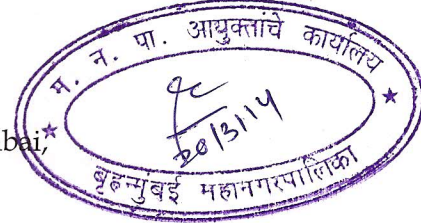


S. S. Hussain I.A.S. (Ex)
Chief Executive Officer

Ref. No. MCHI/CEO/13-14/293

March 20, 2014

To,
Hon'ble Shri Sitaram Kunte (I.A.S.)
Municipal Commissioner,
Municipal Corporation of Greater Mumbai,
Mumbai - 400 001.



Sub.: Interim order dated 3rd February, 2014 arising out of Writ Petition No.1564 of 2013 in Heritage matter.

Ref.: Legal Opinion sent by Shri Milind Sathe, Sr. Counsel.

Dear

As you are very well aware that there was an Interim Order by Hon'ble Chief Justice of High Court, Mumbai in the above matter. They have exempted certain precincts and buildings of certain grades for taking prior permission of Maharashtra Heritage Conservation Committee (MHCC).

MCHI-CREDAI has received legal written opinion on the same, which is being attached herewith for your information, consideration and necessary action as deemed suitable.

Yours

(S. S. Hussain)

To,
Hon'ble Shri Sitaram Kunte (I.A.S.)
Municipal Commissioner,
Municipal Corporation of Greater Mumbai,
Mumbai - 400 001

Encl: Written Opinion by Sr. Con. Shri Milind Sathe.

OPINION

Maharashtra Chamber of Housing Industry ... Querist

1. Maharashtra Chamber of Housing Industry, the Querist, have filed Writ Petition No.1564 of 2013 in the Bombay High Court challenging: (i) the validity of the Notification dated 31st July 2012 issued by the Municipal Corporation of Greater Mumbai (MCGM) under Regulation No.67 of the Development Control Regulations for Greater Mumbai, 1991 (DCR) proposing to amend the list of heritage structures, precincts, etc. The Querist have also challenged the Circular issued by the MCGM on 14th August 2013 which is to the effect that until the finalization of the proposed amendment to the heritage list under the DCR 67(3), no proposal in respect of any of the properties notified in the said list would be entertained by MCGM for the purpose of redevelopment/development without NOC from the Mumbai Heritage Committee (MHC).
2. There are several other petitions also filed challenging the same Notification dated 31st July 2012 issued by MCGM. One of the Petitions filed by Dr.Arun Chitale focuses on structures at Shivaji Park, which is an area notified as proposed heritage precinct in the Notification.

3/10

On the above batch of Writ Petitions, the following orders have been passed by the Bombay High Court :

By an Order dated 3rd October 2013, it was directed that "*cases where development permission under Section 43 of the Maharashtra Regional & Town Planning Act, 1966 was already granted prior to 31st July 2012 the Circular dated 14th August 2013 shall not be applied. If the development permission was granted after 31st July 2012 and the building was lawfully demolished before 14th August 2013, the owner of the concerned building may apply to the MCGM for getting a certificate about the present status of the building. If the Corporation finds that the building was lawfully demolished before 14th August 2013, the Corporation shall consider the application for Commencement Certificate*".

4. On 25th November 2013, the Court extended the time granted to MCGM for hearing objections to the draft Notification and finalizing the proposal to be submitted to the State Government by 31st January 2014. It was further directed that "*while extending the time limit upto 31st January 2014, it is directed that the Corporation shall first take up for consideration cases where parties have submitted their applications for permission to redevelop. MCGM shall physically accept such applications for redevelopment and start processing them in accordance with law*".

AM

S.M. On 3rd February 2014, further arguments were heard. All the Writ Petitions have been admitted, Rule has been issued and the following directions were also issued:

“21. *In view of the above we are clearly of the view that the Circular dated 14th August 2013 of the Mumbai Municipal Corporation requiring proposal for redevelopment under Regulations 33(6), 33(7), 33(8), 33(9), and 33(10) of DCR 1991 of several buildings to be sent to Mumbai HCC even if they are not proposed to be declared as Grade I or Grade II heritage buildings in the notice dated 31st July 2012 published by the Municipal Corporation is not sustainable. Therefore the Circular dated 14th August 2013 is stayed to the above extent”.*

6. According to the Querist, after passing of the Order dated 3rd February 2013, MCGM is taking up a stand that the Circular dated 14th August 2013 is stayed to the extent as indicated in the Order dated 3rd February 2014 and consequently the previous orders dated 3rd October 2013 and 25th November 2013 have got merged into the Order dated 3rd February 2014 and the MCGM is not bound by the directions earlier given in the previous two orders.
7. The Querist seeks my opinion as to whether the above contention urged by the MCGM is legally correct and sustainable.

