REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL No. 1890-91 of 2010

ASSOCIATION OF VASANTH APARTMENTS' OWNERS …**APPELLANT(S)**

VERSUS

V. GOPINATH & ORS. …**RESPONDENT(S)**

WITH

CIVIL APPEAL NO. 7334 OF 2013

CIVIL APPEAL NO. 7847-7848 OF 2013

WRIT PETITION (CIVIL) No.591 of 2015

J U D G M E N T

K.M. JOSEPH, J.

1. Civil Appeal Nos. 1890-91 of 2010 is connected with the other cases. We are disposing of the Appeals and the Writ Petition filed under Article 32, having generated certain common issues by the following common Judgment.

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ABOUT THE CASES AND THE PARTIES

The case of Association of Vasanth Apartments Owners

2. Civil Appeal Nos. 1890-91 of 2010 is directed against the judgment dated 19.10.2007 rendered by a division bench of the High Court. Writ Appeal No. 478 of 2007 and Writ Appeal No. 1026 of 2007 were appeals generated by the judgment which was rendered by the learned Single Judge, in Writ Petition No. 4766 of 2007 dated 20.02.2007. By the same the learned Single Judge allowed the writ petition filed by the writ petitioners

who are the appellants before us. It was interalia their case that they were owners of certain apartments situated in a complex which consisted of 12 blocks. The total area of the layout was more than 10,000 sq. metres. A portion of the land was earmarked in terms of Rule 19 of the Development Control Rules (hereinafter referred to as 'DCR') as Open Space Regulation area (hereinafter referred to as 'OSR'). A gift deed was executed in favour of the Chennai Metropolitan Development Authority on 18.02.1994. However, despite the lapse of 12 years of the gift, the OSR area had not been developed into a park. The learned Single Judge disposed of the writ petition by directing the appellant association to maintain the open space area as a park with recreational facilities in accordance with the 'DCR'. It was also made clear that it is always open to the respondents to take action in accordance with law if there is any violation. It was found to be the duty of the respondents to maintain such open areas as parks and on there being a failure on their part, the association of the residents should be welcomed to do the same subject to the rules. Writ

Appeal no. 478 of 2007 was filed by one Shri Gopinath and others. They were persons who were living in the neighbourhood. Writ Appeal no. 1026 of 2007 was filed by the Commissioner of the Corporation of Chennai and the Member Secretary of the Chennai Metropolitan Development Authority (hereinafter referred to as the 'CMDA'). It was by the judgment impugned in Civil Appeal Nos. 1890-91 of 2010, the division bench allowed the Writ Appeals and set aside the judgment of the learned Single Judge. We notice the following findings and relief granted: -

> **"17. When the land has been assigned in the year 1994 in favour of the CMDA by way of the Gift Deed, neither the CMDA nor the Corporation of Chennai have taken any step to make use of the land for the interest of public. It is clear from the report filed by the Advocate-Commissioner and the photographs filed before us and the other materials available on record that in the OSR area, there is a katcha road, which is said to have been laid by the Corporation in the year 2003. Probably because of this katcha road and the usage of the same as road by all the residents in the locality, the occupants of the Vasanth Apartments might have felt disturbance, which would have prompted them to make a representation to the Corporation to develop a park in the said area or in the alternative to permit them to develop and maintain a park for their recreational purpose besides illegally constructing a compound wall, separating the petrol bunk and**

the compound wall for about a length of 30 feet separating the unbridged 11 feet wide open canal upto ground level, so as to close the way once and for all. At this juncture, it is to be pointed out that the Vasanth Apartments is divided by a compound wall from this area and it is It also not made clear by the Vasanth Apartments Owners Association that the said land, which was gifted to the CMDA, is part of their lay out."

"18. It has also been alleged that under similar circumstances, the CMDA has permitted all the residents associations in Velachery to maintain the open spaces as recreational parks in the nearby area viz. K.G.Apartments, Sai Sarovar etc. Each case has to be viewed and decided on its own merits and since in the case on hand, in the interest of thousands of general public residing in and around the area, the authorities have taken a wise decision to lay a road to have easy and immediate access to the 100 ft. road, the same cannot be found fault with."

"19. Further more, it has been brought to our notice that with a view to form connecting road to 100 feet bye-pass road, the Chennai Corporation has already addressed the Commissioner, Hindu Religious and Charitable Endowments Department to transfer and convey the land belonging to Arulmigu Dhandeeswarar Temple, Velachery, Chennai in favour of the Corporation and also obtained the said land to form the connecting road from Hindu Religious and Charitable Endowments Department."

"20. Thus, though belatedly, now the CMDA and the Corporation of Chennai are taking all efforts to lay a pucca road in the OSR area for the convenience of nearly one lakh people in the area including the residents of Vasanth Apartments. In this city, ill-famous for its bumper to bumper traffic and the related

hazards faced by the road users day in and day out, any such step taken by the civic authorities to ease such bottleneck traffic congestions should be appreciated and welcomed without allowing anybody to put spokes in the wheel of development, as /3 has been attempted on the part of the Association of Vasanth Apartments Owners in the case on hand.

For all the above reasons, since it has been found that the writ petitioner has no right or interest, whatsoever, in the OSR land, and the prayer in the writ petition itself is misconceived, both these writ appeals are allowed, thus setting aside the order passed by the learned single Judge. No costs. Consequently, M.P.No.2 of 2007 in W.A.No.1026 of 2007 is closed."

3. **C.A. No. 7847-48 of 2013 arising out of SLP (C)No. 25709-25710 of 2011 is again filed by the Association of Vasanth Apartments' Owners i.e., the appellants in C.A. No. 1890-91 of 2010. This is a separate litigation though having a bearing on the issue. In this appeal, Writ Petition No. 23397 of 2007 came to be filed by the appellant Association challenging the vires of Rule 19 of the 'DCR' under which a gift had to be executed in respect of the land comprised in 10% as we shall see in greater detail. The Writ Petition, came to be dismissed by the division bench by its judgment dated 06.03.2008 and it upheld the validity of the rule. C.A.**

No. 7847 of 2013 is filed against the same. A review filed turned unsuccessful. The order in the review has led to the appeal, C.A. No. 7848 of 2013.

The case of Keyaram Hotels Pvt. Ltd.

4. Writ Petition no. 11934 of 1995 brings in the next appeal which is C.A. No. 7334 of 2013. The above writ petition was filed by M/s. Keyaram Hotel Pvt. Ltd. The challenge in the said writ petition was to the very same rule.

5. The case set up in short is as follows. The petitioners are the owners of about 62 grounds. It applied for the sanction of a building plan in the year 1975 for the construction of a hotel. There is reference to an earlier writ petition and contempt proceeding. Suffice it to notice, that planning permission was granted after a delay of 12 years on 08.09.1992. It is their case that it was faced with certain difficulties in the construction. A revised plan was submitted and building permission was sought for on 17.08.1994 for the construction of a hotel and hotel annexe building etc. which consisted of a

basement, ground floor and three further floors. By letter dated 13.09.1994 issued by the second respondent the petitioner was to gift the open space reserved area to the Commissioner Corporation of Madras. We may notice further that the third respondent sent communication on 01.12.1994. It is stated inter alia that the structure which existed within the OSR area should be demolished after due sanction and that the OSR land should be free from any structure and be fenced by providing separate entrance from the road side. There is no mention about the gift deed. The petitioner sought a month's time to comply with the conditions in letter dated 01.12.1994. However, the respondent insisted on compliance with the requirement of executing a gift deed. In the writ petition, an interim Order dated 13.03.1996 was passed directing permission after recording undertaking by petitioner to execute gift deed without prejudice to the rights of the petitioner. Petitioner executed gift deed on 22.05.1996. Petitioner's revised plan was approved as a group development on 24.04.1999. The grounds urged against the rule appear to be as follows:

1. The rule is an illegal infraction of the petitioner's right to hold and enjoy the property.
2. The rule is contrary to the Act and derogatory to the interest of the land owners.
3. The stipulation is violative of the civil right vested in every owner of the property to hold his land and the right to safeguard public interest cannot be stretched to create a right and title in favour of a local body in the manner contemplated by the respondents 1 and 2. It could only impose a condition to keep such land as open for being used by the user of such building for their communal or recreational purpose.
4. The provision for open space with respect to a special building is for the communal and recreational purposes of the people who shared their accommodation in the said building or otherwise lawfully use the same. It is not intended to take away the proprietary right of the owners. The expression of willingness by the petitioner to provide the stipulated open space reserved for communal and recreational use of the occupiers will

satisfy the public interest and object of the legislation. Petitioners undertake to keep 10% of the area to be developed excluding roads as open space for communal and recreational purpose.

5. The further condition imposed by the 3rd respondent to provide exclusive frontage for the said open space area opening into the main road is unconscionable in law and contrary to the spirit of the Act. Such stipulation is in terrorum.

The relief sought is to declare Rule 19(b)(I)(v) of the DCR void. That apart sanction is sought without insisting on the rule.

6. We may notice the relevant contents of the counter affidavit filed by the respondent State. The case set up inter alia is that the CMDA had carried out necessary survey and prepared the master plan which lays down policies and programmes which are necessary to regulate the growth of the area and also to ensure its economic viability, social stability and sound management for the present and the foreseeable future and orderly development required the same. The DCR was an integral part of the master plan. Any person wanting to develop

a property within the Metropolitan area must apply for permission and the CMDA is empowered to enforce such conditions and restrictions as was necessary under the rules. It is in public interest. If the ownership of the open OSR area were to be allowed to vest with the original land owner, then the concerned owner would have a chance to convert the same for construction, the area specially reserved as open space, for communal recreation by suppressing the said fact after passage of time. Hence, it is necessary that the open space area should be vested with the civil authorities who are responsible for maintenance of parks and play fields in the sites. The open space reservation is provided to create lung space in the city and to have sufficient open space for the use of society.

7. A counter affidavit was filed by the Chief Planner of the CMDA and the stand taken was to seek support under Section 17 of the Act read with Section 49. The impugned Rule has been also referred to. As regards the facts, it is stated as follows: -

> "Para 5. petitioner submitted the application on 17 .08.1994 for planning Permission for the

proposed construction of Hotel Complex consisting of group of two massive blocks of Basement plus ground plus three floors building and four small buildings at D.No.1 & 2, Harrington road, Chetput, Madras - 31 in R.S.No.355 of Nungambakkam Village. The total floor area of the Hotel Buildings is about 13,300 M2. The extent of the site is about 10692 M2. In the plan submitted by the petitioner there are certain existing structures also, which are to be demolished for the construction of the proposed hotel buildings consisting of basement plus ground plus three floors, after demolishing the existing structures. In the plan submitted by the petitioner he has also shown the area to be reserved and handed over as open space reservation. As the proposal of the petitioner consists of group of two blocks of basement plus ground plus three floors buildings in a site of an extent of more than 10,000 M2, the same was examined by this respondent under Development Control Rules 19 (b) (II) (1) to (V) and (VI) - C related to group development. While the Development Control rule 19(b)(II) (1) to (v) deals with the open spaces to be left around the buildings, distance to be maintained between the buildings etc, the rule 19(b)(II) (VI-C) prescribes as following:

"C) SITE EXTENT above 10,000 m2

10 percent of the area excluding roads shall be reserved and this space shall be transferred to the authority or to the local body designated by it, free of cost, through a deed. It is obligatory to reserve the 10 percent of the site area and no charges can be accepted in lieu, m case of new developments or redevelopments "

The second respondent examined the planning permission application of the petitioner and having satisfied with the plans with reference to the Development Control Rules and in View of the fact that the petitioner already

earmarked 1070 m2 being the 10 % open Space Reservation area in the plan, sent a letter in No.82/17789/94, dated 13.09.1194 stipulating certain conditions and requesting, the petitioner to,
i) pay the following charges
a) Development charges: Rs. 82,000/-
b) Security Deposit
for the building: Rs. 8, 00, 000/-
ii) hand over the 10% Open Space Reservation Area reserved and shown in the plan to the third respondent through a registered gift deed.
The petitioner has not paid the security Deposit, but however obtained a direction from this Hon'ble Court to accept the Bank Guarantee towards the security Deposit and furnished the same to the second respondent along with his consent letter dated 28.02.1995 accepting the conditions stipulated in letter No. 82/ 17789 /94, dated 13.09.1994. In the said letter dated 13.09.1994 of the second respondent, one of the condition is that the petitioner should hand over the 10% Open Space Reservation Area to the Commissioner, Corporation of Madras, free of cost, through a· registered gift deed, which is a lawful condition under Development Control Rule 19 (b)(II) (VI - C). It is respectfully denied that the petitioner has not made any representation to relax the condition of gifting of the Open Space Reservation Area and the same was never under the consideration of the second respondent."

"Para 7. It is submitted that the second respondent has requested the petitioner to transfer the 10% Open Space Reservation Area free of cost, through a registered gift deed in favour of the third respondent as per the provisions of Development Control Rules 19 (b) (II) (VI - C), under group development regulations and not as contended by the petitioner under rule 19 (b) (I) (V), which

related to special Buildings. The Development Control Rule 19 (b) (II) (VI - C) is as follows:

"C) SITE EXTENT above 10,000 m2

10 percent. of the area excluding roads shall be reserved and this space shall be transferred to the authority or to the local body designated by it, free of cost, through a deed. It is obligatory to reserve the 10 percent of the site area and no charges can be accepted in lieu, in case of new developments or redevelopments"

Explanation: -

(3) The land so reserved shall be free from any construction by the owner or promoter or developer. The land for communal and recreational purposes shall be restricted at ground level in a shape and location to be specified by the MMDA"

The Development Control Rule is the integral part of the Master Plan and was framed under section 17 of the Town and Country Planning Act. The second respondent exercised the power vested in it, since the total extent of the petitioner's site is more than 10,000 m2, the insisting of the requirements of reservation of 10 % Open Space Reservation Area and consequent direction to the petitioner to hand over the same to the third respondent through a registered gift deed as per Development Control Rules 19(b)(II) (VI- C) is well within the jurisdiction of the second respondent."

"Para 8. The petitioner is challenging the concept of reserving the 10 % area for open space and recreational purposes. This is a statutory requirement under Development Control Rule 19 (b) (ii) (vi - c) for all the proposals of group development, where the extent of the site is more than 10,000 m2. Further the city is fastly developing and

individual houses are being demolished and multi family apartments are constructed in the same site where there was only one family residing therein earlier. The intense vertical developments make the city more dense demanding more water, pollution free air, noise free atmosphere etc. The city is already over congested and therefore more open spaces have to be created wherever new developments or redevelopment takes place. The open spaces so created serve as long space to the city benefiting the community at large. The open space enable to make the environment clean and provide fresh air, besides facilitating the ground water recharge in a city where water scarcity is a perennial problem."

"Para 9. The petitioner has also questioned the transfer of open space reservation in favour of the Madras Corporation. It is submitted that in practice, the developers take up the development of properties and construct the buildings providing necessary open spaces as per Development Control Rules. After completion of the construction they sell out the building in portions to various persons and later the open space reserved become no man's land without any care for its maintenance. If the ownership of the open space reservation for communal and recreational purpose, suppressing the facts later, after passage of time. Therefore, it is essential that the ownership of the open Space Reservation area should be vested with the civic authority, which is responsible for the maintenance of the parks and play fields in the city. The civic authority is maintaining many parks and play grounds such as Elliot's Beach Garden, Anna Nagar, Thiru Vi Ka park etc. Which are maintained very well. It is also therefore essential that the open Space Reservation Area should be located in a location shape and size which is accessible from the public road not only to the Civic Authority but also to the

general public without any restriction. Therefore, transferring the OSR area to the Civic body will not amount to talking away the rights of the property owner and it is intended for the benefit of the community at large."

"Para 10. In the case of the petitioner, it is submitted that the 10 % Open Space Reservation Area is very close to his hotel buildings. Therefore, if the ownership were to be vested with the petitioner, it is most likely to be misused by the petitioner for Hotel related activities, rather than allowing it to the use of general public. It is also likely that over a period of the time the OSR area would be misused for commercial purposes by the petitioner under the guise of improving it.

The petitioner has also expressed that the maintenance of the 10 % Open Space Reservation Area will be done by him. It is submitted that the entrusting the maintenance of the Open Space Reservation area is at the discretion of the second and third respondents. The development Control Rule 19 (a) (II) (Vii) prescribes as follows:

" The authority reserves the right to enforce the maintenance of such reserved land by the owner to the satisfaction of the Authority or order the owner to transfer the land to the authority or local body designated by it, free of cost, through a deed, to the Authority or the local body designated by the authority as case may be, reserve the right to dedicate on entrusting the maintenance work to institution / individual o merits of the case.

It is submitted that as per the provisions of the Development Control Rule 19 (b) (II) (Vii) this second respondent reserves the right to decide on entrusting the maintenance of OSR area to the petitioner. It become the bounden

duty of the state Government to safeguard the interest of the public at large and the state government have the statutory power and have approved the development control rules as an integral part of the master plan for the benefit of the public and to enforce it accordingly. Therefore, the reservation of 10% OSR area in a statutory requirement. Under the above said circumstances the petitioner is not deprived of their right of enjoyment of the properly by implementing of the rules framed under the Town and Country Planning Act. The writ petition is devoid of merits and the same has to be dismissed in limini.

Therefore, it is prayed that this Hon'ble Court may be pleased to pass an order by dismissing the writ petition and thus render justice".

(Emphasis supplied)

8. **The Corporation of Madras also filed a counter affidavit. Therein it was inter alia stated that the OSR land should have access from a public street as per which the development authority directed the petitioner to execute the gift deed to the Corporation as it had to be used for communal and recreation purpose. In the reply affidavit, the petitioner took the stand that the impugned rule does not fall under Section 17. The OSR under the Act is only an amenity for the benefit of the property owner. The rule was projected as an executive order falling beyond the Act. Any misuse could be dealt with under the law.**

CREDAI; Writ Petition No. 591/15 under Article 32

9. **The last of the litigation with which we are concerned is Writ Petition no. 591 of 2015. This is a writ petition sought to be maintained under Article 32. The writ petition has been filed by an association which the petitioner describes as the Confederation of the Real Estates Developers Association of India (CREDAI).**

10. **This petition is filed under Article 32 of the Constitution of India. It is filed by a Federation of registered Association claiming to be an Apex body of the organised union and state real estate developers, builders across India. In the Additional affidavit filed, it is contended that the total number of members of Petitioner is 350 and that of Chennai Chapter is 163 members. The relief sought in the writ petition is as follows:**

> **"(a) allow the present writ petition and issue a writ of Certiorari quashing Regulation 29(7)(a) (at pg.221 Vol. 2) as well as Annexure XX (at pgs.293-294 Vol. 2) of the Development Regulations for Chennai Metropolitan Area issued by the Respondent No.2 as being ultra**

vires, unconstitutional and violative of the fundamental rights of the Petitioner; and"

11. **However, in the additional affidavit filed on 8.12.2021, we may notice paragraph 4.**

> **"4. That, in so far as challenge to Regulation 29(7)(a) in the present writ petition is concerned, the petitioner is restricting its challenge only to the latter part of the provision i.e., the requirement to transfer free of cost through a registered gift deed, 10% area reserved for recreational purposes only and not the space set apart for roads."**

12. **We may notice the grounds taken in the writ petition. It is contended that by the impugned regulations there is expropriation of the private property of the petitioner's members Association. Reliance is placed on the judgment in *Chet Ram Vashist (Dead) by LRs v. Municipal corporation of Delhi*[1]. Support is drawn from Article 300A. It is sought to be contended that allowing use of the OSR Area amounts to a blatant exercise of the power of eminent domain. Transfer of property of the petitioner is sought to be achieved through the impugned regulation. In fact, in**

[1] (1995) 1 SCC 47

ground (i), it is submitted that expropriation of land is possible at best by way of plenary legislation and the impugned regulation not being such a legislation, it is vulnerable. The impugned regulation is contrary to the Act. The Act regulates the land use. The authorities under the Act cannot change the user of a land. In other words, the point is that allowing use of area meant for recreational purpose by the members of the general public is expropriatory and contrary to the Act. It is also contended that the impugned regulation is unreasonable and disproportionate.

13. We have heard Shri Gopal Sankaranarayanan, learned Senior Counsel on behalf of the appellants in C.A. No. 7847 of 2013. We also heard Shri N Subramaniyan, learned counsel on behalf of M/s. Keyaram Hotel Pvt. Ltd. (C.A. No. 7334 of 2013). We further heard Smt. V. Mohana learned senior counsel on behalf of the writ petitioner (writ petition no. 591 of 2015). We also heard the learned counsel on behalf of the appellants in C.A. No. 1890-91 of 2010. We further heard the learned counsel Shri K.S. Suresh on behalf of Association of Vasanth Apartments' Owners which has in

C.A. No. 7848 of 2013 challenged the judgment rejecting the review petition filed in the writ petition unsuccessfully challenging the rule.

14. We heard Shri Sanjay R. Hegde learned senior counsel on behalf of the corporation of Chennai and heard Shri Amit Anand Tiwari, AAG on behalf of the Government of Tamil Nādu and also the CMDA. We finally heard Shri JayanthMuth Raj, learned Senior Counsel on behalf of the appellants in Writ Appeal no. 478 of 2007 who are the persons residing in the area and whose writ appeal stood allowed by the High Court.

