupation as a licensee being a project affected person.

(f) The Developer immediately forwards a proposal for repair permission of the godown to the MCGM.

(g) The Executive Engineer informs that such a proposal cannot be considered as per the repair policy as the structure under reference is used as a godown.

(h) The architect immediately submits a proposal for change of activity from godown to IT office which is recommended and granted promptly.

(i) IOD is issued for carrying out the repairs as proposed.

(j) Even without obtaining CC for demolition, the Developer demolishes the godown.

(k) The Dean, Nair Hospital is virtually pleading for the premises which were acquired for its purpose in public interest.

(l) The DMC (Zone 1) requests for cancellation of tenancy of Nalini, revocation of IOD to the developer, restoration of possession of premises to Nair Hospital and conducting enquiry against the staff of building proposal/development plan department. It is pointed out that the structure for which repair permission is applied was already demolished. It is also pointed out that Nalini without valid permission of MCGM has sold the premises to the Developer.

(m) A stop work notice is issued to the Developer.

(n) The AMC (WS) noticing the above factors, still recommends the proposal for repairs in view of the IOD already granted and subject to the conditions that the Developer would undertake to restore the premises when MCGM wants them and that no permanent construction will be made.

(o) The Municipal Commissioner accepts the recommendation of the AMC (WS).

(p) The Dean, Nair Hospital has no option but to fall in line in view of the Municipal Commissioner's decision, but requests that an enquiry be made as some permanent construction activity is ongoing on the plot (letter dated 14/01/2010).

(q) In the teeth of the condition imposed by the MCGM that permanent construction shall not be allowed under any circumstances, the Developer puts up a permanent construction on the vacant plot of land on the strength of IOD issued for repairs.

200. We are sorry to observe that not only the irregularities are overlooked but the authorities of the MCGM appear to have indirectly assisted the Developer at every stage by ignoring the genuine pleas made by the Dean, Nair Hospital and some of its own officers. On the basis of the repair permission, which was granted even before the Developer was recognized as a licensee, a permanent new construction altogether is put up on a

vacant plot of land, flouting the orders of the Municipal Commissioner/Additional Municipal Commissioner themselves. We feel sorry for the Dean of the Nair Hospital who has been treated so shabbily by the MCGM, thereby depriving the patients with medical conditions and their relatives accompanying them of some basic needs, all for the benefit of a private developer. We cannot allow public interest to be defeated in the manner that is sought to be done by the MCGM.

201. The PIL petition is filed in the year 2013. The premises are in the Developer's occupation since March 2008, for more than 14 years. Till this date, the MCGM has not shown any urgency in getting back the premises despite the undertaking given by the Developer that the premises would be restored when demanded. Even today the stand of the MCGM is that at the appropriate stage they would call upon the Developer to hand over the possession and the Developer too says that it is bound to hand it over to the MCGM in terms of the permissions whenever the Corporation wants the premises back. Judicial notice can be taken of the sheer lack of space and hardship faced by the patients, their family members, relatives, the doctors and the staff in municipal hospitals. Public health is one of the most important functions to be discharged by the MCGM. Law is well settled that in the exercise of writ jurisdiction, we can test the decision making process and not the decision itself. However, taking an overall view of the

matter and more particularly, in view of the condition imposed by the MCGM about the Developer handing over the premises when called upon, which the Developer does not dispute, this is a fit case for passing mandatory orders. In a city like Mumbai, where space comes at a premium, the sheer apathy on the part of the MCGM to get back the premises and hand it over to Nair hospital is appaling. It was as far back in the year 1981, the development plan reserved the land for Nair Hospital. The possession of the acquired land was actually handed over in the year 1992 to the MCGM. Since then repeated requests have been made by the Dean for handing over the premises. The MCGM instead of taking action against Nalini for committing breach of the terms of the leave and license agreement, on the contrary recognizes the Developer as a licensee, who had so brazenly entered into the godown premises without any permission of the Municipal Commissioner. This is a classic case of how the Developer has got away with so many irregularities and yet the MCGM except for saying that at the appropriate stage they will recover the possession, nothing is done. The manner in which the officials in the higher echelons of the MCGM proceeded at the relevant time is not only shocking, against public interest, but to the detriment of Nair Hospital and ultimately the citizens for whom the land was acquired. We are saddened to note that instead of safeguarding public interest, the then officials of the MCGM have all gone out of the way to promote the

private interest of the Developer. All this at the cost of the citizens for whom the State Government had acquired the land in a prime location at Mumbai to cater to their health and medical needs. We are amazed at the insensitivity which is displayed in the present case as we find that one of the officers of the MCGM had the audacity to ask the Dean of Nair Hospital as to why Nair Hospital needs the Dharmashala, despite the fact that the land in question was acquired for Nair Hospital, and it is the Dean's views which should have received primal importance. We would have expected the MCGM, even now to have displayed a sense of urgency. Surprisingly there is none. Except for saying that the extension is proceeding in a phased wise manner and at the appropriate stage the Developer will be called upon to hand over the possession, we find the response of the MCGM as cold as it can be.