M

8. The question raised in the Writ Petitions which are pending is regarding the validity of the Notification dated 31st July 2012 issued under DC Regulation 67 by MCGM and the Circular dated 14th August, 2013. The above Notification proposes to amend the list of heritage structures, precincts and modify the previous list whereby the categorization of the structures and precincts is proposed to be upgraded or downgraded.

9. The MCGM issued the Circular dated 14th August 2013 providing "*that the provisions of DC Regulation 67 should be considered while considering applications for permission for developments proposal in respect of the proposed heritage list and that will include reference the MHCC for its remarks/NOC wherever required*". The circular also provides that the Notification dated 31st July 2012 is to be treated as a draft proposal published by means of notice within the meaning of Section 46 of the Maharashtra Regional & Town Planning Act, 1966 (MRTP Act, 1966). The circular also refers to the previous circular dated 30th October 2007 which provides that if the property under development is situated within a radius of 100 meters from any heritage building categorized as Grade I Building/monument, then NOC from Heritage Committee shall be obtained prior to approval of building plans so that the grandeur or view from the existing Grade I heritage building/monument could be maintained.

4
M

10. The orders of the High Court dated 3rd October 2013 and 25th November 2013 have provided, inter alia, for the following :

- (i) that if the property owner has development permission granted prior to 31st July 2012 and the building was demolished before 14th August 2013, the reference to MHCC for NOC would not be necessary as there would be no structure in existence;
- (ii) the Corporation was directed in such cases to process the applications for planning permissions;
- (iii) that the Corporation was bound to physically accept all applications submitted and start processing them in accordance with law.

The above aspects in the orders dated 3rd October 2013 and 25th November 2013 have not been touched upon in the last order dated 3rd February 2014. Consequently, the previous orders continue to operate.

11. The interim orders passed in the proceedings including the writ proceedings will not and do not get vacated by the subsequent interim order unless they are expressly vacated and/or modified, particularly when they deal with different aspects of the matter, as they do in the present case. In any case the substance of the previous two orders has not been touched upon in the last order dated 3rd February 2014 and therefore the orders dated 3rd October 2013 and 25th November 2013 would clearly continue to operate.

5


12. In cases where planning permission has been received prior to 31st July 2012 (that is, the date of the publication of the Notification) and the building has been demolished before 14th August 2013 (that is the date of issuance of the circular), the MCGM is bound to process the application for planning permission in accordance with Section 45 of the MRTTP Act, 1966. This is for the reason that the demolition of the building also falls within the definition of "development" for which permission is required. No building can be demolished within the Municipal limits without prior permission of MCGM and permission for development therefore in such cases is a continuous process which ultimately culminates in Occupation Certificate after construction is complete. Such permission can be modified or revoked only in accordance with the procedure prescribed under Section 51 of the MRTTP Act, 1966. These provisions therefore, as clarified in the orders dated 3rd October 2013 and 25th November 2013, would enure to the benefit of persons who were granted planning permission prior to the Notification. These two orders therefore are in the nature of restating the obvious statutory regime.

13. In view of the above, the orders dated 3rd October 2013 and 25th November 2013 have neither merged nor been vacated or have been modified by virtue of the order dated 3rd February 2014.

14. In the event of any person who is a member of the Querist fitting into the fact situation as covered by the two orders dated 3rd October 2013 and 25th November 2013 is not given the benefit of the previous two orders by the MCGM, it would be open for the Querist to bring this conduct of MCGM to the notice of the court by filing a separate application by way of a Notice of Motion for directions as well as take proceedings for Contempt of Court.

15. My opinion to the query therefore is to the effect that the orders dated 3rd October 2013 and 25th November 2013 do not get merged with the order dated 3rd February 2014 nor have they been modified and/or vacated.

16. I have nothing further to add.

Mumbai: this 8th day of March, 2014.

Milind Sathe
MILIND R. SATHE
(Senior Advocate)