SUBMISSIONS OF APPELLANTS/PETITIONER

15. In Civil Appeal Nos. 7847 of 2013, Shri Gopal Sankaranarayanan would contend that a compelled gift attracted the wrath of Article 300A of the Constitution. There was clearly deprivation of property. It was without the authority of law. It was without the authority of law because 'DCR' was not statutory in nature, having been made by the CMDA without any provision enabling it to make statutory rules. The power to make rules was vested with the

State Government under Section 122 of the Tamil Nadu Town & Country Planning Act, 1971 (hereinafter referred to as the 'Act'). Section 9C relied upon by the respondents did not clothe the authority with power to make rules. Equally, Section 17 would not come to the aid of the respondents. Therefore, the rule was not law within the meaning of Article 300A. There is no law made by the competent legislature empowering deprivation of the property of the appellants.

16. Even a law made by the legislature could not result in the deprivation of property in the manner which is purported to be achieved through what is described as a rule which in fact is not a statutory rule. It is his contention that the survey of the Act would reveal that wherever the land is reserved, the lawgiver has contemplated that the land should be acquired. The concept of acquisition is traced to Entry 42 of List III of Part VII of the Constitution. In other words, unless land is acquired under the relevant law which undoubtedly involves payment of compensation there would be no justification in law to compel a person to part with his property by what is described as a

compelled gift. There is no compensation payable under the gift admittedly. Therefore, this amounts to the execution of the gift which is a direct result of the rule which so mandated the execution of the gift. It is clearly expropriatory. The law at any rate, it is contended that is, the impugned rule, is palpably and manifestly arbitrary. Similar arguments have, no doubt, been addressed by the other learned senior counsel appearing on behalf of both the appellants and the writ petitioner. There are various other ancillary submissions which had been taken up.

17. There is also a further case that the rule falls foul of Article 14 for another reason. It is complained that the rule produces classification which is not permitted under Article 14. In other words, it is pointed out that for layout upto 3,000 sq. metres, there is no requirement to execute a gift. In respect of layout which is in excess of 3,000 sq. metres and which is less than 10,000 sq. metres, there is no such requirement and in place of a gift, it is open to the proponent of the project to give the equivalent value. It is without any rational basis, and therefore,

attracting the vice of class legislation or unreasonable classification resulting in equals being treated differently, that in respect of projects involving more than 10,000 square metres, the builder is bound to execute a gift in favour of the authority.

SUBMISSIONS OF SHRI N. SUBRAMANIYAN, ADVOCATE IN C.A. 7334 OF 2013 [KEYARAM HOTELS P. LIMITED]

18. **In this case, the appellant is the owner and continues to be the owner of the layout area. The gift was effected as per an undertaking given to the High Court but subject to the Writ Petition. Secondly, there is no laches or delay. Immediately as the condition was sought to be imposed, the Writ Petition was filed in the year 1995. At best, Rule 19 can be only a Statutory Order/Notification/ Guideline and it cannot be considered more than a Subordinate Legislation. Relying on the principles laid down for impugning Subordinate Legislation in *State of Tamil Nadu v. P. Krishnamurthy*[2], it is contended that the Rule, Rule 19(b)(2)(vi)(c)**

[2] (2006) 4 SCC 517

violates Sections 36 to 39. Harmoniously reading Section 17 and Section 20 and Sections 36 to 39 of the Act, would establish that the reserved lands (made for open spaces) under Section 17(2)(k) and Section 20(1)(k), should be acquired within three years, failing which, the lands shall get reverted to the owner. In the case of regulating the use of lands, such as putting restrictions on the use of land under Section 17(2)(l) and Section 20(1)(n), within the planning area, do not call for compensation. Section 17(2)(b), as also Sections 21(1)(k) and (n) relating to detailed development plans, are the only provisions dealing with the open spaces. Proviso to Section 39(1) require the respondents to pay compensation for all items, except the matters that fall under Section 17(2)(l) and Section 20(n), again, both of which are regulatory. Sections 48, 49 and 52 to 54 are projected to contend that the object of the Act is to regulate the development and not to deprive land. Sections 52 to 54 also mandate, payment of compensation. Exceptions to the 'Pay compensation' principle, involve cases, where there is no mandate to reserve land for public purposes.

There is no power, as claimed under Sections 9C, 17, 20 and 35 or Section 124, to make the impugned Rule. It is further contended that the impugned Rule contravenes and is inconsistent with the Sections 6(2), 12 and 18 of the Tamil Nadu Apartment Ownership Act, 1994 and, hence, is void. The appellant, having developed two blocks, the developed building comes under the said 1994 Act. It applies to apartments constructed prior to its commencement. The impugned Rule, being inconsistent with Sections 6(2), 12, 18, 25 and 26 of the Act had become inoperative. The impugned Rule is alleged to be violative of the Land Acquisition Act, 1894 and hence, void, in view of Article 254(2) of the Constitution. It is sought to be contended that since Entry 42 of the Concurrent List provides for acquisition and requisition, any State Legislature, seeking to put in place, a law to acquire lands with lesser compensation, it would be impermissible. It would be discriminatory. The Act took care to incorporate Land Acquisition Act by reference under Section 36 of the Act. This meant that depravation of property, without compensation, was not contemplated. Sections 36 and 37 are invoked. Even

the State Legislature has no power to seek transfer of lands to the State free-of-cost. Even a single owner could construct a luxury independent bungalow with 3000 square meters and he will not be required to spare any land to society whereas 184 owners who constructed 184 flats with each family having 59.7 square meters would have to spare 10 per cent of their land free-of-cost. This is unconscionable. No civilised society would expect or require or steal someone's property for their betterment and the Rule of Equality requires the beneficiary to share the costs. Appellants rely on *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India*[3], *Nagpur Improvement Trust and another v. Vithal Rao and others*[4], *K.T. Plantation Private Limited and another v. State of Karnataka*[5]. The appellant would pray that the Rule be declared null and void and it be declared that the ownership of the OSR lands revert back to the appellants.

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[3] *(1970) 1 SCC 248*
[4] (1973) 1 SCC 500
[5] (2011) 9 SCC 1

SUBMISSIONS OF MS. V. MOHANA, SENIOR ADVOCATE ON BEHALF OF THE WRIT PETITOINER IN WRIT PETITION (CIVIL) NO. 591 OF 2015.

19. **The objections to the challenge to the Regulation on the ground that the Rule/Regulation had continued on the Rule Book for long, cannot, by itself, be a ground to repel the challenge. [See *Shayara Bano v. Union of India and others*[6] and *Indian Young Lawyers Association (Sabarimala Temple-IN RE) v. State of Kerala and others*[7]]. Doctrine of Laches and Delay cannot become a constitutional limitation on court's power. Expropriation of property can only be done by plenary legislation, i.e., by Parliament or by State Legislature. Rule, made under the Rule-making power cannot empower the deprivation of any substantive right, which include property. An expropriatory law must, at any rate, be construed strictly and must not be brought to life in the absence of specific express provisions [See *Nareshbhai Bhagubhai and others v. Union of India and others*[8]]. The State is blowing hot**

[6] (2017) 9 SCC 1
[7] (2019) 11 SCC 1
[8] (2019) 15 SCC 1

and cold in regard to power to make Regulations. Reference is made to Sections 47 and 55 to contend that the bar on compensation will not apply in case of deprivation of property. Neither the provisions of the master plan nor provision relating to control of development, authorised deprivation of property without payment of compensation. The present is a case of no compensation and not nil compensation. The decision in *K.T. Plantations Limited v. State of Karnataka*[9], is relied upon. The laudable object cannot legitimise the violation of the Fundamental Right or Constitutional Guarantee. It is pointed out that in Ground-K of the Writ Petition, it is contented that arbitrary restrictions on the petitioner to use his property through Executive action, attracted Article 14. It is further pointed out that Fundamental Right violation is projected in Grounds-L, M and N. Equally, Article 300A and Article 14 forms the subject matter of Grounds-C, D, E, F, G, H, I and J, it is submitted. It is contended that the repeal of the Regulation, which is impugned, by the Rules of 2019, would not save the Regulation

[9] (2011) 9 SCC 1

from the *vice* of invalidity. Reliance is placed on the decision of this Court in *Behram Khurshid Pesikaka v. State of Bombay*[10]. The impugned Regulations would constitute law for the purpose of Article 13 in this regard. The declaration of the Regulation falling foul of Fundamental Rights, would have the effect of rendering such law void ab initio. Reliance is placed on the 2019 Rules and the repealing and saving provision [Rule 74(3)]. It is contended, in short, that the rights and obligations, apart from the express savings under the 2019 Rules, would remain intact. With reference to Sections 49 and 50 of the Act, it is contended that permissions under the Development Regulations of 2008 would continue to be governed by the Regulations. Thus, repeal does not render the present Writ Petition academic or infructuous. The fact that the petitioner is an Association of real estate developers cannot detract from the matter being justiciable and a Constitutional Court should not countenance technical pleas, when Fundamental Rights are at stake. When otherwise, considering the importance of this matter,

[10] (1955) 1 SCR 613

bearing in mind the interplay between the Fundamental Rights and Article 300A, this Court, despite any delay, should consider the challenge. Petitioner is restricting the challenge to Regulation 29(7)(a) only to the latter part, *viz.*, the requirement to transfer free-of-cost, the 10 per cent area reserved for recreational purposes. Section 20(1)(d), employing the word 'otherwise', cannot encompass a gift. A gift would be without compensation, which would be contrary to the provisions of the Act. Sections 36 to 39 make it clear that whenever an acquisition was contemplated, it was deemed to be a public purpose and payment of compensation has been provided for. If gift is comprehended in Section 20(1)(d), it would be in conflict with Section 39. Earmarking or reserving an area, may not constitute an injury. But the compulsory gifting of the same, without any compensation, coupled with changing of the character of the property from private to public, reaches an injury. The person must be compensated. Reliance is placed on *Sahu Madho Das and others v. Pandit Mukand Ram and another*[11] *and*

[11] (1955) 2 SCR 22

Rajendra Shankar Shukla and others v. State of Chhattisgarh and others[12]***. Reliance is placed in M. Krishnasamy v. Member Secretary, Chennai Metropolitan Development Authority, Gandhi Irwin Road, Egmore, Chennai-8***[13] ***to*** **contend that a Single Judge of the Madras High Court doubted the very demand for conveying of OSR land. Regulatory law, depriving a person of property, must be strictly construed. In this regard reliance is placed on *B.K. Ravichandra and others v. Union of India and others***[14]**. Section 124, under which Regulations can be made, cannot empower any Authority to create or takeaway or deprive a person of their property, by a manner, not provided for under the Act [See *Indian Young Lawyers Association and others (Sabarimala Temple-In Re.)*[15]]. The Regulation represents the case of action in excess of power. The lands, which have been transferred, are not being used for the purpose of open space. They are being used as dump yard or other use. The valuable easementry rights or lung space of the**

[12] (2015) 10 SCC 400
[13] (2013) 1 CTC 80
[14] 2020 SCCONLINE SC 950
[15] (2019) 11 SCC 1

residents are lost. The frontage of the property and its aesthetic appearance is affected. The rights of the members of the petitioners' Association under Article 19(1)(g) is violated. In answer to the contention of the respondent, that wherever compensation is compulsorily payable, the Constitution itself has made provision as is clear from Article 30(1A) it is sought to be rebuffed. It is pointed out that Article 30(1A) is only an additional protection. Compensation must be paid, when property is deprived for a public purpose. Reliance is placed on decisions of this Court, including the decision of this Court *in Lalaram and others v. Jaipur Development Authority and another*[16]. The Court is requested to mould the relief appropriately so that the lands so transferred in favour of the Authority may be reverted to the persons directly benefiting therefrom, i.e., the Residents' Welfare Associations or the residual owners of the developed areas. It is further prayed that the Court may fix a time limit, within which, interested parties to whom the land is to be reverted may apply for seeking

[16] (2016) 11 SCC 31

such reversion. No other developments/redevelopments should be made on such lands except in accordance with law.

20. Shri Sanjay Hedge, learned Senior Counsel, for the Corporation of Chennai, supported the judgments. He contended that the impugned provision promoted a salutary goal. He highlighted the public interest involved.

SUBMISSIONS OF SHRI AMIT ANAND TIWARI; ADDITIONAL A.G. ON BEHALF OF STATE OF TAMIL NADU AND 'CMDA'.

21. Section 124 of the Act confers powers to make the Regulations. Reliance is placed on Section 9C(ii) to empower CMDA to prepare the master plan or any detailed development plan. Reliance is also placed on Section 17. The DCR and the Regulations are part of the master plan. Section 2(36) defines 'public purpose' as 'any purpose which is useful to the public or any class or section of the public'. Reserving any site, plot for communal/recreational purposes in layout plan, is public purpose. Section 47 is relied upon to contend

that the DCR is statutory in nature. Equally, Sections 17, 18 and 20 are invoked along with Section 124, to contend that the DCR is statutory. Section 2(15) of the Act includes master plan. Sections 105 and 111 give an overriding effect to the Act. All the Rules and Regulations, which will include the master plan, are to prevail notwithstanding anything inconsistent with the same contained in any other law, inter alia. Further, it is contended that the DCR and the Regulations have been subsumed under the Tamil Nadu Combined Development and Building Rules, 2019. Rule 74(3) of the 2019 Rules, is relied upon to contend that it creates a legal fiction that anything done under the Rules/Regulations, is deemed to have been done under the 2019 Regulations. Reliance is placed on Judgment in *Bengal Immunity Company Limited v. State of Bihar and others*[17]. The word 'including' extends and enlarges the scope of the Clause [See *State of Jammu & Kashmir v. Lakhwinder Kumar and others*[18]]. If challenge to the Rules/Regulations succeeds, it will also render the sanction of the

[17] (1955) 2 SCR 603
[18] (2013) 6 SCC 333)

development plans, illegal, which will necessitate petitioners applying afresh under the 2019 Rules, whereunder also, the prescription of 10 per cent land being gifted, exists.

22. It is further contended that the Rules/Regulations, being part of the master plan, are statutory and being framed under the Statute, they operate as law under Article 300A. Reliance is placed on *Pune Municipal Corporation and another v. Promoters and Builders Association and another*[19]. Reliance placed by appellants on *Pt. Chet Ram Vashist (Dead) by Lrs. v. Municipal Corporation of Delhi*[20], is alleged to be misplaced. In the said case, there is no provision in the Delhi Municipal Corporation Act, 1957, under which, the Corporation could pass a Resolution to ask the appellant therein to transfer property free of cost. It is further contended that the Court may bear in mind that the Act replaced the Tamil Nadu Town and Country Planning Act, 1920, which was based on the British Town and Country Planning and Housing Act, 1909. From the

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19 **(2004) 10 SCC 796**
20 **(1995) 1 SCC 47**

Statements of Objects and Reasons, it is contended that the Act was based on the Model Town and Country Planning Bill, which was prepared by the Ministry of Health and Housing of the Government of India after a comprehensive study of various Town Planning Enactments in the western countries. The regional concept in the Maharashtra Town and Country Planning Act, 1966 also made its presence felt. The Act is designed to serve legitimate state interest of planned development down to the regional limit. Crowded urban areas, create adverse living conditions. The reservation of open space for parks and playgrounds is universally recognised. The decision of this Court in *Bangalore Medical Trust v. B.S. Muddappa and others*[21], is relied upon. It is contended that the Act requires only the simple laying of Rules and Regulations under Section 123 of the Act. The laying of the Rules, which is not mandatory, if not followed, will not affect the validity of the Rules/Regulations. The terms of Section 123(2) are relied upon to contend that the Rules will come into effect even before they are placed before the

[21] (1991) 4 SCC 54

Legislative Assembly and any modification made by the Assembly, will apply only from the date it is carried out. Reliance is placed on *Atlas Cycle Industries Ltd. and others v. State of Haryana*[22]. It is further contended that acquisition under Chapter IV of the Act is not required in the facts. The area is not reserved in the master plan nor was any Notice published under Section 26 or 27. Acceptance of appellant's contention would involve the need to compulsorily acquire all the reserved lands including areas such as setback areas, open spaces and other reserved area. Such interpretation would also render the provisions of Chapter VI, in particular Section 55, otiose. Chapter IV apply to areas reserved and notified in the master plan itself or to an area in excess of 10 per cent for proposed developed area of 3000 and above square meters or where area reserved is sought to be utilised for purpose not being communal or recreational, or areas, for which, there are other exceptions in the impugned Rules/Regulations. Section 20(1)(d) stipulates that a detailed development plan may propose or provide for

[22] (1979) 2 SCC 196

acquisition by purchase, exchange or otherwise, of any land. The words 'or otherwise' include a transfer of 10 per cent of the land by way of a gift. It is further contended that there is no constitutional obligation to pay compensation. The Act contemplates divestment of property without compensation as is evident from Sections 31 and 55 read with Sections 17 and 20. It is a settled position of law that Article 300A does not involve or compel payment of compensation. Support is drawn from Judgment of this Court in *K.T. Plantation Private Limited and another. v. State of Karnataka*[23]:

> **"183. Payment of compensation amount is a constitutional requirement under Article 30(1-A) and under the second proviso to Article 31-A(1), unlike Article 300-A. After the Forty-fourth Amendment Act, 1978, the constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. Article 300-A, however, does not prohibit the payment of just compensation when a person is deprived of his property, but the question is whether a person is entitled to get compensation, as a matter of right, in the absence of any stipulation in the statute, depriving him of his property.**
>
> **xxx xxx xxx**

[23] (2011) 9 SCC 1

192. At this stage, we may clarify that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the Government to establish validity of such law. In the latter case, the Court in exercise of judicial review will test such a law keeping in mind the above parameters.

xxx xxx xxx

205. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy."

23. **It is contended that *nil* compensation, as contemplated in paragraph 192, is applicable as a State undertakes to discharge liability for providing spaces for requirement for recreational and communal use, which is a public purpose. The area taken under the gift deed from the appellant in Civil Appeal No. 7334 of 2012 has been developed as a walkers' park and used by the public. It is contended that town planning**

legislation has been viewed differently as it served a legitimate State interest. Even in the United States, where the Fifth Amendment to the U.S. Constitution contemplates compensation for taking, for public use, private property, courts have upheld validity of zoning regulations which substantially limit the rights of the owners to develop land. Compensation has been refused. Reliance is placed on *Agins v. City of Tiburon*[24]. In India, there is no constitutional guarantee for payment of compensation especially when they are required to serve a legitimate public purpose. The gift of property, apart from serving the larger interest of the community, would also be conducive to the interests of the appellants. Refuting the contention of the appellants that the land which is transferred can be used only by the members of the society and not by the members of the general public, it is pointed out that since reservation is for communal and recreational purposes, the word 'communal purpose' must be understood to mean that it is meant for community at large. In the case of proposed development area being

[24] 447 US 255 (1980)

3000 square meters – 10000 square meters, 'public access is specifically excluded, as the Rules/Regulations provide that public access to area earmarked for transfer to Authority, will not be insisted upon'.

24. There is no violation of Article 14. Classification based on size of plot has a clear nexus with the object, viz., planned development. Reliance is placed on Judgment of this Court in *State of Maharashtra and another v. Basantibai Mohanlal Khetan and others*[25]. As far as Civil Appeal No(s). 1890-1891 of 2010 is concerned, the complaint of the appellants that the land transferred under the gift was being made use of as a road, which is impermissible, it is contended that it is misleading. It is the case of the respondent that the 10 per cent land transferred, already had a *kachha* road on the said land and it was being used by the public. The appellants tried to prevent the use of the road. The High Court considered the Report of the Court Commissioner and concluded that furbishing of the road served a larger public interest and provided better

[25] (1986) 2 SCC 516

connectivity to a larger population. Alternatively, assuming communal purpose, would not include construction of roads on OSR land, in the facts of the case, appeal is made that this Court may not interfere in the Extraordinary Jurisdiction under Article 136.

SUBMISSIONS MADE BY SRI JAYANTH MUTHRAJ, SENIOR ADVOCATE RESPONDENTS NOS. 1 AND 2 IN C.A. NO. 1890 OF 2010.

25. The developers had transferred, in the interest of public, 1100 square meters of land, to the Authority for roads, parks and other open spaces by the gift deed dated 18.02.1994. In the year 2003, the Corporation of Chennai laid metal road, which provided a direct and short link to the Velacherry 100 feet bypass road to enable thousands of general public to have easy access and movements. The appellant-association has no *locus* as it is neither the owner of the property nor has any usage right been assigned to it. The CMDA is the absolute owner of the gifted property. The public road was laid as per the terms of the gift. The property is used for communal purpose. The word 'communal' means public. He relies on the definition of the word

'communal' in the International Websters Comprehensive Dictionary of the English Language Encyclopaedic Edition (2004 Edition) to mean 'common; public; belonging to a community'. He also would contend that the DCR was prepared in accordance with Section 17 read with Section 9C, Section 20(1)(d) and Section 20(1)(k) and Section 35 with Section 124. Rules and Regulations are authorised. He relies on the Judgement of this Court in *R.K. Mittal and others v. State of Uttar Pradesh and others*[26] and *New Delhi Municipal Council and others v. Tanvi Trading and Credit Private Limited and others*[27]. The impugned Rule is not an expropriatory action. It is only regulatory. The Rule is informed by intelligible *differentia* having a nexus with the object. The challenge is academic as the DCR is already repealed by the Regulation made on 02.09.2008. There is latches in filing the Writ Petition after 13 years of the execution of the gift deed. Even assuming the Rule is bad, the gift deed is beyond challenge. The appellants having maintained Writ Petition (Civil) No. 4766 of 2007,

[26] (2012) 2 SCC 232
[27] (2008) 8 SCC 765

based on the gift deed, cannot challenge the validity of the gift deed in the subsequent Writ Petition. Estoppel and constructive *res judicata* are principles which are enlisted in support.