202. It is well settled that a public body cannot deal with its property without inviting bids and conducting an auction. If any authority is required in support of this proposition, we rely upon the decisions of the Supreme Court in the case of **M.I. Builders vs. Radhey Shyam Sahu and others**[22] and in the case of **Sterling Computers Limited vs. M & N Publications Limited and others** [23]. In a very novel way, the Developer has succeeded in bypassing these settled legal principles.

22 (1999) 6 SCC 464
23 (1993) 1 SCC 445

203. Now a brief reference to the repair policy under which the permission has been obtained. A compilation has been produced on record by Shri Godbole, learned counsel for MCGM regarding repair proposal. The MCGM in the brief submissions has taken a stand that this is not a case where the municipal property is being permanently divested and according to the stage of the construction, the concerned property will be used by taking it back from the Developer when Phase-3 of the project is implemented. It is stated that though, there was an unauthorized transfer and illegal demolition; considering the transfer policy and repair policy of the BMC, the developer was accepted as a Municipal licensee (and not as tenant) and construction was allowed without changing the footprint of original structure and subject to the conditions in the proposal/recommendation of the AMC (W.S) and approval of the Municipal Commissioner. We have seen the photographs of the structure. The original structure is demolished. There was no structure left for carrying out repairs. The condition imposed by AMC was that there has to be no new construction. We find that there is a completely new construction raised, despite which the MCGM chooses to ignore something so glaring. The construction which has come up is contrary to the conditions imposed by the MCGM. Though, it is the contention of learned counsel for the MCGM that the Developer is accepted as a licensee in view of the transfer policy, but it has to be borne in mind that the MCGM is

recognizing the Developer as a licensee of premises which was acquired for a public purpose in which Nalini was allotted the premises on a leave and license basis in her capacity as a PAP. Recognizing the Developer as a licensee in this manner amounts to defeating the public purpose for which the land was acquired and which is still subsisting.

204. Even so far as the repair policy is concerned, we find that Chapter II deals with scrutiny of proposals for repairs. One of the prerequisite while submitting the proposal in terms of 1(iii) is photographs showing condition of building. In the present case, when the proposal of repairs was submitted by the Developer, the godown was in existence. Later on it was demolished. It is thereafter that the Municipal Commissioner granted repair permission on the basis of IOD granted prior to demolition. We fail to understand why the MCGM went soft in case of such a developer. To top it, the Additional Municipal Commissioner imposes a condition that no new construction can be put up. We have already noticed that a completely new structure has been constructed by the Developer which is sought to be justified by contending that the footprints are maintained.

205. Mr. Godbole, invited our attention to the short and long term development plan of Nair hospital and T.N. Medical College prepared in order to facilitate proper facility distribution and catering to the additional capacity of patient's care dated 28/06/2016. While going through the

proposed development, we noticed clause (e), which mentions that there is a proposal to construct a multistoried building for rehabilitating the tenants which are currently occupying the pieces of land reserved for Nair Hospital extension and partly for emergency labour quarters. Mr. Godbole submitted that this is only a proposal. We hope and trust that the MCGM does not propose to rehabilitate the Developer, a private developer who benefited so long from the unwarranted action on the part of the MCGM.

206. The construction has been put up by the Developer after obtaining permission from the MCGM. The MCGM allowed the construction to be put up. Now that we propose to allow the PIL petition and direct the Developer to hand over the premises back to MCGM, the question came up for consideration as to whether the Developer should be compensated. We find that the construction was put up on the understanding that whenever the MCGM would require the premises back, the same would be handed over to the MCGM. Moreover, the Developer is in possession of the premises for last more than 14 years and has upon construction of the new building, utilized the structure for private purpose and gains. The Developer was always well aware of the consequences and, therefore, the question of compensation does not arise.

207. Before parting, we must appreciate the efforts of the Deputy Municipal Commissioner and other officials who made an attempt to put up the proposals in accordance with

law but they unfortunately had to fall in line with the dictates of their superiors.

208. We place on record our appreciation for the efforts of learned *amicus curiae* Shri Assem Naphade in presenting this PIL petition so effectively.

209. The PIL petition therefore deserves to be allowed in terms of prayer clauses (a) & (b). The developer-respondent no. 5 to vacate the subject premises within one month from the date of uploading of this order. In the facts of the present case, there shall be no order as to costs.

210. Rule is made absolute in the above terms.

211. In the light of the disposal of the PIL petition, the interim application also stands disposed of.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**