SUBMISSIONS BY SHRI K.S. SURESH, ADVOCATE IN CIVIL APPEAL NO.7848 OF 2013

26. Shri K.S. Suresh, learned counsel appearing in C.A. No. 7848 of 2013, (the appeal by Vasanth Apartment Owners Association challenges the order in the review petition) would submit that there is no power to compel gift of land which is not required, reserved or designated. He refers to Section 36 and would contend that there is no power beyond the same to demand the transfer of land. The rule providing for a compelled gift is not within the objects, provisions and policies of the Act. One of the zones reserved is for open space and recreational use. Sections 36 and 37 only provide for acquisition of land in such zones. Legislative policy is not to acquire land without paying fair market value. Planning permission cannot result in deprivation of property. The DCR are not the rules made under the

Act. The authority is competent only to make regulation under Section 124. In the absence of express power to demand a gift, there cannot be an implied power. The Act is regulatory and not a taxing legislation. The appellants are entitled to restitution. Otherwise, he adopts the arguments of the Shri Gopal Sankarnarayanan made in C.A. No. 7847 of 2013. He would also in his rejoinder submission point out that support cannot be derived from Section 17 having regard to Section 12. He would reiterate the argument that the State Government also has no power relying on the judgment reported in (2003) 5 SCC 622. He would contend that the words in Section 122(1) empowering making rules 'for carrying out the purposes of the act' is unbridled and it must be understood as meant for regulating the use of land.

ANALYSIS

27. **We have noticed the facts in the case of Vasanth Apartments and in the case of Keyaram Hotels. In the case of Vasanth Apartments, the land which was gifted by the owner in compliance with the impugned rule has been sought to be made use as a road. In the case of**

Keyaram Hotels the pertinent point which must be noticed is that the OSR area is not sought to be so maintained as road but access to the public by having an entrance to the area through a public road is sought to be projected as being contrary to the very concept of OSR meant for communal purpose, if the word 'communal' is to be understood as being confined to benefit the interest of the community which in the context of the case is the community of persons who patronise the hotel and who used the facilities provided in the hotel and its premises.

28. <u>Whether impugned rule is statutory or it has statutory underpinning? Whether it is law?</u>

The argument of the appellants appears to be, that the impugned rule is not a statutory rule. Instead, the further case is that the impugned rule is not a rule made under Section 122 of the Act. Section 123 contemplates placing of rules made under Section 122 before the legislative assembly. The said procedure has not been followed as regards the impugned rule. Therefore, it is not open to the respondents to claim that the impugned rule is a statutory rule. It is

nothing but an executive fiat. If it is merely executive in nature, then it is not open to the respondents to direct the owners to execute a gift deed of valuable property, and thus, deprive the owners of the rights over their property.

29. **The argument, on the other hand, of the respondents is that the DCR of which the impugned rule, is a part of the Master Plan and there is statutory authority in regard to the making of a Master Plan located in Section 17 of the Act. In other words, the argument of the respondents is that the court, when it approaches the issue raised in this case, cannot have a pedantic view and understand a Master Plan as one which is limited or confined to mere drawings. The Master Plan as contemplated in the Act in regard to a Metropolitan Authority like the CMDA must be viewed on a larger canvass. The plan was put in place for catering to the needs of an ever-growing Metropolis. Various restrictions necessarily have to be put in place to provide for an orderly development of such a sprawling urban area. The larger public interest of the entirety of the residents of such an area had to be envisaged**

and it is in this regard that the concept of OSR must be viewed. The Master Plan goes to meticulous details about what is permitted and what is not.

30. A perusal of the writ petition No.23397 of 2007 being the petition filed by the Association of Vasanth Apartments Owners wherein Rule 19 has been challenged, reveals the following pleading:

> It is specifically stated that Rule 19 of the DCR which forms part of the Master Plan prepared under Section 17 of the Act mandates reservation of 10% as open space for open and recreational facilities when the area exceeds 10000 sq. meters. The gift in the case was executed in the year 1994 (16.02.1994). It is further contended that under the rule the second respondent was to maintain it either on their own or through the local body. The second respondent is the authority. Thereafter since the second respondent has not developed OSR area as park, petitioner wanted to maintain the OSR as Park. Reference is made to Writ Petition No. 4766 of 2007 and the developments including the order passed by the learned single judge and also writ appeal (writ appeal no. 478 of 2007)

wherein an interim order was passed. Thus, the writ petition is filed in the year 2007. Now let us look at the grounds urged:

(1) Rule 19(b) of the DCR is beyond the rule making power conferred on the first respondent. The Act does not empower the first respondent (the State of Tamil Nadu) to make the DCR. Section 36 contemplates acquisition where land is reserved for open space. Therefore, the rule is ultra vires.

(2) There is an absolute right to enjoy the property. This is a constitutional right under Article 300A of the Constitution. Unless there is acquisition and payment of due compensation, Article 300A is violated. Therefore, the rule is unconstitutional.

(3) The rule empowers the Authority to maintain the OSR area themselves or through others without permitting owners to themselves to do so. The respondents have no right to possess and manage the same. Therefore, the impugned rule

authorising the second respondent to maintain and manage the OSR area is unconstitutional.

(4) The DCR not having been placed before the legislative assembly, it has no force of law.

(5) The impugned rule without any guideline enables exercise of arbitrary power.

(6) There is no power with first respondent State to usurp the lands free of cost, and that too selectively, under the guise of regulating the development of the area.

The prayer is to declare Rule 19 (b) of the DCR relating to group development in so far as it mandates the transfer of 10% area of the layout of any developmental plan having area 10,000 sq. meter or more reserved as open space for communal and recreational purposes to the second respondent or the local body designated by it, free of cost through a registered deed and empowering the second respondent or any authority other than the association of resident owners to maintain the said OSR area of the respective layout, and the gift deed executed and registered as Document No.262 dated 18.02.94 in the

office of the 4th respondent pursuant to the impugned rule are unconstitutional and null and void and consequently direct the 3rd respondent to enter in their records the members of the petitioner Association as Owners of the said OSR area and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

31. Before we deal with the issue we must bear in mind as to what is law. Article 13 of the Constitution reads as follows: -

> **"Article 13. Laws inconsistent with or in derogation of the fundamental rights. — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.**
> **(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.**
> **(3) In this article, unless the context otherwise requires, —**
> **(a) "law" includes any Ordinance, order, bye-law, rule, regulation,**
> **notification, custom or usage having in the territory of India the force of**
> **law;**

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

[(4) Nothing in this article shall apply to any amendment of this
Constitution made under article 368.]"

32. Existing law has been defined in Article 366. It reads as follows: -

"Article 366. (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

33. Law in force is an expression found in Article 372 of the Constitution. It reads as follows: -

"Article 372. — The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

34. Section 3(29) of the General Clauses Act, 1897 defines Indian Law as:

> (29) "Indian law" shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;

35. In Salmond on Jurisprudence 12th Edition, it is profitable to notice the following discussion:

> ## Law as the dictate of reason: natural law
>
> The idea that in reality law consist of rules in accordance with reason and nature has formed the basis of a variety of natural law theories ranging from classical times to present day(q). The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature.
>
> ## Law as the command of the sovereign: imperative law
>
> Diametrically opposed to the theory of natural law is the positivist, or imperative, theory of law (j). This theory distinguishes the

question whether a rule is a legal rule from the question whether it is a just rule (k), and seeks to define law, not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on.

Xxx xxx xxx

According to Austin, whose version of the theory will be considered here, positive law has three characteristic features. It is a type of command, it is laid down by a political sovereign and it is enforceable by sanction.

Xxx xxx xxx

We must now distinguish commands which are laws from commands which are not. Imagine a state governed by an absolute ruler R. Here the law is what R command. But is the converse true? Are all R's commands law?

Xxx xxx xxx

Now if particular commands can qualify as laws, how can we distinguish laws from commands which are not? Everyday life is sprinkled with examples of people giving commands to others: masters give orders to servants, teachers to pupils, parents to children and so forth.

Xxx xxx xxx

Such criticism overlook the importance of Austin's second requirement: for to qualify as law a command must have been given by a political superior, or sovereign.

Xxx xxx xxx

To define law as a command can mislead us in several ways. First, though this may be a not

in appropriate way of describing certain portions of law such as the criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be come, but which empower people by certain means to achieve certain results: e.g., laws giving citizens the right to vote, laws conferring on lease-holders the right to buy the reversion, laws concerning the sale of property and the making of wills: indeed the bulk of law of contract and of property consists of such power-conferring rules. At this point the theory could be saved by arguing that a rule conferring a right on one person is really an indirect command addressed to another: a law empowering the citizen to vote is really an order to the returning officer to register the vote.

Xxx xxx xxx

Thirdly, "command" conjures of the picture of an order given by one particular commander on one particular occasion to one particular recipient. Laws differ in that they can and do continue in existence long after the extinction of the actual law-giver (r).

Xxx xxx xxx

But whether we define law as a command or a rule, we must still distinguish commands (or rules) which are law from those which are not. For Austin, as we saw, a command can only be law if it emanates from a sovereign. This raises the question how far there can exist laws other than those made by the sovereign. Obviously in a complex modern state it would be impossible for a sovereign to enact every legal rule: much law-making will in fact be done by subordinates to whom legislative powers have been delegated. A good deal of English law consists of such delegated legislation, e.g., regulation made by Ministers under Acts

> **of Parliament. Here Austin finds no problem, since he sees no difficulty in the notion of a sovereign conferring law-making powers on others (u).**

36. The distinguishing feature of law has been the subject matter of considerable debate and we may only for the purpose of these cases note that one of the essential features which mark out law from an executive order is that 'law' has general application. In other words, law sets out principles and rules which apply to all of those who would be within its purview otherwise. A law is not to be viewed as particularised decisions of the executive. Law is generally to have operation in the future. This court speaking through O. Chinnappa Reddy, J. held in *Union of India and Another v. Cynamide India Limited and Another.*[28]:

> **"5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing — there are several instances of the legislature requiring the subordinate legislating authority to give public notice and**

[28] **(1987) 2 SCC 720**

a public hearing before say, for example, levying a municipal rate — in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation…".

"7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is "difficult in theory and impossible in practice". Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as "one between the general and the particular". "A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy". "Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases." It has also been said: "Rule-making is normally directed toward the formulation of requirements having a general

application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts."

37. **Paton in his work on Jurisprudence says this about the law.**

"Law may shortly be described in terms of a legal order tacitly or formally accepted by a community. It consists of the body of rules which are seen to operate as binding rules in that community, backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured to enable the system or set of rules to continue to be seen as binding in nature. A mature system of law normally sets up that type of legal order known as the State, but we cannot say a priori that without the State no law can exist."

38. **In the DCR the preamble recites that Section 9 (c) of the Act prescribes that the Authority is to carry out a survey of the Chennai Metropolitan Area and prepare a Master Plan referred to in Section 17. It is further stated that having carried out necessary surveys and studies, the Master Plan prepared in 1975 stood approved by government on 04.12.1976. The DCR inter alia provides as follows:**

> **No development as defined in the Act is permissible without written permission. It provides for the manner of obtaining permission. Rule 3 proclaimed that no development shall be in contravention of the DCR. Site approval is made mandatory. The land use classification was put into place. The DCR divided land use in terms of 9 separate zones which included primary residential zone, mixed residential zone, institutional use zone, open space and recreational use zone etc. There were detailed restrictions put in place qua the zones in regard to what activities were permitted as also what were prohibited. Part III commencing with Rule**

17 was captured under the Caption 'General Provisions'. It is under this chapter that Rule 19 made its appearance. Rule 19 dealt with Layout and sub division. It inter alia provided for passage, streets and roads and cul-de-sacs and it is thereunder that in respect of reservation of land for communal and recreational purpose in a layout or sub division that the DCR contemplated inter alia the impugned provisions. Rule 20 provided for parking. Rule 21 dealt with architectural control. Rule 22 provided for preservation of buildings of historical or architectural interest. Rule 23 dealt with tree preservation. Rule 24 dealt with advertisement control. Rule 25 provided for Airport zone and Microwave Zone. In fact, Rule 26 may be noticed at this stage in full.

> "26. These rules to prevail :- (a) In the application of these rules if there is conflict between the requirements under these rules and the requirements under any other Act or rules or by laws in force the requirements under these rules and the provisions of Chennai City Municipal Corporation Act, Tamil Nadu Distrit Municipal Act or Panchayat Act or any other law relating to the local authority for the time being in force or any rule, by law or regulation made under the said act or laws,

such provisions which are contrary to these rules shall stand suspended. (b) The notifications made under the Municipal and Panchayat Acts and the Tamil Nadu Public Health Act, 1939 (Tamil Nadu Act III of 1939) as regards setting of the Industrial and Residential area in the Chennai Metropolitan Area will cease to operate from the date of commencement of these rules. 27."

Rule 27 dealt with identification of boundaries. Rule 28 provided for delegation of power. Rule 29 made contravention of the rules punishable with fine.

39. Section 9(c) must be read along with Section 17 of the Act. Section 9 (c)(ii) declares that subject to the provisions of the Act and the rules made under the Act, the functions of the Authority is to inter alia prepare a Master Plan referred to under sub-Section (2) of Section 17. Section 17 deals with Master Plans. Section 17 contemplates that the Local Planning Authority (which is mentioned under Section 4(b) of the Act) shall within such time as may be prescribed and after consulting the Regional Planning Authority (see Section 4(a) of the Act) and the Local Authority, prepare and submit to the Government, a Plan called the Master Plan. Section 17(2) reads as follows:

"(2) The master plan may purpose or provide for all or any of the following matters, namely: -

(a) the manner in which the land in the planning area shall be used;

(b) the allotment or reservation of land for residential, commercial, industrial and agricultural purposes and for parks, play-fields and open spaces;

(c) the allotment and reservation of land for public buildings, institutions and for civic amenities;

(d) the making of provision for national highways, arterial roads, ring roads, major streets, lines of communication including railways, airports and canals;

(e) the traffic and transportation pattern and traffic circulation pattern;

(f) the major road and street improvements;

(g) the areas reserved for future development, expansion and for new housing;
(h) the provision for the improvement of areas of bad layout or obsolete development and slum areas and for relocation of population;

(i) the amenities, services and utilities;

(j) the provision for detailed development of specific areas for housing, shopping, industries and civic amenities and educational and cultural facilities;

(k) the control of architectural features, elevation and frontage of buildings and structures;

(l) the provision for regulating the zone, the location, height, number of storeyes and size

of buildings and other structures, the size of the yards and other open spaces and the use of buildings, structures and land;

(m) the stages by which the master plan shall be carried out;

and (n) such other matters as may be prescribed."

40. **The Act as noted contemplates preparation of detailed development plan also. Section 24 of the Act contemplates that as soon as may be after the Master Plan inter alia has been submitted to the Government, the Government may not later than the time prescribed direct the appropriate Planning Authority to make such modification in the Master Plan inter alia. Thereupon, the modified Plan has to be resubmitted to the Government. Thereupon, the Government may give the consent for publication of the notice under Section 26 of the preparation of the Master Plan inter alia. Moving on to Section 26, it contemplates publication in the Gazette, of the notice of the preparation of the Master Plan inter alia. The notice must indicate the place or places where the copies may be inspected. More importantly, objections and suggestions in writing are**

to be invited within such period as is specified in the said notice. The period shall not be less than two months from the publication of the notice. Section 26 (2) contemplates that a reasonable opportunity of being heard must be provided to any person including representative of the Government Authority, who have made any objection. The Planning Authority can make amendments based on the objections and with the amendments, if any, carried out, the Plan is again submitted to the Government. Section 28 contemplates approval by the Government after consulting the Director of Town and Country Planning of the Plan submitted under Section 26(2). The approval may be with or without modification. Again, it is open to the Government to return the Plan, to modify the plan, or to prepare a fresh Plan in accordance with such directions as the Government may issue in this behalf and resubmitted to the Government for approval. The approval which is granted under Section 28 by the Government to a Master Plan inter alia is to be published by the Government in the gazette and leading newspapers. The notification must indicate the place

and time at which the Plan shall be open to inspection to the public. The Plan shall come into operation from the date of publication in the Tamil Nādu Government Gazette. Section 32 of the Act provides for variation, revocation and modification of regional plans, Master Plan and the new development plan, at any time, by a subsequent plan prepared and approved under the Act.

41. Even according to the petitioner in Association of Vasanth Apartments Owners, the DCR is a part of the Master Plan. This is precisely the argument of the respondent as well. We are in agreement with the stand taken by the petitioner and the respondent. The DCR is a part of the Master Plan. The process involved in the making of the Master Plan points to active participation of all stakeholders. The plan which is apparently tentatively prepared must first receive approval from the Government before the notice of its preparation is published. It is upon such notice being published, objections are also invited. It is open to the Planning Authority to amend the Plan, paying heed to the objections found to be with merit. Again, the matter goes to the Government. Government has the power

again to return it. Government as well may approve the Plan. As we have already found Master Plan cannot be conflated with a set of drawings or maps. It must, in the context of law in question, be extended to encompass within its embrace rules by which alone the Plan can become workable and the sublime goal of the lawgiver attained. The Master Plan accompanied with the DCR were to hold sway. It was to have general application. It was intended to bind everyone. It created rights and liabilities. It was not intended for any particular person. It was to operate in the future. It carried with it the attributes of law. The Government all throughout plays the pivotal and leading role and it is only with the imprimatur of approval by the Government that the Plan read with the Rules assumed force. Government undoubtedly had power to make rules under Section 122 of the Act. We would therefore hold that the DCR which held the field till 2008 when Regulations were enacted had the force of law.

42. **It is profitable for us at this juncture to look at what a learned single judge had to say regarding the history of the 'DCR' and the regulation. Justice V.**

Ramasubramanian, while judge of the High court, has rendered judgment reported in *M. Krishnasamy V. The Member Secretary, Chennai Metropolitan Development Authority and Another*[29]. It was rendered on 25.09.2012. The petitioner therein challenged a communication by the member secretary of the authority rejecting the request to waive open space reservation charges for the grant of planning permission. The amount of OSR charge demanded was Rs.58,50,000. It was the contention of the petitioner therein that the charges could be levied only if land of an extent equivalent to 10% of the total area was not reserved for open space and conveyed to the local body. It was his case that his predecessor in title had already earmarked 10% of the total area and handed it over to the Corporation of Chennai. A draft deed of conveyance was also submitted by his predecessor which could not be executed on account of the lethargy on the part of the corporation but possession was taken in 1976. The learned single judge went on to find as a matter of fact that though a gift deed as such was not executed, the land was in public

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domain for the past 36 years and no one except the local body would lay a claim on the said land. The Court held;

> **"Para 12. Though in paragraph 10 of the counter affidavit, the first respondent has claimed that OSR land was neither gifted nor handed over to the Corporation, the same appears to be an incorrect statement. The Corporation has categorically confirmed that the land of the extent of 6 grounds 170 sq. ft., had been handed over by the original owner. This is also corroborated by (i) a letter of the Assistant Engineer of the Corporation of Chennai dated 29.1.1976 and (ii) the handing over-taking over certificate dated 11.2.1976 signed by an Officer of the Deputy Collector's office and the Corporation of Chennai. The fact that the said land has been developed into a park and that it is now maintained by the Corporation of Chennai, is beyond any pale of doubt. But it is equally true that no deed of conveyance/gift was executed and registered by the original promoter in favour of the Corporation. Nevertheless, the land is in public domain for the past 36 years and no one except the local body, can today lay a claim on the said land of the extent of 6 grounds and 170 sq. ft. Therefore, on the first question, it has to be held that OSR land has already been handed over to the local body."**

43. Thereafter it is interesting that the learned Single Judge holds as follows: -

> **"Para 13. Incidentally it must be pointed out that in Pt. Chet Ram Vashist vs. Municipal Corporation**

of Delhi {1995 (1) SCC 47}, the Supreme Court held that the effect of reserving any site for open space, park etc., in a layout is that the owner ceases to be a legal owner of the land in dispute and that he would hold the said land for the benefit of the society or the public in general. It was further held in the said decision that the entitlement of the Corporation or the local body to demand the transfer of the land to them, is not made out from the provisions of any Act or on any principle of law. The Court pointed out that the Corporation may get a right as custodian of public interest to manage it in the interest of the society in general. However, the right to manage as a local body, was held by the Supreme Court in the said decision, to be not the same thing as to claim transfer of the property to itself. The decision in Pt. Chet Ram Vashist, was followed in Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke & Chemicals Ltd {MANU/SC/7706/2007 : 2007 (8) SCC 705}. Again in Babulal Badriprasad Varma vs. Surat Municipal Corporation {MANU/SC/7606/2008 : 2008 (12) SCC 401}, the Supreme Court pointed out that a statute of town planning ex facie is not a statute for acquisition of a property. The Court further observed that every step taken by the State does not involve application of the Doctrine of Eminent Domain."

Para 16. At this juncture, a small prelude is necessary, to understand how the liability to earmark open space for public and recreational purposes, in a land developed into a layout and how the liability to pay OSR charges, came into existence. Hence it is presented as follows: -

(i) Section 9C, Chapter II-A of the Tamil Nadu Town and Country Planning (Amendment) Act, 1973 (Tamil Nadu Act No. 22 of 1974) prescribed that the Madras Metropolitan Development Authority shall carry out a survey of Madras Metropolitan area and prepare a Master Plan as referred to in Section 17.

(ii) Accordingly, MMDA carried out necessary surveys and studies and prepared the First Master Plan for the Chennai Metropolitan Area in 1975. The Government approved the same in G.O.Ms. No. 2395, Rural Development and Local Administration dated 4.12.1976.

(iii) The First Master Plan covered an extent of approximately 1170 sq. kms. It included within the City of Chennai, a part of Ambattur Taluk, Tambaram Taluk, Tiruvallur Taluk, Chengalpet Taluk, Sriperumbudur Taluk, Ponneri Taluk and Poonamallee Taluk.

(iv) Under the said Plan, all lands in the Metropolitan Area were categorised into 10 zones such as Primary Residential Use Zone, Mixed Residential Use Zone, Commercial Use Zone, Light Industrial Use Zone, General Industrial Use Zone, Special and Hazardous Industrial Use Zone, Institutional Use Zone, Open Space and Recreational Use Zone, Agricultural Use Zone and Non-Urban Use Zone.

(v) Along with the First Master Plan, a set of rules known as Development Control Rules were issued by the Government. These rules dealt with (i) permission for development (ii) use zones and (iii) general provisions.

(vi) Rule 19 of the Development Control Rules, which comes under Part III, under the heading "General Provisions" deals with layout and subdivision.

(vii) The liability to reserve a portion of the site in a layout as open space, arose out of Rule 19 of the Development Control Rules, till these rules were in operation.

Para 17. Rule 19 of the Development Control Rules contains a Table which prescribes the minimum width of the streets and roads in different types of layouts. Just below the Table under Rule 19, there is a Note. The said Note contains 3 prescriptions. The third prescription in the

said Note contains a Table indicating the extent of land to be reserved for communal and recreational purposes in a layout or subdivision for residential, commercial, industrial or combination of such uses.

Para 21. It may be of interest to note that at the time when the First Master Plan was conceived in 1975, the concept of "Group Development" or "Flats", had not gained momentum in the City of Chennai. Therefore, the Development Control Rules did not contain specific provisions to regulate the same. But when developers started promoting flats, the issue was taken up by the Madras Metropolitan Development Authority with the Government, in a letter dated 22.3.1981. On the basis of the said letter of the Member Secretary and the recommendations of the Technical Committee of MMDA and the response of the public to the proposed amendment to the Rules, the Government issued G.O.Ms. No. 940, Housing and Urban Development, dated 8.10.1982, approving the Draft Rules for incorporation in the Development Control Rules with certain modifications. They were issued by the Government in exercise of the power conferred by Section 32 of the Tamil Nadu Town and Country Planning Act, 1971.

Para 22. By the Amendment so made to the Development Control Rules, sub-rules (b) & (c) were inserted under Rule 19. While sub-rule (b) dealt with "Special Buildings", sub-rule (c) dealt with "Set Back" for residential and commercial. Under Clause (v) of sub-rule (c) of Rule 19, the extent of land to be reserved for Community Recreational Purposes, was indicated in a tabular column. It reads as follows:

Exent of layout ***(1)***	***Reservation*** ***(2)***
(i) For the first 3000 sq.meters	**Nil**

(ii) Between 3000 square meters and 10,000 square meters	**10% of the area excluding roads or in the alternative, he/she shall pay the market value of the equivalent land excluding the first 3000 square meters as per the valuation of the registration department. The space so reserved shall be maintained as Community Recreational Space and shall remain private.**
(iii) Above 10,000 sq.meters	**10% of the area excluding roads shall be reserved and this space shall be transferred to the Authority or to the local body designated by it, free of cost, through a deed. It is obligatory, to reserve the 10% space of the site area and no charges can be accepted in lieu.**

Para 23. But in so far as "Group Development/Flats" are concerned, the open space to be reserved for Community Recreational Purposes was indicated in a separate Table in the same Government Order G.O.Ms. No. 940, dated 08.10.1982, as follows:

Exent of layout (1)	***Reservation (2)***
(i) For the first 3000 sq.meters	**Nil**
(ii) Between 3000 square meters and 10,000 square meters	**10% of the area excluding roads or in the alternative, he shall pay the market value of the equivalent land excluding the first 3000 square meters as per the valuation of the Registration Department. The space so reserved shall be maintained as Community**

	Recreational Space and shall remain private.
(iii) Above 10,000 sq.meters	10% of the area excluding roads shall be reserved and this space shall be transferred to the Authority or to the local body designated by it, free of cost, through a deed. It is obligatory to reserve the 10% of the site area and no charges can be accepted in lieu.

Para 24. Rule 19(a) & (b) was amended further by G.O.Ms. No. 35, Housing and Urban Development, dated 9.1.1989. But the Amendments introduced by the said Government Order covered only layouts of the extent between 3,000 sq.meters and 10,000 sq.meters. In other words, layouts of larger extents above 10,000 sq.meters, were not covered by the said Amendment.

Para 25. There appears to be a subsequent amendment. Though the year of such amendment is not clear, the Development Control Rules hosted in the Internet by the CMDA, as amended upto September 2004, contains two Tables, one in respect of normal buildings under Rule 19(a) and another in respect of "Special Buildings and Group Developments" under Rule 19(b). The Table under Rule 19(a) is as follows:

Exent of layout (1)	*Reservation (2)*
For the first 3000 square meters	Nil
Between 3000 square meters and 10,000 square meters	10 percent of the area excluding roads or in the alternative he shall pay the market value of equivalent land

	excluding the first 3000 square meters as per the valuation of the registration department. "No such area reserved shall measure less than 100 square meters with a minimum dimension of 10 meters". The space so reserved shall be transferred to the Authority or to the Local body designated by it, free of cost, through a deed, and in turn the Authority or the Local body may permit the residents Association or Flat Owners' Association for maintaining such reserved space as park. In such cases public access for the area as earmarked shall not be insisted upon.
Above 10,000 square meters	10 percent of the area excluding roads shall be reserved and this space shall be maintained as Community Recreational Open

	Space to the satisfaction of the authority or transferred to the authority for maintenance. It is obligatory to reserve 10 percent of the layout area.

Para 26. The Table under Rule 19(b) in respect of Special Buildings, is as follows:

Exent of layout (1)	*Reservation (2)*
For the first 3000 square meters	Nil
Between 3000 square meters and 10,000 square meters	10 percent of the area excluding roads or in the alternative shall pay the market value of the equivalent land excluding the first 3,000 square meters as per the valuation of the Registration Department only where it is not possible to provide open space due to physical constraints. No such area reserved shall measure less than 100 square meters with a minimum dimension of 10 meters. The space so reserved shall be transferred to the Authority or to the Local Body designated by it, free of cost, through a deed, and in the turn the Authority or the local body may permit the Residents Association or Flat Owners' Association for

	maintaining such reserved space as park. In such cases, public access for the area as earmarked shall not be insisted upon.
Above 10,000 square meters	10 percent of the area excluding roads shall be reserved and this space shall be transferred to the authority or to the local body designated by it, free of cost, through a deed. It is obligatory to reserve the 10 percent space of this site area and no charges can be accepted in lieu, in case of new developments or redevelopments.

Para 27. After a spurt in developmental activities, the CMDA felt a need for a Second Master Plan for the Chennai Metropolitan Area. Therefore, a Draft Second Master Plan 2011 was prepared and submitted to the Government and the Government gave its consent to it under G.O.Ms. No. 59, Housing and Urban Development Department, dated 30.6.1995. After public consultation, it was submitted to the Government in December 1995 for approval. But approval could not be granted on account of an interim prohibitory order granted by this Court in a Writ Petition. Though the Writ Petition W.P. No. 14819 of 1995 was eventually dismissed on 10.7.2001, the Government returned the Draft Second Master Plan to the CMDA for suitable modifications. This was under G.O.Ms. No. 408, dated 5.10.2001.

Para 28. Thereafter, a revised Draft Second Master Plan with the year 2026 as the horizon year, was prepared and submitted to the Government in December 2005. The Government again returned it under G.O.Ms. No. 331, H & UD Department, dated 5.12.2006, with a direction to

incorporate certain developments in the field and to submit a fresh proposal for consent. This was done in February 2007 and the Government gave its consent on 30.3.2007.

Para 29. Thereafter, copies of the Draft Second Master Plan were made available to the public and also hosted in the official website of the First Respondent. Subsequently public consultations were conducted in April and July 2007 and a two-day workshop was also held in August 2007. Thereafter, the draft was finalised and submitted to the Government. Finally, the Second Master Plan for Chennai Metropolitan Area was approved by the Government of Tamil Nadu in G.O.Ms. No. 190, Housing and Urban Development, dated 2.9.2008 and it was notified in the Gazette on the same day. As part of the Second Master Plan, a set of Regulations known as "Development Regulations" were issued and they came into force on 2.9.2008.

Para 30. Regulation 26 of the Development Regulations 2008, contains stipulations regarding "Special Buildings". A Special Building is defined in Regulation 2(40) to mean (i) a residential or commercial building with more than two floors, or (ii) a residential building with more than 6 dwelling units or (iii) a commercial building exceeding a floor area of 300 sq.meters."

44. **After referring to Rule 27 dealing with group developments and Rule 29 which dealing with layout and sub division regulations and finding it to correspond to Rule 19 of the DCR and further noticing Rule 27 in**

greater detail, the learned Single Judge then proceeds to hold further as follows: -

> "Para 34. A careful survey of (i) the provisions that existed from 1975 till 2008 under the First Master Plan and the Development Control Rules, and (ii) the provisions that exist with effect from 2008 under the Second Master Plan and the Development Regulations, would show that layouts had always been classified into 3 categories. They are, (i) those whose total land extent is upto 3,000 sq.meters, (ii) those whose total land extent is between 3,000 sq.meters and 10,000 sq.meters, and (iii) those whose total land extent is above 10,000 sq.meters.
>
> Para 35. Consistently, the Development Control Rules which were in force till 2008 and the Development Regulations which are in force from 2008, have exempted layouts whose total extent of land is upto 3,000 sq.meters, from the obligation to reserve any open space. Similarly, the Rules have consistently given two options, either to hand over 10% of the area excluding roads or to pay the market value of equivalent land, in so far as layouts whose total extent of land is between 3,000 sq.meters and 10,000 sq.meters.
>
> Para 36. But, in respect of layouts whose total extent of land is above 10,000 sq.meters, the Rules have always insisted upon handing over of Open Space Reservation land to the extent of 10% of the total area. In respect of layouts whose total extent is above 10,000 sq.meters, it was made clear by the successive Government Orders that no charges in lieu of 10% of the area can be accepted. This is borne out by—
> (1) G.O.Ms. No. 743, Housing and Urban Development, dated 10.5.1979,

(2) G.O.Ms. No. 940, Housing and Urban Development, dated 8.10.1982,
(3) the Development Control Rules as of September, 2004 (hosted in the official website) and the Table contained therein under Rules 19(a) & 19(b), and
(4) Regulation 29 and Annexure XX under the Development Regulations of the year 2008."

We are fortified in our conclusion that the Rule in question was statutory in nature. Section 123 (2) contemplates that every rule made under the Act is to be laid as soon as may be on the table of the Legislative Assembly and it *inter alia* enables the Assembly to modify the rule and if the Assembly decides that the rule should not be made or give it a modified operation or no effect, then such a decision of the Assembly will prevail. It is to be noticed that this is after providing that unless otherwise expressed, the rules come into force on the day on which they are published in the Gazette. This shows that the rule has life without reference to the Legislative Assembly. It is undoubtedly true that Section 122 speaks of the power of the Government to make rules. While it is true that the Master Plan is to be prepared by the CMDA and the rules would form part of the Master Plan, the scheme

of the rules would show that it is only with the approval of the Government that the rules along with the Master Plan come into force. We have already noticed the effect of Section 32 as indeed it was considered by the learned Single Judge in the judgment we have referred to.

THE GIFT DEED IN VASANTH APARTMENTS CASE

45. The complaint about there being no rationale in allowing a developer who develops a layout which is between 3000 sq.m. and 10000 sq.m. to pay the equivalent is to be found both in the circumstance that it is permitted only when there is a physical complaint and also it is obvious that the local Authority would be expected to plough back the money equivalent into making available alternate facility by way of OSR in such cases.

46. It is necessary to notice the relevant facts in the case relating to Vasanth Apartments in greater detail. The writ petition filed by the Association of Vasanth Owners is in the year 2007. The Vasanth Apartments is located at 100 feet bye-pass road, Velacherry. The

apartments were promoted as group developments in terms of approval granted by the CMDA on 16.05.1997. The Apartments consist of 12 blocks, out of which 11 blocks consist of 4 storeys and house about 180 dwellings. The total area of the layout is more than 10,000 sq. mtr. 10% of the total area consisting of 1164 sq. mtr. was reserved for use as OSR. A gift was executed on 10.02.1994 under the DCR. The CMDA was either to maintain the OSR area on its own or to permit the appellant Association to maintain the same. 180 families residing in the campus do not have any park and any recreational facility despite the OSR. Thereafter, there is reference to attempts being made by some persons to encroach on the said OSR area for some other purposes. Several loads of earth was dumped in the OSR area. The case on the other hand of the respondents as can be seen from the writ appeal is that at the time of construction, the land owners earmarked the portion of the land, that is, 11836 sq. feet, as open space regulation (OSR area) for road and park and gifted the same as per the gift deed. The second respondent Corporation has formed road in that land

during the year 2003 itself and was maintaining the same. It is their case that the appellant Association was blocking the said road. The said road is a shortest link from West Vellachery to East Vellachery - Vijay Nagar and this road gives access to Venkateshwara Nagar, MGR Nagar and Devikarumariamman Nagar etc., where one lakh people are living in Vellachery.

47. Now, it is necessary to notice the actual terms of the gift deed which was executed on 18th February, 1994. The relevant terms read as follows: -

"GIFT DEED

This indenture made on this 18th day of February 1994.

between

1. Shri K.S. Dasarathan, Hindu, aged about 48 years.
2. Smt. D. Inbanayagi, Hindu, aged about 40 years, wife of Shri K.S.Dasarathan.

both residing at 84, Dr. Natesan Road, Mylapore, Madras-4.

3. Shri G.T. Murugesan, Hindu, aged about 45 years.
4. Smt. M. Jayalakshmi, Hindu, aged about 40 years, wife of Shri G.T. Murugesan.

both residing at No.35, Nainar Nadar Road, Mylapore, Madras-4.

All represented by their Power Agent Shri M.S. Rajamanickam, son of Shri M. Sivagnanam, aged about 42 years, residing at 75, C.P. Ramasamy Road, Alwarpet, Madras, hereinafter called "THE DONOR" of the one part;

and

The Madras Metropolitan Development Authority, represented by its Member Secretary, having their office at No.8, Gandhi Irwin Road, "Thalamuthu Natarajan Building", Egmore, Madras, hereinafter called "THE DONEE" on the other part;

WHEREAS the "DONOR" is well sufficiently entitled, free from all encumbrances, the piece of lands for roads and parks hereunder described and intended to be hereby granted conveyed and assigned.

WHEREAS the DONOR is the absolute GPA holder of the property bearing S.No.379/1 (Part) and 380 / 4 (part) of Velacherry Village and submitted a proposal for development of the land in the above S.Nos. for residential purposes. To comply with the rules and regulations prevailing now, the DONOR in the interest of public has agreed to transfer the roads and park and other open space hereunder described through a gift deed in favour of DONEE and DONEE has agreed to accept the same.

Now this indenture witnesseth that the DONOR doth hereby give, grant, convey and assign in the interest of public unto the DONEE who hereby accepts the same all that lands for roads, parks and other open space situated in S.Nos.379 / 1, (part) and 380 / 4 (part) which is for the use of the public comprised in layout sketch enclosed, within registration subdistrict of Madras South and registration district of Madras Central and more particularly described in the schedule hereunder written and the DONOR doth hereby covenant with the DONEE that the DONOR now does have good right to grant, convey and assign the lands of roads/parks hereby granted conveyed and assigned upto the "DONEE" with the manner aforesaid and that the "DONEE" shall and may at all times hereafter peacefully and quietly

possess and enjoy the said lands of roads/parks free from all encumbrances whatsoever without any lawful eviction, interruption, claim, whatsoever, from or by the "DONOR" or any person claiming under or interest for him and further that the "DONOR" and all person having lawfully or equitably claiming any rights on roads/parks or interest with the said premises or any part thereof from under or interest for the "DONOR" or from or under any of his ancestors shall and will from time to time and at all times hereafter at the request of and cost of the "DONOR" do execute and register or cause to be done
executed and registered all such acts, deeds and things whatsoever for further and more perfectly assuring the said lands or roads and parks every part thereof unto the "DONEE" in the manner aforesaid or as shall or may be reasonably required.

THE SCHEDULE OF PROPERTY

All that piece and parcel of lands measuring 1100 square meters reserved for parks/open spaces and marked in colour of the layout sketch enclosed herein situated in S.No.379/1 (part) and 380/4 (part) of Velacherry Village, Saidapet Taluk, Madras and within the sub registration District of Madras South and Registration District of Madras Central.
The value of property Rs.1,99,000/-."

WHETHER THE IMPUGNED RULE VIOLATES ARTICLE 14 OF THE CONSTITUTION? IS IT DISCRIMINATORY?

48. As far as this ground is concerned, we do not find any reference to this line of argument before the High

Court. In the writ petition filed by the Vasanth Apartments (writ petition no. 23397 of 2007) the only feeble reference, if at all we can understand the same to be one, is ground (F) where what is contended is that the CMDA had no power under the Constitution to usurp the lands of citizens free of cost, that too selectively, under the guise of regulating the development of the area. In the written submissions, no doubt we may notice the following: -

> "(v) Further, if a plot measuring 200m x 55m abutting a road of wide 10 m and above if developed by seeking a single approval, it would attract the impugned rule of gifting 10% area whereas if it is divided into 4 pieces of 50 m* 55 m and sold to 4 individuals and then developed by the 4 persons, for the same development, then the impugned rule will not be attracted. Therefore, the impugned rule mandating the transfer of OSR area free of cost has no rational basis and hence arbitrary.
>
> (vi) Further, if an open space is required for public purpose, then every public would be enjoying the same. The state may tax the public based on wealth but can not tax only a person who is proposing to develop an area of 10,000 sqm. Therefore, the classification has neither any intelligible differentia nor has rational nexus with the object of town Planning. Therefore, the impugned rule is discriminatory and hence violative of Art.14 of Constitution of India.

The Hon'ble Court Supreme Court in Yogendra Pal & others Vs. Municiplaity, Bhatinda, reported in AIR 1994 Supreme Court 2550 [relevant para-9] has held that the statutory provisions U/S 192(1)(c) of the Punjab Municipal Act'1911 and U/S 203(1)(c) of Haryana Municipal Act'1973 enabling the State to seek transfer of land to the extent of 25% of the private land free of cost while developing a building scheme as violative of Art.14 of the Constitution of India. The Hon'ble Supreme Court while upholding the said provisions as not violative of Arts. 19(1)(f) and 31(2) (the then existing provisions) of Constitution of India but held the said provisions as violative of Art. 14 of the Constitution of India.

Therefore, due to the aforesaid reasons, the mandate under the impugned rule to transfer the OSR area free of cost is without any basis and hence arbitrary and unreasonable and discriminatory and hence violative of Art.14 of the Constitution of India."

49. **In the review petition (filed as review application no. 69 of 2008) also there is no contention seeking to ventilate the complaint that the impugned rule falls foul of Article 14 on the basis that it is discriminatory.**

50. **We are concerned in this case with the provision which provides for town planning. In regard to such law, a certain measure of free play is to be given to the planning authority bearing in mind that it is urban planning what is involved. In regard to the grant of**

development permit up to 3000 sq. mtr., the rules do not contemplate any requirement in the matter of OSR. It is a matter which goes to the wisdom and clearly falls within the realm of policy. In other words, having regard to the size of the development contemplated, the authority has not found it fit to provide for reservation under the head open space. It cannot be described as being bereft of any rationale that upon the minimum threshold of 3,000 sq. mtr. being breached and the layout being between 3,000 sq. mtr. and 10,000 sq. mtr., 10% of the area excluding roads is to be maintained as open space. In other words, 10% of area would have to be reserved for communal and recreational facilities. It is no doubt true that that in cases falling in the said category namely group developments which comprise of an area in excess of 3,000 sq. mtr. and up to 10,000 sq. mtr., it is open to the project proponent to pay the market value equal to the land on the basis of valuation as provided therein. However, it is only if on account of the physical constraints it is not possible to provide open space, that payment is contemplated. Another noteworthy feature is that in

cases where the land is between 3,000 sq. mtr. and 10,000 sq. mtr. public access for the area as earmarked shall not be insisted upon. It is when it comes to a case where if the area goes above 10,000 sq. mtrs., that it becomes obligatory to reserve 10% of the area excluding road and the OSR reserved is to be transferred by way of gift deed.

51. We are unable to persuade ourselves to hold that the impugned rule violates Article 14 on the score that it is discriminatory. In a challenge to a provision based on discrimination under Article 14, the burden is on the applicant to lay clear foundation in pleadings and further to discharge the burden by making good the case and the court will not lightly enter a finding of discrimination. Town planning being a complex subject involving various inputs and value judgements which are intended to ensure the orderly, visionary and planned development, they require greater deference from courts.

IS THE IMPUGNED RULE/ REGULATION ULTRA VIRES?

52. It has been contended on behalf of the appellants/writ petitioner that the impugned provisions represent a case of they being *ultra vires*. In *General Officer Commanding-in-Chief and another v. Dr. Subhash Chandra Yadav and another*[30], this Court was considering the validity of Rule 5C of the Cantonment Funds Servants Rules, 1937. It was contended that it was contrary to Section 280(2)(c) of the Cantonment Act, 1924. The argument was accepted. The argument of the appellant, that in view of the provision in the Parent Act that Rules, when published, would have effect as if they were enacted in the Act, was repelled. We notice only the following discussion:

> "14. This contention is unsound. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (*1*) it must conform to the provisions of the statute under which it is framed; and (*2*) it must also come within the scope and purview of the rule-making power of the

[30] (1988) 2 SCC 351

authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. The position remains the same even though sub-section (2) of Section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act."

53. **In *Kunj Behari Lal Butail and others v. State of H.P. and others*[31], the Parent Act conferred power on the Delegate from the Government, to make Rules for carrying out the purpose of the Act, a familiar legislative device. The contention taken was that the Rule in question revealed the Delegate surpassing its authority. We notice the following discussion:**

> **"8. … Tea estates are excluded from the provisions of the Act by Section 5. "Tea estate" is defined in the interpretation clause of the Act to mean an area under tea plantation and includes within the definition "such other area necessary for purposes subservient to a tea plantation as may be prescribed". Rule 3 defines what areas shall be treated as subservient to a tea plantation. The amendment made vide notification dated 4-4-1986 places an embargo on the right to transfer such subservient land though exempted from the operation of the Act. Clearly the impugned proviso is beyond the rule-making power of the State Government as conferred by the Act. It is well settled that the legislature cannot delegate its essential legislative functions which consist in the**

[31] (2000) 3 SCC 40

determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up the details. [See: *Principles of Statutory Interpretation*, Justice G.P. Singh, (7th Edn., 1999, at pp. 689-90).]

9. In *Supreme Court Employees' Welfare Assn.* v. *Union of India* [(1989) 4 SCC 187 : 1989 SCC (L&S) 569 : AIR 1990 SC 334] this Court has held:

"(A) delegated legislation or a subordinate legislation must conform exactly to the power granted."

(SCC p. 222, para 62)

"Rules, whether made under the Constitution or a statute, must be intra vires the parent law under which power has been delegated."

10. In *General Officer Commanding-in-Chief* v. *Dr Subhash Chandra Yadav* [(1988) 2 SCC 351 : 1988 SCC (L&S) 542 : (1988) 7 ATC 296 : AIR 1988 SC 876] it has been held: (SCC p. 357, para 14)

"[B]efore a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (*1*) it must conform to the provisions of the statute under which it is framed; and (*2*) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

54. **Finally, we may notice *Global Energy Ltd. and another v. Central Electricity Regulatory Commission*[32]. This Court laid down as follows:**

> **"25. It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.**
>
> **26. We may, in this connection refer to a decision of this Court in *Kunj Behari Lal Butail* v. *State of H.P.* [(2000) 3 SCC 40] wherein a three-Judge Bench of this Court held as under: (SCC p. 47, para 14)**
>
> **"*14*. We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."**
>
> **[See also *State of Kerala* v. *Unni* [(2007) 2 SCC 365] (SCC paras 32 to 37) and *A.P. Electricity Regulatory Commission* v. *R.V.K. Energy (P) Ltd.* [(2008) 17 SCC 769 : (2008) 9 Scale 529]]**

[32] (2009) 15 SCC 570

55. **The case law is relied upon to contend that the impugned provisions, in the cases before us, purport to achieve, what is not contemplated by the Act. In other words, the Act does not contemplate the execution of the gift deed. It becomes impermissible for the Delegate of the Law Giver to make subordinate legislation to provide so. We may only finally notice the recent Judgment of this Court in *Indian Young Lawyers Association and others (Sabarimala Temple-In Re.) v. State of Kerala and others*[33], where this Court has reiterated the aforesaid principles. (See paragraphs 137 to 140 and paragraph 373).**

THE IMPACT OF SECTIONS 36 AND 37

56. **The appellants/petitioner would argue that Sections 36 and 37 contemplate acquisition of the lands which are reserved. This means that there cannot be a gift deed, as contemplated in the impugned Rules/Regulations.**

[33] (2019) 11 SCC 1

57. We are afraid that though at first blush, the argument may appear to be attractive, it cannot pass muster on a deeper scrutiny. What Section 36 provides is, for power to acquire land, under the Land Acquisition Act. It goes on to provide that any land required, reserved or designated in a regional plan, master plan, detailed development plan, is deemed to be land needed for a public purpose under the Land Acquisition Act. What is more, such land can be acquired under the said law, as modified in the Act. It is thereafter that Section 37 contemplates that upon publication of the notice in a Government Gazette of the preparation of the plan that any land is required, reserved or designated in such plan, the appropriate Planning Authority, which includes, no doubt, the CMDA, can do two things: (1) It may enter into an agreement for the acquisition by purchase of any land. It is apparently land, which is covered by Section 36, which means land which is required, reserved or designated in a master plan, inter alia. (2) The Planning Authority may apply to the Government for acquiring such land under the Land Acquisition Act. Section 37(2)

goes on to provide that if an application is received and if the Government is satisfied that the land is needed for the public purpose, the Government may make a declaration in the manner provided in Section 6 of the Land Acquisition Act 1894. It will be noticed that what is contemplated under Sections 36 and 37 is that it is in regard to any land, which is required, reserved or designated in a plan that the question of acquiring such a land arises. In other words, if the property is needed under the plan and it is shown as required, reserved or designated, as such, in the plan, then, it is open to the Authority acting in coordination with the Government to acquire such land so that the lofty goal of planned and orderly development, contemplated in the plan, is achieved. In this connection, it is relevant to notice that Section 37 kicks in immediately upon the publication of a notice for the preparation of the plan. The notice is published under Section 26 or Section 27. Such notice is published after the consent of the Government is received under Section 25. It is next relevant to notice Section 38. Section 38 allows the period of three years from the date of

publication of the notice under Section 26 or Section 27 for the Government to publish the declaration contemplated under Section 37, which, no doubt, amounts to a declaration under Section 6 of the Land Acquisition Act. Section 38 provides that if the declaration is not made under Section 37 of the Act, the land shall be deemed to be released from such reservation, allotment or designation. The time limit of three years, not being observed for acquiring the land by way of purchase, also has the same result, viz., the land, which in the plan, is shown as reserved, allotted or designated, shall be freed from such reservation, allotment or designation.

58. We are, in these cases, dealing with the reservation of land by a person, who applies for development of the land and, more specifically, for the purpose of group development. The person, who applies, becomes obliged under Rule 19(b) to reserve 10 per cent of his land excluding roads, for communal and recreational purposes. This is a reservation to be made by a person applying for planning permission on the basis of the extent of the layout. It is, no doubt,

premised on the land being in excess of a certain threshold becoming subject matter of the planning permission. The land so reserved is to be freed from any construction by the owner/promoter/developer. The land for communal and recreational purposes, is to be restricted at ground level in a shape and location to be specified by the CMDA (See Clause (3) of the Explanation in Rules.). Therefore, the exact land to be reserved under the impugned Rule, will vary from case to case. It is not to be confused with the areas required, reserved or designated in the plan. In fact, in Annexure XX, which is the subject matter of the 2008 Regulations, the specific requirement in regard to the place where the OSR is to be located is indicated as the place where the property abuts a public road.

59. From the Preamble to the DCR, it would appear that the first master plan was prepared in 1975 for the Chennai Metropolitan Area and the Government approved it on 04.12.1976. As found by V. Ramasubramanium, J. in the Judgment, which we have elaborately referred to, the DCR came to be issued along with the first master plan. Thereafter, as noticed by him, to deal with group

development or flats, the issue was taken up by the CMDA by letter dated 22.03.1981, Government issued GoMS dated 08.10.1982. The learned Judge has found that the Government exercised power under Section 32 of the Act. What we are indicating is that the reservation of the land for communal or recreational purposes in individual cases, on the basis of applications made by persons, is not to be conflated with the land which is declared as required, reserved or designated in the master plan, inter alia, which latter categories alone are the subject matter of Sections 36 and 37 of the Act.

IS THE IMPUGNED RULE/REGULATION BAD FOR THE REASON THAT IT IS CONTRARY TO THE MANDATE OF SECTION 39 OF THE ACT?

60. Section 39 of the Act, reads as follows:

> "39. Right to compensation. - (1) Any person whose property is injuriously affected by virtue of any of the provisions contained in any regional plan, master plan, detailed development plan or a new town development plan made under this Act shall, if he prefers a claim for the purpose to the Tribunal with such particulars and within such period as may be prescribed, be entitled to obtain compensation

in respect thereof as determined by the Tribunal:

Provided that property shall not be deemed to be injuriously affected by reason of any of the provisions inserted in any development plan which impose any condition or restriction in regard to any of the matters specified in clause (f) of sub-section (2) of section 15, or in clauses (k) and (l) of sub-section (2) of section 17 or in clauses (m) and (n) of sub-section (1) of section 20, as the case may be.

(2) If, at any time after the day on which any regional plan, master plan, detailed development plan, or a new town development plan has come into force, such plan is varied, or revoked, any person who has incurred any expenditure for the purpose of complying with such plan, shall, if he prefers a claim for the purpose to the Tribunal with such particulars and within such time as may be prescribed, be entitled to obtain compensation in respect thereof as determined by the Tribunal, if by reason only of the variation or revocation of such plan, such expenditure has ceased to be in any way beneficial to him."

61. **What Section 39 contemplates is the following:**

A person must be injuriously affected on account of any of the provisions contained in a regional plan, master plan, detailed development plan or a new town development plan, under the Act. Should this occur, the affected party becomes entitled to move the Tribunal and seek compensation, which is to be determined by the

Tribunal. The *proviso* to Section 39(1), however, declares that property shall not be deemed to be injuriously affected on account of any development plan, which may impose certain conditions, which are specified in Section 15(2)(f), Section 17(2)(k) and (l) or in Section 20(1)(m) and (n).

62. **'Development plan' is defined in Section 2(15) as follows:**

> **"(15) "development plan" means a plan for the development or re-development or improvement of the area within the jurisdiction of a planning authority and includes a regional plan, master plan, detailed development plan and a new town development plan prepared under the Act."**

63. **Therefore, a development plan would embrace a master plan. The effect of the *proviso* is that, in respect of the matters contained in the *proviso*, the law declares that there would not be a claim for compensation on the basis that the property of a person is injuriously affected as a result of the contents of the development plan in relation to matters specified in the *proviso*. The word 'injuriously affected' would**

apparently mean that a person has land, which is adversely affected as a result of the coming into operation of the development plan. Section 15(2)(f) deals with demarcation of objects and buildings of archaeological or historical interests or of natural beauty or actually used for religious purposes or as regarded by the public with veneration. Similarly, Section 17(2)(k) deals with control of architectural features, elevation and frontage of buildings and structures. Section 17(2)(l), which is also referred to in the *proviso*, deals with matters relating to zonal regulations, location, the height, the number of storeys, size of buildings and other structures, the size of the yards and other open spaces and the use of buildings, structures and land. If anyone is otherwise injuriously affected as a result of any of these aspects provided for in a master plan under Section 17, he cannot make a complaint of it under Section 39 and claim compensation for it. The master plan provides for zones, nine in number. One of the zones is open space zone. Open space requirements are separately stipulated in respect of other zones. Similarly, Section 20, which

deals with the contents of the detailed development plan, in sub-Section (1)(m), deals essentially with buildings of archaeological and historical interests, *inter alia*. Section 20(1)(n) of the Act reads as follows:

> **"20(1)(n) the imposition of conditions and restrictions in regard to the character, density, architectural features and height of buildings, the building or control lines for roads, railway lines and power supply lines and the purposes to which buildings or specified areas may or may not be appropriated and the provision and maintenance of sufficient open spaces about buildings;"**

64. A perusal of Section 39 would clearly reveal that a right to compensation is conferred on any person whose property is 'injuriously affected' by any of the provisions contained in the master plan. A person seeking to develop his land and if he falls within the ambit of rule/regulation in question cannot be described as a person whose property is injuriously affected by the provisions of the master plan inter alia. The very language used in Section 39 appears to be incongruous with the raising of any such claim. It is not as if the parties have in this case raised any

such claim. The contention taken in the case of M/s. Keyaram Hotels is that Section 39 provides for compensation to persons who are affected in the manner provided in the said provision. The provision actually deals with cases of a person having property, who, with the making of a master plan, inter alia, becomes injuriously affected. The words 'injuriously affected' would bear meaning if expounded with reference to a person who has a property and that property becomes injuriously affected by virtue of the provision of any master plan. Take for instance, the land of a person is found to fall in a zone which is earmarked in the primary residential use zone. The provision in the DCR which forms part of the plan inter alia provides that all uses not specifically permitted under sub-rule (a) and (b) will stand prohibited in the zone. The proviso is only to be understood as qualifying the ambit of the main provision which itself must be understood has application in cases where a person is injuriously affected by the provision of a master plan inter alia.

65. We are reinforced in our view that the contention of the appellants is misplaced with reference to the

concept of 'injuriously affected' finding expression in Section 39, having regard to the decision by this Court in *Prakash Amichand Shah v. State of Gujarat*[34]. This was also a case relating to town planning. It arose under the Bombay Town Planning Act. We may only refer to paragraph 10 which reads as follows:

> **"10. Section 69 states that the owner of any property or right which is injuriously affected by the making of a town planning scheme shall be entitled to obtain compensation from the local authority or from any person benefited or partly from the local authority and partly from such person as the Town Planning Officer may in each case determine. It seems obvious that the property or right which is injuriously affected by the making of a town planning scheme is a property or right other than that acquired for the purposes of the scheme. The property or right affected remains with the owner who is entitled to compensation for such injurious affection. When under the Act a plot of land is taken for the purposes of a town planning scheme, it cannot be suggested that that land itself is injuriously affected; such a view is unsupportable both as a matter of language and having regard to the scheme of the Act. On behalf of the appellant it was urged that clause (*xiii*) would cover the case of the appellant if only we read a few words in that clause and that we should do so to avoid injustice being done to the appellant and the owners of land similarly situated. That we are afraid is not possible. We find no compelling reason for restructuring the clause, and taking acquisition of land to mean "injurious**

[34] **(1981) 3 SCC 508**

> affection" of the land acquired would be inconsistent with the entire scheme of the Act. We may refer to clause "fourthly" of Section 23(1) of the Land Acquisition Act, 1894 which requires the court to take into consideration in determining the amount of compensation to be awarded for land acquired under that Act, the damage sustained by the "person interested" "by reason of the acquisition injuriously affecting his other property". The expression "person interested" as defined in Section 3 of the Land Acquisition Act means all persons calming an interest in compensation to be made on account of the acquisition of land under that Act. It is made clear in clause "fourthly" that the damage is for injurious affection of some property other than the land acquired. The sense in which the expression "injurious affection" is used in Section 23(1) of the Land Acquisition Act is the generally accepted meaning of that expression and we find nothing in the Act concerned in this case that suggests that it should be construed differently."

66. The case of a person developing land being subjected to the requirement of leaving 10 percent of the property in a situation where more than nearly 2 and a half acres is being developed in an urban metropolis as space for communal and recreational purposes cannot be said to be a person 'injuriously affected' within the meaning of Section 39.

THE IMPACT OF SECTIONS 48 TO 55

67. **The contention is taken that Sections 48 and 49 do not authorise or enable deprivation of a person's property sought to be developed free of cost. Equally, it is contended that Sections 52 to 54 obligate the state to acquire lands even if permission for development is rejected or if any of the conditions for any permission is objected or even if any modifications of already given permission is not acceptable to the owner. It is also contended that Sections 52 to 54 patently provide for compensation. Therefore, the impugned rule which provides for a compelled gift involving transfer of right to property free of cost is ultra vires. It is the further contention that the legislature took extraordinary care to ensure that a landowner is not affected or injured even slightly because of the planning law. The exceptions from obligation to pay compensation are provided in Sections 17(2)(k) and (l) which relate to the use of land and do not provide for reserving any land for public purpose.**

68. **Section 47 of the Act comes under Chapter VI which deals with control of development and use of land. It declares that after the coming into operation of any development plan in any area, any person, other than the government or local authority, cannot use or cause to be used any land otherwise in accordance with the development plan. This would mean that once a development plan which includes a master plan comes into operation which happens on the approval of the government being published under Section 30 of the Act in the Gazette, Development activities must be carried on only in accordance with the terms of the master plan. Section 48 is intended to place restrictions on buildings and land when a notice in the Gazette is published under Section 26, inter alia. With the publication of the notice which is a prelude to the coming into operation of the plan under Section 30, Section 48 prohibits the erection of any building or other work or other excavation as enumerated therein except with a written permission of the planning authority and subject to such conditions. Section 49 provides for application for such permission when**

notice of preparation of a master plan, inter alia, is published under Section 26 of the Act inviting the restrictions contemplated in Section 48. It is dealing with such a situation, namely, when the master plan, inter alia, has not come into operation and only a notice is published under Section 26, inter alia, that Section 49(2) provides for three matters which are to guide the planning authority in deciding whether permission should be granted or not. They are as follows: -

i. The purpose.

ii. The suitability of the place for such purpose.

iii. The future development and maintenance of the planning area.

69. Section 50 provides that the permission granted under Section 49 is to remain in force for a period of three years from the date of permission. It can be extended but subject to a maximum period of three years. Section 52 provides for an obligation to acquire land or building. It operates in the following circumstances. A land may be required or reserved or designated in any development plan which includes

master plan. A person must be interested in the land or building which is so required, reserved or designated in such plan. He must have made an application seeking permission. The application must have been either refused or granted, subject to conditions. For the section to operate the following further conditions must exist. The refusal to grant permission should result in the land or building becoming incapable of reasonably beneficial use in the condition in which the land is. This means that as a result of the land or building being required, reserved or designated in the plan, the person interested in the land or building is unable to use the land for which he could have used, but for the requirement, reservation or designation in the plan, and it has resulted in the rejection of his application for permission to develop the property. Then the law has given the person so aggrieved to serve a notice described as the 'acquisition notice' calling upon the government to acquire his interest in the land or building. The same would be the position if permission is granted but subject to the conditions which render

the land incapable of beneficial use. Section 53 deals with refusal of permission or grant of permission subject to conditions in certain other cases. In fact, the proviso in Section 53 declares that no compensation can be claimed under the main provision if the refusal or grant of permission subject to conditions is based on any provision of any development plan. Section 54 deals with cases of permission which is granted for any development under the Act being revoked or modified. Section 54(2) contemplates compensation for the expenditure which is incurred for carrying out the development based on the grant of permission which was rendered abortive by the revocation. Section 55 declares that nothing in the Act confers any right to obtain compensation in respect of development made by a person after a notice in the Gazette is published under Section 26, inter alia, without obtaining the permission as required under Section 49. Sub-section 2 of Section 55 reads as follows: -

> **"(2). Whether any property is alleged to be injuriously affected by reason of any of the provisions contained in any development plan, no compensation shall be paid in respect thereof, if or in so far as the provisions are**

such as would have been enforceable without any compensation under any law, rule or regulation or bye-law at the time in force."

70. We are unable to find merit in the contention that Rule 19 of the DCR or the regulation which is impugned is in anyway ultra vires of the provision of the Act and the arguments suggestive of the same are repelled.

71. Even though the appellant's (M/s. Keyaram Hotels Pvt. Ltd.) attempt to invite us to pronounce on the validity of the impugned rule on the score that it contravened the provisions of the Tamil Nadu Apartment Ownership Act, 1994 which got presidential assent on 06.04.1995 and came to be notified on 24.04.1995, we do not think that the appellant should be permitted to test the validity of the impugned rule on a ground which was not raised before the High Court. It is true that the gift deed was executed on 22.05.1996. But this was not a ground which was urged before the court and we do not intend to explore the contention in this proceeding.

72. **We have found that the impugned rule/ regulation cannot be said to be ultra vires the parent act. This is after finding that the rule has statutory force.**

THE RIGHTS REGIME

73. **It is necessary to deal with a right, a person has, as an owner of a property. In Salmond on Jurisprudence 12th Edition, we note the following:**

> **"Secondly, the owner normally has a right to use and enjoy the thing owned: right to manage it, i.e., the right to decide how it shall be used; and the right to the income from it. Whereas the right to possess is a right in the strict sense, these rights are in fact liberties: the owner has a liberty to use the thing, i.e., he is under no duty not to use it, in contrast with others who are under a duty not to use or interfere with it."**

74. **We may however notice the following:**

> **"This does not mean, however, that an owner whose property is unencumbered has completely unlimited rights. To describe someone as an absolute owner of property is to say two things; it is to assert that his title to the property is indisputable, and that he has all the rights of ownership allowed by the legal system in question. We have seen that the rights of ownership may be limited by the adverse dominant rights of an encumbrancer or by the rights of the possessor (who is in fact one very special type of an encumbrancer). They**

may also be limited by special provisions of law such as Town & Country planning law, which regulates for social purposes the use which an owner may make office land. But in addition to being restricted by such specific provisions of public law, and owner's rights are restricted by a whole variety of provisions of the ordinary law, according to which various harmful and dangerous types of conduct qualify as criminal or tortious; the fact that I am the owner of a knife will not entitle me to use it to kill Smith. We may say that an owner is free to use and dispose of his property as he pleases, except in so far as he does not infringe his duties to specific encumbrancers, his duties under special regulations concerning the use of property (f) and his general duties under the general law of the land (f)."

(Emphasis supplied)

75. In *T. Vijayalakshmi v. Town Planning Member,*[35] this Court while dealing with a case arising under the Town Planning Law had this to say:

> **"13. Town Planning legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation.**
>
> **15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away.**

[35] (2006) 8 SCC 502

It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play."

(Emphasis supplied)

76. **In *Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd.*,[36] this Court was again dealing with a case under the town Planning Law. The following statement requires to be noticed:**

"45. Town and country planning involving land development of the cities which are sought to be achieved through the process of land use, zoning plan and regulating building activities must receive due attention of all concerned. We are furthermore not oblivious of the fact that such planning involving highly complex cities depends upon scientific research, study and experience and, thus, deserves due reverence.

46. Where, however, a scheme comes into force, although it may cause hardship to the individual owners as they may be prevented from making the most profitable use of their rights over property, having regard to the drastic consequences envisaged thereunder, the statute should be considered in such a manner as a result whereof greater hardship is not caused to the citizens than actually contemplated thereby. Whereas an attempt should be made to prevent unplanned and haphazard development but the same would not mean that the court

[36] **(2007) 8 SCC 705**

would close its eyes to the blatant illegalities committed by the State and/or the statutory authorities in implementation thereof. Implementation of such land development as also building laws should be in consonance with public welfare and convenience. In United States of America zoning ordinances are enacted pursuant to the police power delegated by the State. Although in India the source of such power is not police power but if a zoning classification imposes unreasonable restrictions, it cannot be sustained. The public authority may have general considerations, safety or general welfare in mind, but the same would become irrelevant, as thereby statutory rights of a party cannot be taken away. The courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.

47. For the aforementioned purpose, an endeavour should be made to find out as to whether the statute takes care of public interest in the matter vis-à-vis the private interest, on the one hand, and the effect of lapse and/or positive inaction on the part of the State and other planning authorities, on the other.

52. The courts should, therefore, strive to find a balance of the competing interests.

Human rights issue

53. The right to property is now considered to be not only a constitutional right but also a human right.

Interpretation of the Act

57. The Act being regulatory in nature as by reason thereof the right of an owner of

property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right to property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be reasonable ones. (See ***Balram Kumawat*** **v.** ***Union of India*** [(2003) 7 SCC 628] ; ***Krishi Utpadan Mandi Samiti*** **v.** ***Pilibhit Pantnagar Beej Ltd.*** [(2004) 1 SCC 391] and ***Union of India*** **v.** ***West Coast Paper Mills Ltd.*** [(2004) 2 SCC 747]) **The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation.**

58. Expropriatory legislation, as is well-known, must be given a strict construction.

(Emphasis supplied)

77. **An owner of land may not have an absolute and unqualified right which is the idea which not unnaturally comes to mind when the idea of ownership is under consideration. As we have already noted, the right is capable of being regulated and restricted under a law relating to Town Planning. Proceeding on the basis that DCR is law, the question would arise under the said law whether a person can use his land as he chooses. Zoning requirements have been put in**

place. Primarily in a residential zone, can anyone put up an industrial establishment if the said use is prohibited? The answer is quite clearly in the negative. Can anyone construct a building in excess of the stipulated requirement as to the height of the building or contravening restrictions such as setback, floor space area etc.? The answer cannot be in the affirmative.

78. At this juncture, we may also notice the scheme of the Constitution as regards property rights. When Constitution was originally enacted the right to acquire, hold and dispose of property was guaranteed as a fundamental right to citizens of India vide Article 19(1)(f). This was, however, made subject to reasonable restrictions which could no doubt be imposed by a law under Article 19(5). That apart, Article 31 originally provided as follows:

> **"31. (1) No person shall be deprived of his property save by authority of law.**
> **(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial of industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for**

compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the legislature of a State has, after it has, been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(*a*) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(*b*) the provisions of any law which the State may hereafter make—

(*i*) for the purpose of imposing or levying any tax or penalty, or

(*ii*) for the promotion of public health or the prevention of danger to life or property, or

(*iii*) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies,

it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of Section 209 of the Government of India Act, 1935."

79. This Article 31 came to be amended by Constitution (Fourth Amendment) Act and after the amendment, the amended provision read as follows:

The Constitution (Fourth Amendment) Act amended clause (2) and inserted a new clause (2-A). The amended clause (2) and the new clause (2-A) are in these terms:

"31. (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2-A). Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

80. **At this juncture again, we must notice the aspect of Police power, in contrast with the Doctrine of Eminent Domain.**

81. **In the judgment of this court in *Deputy Commissioner and Collector v. Durga Nath Sarma*[37], this Court has noticed the amendment of Article 31 as noticed hereinbefore and has expounded the law in the following paragraph:**

> **"10. Our attention has been drawn to certain opinions expressed in our earlier decisions that Article 31(2) occupies the field of eminent domain and Article 31(5)(*b*)(*ii*) contains a saving clause with regard to the police powers of the State. The concepts of eminent domain and police powers are borrowed from American law. The constitutional guarantee of the due process clause in the United States Constitution requires that no private property shall be taken for public use without just compensation. In the exercise of its police power, the State may pass regulations designed to ensure public health, public morals, public safety as also public convenience or general prosperity, see *Chicago, Burlington & Quincy Railway company* v. *People of the State of Illinois* [200 US 561 : 50 LEd 596, 609] . In the exercise of its eminent domain power, the State may take any property from the owner and may appropriate it for public purposes. The police and eminent domain powers are essentially distinct. Under the police power many restrictions may be imposed and the property may even be destroyed without compensation being given, whereas under the**

[37] **AIR 1968 SC 394**

power of eminent domain, the property may be appropriated to public use on payment of compensation only. The distinction between the two powers is brought out clearly in the following passage in *American Jurisprudence*, 2nd Edn., Vol. 16, Article 301 p. 592:

> **"The state, under the police power, cannot in any manner actually take and appropriate property for public use without compensation, for such action is repugnant to the constitutional guaranty that where private property is appropriated for public use, the owner shall receive reasonable compensation. Thus, there is a vital difference, which is recognised by the authorities, between an Act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and an Act which not only declares the existence of a nuisance created by the condition of particular property, but in addition, and as the best means of accomplishing the end in view, authorizes the same property to be appropriated by the public."**

In *Sweet* v. *Rechel* [159 US 380 : 40 LEd 188] the validity of an Act to enable the city of Boston to abate a nuisance existing therein and for the preservation of the public health in the city by improving the drainage of the territory was sustained on the ground that the Act provided for payment of just compensation. The Court pointed out that private property the condition of which was such as to endanger the public health could not be legally taken by the Commonwealth and appropriated to public use without reasonable compensation to the owner. In *Delaware L. & W.R. Co.* v. *Morristown* [276 US 182 : 72 LEd 523, 527] an Ordinance establishing a public hack stand on private property without payment of compensation was struck down on the ground that assuming that the creation of the public hack stand would be a proper

exercise of the police power it did not follow that the due process clause would not safeguard to the owner just compensation for the use of the property. In *United States* v. *Caltex (Philippines)* [344 US 149 : 97 LEd 157] the Court held that no compensation was payable by the United States for the destruction by its retreating army of private property to prevent its falling into enemy hands. But the Court recognised that compensation would be payable for the army's requisitioning of private property for its subsequent use. The Court said that in times of imminent peril such as when fire threatened a whole community — the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved. Indeed, it would be folly not to destroy some building so that an entire town may be saved from the conflagration, as will appear from the following historic incident referred to in *Respublica* v. *Sparhawk* [1 Dall 357, 363 : 1 LEd 174] :

"We find, indeed, a memorable instance of folly recorded in the 3rd Vol. of *Clarendon's History*, where it is mentioned, that the Lord Mayor of London in 1666, when the city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses or to removing the furniture etc. belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt."

If Article 31(5)(*b*)(*ii*) is regarded as a saving clause with regard to the police power of the State, it is clear that under a law designed to promote public health or to prevent danger to life or property the State may in cases of imminent peril destroy or impair the value of private property without any obligation to pay

compensation, but it cannot arrogate to itself the power to acquire and appropriate to its own use private property without payment of compensation.

82. We may also notice that in *Tukaram Kana Joshi v. MIDC*[38], while dealing with a case of acquisition of land, this Court held as follows:

> **"11. …The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the landowner as a "subject" of medieval India, but not as a "citizen" under our Constitution."**

83. It has been followed in *Bhimandas Ambwani (Dead) through LRs v. Delhi Power Company Ltd*.[39].

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[38] (2013) 1 SCC 353

[39] (2013) 14 SCC 195

84. **While on the issue relating to the aspect of acquisition, a case arose under the Coffee Act in *Coffee Board, Karnataka, Bangalore v. Commissioner of Commercial Taxes, Karnataka and others*[40] and the question which arose was whether the coffee grower who made a sale made compulsorily to the Coffee Board amounted to sale or was it an acquisition. It is apposite that we advert to the following paragraphs:**

> **"28. Since all persons including the Coffee Board are prohibited from purchasing/selling coffee in law, there could be no sale or purchase to attract the imposition of sales/purchase tax it was urged. Even if there was compulsion there would be a sale as was the position in *Vishnu Agencies* [(1978) 2 SCR 433 : (1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449] . This Court therein approved the minority opinion of Hidayatullah, J. in *New India Sugar Mills* v. *CST* [*New India Sugar Mills Ltd.* v. *CST*, AIR 1963 SC 1207 : 1963 Supp (2) SCR 459 : (1963) 14 STC 316] . In the nature of the transactions contemplated under the Act mutual assent either express or implied is not totally absent in this case in the transactions under the Act. Coffee growers have a volition or option, though minimal or nominal to enter into the coffee growing trade. Coffee growing was not compulsory. If anyone decides to grow coffee or continue to grow coffee, he must transact in terms of the regulation imposed for**

[40] (1988) 3 SCC 263,

the benefit of the coffee growing industry. Section 25 of the Act provides the Board with the right to reject coffee if it is not up to the standard. Value to be paid as contemplated by the Act is the price of the coffee. Fixation of price is regulation but is a matter of dealing between the parties. There is no time fixed for delivery of coffee either to the Board or the curer. These indicate consensuality which is not totally absent in the transaction."

It was found that it was a sale which took place.

85. Article 31 stands omitted and Article 19(1)(f) also stands deleted by way of the Forty-Fourth Amendment to the Constitution which came into effect from 20.06.1979. It is by the very same amendment that Article 300A was inserted in the Constitution. Article 300A is a resurrection of Article 31 (1). This Court in the judgment in *Jilubhai Nanbhai Khachar v. State of Gujarat*[41] held as follows:

"34. The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact

[41] 1995 (suppl.) 1 SCC 596

idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term "eminent domain".

(Emphasis supplied)

This Court opined that the right to property is not a basic feature of the Constitution [See paragraph 30]. We may also notice the following views: -

"48. The word 'property' used in Article 300-A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and property expropriated. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase "deprivation of the property of a person" must equally be considered in the fact situation of a case. Deprivation connotes different concepts. Article 300-A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in every sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent. Prima facie, State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the court to determine whether a particular purpose is a

public purpose or not. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300-A nor every exercise of eminent domain an acquisition or taking possession under Article 300-A. Generally speaking preservation of public health or prevention of damage to life and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or possession taken under Article 300-A. It would be by exercise of the police power of the State. In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300-A."

(Emphasis supplied)

86. A Constitution Bench has considered the aspects arising out of the changes brought by the amendment to the Constitution by the insertion of Article 300A in the judgment of this Court in K.T. *Plantation Private Limited v. State of Karnataka*[42]. We may advert to the following views:

"178. The principles of eminent domain, as such, are not seen incorporated in Article 300-

[42] (2011) 9 SCC 1

A, as we see, in Article 30(1-A), as well as in the second proviso to Article 31-A(1) though we can infer those principles in Article 300-A. The provision for payment of compensation has been specifically incorporated in Article 30(1-A) as well as in the second proviso to Article 31-A(1) for achieving specific objectives. The Constitution (Forty-fourth Amendment) Act, 1978 while omitting Article 31 brought in a substantive provision clause (1-A) to Article 30. Resultantly, though no individual or even educational institution belonging to majority community shall have any fundamental right to compensation in case of compulsory acquisition of his property by the State, an educational institution belonging to a minority community shall have such fundamental right to claim compensation in case the State enacts a law providing for compulsory acquisition of any property of an educational institution established and administered by a minority community. Further, the second proviso to Article 31-A(1) prohibits the legislature from making a law which does not contain a provision for payment of compensation at a rate not less than the market value which follows that a law which does not contain such provision shall be invalid and the acquisition proceedings would be rendered void.

179. Looking at the history of the various constitutional amendments, judicial pronouncements and the Statement of Objects and Reasons contained in the Forty-fourth Amendment Bill which led to the Forty-fourth Amendment Act we have no doubt that the intention of Parliament was to do away with the fundamental right to acquire, hold and dispose of the property. But the question is whether the principles of eminent domain are completely obliterated when a person is deprived of his property by the authority of law under Article 300-A of the Constitution.

Public purpose

180. Deprivation of property within the meaning of Article 300-A, generally speaking, must take place for public purpose or public interest. The concept of eminent domain which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. Any law, which deprives a person of his private property for private interest, will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review. But the question as to whether the purpose is primarily public or private, has to be decided by the legislature, which of course should be made known.

Compensation

182. We have found that the requirement of public purpose is invariably the rule for depriving a person of his property, violation of which is amenable to judicial review. Let us now examine whether the requirement of payment of compensation is the rule after the deletion of Article 31(2).

183. Payment of compensation amount is a constitutional requirement under Article 30(1-A) and under the second proviso to Article 31-A(1), unlike Article 300-A. After the Forty-fourth Amendment Act, 1978, the constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. Article 300-A, however, does not prohibit the payment of just compensation when a person is deprived of his property, but the question is whether a person is entitled to get compensation, as a matter of right, in the absence of any stipulation in the statute, depriving him of his property.

188. We find no apparent conflict with the words used in List III Entry 42 so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under List III Entry 42. Right to claim compensation, therefore, cannot be read into the legislative List III Entry 42.

189. Requirement of public purpose, for deprivation of a person of his property under Article 300-A, is a precondition, but no compensation or nil compensation or its illusiveness has to be justified by the State on judicially justiciable standards. Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300-A, it can be inferred in that article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors.

190. Article 300-A would be equally violated if the provisions of law authorising deprivation of property have not been complied with. While enacting Article 300-A Parliament has only borrowed Article 31(1) (the "Rule of Law" doctrine) and not Article 31(2) (which had embodied the doctrine of eminent domain). Article 300-A enables the State to put restrictions on the right to property by *law*. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation

or restriction must not be disproportionate to the situation or excessive.

191. The legislation providing for deprivation of property under Article 300-A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(*g*), 26(*b*), 301, etc. Thus in each case, courts will have to examine the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above.

192. At this stage, we may clarify that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the Government to establish validity of such law. In the latter case, the Court in exercise of judicial review will test such a law keeping in mind the above parameters.

209. Statutes are many which though deprive a person of his property, have the protection of Article 30(1-A), Articles 31-A, 31-B, 31-C and hence are immune from challenge under Article 19 or Article 14. On deletion of Article 19(1)(*f*) the available grounds of challenge are Article 14 [Ed.: It would seem that for statutes *not* protected by Arts. 31-A, 31-B or 31-C, Art. 14 simpliciter is available as a ground of challenge. For statutes protected by Arts. 31-A, 31-B and 31-C, it would seem that a challenge under Art. 14 would be maintainable only when taken *as a part of the basic structure* of the Constitution, as explained

in *I.R. Coelho*, (2007) 2 SCC 1.] , the basic structure and the rule of law, apart from the ground of legislative competence. In *I.R. Coelho case* [(2007) 2 SCC 1] the basic structure was defined in terms of fundamental rights as reflected under Articles 14, 15, 19, 20, 21 and 32. In that case the Court held that statutes mentioned in Schedule IX are immune from challenge on the ground of violation of fundamental rights, but if such laws violate the basic structure, they no longer enjoy the immunity offered by Schedule IX."

(Emphasis supplied)

DOWN MEMORY LANE

PT. CHET RAM VASHIST (DEAD) BY LRS. V. MUNICIPAL CORPORATION OF DELHI[43]

87. **In the said case, the Municipal Corporation of Delhi passed a Resolution that, building activity in certain areas, be allowed, subject to the condition that the open spaces for parks and schools was to be transferred to the Corporation. This led to a civil suit by the appellant, challenging the Resolution. This Court found that Section 313 of the Delhi Municipal Corporation Act, 1957, did not empower the Corporation to claim any property in the manner done. It was further**

[43] **(1995) 1 SCC 47**

found that the Resolution was contrary to the language used in Section 313 and violated a civil right, which vests in every owner, to hold his land and transfer it in accordance with law. The finding of the High Court that condition was only one involving transfer of the right of management, was not accepted. In fact, this Court also held, *inter alia*, as follows:

> **"5. The power directing transfer of the land has been exercised under Section 313 of the Act. This section falls in Chapter XV which deals with streets. The public streets are dealt from Section 298 to Section 311 whereas private streets are dealt from Section 312 to Section 330. Section 312 obliges an owner of any land utilising, selling, leasing out or otherwise disposing of the land for the construction of building to layout and make a street or streets giving access to the plots into which the land may be divided and connect it with an existing or public street. Section 313 requires such owner to submit a layout plan before utilising the land for any of the purposes mentioned in Section 312 and send it to the Commissioner with a layout plan showing the particulars mentioned in clauses (*a*) to (*e*). The reservation or allotment of any site in the layout plan for any open space, park or school is to be provided by clause (*b*) of Section 313. Section 316 entitles the Commissioner to declare a private street to be a public street on the request of owners. Section 317 prohibits a person from constructing or projecting any structure which will encroach upon, overhang or project into a private street. In fact the entire cluster of sections from 312 to 330 of which Section 313**

is a part, deals with private streets only. There is no provision in this chapter or any other provision in the Act which provides that any space reserved for any open space or park shall vest in the Corporation. Even a private street can be declared to be a public on the request of owners of the building and then only it vests in the Corporation. In absence of any provision, therefore, in the Act the open space left for school or park in a private colony cannot vest in the Corporation. That is why in England whenever a private colony is developed or a private person leaves an open space or park to be used for public purpose he is required to issue what is termed as 'Blight Notice' to the local body to get the land transferred in its favour on payment of compensation. Section 313 which empowers the Commissioner to sanction a layout plan, does not contemplate vesting of the land earmarked for a public purpose to vest in the Corporation or to be transferred to it. The requirement in law of requiring an owner to reserve any site for any street, open space, park, recreation ground, school, market or any other public purposes is not the same as to claim that the open space or park so earmarked shall vest in the Corporation or stand transferred to it. Even a plain reading of sub-section (5) indicates that the land which is subject-matter of a layout plan cannot be dealt with by the owner except in conformity with the order of the Standing Committee. In other words the section imposes a bar on exercise of power by the owner in respect of land covered by the layout plan. But it does not create any right or interest of the Corporation in the land so specified. The resolution of the Standing Committee, therefore, that the area specified in the layout plan for the park and school shall vest in the Corporation free of cost, was not in accordance with law."

(Emphasis supplied)

88. Still further, the Court held as follows:

> "6. Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. …"
>
> (Emphasis supplied)

T. VIJAYALAKSHMI AND OTHERS V. TOWN PLANNING MEMBER AND ANOTHER[44]

89. In this case, the appellants were the owners of agricultural land, who had been permitted to use the same for non-agricultural purposes in 2004. An

[44] (2006) 8 SCC 502

application was filed for approval of a building plan.

This Court, *inter alia*, held as follows:

> **"15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play.**
>
> **xxx xxx xxx**
>
> **18. It is, thus, now well-settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time. (See *Kuldeep Singh* v. *Govt. of NCT of Delhi* [(2006) 5 SCC 702: (2006) 6 Scale 588].)"**

PUNE MUNICIPAL CORPORATION AND ANOTHER V. PROMOTERS AND BUILDERS ASSOCIATION AND ANOTHER[45]

90. The matter arose under the Maharashtra Regional Town Planning Act, 1966 (MRTP). The Development Control Rules were directed to be amended by the Government

[45] (2004) 10 SCC 796

under Section 37 of the said law. The case of the respondents before this Court was that the matter travelled beyond the powers of the State Government under Section 37(2) of the Act. We notice the following:

> **"5. Making of DCR or amendments thereof are legislative functions. Therefore, Section 37 has to be viewed as repository of legislative powers for effecting amendments to DCR. That legislative power of amending DCR is delegated to the State Government. As we have already pointed out, the true interpretation of Section 37(2) permits the State Government to make necessary modifications or put conditions while granting sanction. In Section 37(2), the legislature has not intended to provide for a public hearing before according sanction. The procedure for making such amendment is provided in Section 37. Delegated legislation cannot be questioned for violating the principles of natural justice in its making except when the statute itself provides for that requirement. Where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it is not permissible to read natural justice into such legislative activity. Moreover, a provision for "such inquiry as it may consider necessary" by a subordinate legislating body is generally an enabling provision to facilitate the subordinate legislating body to obtain relevant information from any source and it is not intended to vest any right in anybody. (*Union of India* v. *Cynamide India Ltd.* [(1987) 2 SCC 720] , SCC paras 5 and 27. See generally *H.S.S.K. Niyami* v. *Union of India* [(1990) 4 SCC 516] and *Canara Bank* v. *Debasis Das* [(2003) 4 SCC 557 : 2003**

SCC (L&S) 507] .) While exercising legislative functions, unless unreasonableness or arbitrariness is pointed out, it is not open for the Court to interfere. (See generally *ONGC* v. *Assn. of Natural Gas Consuming Industries of Gujarat* [1990 Supp SCC 397] .) Therefore, the view adopted by the High Court does not appear to be correct.

6. DCR are framed under Section 158 of the Act. Rules framed under the provisions of a statute form part of the statute. (See *General Officer Commanding-in-Chief* v. *Dr. Subhash Chandra Yadav* [(1988) 2 SCC 351 : 1988 SCC (L&S) 542 : (1988) 7 ATC 296] , SCC para 14.) In other words, DCR have statutory force. It is also a settled position of law that there could be no "promissory estoppel" against a statute. (*A.P. Pollution Control Board II* v. *Prof. M.V. Nayudu* [(2001) 2 SCC 62] , SCC para 69, *STO* v. *Shree Durga Oil Mills* [(1998) 1 SCC 572] , SCC paras 21 and 22 and *Sharma Transport* v. *Govt. of A.P.* [(2002) 2 SCC 188] , SCC paras 13 to 24.) Therefore, the High Court again went wrong by invoking the principle of "promissory estoppel" to allow the petition filed by the respondents herein."

TUKARAM KANA JOSHI AND OTHERS V. MAHARASHTRA INDUSTRIAL DEVELOPMENT CORPORATION AND OTHERS[46]

91. **In the said case, the land of the appellants was taken over by the agents of the State. Compensation,**

[46] (2013) 1 SCC 353

despite repeated requests, was not made available. This Court held:

> **"11. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. The functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the landowner as a "subject" of**

medieval India, but not as a "citizen" under our Constitution."

92. **This has been followed in *Bhimandas Ambwani (Dead) Through Lrs. v. Delhi Power Company Limited*[47] (See paragraph 13 of the said Judgment).**

JILUBHAI NANBHAI KHACHAR AND OTHERS V. STATE OF GUJARAT AND ANOTHER[48]

93. **We have already adverted to it earlier.**

STATE OF GUJARAT V. SHANTILAL MANGALDAS AND OTHERS[49]

94. **The said decision was rendered by a Constitution Bench of this Court. The matter in issue was the validity of Sections 55 and 67 of the Bombay Town Planning Act (Act 27 of 1955). The High Court had declared the provisions violative of Article 31(2) of the Constitution. This Court embarked upon elaborate consideration of the provisions of the Act, and it will be profitable, if we advert to paragraph-22, wherein, the Court, after referring to the provisions of Article**

[47] (2013) 14 SCC 195
[48] 1995 Supp (1) SCC 596
[49] (1969) 1 SCC 509

31, as amended by the Fourth Amendment in the year 1955, proceeded to hold as follows:

> **"22. The following principles emerge from an analysis of clauses (2) and (2-A): compulsory acquisition or requisition may be made for a public purpose alone, and must be made by authority of law. Law which deprives a person of property but does not transfer ownership of the property or right to possession of the property to the State or a corporation owned or controlled by the State is not a law for compulsory acquisition or requisition. The law, under the authority of which property is compulsorily acquired or requisitioned, must either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given. If these conditions are fulfilled the validity of the law cannot be questioned on the plea that it does not provide adequate compensation to the owner.**
>
> **xxx xxx xxx**
>
> **26. Article 31 guarantees that the law providing for compulsory acquisition must provide for determining the giving of compensation for the property acquired. The expression "compensation" is not defined in the Constitution. Under the Land Acquisition Act compensation is always paid in terms of money. But that is no reason for holding that compensation which is guaranteed by Article 31(2) for compulsory acquisition must be paid in terms of money alone. A law which provides for making satisfaction to an expropriated owner by allotment of other property may be deemed to be a law providing for compensation. In ordinary parlance the expression "compensation" means anything given to make things equivalent; a thing given to or to make**

amends for loss, recompense, remuneration or pay; it need not therefore necessarily be in terms of money. The phraseology of the Constitutional provision also indicates that compensation need not necessarily be in terms of money, because it expressly provides that the law may specify the principles on which, and the manner in which, compensation is to be determined and "given". If it were to be in terms of money alone, the expression "paid" would have been more appropriate."

95. **In the course of its Judgment, the Court disapproved observations contained in *P. Vajravelu Mudaliar v. Special Deputy Collector for Land Acquisition and another*[50]. Equally, the Court overruled the decision of this Court in *Union of India v. Metal Corporation of India Ltd. and another*[51].**

96. **It was relying on these two judgments, *inter alia*, that this Court found that the High Court had wrongly concluded that in order that compensation based on market value be sufficient for the purpose of Article 31(2), it must be a just equivalent. We may also notice that the Court repelled the attempt on behalf of the State that because the object of the Act was to promote**

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[50] (1965) 1 SCR 614
[51] (1967) 1 SCR 255)

public health, it fell within the exception to Article 31(5)(b)(ii).

97. **Regarding purport of the Fourth Amendment, in *Shantilal Mangaldas* (supra), this Court declared as follows:**

> **"41. The principal effect of this amendment, in so far as that is relevant in this appeal, was to snap the link which, according to this Court, existed between clauses (1) and (2) — that was achieved by enacting clause (2-A); greater clarity was secured by enacting in clause (2) that property shall be compulsorily acquired only for a public purpose; and by authority of law which provides for compensation, and either fixes the amount of compensation or specifies the principles on which, and the manner in which, compensation is to be determined and given; and that the law for acquisition or requisition shall not be called in question in any court on the ground that the compensation provided thereby is not adequate. By the amendment made in Article 31-A certain classes of statutes were placed with retrospective effect outside the purview of attack before the Courts on the ground of infringement of the fundamental rights under Articles 14, 19 and 31, and by the addition of certain Acts in the Ninth Schedule a challenge to those Acts that they infringed any fundamental rights in Part III could not be entertained. But the amendments made in Article 31 were not given any retrospective operation. The result was that in cases where acquisition was made pursuant to the statutes enacted before April 27, 1955, the law declared in *Mrs Bela Banerjee***

case and *Subodh Gopal Base case* continued to apply."

98. The Judgment in ***Shantilal Mangaldas*** (supra) has been approved of and followed in the case by a Constitution Bench in ***Prakash Amichand Shah v. State of Gujarat and others***[52].

99. The Court repelled the argument that the decision in ***Shantilal Mangaldas*** (supra) was overruled by the Judgment in ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another***[53].

100. This Court also made the following observations, which incidentally are relied upon by the respondents to contend that the developer of property would be entitled to benefits when there is planned development:

> "16. The re-arrangement of titles in the various plots and reservation of lands for public purposes require financial adjustments to be made. The owner who is deprived of his land has to be compensated, and the owner who obtains a re-constituted plot in surroundings which are conducive to better sanitary living conditions has to contribute towards the expenses of the scheme. This is because on the making of a Town Planning Scheme the value of the plot rises and a part of the benefit which arises out of a unearned rise in prices is

[52] (1986) 1 SCC 581
[53] (1973) 4 SCC 225

directed to be contributed towards financing of the scheme which enables the residents in that area to more amenities, better facilities and healthier living conditions. …"

101. **This Court in *Babulal Badriprasad Varma v. Surat Municipal Corporation and others*[54], while dealing with the Gujarat Town Planning and Urban Development Act, 1976, *inter alia*, held:**

> **"33. We are, however, not unmindful of the fact that a statute of town planning ex facie is not a statute for acquisition of a property. An owner of a plot is asked to part therewith only for providing for better facilities of which he would also be a beneficiary. Every step taken by the State does not involve application of the doctrine of eminent domain.**
>
> **34. In this case, the appellant did not oppose the draft scheme. It accepted that the State had a right to do so. Existence of a public purpose and increase in the valuation of the property was admitted. There exists a distinction in the action of the planning authority as regards vesting of a property in it and one so as to enable it to create a third-party interest vis-à-vis for the purpose of reallotment thereof. In the former case, the vesting of the land may be held to be an act of acquisition, whereas in the latter, it would be distribution of certain benefits having regard to the purpose sought to be achieved by a statute involving town planning. It was on that legal principle, this Court in *State of Gujarat* v. *Shantilal Mangaldas* [(1969) 1 SCC**

[54] (2008) 12 SCC 401

509 : (1969) 3 SCR 341] opined that when a development is made, the owner of the property gets much more than what he would have got, if the same remained undeveloped in the process as by reason thereof he gets the benefit of living in a developed town having good town planning."

(Emphasis supplied)

102. In the recent Judgment, again, a Bench of three learned Judges of this Court, followed the Judgment in ***Chairman, Indore Vikas Pradhikaran*** (supra).

NARAYANRAO JAGOBAJI GOWANDE PUBLIC TRUST V. STATE OF MAHARASHTRA AND OTHERS[55]

103. The dispute revolved around a condition in a development agreement executed between the appellant-Trust and the Nagpur Improvement Trust (for short, 'NIT'). Under such condition, the appellant was to transfer the land and/or primary school open land in the layout free-of-cost and the NIT was free to dispose of such land as per its Rules and Regulations. We notice that the predecessor-in-interest of the appellant was given permission by the NIT, under which, an area was

[55] (2016) 4 SCC 443

reserved for a primary school which was a public utility land. The NIT allotted the land in the layout approved in favour of the appellant's predecessor to a third party for construction of a college. Several contentions were arrayed against the allotment, including that the NIT did not have any power to insert such a condition and that there was no power to acquire land *de hors* the Act, under which, it was created. This Court dismissed the appeal and upheld the view of the High Court. In doing so, this Court held as follows:

> **"34. We have carefully heard both the parties at length and have also given our conscious thought to the materials on record and the relevant provisions of law. We are of the view that the High Court in its judgment and order has rightly held that Respondent 1 State and Respondent 2 NIT are bound to stick to the development plan and scheme. It has placed reliance upon the decision of this Court in *Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.* [*Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705] , wherein this Court, while dealing with the aspect of town planning and Articles 300-A and 14 of the Constitution of India, has observed as under: (SCC p. 730, paras 46-47)**
>
> **"*46.* … The courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.**

47. For the aforementioned purpose, an endeavour should be made to find out as to whether the statute takes care of public interest in the matter vis-à-vis the private interest, on the one hand, and the effect of lapse and/or positive inaction on the part of the State and other planning authorities, on the other."

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36. The High Court has, further, rightly held that the impugned clause contained in the said development agreement is neither void nor illegal for want of consideration. It has also been rightly held by it that after consideration of the whole scheme of the NIT Act, particularly, the provisions under Sections 29 to 70 and 121 of the said Act read with the terms and conditions of the said development agreement entered into between the parties, it is clear that the said development agreement creates reciprocal rights and obligations between the parties with some objects.

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38. Thus, seeking abandonment of acquisition of the land as provided under Section 68 of the NIT Act is a huge benefit which the appellant Trust has gained from the agreement. Further, it is not open for the appellant Trust to avail only the beneficial part of the said development agreement to form a layout plan and allow the sites to be allotted in favour of the allottees, when it itself is not willing to discharge the obligation of transferring the reserved land for public utility purpose, as agreed upon in the development agreement.

39. Further, the High Court has rightly observed that another benefit derived by the appellant Trust from the said development

agreement is immediate and reciprocal sanction for the development of the said land with permission for the commercial usage of the same, presuming that there would be no acquisition."

YOGENDRA PAL AND OTHERS V. MUNICIPALITY, BATHINDA AND ANOTHER[56]

104. **The case arose under the Punjab Municipal Act, 1911. The State Government, acting under Section 192(3) of the Municipal Law, sanctioned a Town Planning Scheme, under which, an area of 22.23 acres was transferred to the Municipal Committee. No compensation was paid to the owners. The High Court upheld the provision. Section 192(1)(c), *inter alia*, provided for transfer, to the Committee, of land, either on payment of compensation or otherwise. The contention taken by the respondent was that it was only a transfer of land and not acquisition. This Court found that the provision did contain a restriction on the maximum amount of land which could be transferred and also maximum amount of land which could be transferred without payment of compensation. This Court found that**

[56] (1994) 5 SCC 709

there was no guideline in the Act providing for as to when compensation was payable or could be denied. The Court also took note of the width of the expression 'public purpose', for achieving which, the land could be transferred. It was further noticed that the said expression suggested that the purpose concerned cannot be of benefit only and exclusively to the transferor-landowner. It was to be a utility to members of the public in general. The fact that the transferor-landowner would also benefit, did not make any difference. The use of the word 'transferred' as against 'acquired' and the contention that, 'therefore, the rights of the land owner continued', was rejected. Section 192(c) was contrasted with Section 169 and it was found that the latter provision was confined to use of the land for laying public streets, and what is more, the land could be acquired by paying compensation. Section 169 also contemplated restoration to the original owner, if the land could not be used as a public street. We may bear in mind the following discussions in the context of the facts of the case before us:

"18. The next contention is that the transfer of the land is also for the benefit of the transferor landowner and in fact the balance of the land which remains with him appreciates in value to an extent which more than sufficiently compensates him for the loss of the land. Hence there is no need to pay him separate compensation for the extent of land up to 25 per cent transferred to the Municipal Committee. The contention suffers from several fallacies. In the first instance, as the provisions of the section themselves point out, the land is to be transferred for a public purpose including for use as public street. The purpose of the transfer itself suggests that the transferor landowner is not exclusively to be benefited by the public purpose. He enjoys the benefit, if any, along with the other members of the public. There is no reason why, therefore, he should alone pay for the said benefit in terms of his land. Secondly, the public purpose which is served by the Municipal Committee, assuming it increases the value of the remaining land, also contributes to the increase in the value of the land of all other landowners, which lands are similarly benefited by the said public purpose. There is, therefore, no reason why the landowner whose land is "transferred" for the purpose alone should pay for the increase in the value of his remaining land in terms of the transferred land. In fact, whereas it is only the remaining land of the transferor landowner which is benefited by such increase in value, if any, the whole of the land in the possession of the other landowners is benefited by the accretion in value. Thus, on both accounts, there is a clear violation of Article 14 of the Constitution to make only the transferor landowner suffer for the public purpose. What is further, it is problematic and is in the realm of speculation as to whether the appreciation of the value of the remaining property of the transferor landowner will

always be equivalent to or more than the value of the land transferred to the Municipal Committee, assuming that the public purpose for which the land is taken over contributes to the increase in the value of the remaining property. Lastly, and this is equally important, in many cases the accretion to the value of the remaining property may merely be on paper and be a poor consolation to the transferor landowner if he cannot or is unable for one reason or the other to sell or otherwise dispose of the said property. On the other hand, in such cases, the accretion in value may prove a burden if the property tax, wealth tax, estate duty etc. are calculated on the basis of the market value of the property. The so-called increase in the value of the property may thus prove a liability to those who cannot dispose of their property. Looked at from any angle, the argument that the transferor landowner is benefited because his remaining property appreciates in value and, therefore, he need not be paid separate compensation for the land which is transferred, is untenable in law. We thus find that the provisions of Section 192(1)(*c*) are violative of Article 14 of the Constitution."

VIRENDER GAUR AND OTHERS V. STATE OF HARYANA AND OTHERS[57]

105. **In the said case, the appellant surrendered 25 per cent of her land to the Municipality, which was a condition for sanction for construction of a building. The land stood vested with the Municipality. The land**

[57] (1995) 2 SCC 577

in question stood earmarked for open spaces. A *Dharamshala* came to be put-up for the Punjab Samaj Sabha on the basis of allotment to it. It was contended that in the construction of the *Dharamshala*, even if there was a public purpose, the Government could not direct the Municipality to permit land use, defeating the scheme, which provided for keeping the land open. This Court described environment 'as a polycentric and multifaceted problem, affecting human existence'.

106. The Court, in *Virender Gaur* (supra), further found power to the Municipality under Section 66 to transfer the land vested in it. The Court went on to hold, *inter alia*, as follows:

> **"11. It is seen that the open lands, vested in the Municipality, were meant for the public amenity to the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. Therefore, the order passed by the Government and the action taken pursuant thereto by the Municipality would clearly defeat the purpose of the scheme. Shri D.V. Sehgal, learned Senior Counsel, again contended that two decades have passed by and that, therefore, the Municipality is entitled to use the land for any purpose.**

We are unable to accept the self-destructive argument to put a premium on inaction. The land having been taken from the citizens for a public purpose, the Municipality is required to use the land for the protection or preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. Equally acceptance of the argument of Shri V.C. Mahajan encourages pre-emptive action and conduct, deliberately chartered out to frustrate the proceedings and to make the result fait accompli. We are unable to accept the argument of fait accompli on the touchstone of prospective operation of our order."

107. **This Court also distinguished *Yogendra Pal* (supra) in this regard.**

108. **There is a contention of the appellants and the writ petitioners that, at any rate, the law is an expropriatory legislation. This is for the reason that it operates to deprive a person of his land without his consent. [See in this regard *Chairman, Indore Vikas Pradhikaran* (supra), which has discussed this aspect elaborately.] For reasons already given and to follow, we are unable to agree.**

109. **We agree that the law, undoubtedly, is that the planning law cannot be interpreted as justifying an inroad into the rights of a private person to construct**

a suitable building for the purpose of carrying on his business.

110. **In *Ravindra Ramchandra Waghmare v. Indore Municipal Corporation and others*[58], after an elaborate reference to *Chairman, Indore Vikas Pradhikaran* (supra) and *K.T. Plantations* (supra), this Court, *inter alia*, held as follows:**

> **"76. …It is apparent from the aforesaid dictum that Article 300-A enables the State to put restrictions on the right by law but the same should not be arbitrary or excessive or beyond what is required in public interest. The imposition of restriction must not be disproportionate to a situation or statute. Legislation providing for deprivation of property under Article 300-A must be just, fair and reasonable. Thus, it cannot be said that illusory compensation is provided under Section 306 read with Section 387. The decision renders no help to the cause espoused on behalf of the appellants and on a closer scrutiny, rather counters it. Based on the aforesaid principles we find no malady in the provisions in question which may be required to be cured."**

111. **No doubt, the Court, in the said case also, after referring to *Rajiv Sarin and another v. State of Uttarakhand others*[59], found that the case at hand was**

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[58] (2017) 1 SCC 667
[59] (2011) 8 SCC 708

not a case of no compensation. Incidentally, this Court also followed the Judgment in *Shantilal Mangaldas* (supra):

> **"83. As already held a law seeking to acquire private property for public purpose cannot say that "no compensation" would be paid. The present case is a case of payment of "no compensation" at all. In the case at hand, the forest land which was vested in the State by operation of law cannot be said to be non-productive or unproductive by any stretch of imagination. The property in question was definitely a productive asset. That being so, the criteria to determine possible income on the date of vesting would be to ascertain such compensation paid to similarly situated owners of neighbouring forests on the date of vesting. Even otherwise, the Revenue Authority can always make an estimation of possible income on the date of vesting if the property in question had been exploited by the appellants and then calculate compensation on the basis thereof in terms of Sections 18(1)(*cc*) and 19(1)(*b*) of the KUZALR Act."**

112. **In *Rajiv Sarin* (supra), the U.P. Zamindari Abolition and Land Reforms Act, 1950, the *Kumaun* and Uttarakhand Abolition and Land Reforms Act, 1960, introduced the U.P. Act in the Uttarakhand and *Kumaun* region. The rights of every intermediary in respect of forest land came to be vested with the State Government. This was as a result of an amendment. The**

amendment and Notice came to be challenged. This Court, speaking through a Constitution Bench, held, *inter alia*, as follows:

> **"68. The incident of deprivation of property within the meaning of Article 300-A of the Constitution normally occurred mostly in the context of public purpose. Clearly, any law, which deprives a person of his private property for private interest, will be amenable to judicial review. In the last sixty years, though the concept of public purpose has been given quite wide interpretation, nevertheless, the "public purpose" remains the most important condition in order to invoke Article 300-A of the Constitution.**
>
> **69. With regard to claiming compensation, all modern Constitutions which are invariably of democratic character provide for payment of compensation as the condition to exercise the right of expropriation. The Commonwealth of Australia Constitution Act, the French Civil Code (Article 545), the Fifth Amendment to the Constitution of USA and the Italian Constitution provided principles of "just terms", "just indemnity", "just compensation" as reimbursement for the property taken, have been provided for.**
>
> **70. Under the Indian Constitution, the field of legislation covering claim for compensation on deprivation of one's property can be traced to Schedule VII List III Entry 42 of the Constitution. The Constitution (Seventh Amendment) Act, 1956 deleted Schedule VII List I Entry 33, List II Entry 36 and reworded List III Entry 42 relating to "acquisition and requisitioning of property". The right to property being no more a fundamental right, a**

legislation enacted under the authority of law as provided in Article 300-A of the Constitution is not amenable to judicial review merely for alleged violation of Part III of the Constitution.

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73. It was further submitted that the inherent powers of public purpose and eminent domain are embodied in Article 300-A, and Entry 42, List III, "acquisition and requisitioning of property" which necessarily connotes that the acquisition and requisitioning of property will be for a public use and for compensation and whenever a person is deprived of his property, the limitations as implied in Article 300-A as well as Entry 42, List III will come into the picture and the Court can always examine the legality and validity of the legislation in question. It was further submitted that awarding nil compensation is squarely amenable to judicial review under Articles 32 and 226 of the Constitution of India.

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77. Article 31(2) of the Constitution has since been repealed by the Constitution (Forty-fourth Amendment) Act, 1978. It is to be noted that Article 300-A was inserted by the Constitution (Forty-fourth Amendment) Act, 1978 by practically re-inserting Article 31(1) of the Constitution. Therefore, right to property is no longer a fundamental right but a right envisaged and conferred by the Constitution and that also by retaining only Article 31(1) of the Constitution and specifically deleting Article 31(2), as it stood. In view of the aforesaid position the entire concept of right to property has to be viewed with a different mindset than the mindset which was prevalent during the period when the concept of eminent domain was the

embodied provision of fundamental rights. But even now as provided under Article 300-A of the Constitution the State can proceed to acquire land for specified use but by enacting a law through State Legislature or by Parliament and in the manner having force of law."

113. **The Court also reiterated the distinction between 'no compensation' and 'Nil compensation', as laid down in *K.T. Plantations* (supra). The Court proceeded to find that it was a case of 'no compensation' at all, and therefore, it attracted the *vice* of illegal deprivation of property and gave relief on the said basis. This is after finding that the property in question was a productive asset.**

114. **In W.P. No. 591/15, the challenge is to Regulation 29(7)(a) and Annexure XX. It is first necessary to notice the scheme of Regulation 29(7).**

"29(7) (a) The space set apart for roads (except those which may remain private) and the 10% area reserved for recreational purposes shall be transferred to the Authority or Agency or the Local Body designated by the Authority free of cost through a registered gift deed before the actual approval of the layout under the provisions of the T & CP Act. The exact mode of conveyance should be consistent with the relevant enactment and regulations.

(b) In cases of industrial estates developed by Government agencies the Authority reserves

the right to allow them to retain the spaces set apart for roads and the recreational spaces as parks/play grounds and maintain them for the purposes to the satisfaction of the Authority.

(c) The Authority reserves the right to reserve space for recessed bus stops as part of the road space in the layouts exceeding 2 hectares, where found necessary on public interest and this part of the road space also be transferred free of cost as stated in the sub rule 7(a) above."

115. **Regulation 29(3)(b) deals with the width of the streets and roads within the layout. It inter alia provides for the width and the streets of the roads and passages. Thereunder, in the remarks column, it is provided that starting with the minimum width of 7.2 meters in regard to streets intended to serve not more than 16 plots / or subject to a maximum length of 120 meters, all the streets become public. The common refrain found in the remarks column is that that all such streets shall become public. We must next specifically advert to Regulation 29(6):**

"29(6) Reservation of land for recreational purposes in a layout or sub' division for residential, commercial, industrial or combination of such uses shall be as follows.

Extent of layout	Reservation

(1)	(2)
For the first 3000 square metres	Nil
Between 3000	10 per cent of the area excluding toads or in the alternative he shall pay the market value of equivalent land and excluding the first square metres 3000 square metres as per the valuation of the registration and 10,000 department. "No such area reserved shall measures less than 100 square metres square metres with a minimum dimension of 10 metres."
Above 10,000 square metres	10 per cent of the area excluding roads. It is obligatory to make the reservation and no equivalent land cost in lieu· of the same is acceptable.

(a) The land for community recreational purposes shall be restricted to ground level, in a shape and location to be specified by the Chennai Metropolitan Development Authority. The land so reserved shall be free from any ·construction by the layout owner, developer or promoter

(b) The building and use of land shall conform to the conditions that may be imposed while sanctioning the layout. The space set apart for

commercial, institutional, industrial or other uses shall be deemed to be zoned for commercial, institutional; industrial or corresponding uses under the Master Plan."

116. We may notice at this juncture that there is no challenge to Regulation 29(6). The second most important aspect we notice is that the land for community recreational purposes shall be restricted to the ground level in a shape and location to be specified by the CMDA. Further the land reserved is to be free from any construction by the layout owner, developer and promoter. Further the use of the land shall conform to the conditions that may be imposed while sanctioning the layout.

117. Before we pass on to the impugned regulation, namely, Regulation 29 (7) (a), we must also undoubtedly notice Annexure XX which is also under challenge.

"ANNEXURE XX

Reservation of land for community recreational purposes in case of special buildings/ Group Developments/ multi-storeyed building developments

(1) The reservation of land for community recreational purposes such as park / playground shall be as given below at gr9und level in a shape and location 'abutting a public road to be

specified by Chennai Metropolitan Development Authority:

Extent of site		Reservation
(a)	For the first 3,000 square metres	Nil
(b)	Between 3,000 square metres and 10,000 square metres	10% of the area excluding roads or in the alternative he shall pay the market value of the equivalent land excluding the first 3000 sq.m. as per the valuation of the Registration Department, only where it is not possible to provide open space due to physical constraints. No such area reserved shall measure less than 100 square metres with a minimum dimension of 10 metres. The space so reserved shall be transferred to the Authority or to the Local body designated by it, free of cost, through a registered gift deed. In cases of residential developments, the Authority or the local body concerned may permit the Residents Association or Flat Owner's Association for maintaining such reserved space as park

		/ playground and in such cases where the Authority decides to permit the Resident's Association or Flat Owner's Association for maintaining it, direct access from a public road for the reserved area may not be required, and right of access to the Authority or the local body concerned through set back space shall be transferred through a registered gift deed along with the reserved space.
(c)	Above 10,000 square metres	Ten per cent of the area excluding road shall be reserved and this space shall be transferred to the Authority or to the local body designated by it, free of cost, through a gift deed. It is obligatory to reserve the 10 per cent of the site area and no charge can be accepted in lieu iri case of the new developments or redevelopments.

(2) The site so reserved shall be exclusive of 'the setback spaces and. spacing between blocks prescribed in these rules, and shall· be free from any construction / structure.

(3) For the purpose of this regulation, existing development is defined as one where the extent of ground area covered by structures already existing (prior to application for planning permission) is 25 per cent and above of the total site area.

(4) In case of additions to existing developments, where it is difficult to leave the 10 per cent area as open space for community recreational purposes, the Authority reserves the right to collect the market value of equivalent land in lieu of the land to be reserved. However, if on a future date, the applicant wants to demolish the existing structure and raise new structures on the site in question, the community recreational space as per the rule shall be reserved.

(5) The Authority reserves the right to enforce the maintenance of such reserved lands by the owner to the satisfaction of the Authority or order the owner to transfer the land to the Authority or any local body designated by it free of cost, through a registered gift deed. The Authority or the local body designated by it, as the case may be, reserves the right to decide on entrusting the maintenance work to any institution / individual on the merits of the case."

118. It will be noticed on a perusal of Annexure XX that the reservation for community recreation purposes such as park, playground is to be at ground level in a shape and location abutting a public road to be specified by the CDMA. Thereafter, the requirement relating to executing the gift deed in respect of layout in excess

of 10000 square meters is laid down. It is after this that we must notice Regulation 29 (7)(a).

> "29(7)(a) The space set apart for. roads (except those which may remain private) and the 10% area reserved for recreational purposes shall be transferred to the Authority or Agency or the Local Body designated by the Authority free of cost through a registered gift deed before the actual approval of the layout under the provisions of the T & CP Act. The exact mode of conveyance should be consistent with the relevant enactment and regulations."

119. From the additional affidavit which we have already noticed, the challenge is limited by the petitioner to the stipulation in Regulation 29(7)(a) so far as the requirement of transferring the space set apart for recreational purposes. In other words, the petitioners accept the validity of Regulation 29(7)(a) otherwise. Rule 29 reads as follows: -

> **"29. Layout and sub-division regulations:**
>
> This regulation seeks to ensure access to plots by 'way of roads and private passages, creating hierarchy of roads depending on the road length and intensity of
> developments in the area and also to provide adequate linkages to the existing roads and proposed roads in the Master Plan and Detailed Development Plan and further to provide proper circulation pattern in the area, providing required recreational spaces such as parks /

playgrounds, and providing spaces for common amenities such as schools, post and telegraph offices, fire stations, police stations etc.
(1) The minimum extent of plots and frontage shall be as prescribed for various uses and types of developments given in the DR Nos. 25,26,27 and 28.

(2) (a) The minimum width of the public streets/road on which the site abuts or gains access shall be 7.2m. for residential layout developments and 9m. for industrial layout developments. For subdivisions the minimum width of the passage /public streets/road on which the site abuts or gains access shall be as required for different uses and types of developments.

(b) The minimum width stated above shall be the existing width of the road and not the street alignment prescribed.

<u>For residential development</u>

"29(3) The width of the streets/roads and passages in the layouts. /subdivisions / amalgamations shall conform to the minimum requirements given below:

(a) for Residential developments

Description (1)	Minimum Width (2)	Remarks (3)
A. Passage ' (i) In areas of Economically Weaker Section and· for continuous building area:	1.0 metre	The passage will remain private.

a) For single plot b) For two to four plots	1.5 metre	
(ii) When it is intended to serve upto two plots and length of the passage does not exceed 40 metres)	3.0 metres	The passage will remain private
(iii) When it is intended to serve up to four plots and length of the passage does not exceed 80 metres)	3.6 metres	-Do-
(iv) When it is intended to serve up tb ten plots and length of the passage does not exceed 100 metres)	4.8 metres	-Do-
B. Streets and Roads		
(i) Streets intended to serve not more than 16 plots and / or subject to a maximum length of 120 metres	7.2 metres	All streets shall become public
(ii) Streets intended to serve not more. than 20 plots and / or subject to a maximum	9.0 metres	All streets shall become public

length of 240 metres		
(iii) Roads of length more than 240 metres but below 400 metres	34.0 metres	All streets shall become public
(iv) Roads of length between 400 metres to 1,000 metres	18.0 metres	All streets shall become public
(v) Roads of length more than 1000 metres	24.0 metres	All streets shall become public

29(3)(b) for Industrial Development

Description (1)	Minimum width of passage (2)	Remarks (3)
(1) When it is intended to serve only one plot and length of the passage does not exceed 100 metres	5.0 metres	The passage will remain private
(2) When it is intended to serve two to five plots and the length of the passage does not exceed 120	7.2 metres	-Do-

metres		
(3) When it is intended to serve more than 5 plots	12.0 metres	The street shall become public.

Note: Not withstanding anything contained above Authority reserves the right to revise layouts proposed by the applicant and applied for sanction in order to provide for better adequate linkages proper circulation pattern requirements considering local conditions etc."

120. It becomes clear that in regard to streets and roads what is contemplated under the regulation is that under 29 (3)(a) (B) all streets will become public. This is to be read along with Regulation 29(7)(a). It is apparently to ensure that the roads which are covered by 29(3)(a)(B) which are to be treated as public are so maintained that it is insisted under 29(7)(a) that a gift deed be executed. In other words, keeping in mind the preambular portion of Regulation 29 which proclaims that the regulation seeks to provide access to plots by way of roads and private passages creating a hierarchy of roads based on road length, intensity of developments in the area and also provide adequate linkages to the existing roads and proposed

roads in the Master Plan and a detailed development plan and to provide proper circulation pattern in the area inter alia, we must arrive at the conclusion that visionary perspective of town planning would require an imaginative full play being given. Meticulous requirements of futuristic needs of an ever-growing Metropolis when a large area such as what would be found in a layout of more than 10000 square meters which is nearly one hectare of land in the metropolitan area must be factored in. Circulation of traffic between parts of the area would require the roads being thrown open to the public so that different parts of the metropolitan area can be easily accessed. In fact, even the writ petitioner by seeking to limit the challenge in the first place only to Regulation 29(7)(a) and not to Regulation 29(3)(a)(B) under which anyway the streets are declared as public acknowledges the need for and justification for the declaration of roads being public.

121. The argument of the respondent appears to be as follows:

The execution of a gift deed acts as a safety valve or a safeguard to check the possibility that the developer would resile from the assurance or violate the guarantee that the land, which is reserved as an open space, will not be constructed upon. In other words, if the execution of the gift deed is insisted upon to ensure that in the future, there would not be any contravention of the requirement, *inter alia*, that the area be used as an open space, then, the complaint, which is lodged against the impugned Rule, as also the Regulation, may not stand scrutiny. In regard to the impugned Regulation, it must be borne in mind, as we have already noticed that in the additional affidavit filed by the Writ Petitioner in Writ Petition (C) No. 591 of 2015, the challenge in the writ petition has been limited to the latter part of the provision, *i.e.*, the requirement to transfer free-of-cost, through a registered gift deed, the 10 per cent recreational area reserved for recreational purposes only and not the space set apart for roads. Here, we must observe that as already found by us, that there is no challenge to

Regulation 29(6). The writ petitioner does not seek to, bring under a cloud, Regulation 29(7)(a) otherwise.

122. The result of the above discussion is as follows:

We must proceed on the basis that Regulation 29(6) holds good. This means that when the layout is above 10,000 square meters, reservation of 10 per cent for recreational purposes has to be made. Regulation 29(6)(a) stipulates that the land for the communal and recreational purposes, is to be restricted to the ground level and in a shape and location to be specified by the Authority. It is also to be reserved free from any construction. Therefore, the reservation, which is mandated in terms of Regulation 29(6)(a), and which cannot be a subject matter of a claim for compensation under Section 39 of the Act, is to become the subject matter of the gift deed. The execution of the gift deed, if it is understood as merely as an insurmountable obstacle for an unscrupulous developer to get around the laudable mandate to preserve the requisite area as open space, cannot be rendered vulnerable. Even if, no gifts were to be executed, the

property covered by the open space requirement, would be put beyond the domain and control of the developer. Future generations of successors-in-interest or anyone, who claims under him, will be effectively prevented from setting up any claim over the area. Viewed in this perspective and understanding the gift as not conferring ownership of the area comprised in the open space, we would think that the impugned provisions would pass muster. It would prevent any kind of abuse. It is clear that the Regulation, properly understood, prescribe for the open space and merely provides for the facilitation and preservation of the open space.

A BRIEF LOOK AT THE FIFTH AMENDMENT CASES IN THE UNITED STATES

123. **The Fifth Amendment to the U.S. Constitution, inter alia, declares 'nor shall private property be taken for public use without just compensation'. This limb of the Fifth Amendment has spawned a large body of case law. We may only advert to a few of them. In *Agins (supra)*, the brief facts were as follows:**

The owners of a five-acre parcel of unimproved land challenged the placing of the land by adopting of Zoning Ordinances, by which, the land was placed in residential planned development and open space zone, which permitted the owners to build between 1 and 5 single family residences. The appellants asserted infraction of the Fifth and the Fourteenth Amendments and sought damages for inverse condemnation. (Inverse condemnation amounts to proceedings seeking compensation for compulsorily acquiring land without there being any formal proceedings for acquisition). The challenge was repelled by the U.S. Supreme Court. It was found that there was no violation of the Takings Clause in the Fifth Amendment. It must be made clear that the Taking Clause is based on the prohibition against the taking of private property for public use without just compensation. The Court, inter alia, held as follows:

> **"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, see *Penn***

***Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 S.Ct. 332 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner."**

124. In ***James Patrick Nollan v. Calefornia Coastal Commission***[60], **the following were the facts:**

The prospective purchasers of a beach front plot, which was located between two public beaches, proposed to satisfy a condition on their option to purchase by pulling down an old bungalow on the premises. It was to be replaced with a larger house. The respondent

[60] **483 US 825, 97 L Ed 2d 677,**

Commission stipulated the condition that purchasers must give the public an easement to pass across the portion of the property which lay between the mean high tide line. The purchasers took shelter under the Takings Clause. In 5:4 Majority Judgment, the Court took the view that the Takings Clause was offended. In the course of the Judgment, the Court held, *inter alia*:

> **"[1b, 5] "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose")."**
>
> **xxx xxx xxx**
>
> **"[1c] The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some**

condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."

125. **In *Florance Dolan v. City of Tigard*[61], again the scope of the Fifth Amendment or rather the Takings Clause thereunder, fell for consideration. The owner of a city plot applied for a building permit for a bigger store than she had with certain other facilities, including parking area. The permission though granted came with two conditions. The owner was to dedicate to the city, as a greenway, a portion of her lot within the 100-year floodplain of a creek, which flowed through one corner and along one boundary of the lot. The owner had also to dedicate to the city as a pedestrian/bicycle pathway, an additional 15-foot strip of land adjacent to the floodplain. Her request for variance of the conditions was rejected. This stand was approved by the Authorities as also the Court of Appeals with four learned Judges dissenting with the Majority, remitted the matter back. Distinguishing the decision in Village of *Euclid v. Ambler Reality Company*[62] and *Agins* (supra), the Court held, inter alia, as follows:**

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[61] 512 US 374
[62] 272 US 365

"9. The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra,* we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular

dedications required from her which are not required from the public at large."

xxx xxx xxx

"[1c, 2d, 11a] We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

126. The remand was limited to the first condition. In regard to the second condition, viz., dedication for the pedestrian bicycle pathway, the Court held as follows:

"[1g, 13] With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day.[9] Dedications for streets, sidewalks, and

> **other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."**
>
> **As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will,* or is *likely to,* offset some of the traffic demand." 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."**

127. **No doubt, there were vigorous dissents expressed by the four learned Judges. In the dissent by Justice Stevens, with whom Justice Blackmun and Justice Ginsburg agreed, the essential nexus requirement propounded in *Nollan* (supra) was recognised. The dissenting Judges, however, opposed the employment of the 'rough proportionality' requirement. Decrying the**

consequences that may follow from the requirement to make 'individualised determinations', the learned Judges found that the questions could be answered under the framework of the existing caselaw. The learned Judges also found that there was no basis for applying the 'Unconstitutional Conditions' Doctrine. We are tempted to and rightfully so, to advert to the following observations in the dissenting Judgments in regard to the true place of the Doctrine of Unconstitutional Conditions:

> **"Even if Dolan should accept the city's conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied "just compensation" since it would be appropriate to consider the receipt of that benefit in any calculation of "just compensation."**
>
> **xxx xxx xxx**
>
> **"In this respect, the Court's reliance on the "unconstitutional conditions" doctrine is assuredly novel, and arguably incoherent. The city's conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit."**

128. **In *Linda Lingle, Governor of Hawaii, et al. v. Chevron U.S.A.INC.*[63] in the context of a State statute limiting the rent that oil companies could charge to its dealer who lease service stations owned by the companies took the view after noticing *Nollan* (supra) and *Dolan* (supra) which we have referred to that "substantially advances" formula is not a valid Takings test initiated in *Agnis* (supra) and it was concluded that it has no proper place in the Takings jurisdiction.**

129. **In *Village of Euclid, Ohio Et Al v. Ambler Reality Company*[64], the village of Euclid lay in the form of a parallelogram. The appellant was the owner of the land measuring 68 acres. The entire area of the village was divided into six classes of use places.**

130. **We may notice they appear to be similar to the zones contemplated under the DCR in the instant cases. There were restrictions in regard to use, the number of dwellings and the height, inter alia. Appellant's land fell under U-2, U-3 and U-6. The Ordinance came**

[63] **544 US 528, 161 L.Ed.2d 876**
[64] **272 US 365 (1926)**

to be challenged on the ground that it deprived the appellant of its right to liberty and property without due process of law as also equal protection of the law under the Fourteenth Amendment to the U.S. Constitution. Certain provisions of the State Constitution were also relied upon.

131. Though in the context of the validity of the restrictions under the Zoning Ordinance, we notice the prescience of mind with which the Court approached the matter and refused to apply constitutional safeguards:

> "Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable."

132. **In the recent judgment relating to land use in the United States reported in *Coy A. Koontz v. St. Johns River Water Management District*[65], the Court, speaking through the majority Judgment (5:4), had the following facts before it. The petitioner therein decided to develop a 3.7 acre section of his property and he applied for certain permits required in this regard. To mitigate the environmental effects of his proposal, the petitioner offered to foreclose any possible future development of the approximately 11 acres southern section of his land by deeding to the district a conservation easement on that portion of his property. The District, however wanted the petitioner to reduce the size of development to 1 acre and deed the conservation easement to the remaining extent of 13.9 acres. The District wanted the petitioner to make improvement to District owned wet lands, several miles away. The District hinted all that it would consider alternative wherein monetary equivalent was proposed.**

[65] 133 S.Ct. 2586 (2013)

It is in these facts that the majority view was inter alia as follows: -

> **"II A [1,2] We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With_Representation of Wash.,*_461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). See also, *e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 59–60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)."**
>
> **xxxx xxxx xxxx**
>
> **"A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road."**
>
> **xxxx xxxx xxxx**
>
> **"(3) …Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."**

xxxx xxxx xxxx

> **"(7) …Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."**

xxxx xxxx xxxx

> **"(13) …We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan,* the landowner has not been subjected to an unconstitutional condition."**

133. **It is noteworthy to begin with that in India there is no provision similar to the Takings clause in the 5th amendment to the US constitution. It is in fact true that Article 31(2) did provide that a person could not be deprived of his property except after payment of compensation. Article 31 stands deleted by the Forty-Fourth Amendment. In Article 300A, what has been inserted by the same amendment is only the first limb**

of Article 31, viz., no person shall be deprived of his property save by authority of law. The ambit of this Article has been discussed in the decision in *K.T. Plantations* (supra).

134. Even under the Takings clause, we may only notice *Nollan-Dolan* (supra) and as interpreted by the majority in *Koontz* (supra) it is open to the government to consider how the permit applicant must mitigate the impacts of a proposed development and what is required to make State action legitimate is that the conditions imposed must bear an essential nexus and a rough proportionality to the impacts perceived.

ENTRY 42 OF LIST III OF THE SEVENTH SCHEDULE

135. Is the impugned Rule/Regulation, a case where it would be said that Entry 42 in List III to the Seventh Schedule applies? In other words, is there acquisition of land and is it a case of exercise of eminent domain by the state? Is it a case where the impugned provisions are more relatable to the exercise of police power? Does the impugned provision constitute deprivation of property within the meaning of Article 300A? Since we

have held that the impugned provision in the case of the rule is law, would not the Rule be a law which provides for deprivation of property, and therefore, there is no violation involved at all. Does the impugned Rule bring about deprivation and for which compensation must be paid, failing which it cannot but perish by placing it side by side with Article 300A?

136. We have noticed that right from 1975 onwards with the promulgation of DCR along with a master plan, and subsequently, in the year 2008, with the enactment of the regulations, and still, what is more, in supersession of the Regulations by the Rules of 2019, the Law Giver has put in place the requirement of making available 10 per cent of land excluding roads for the purpose of communal and recreational purposes, when the layout exceeds 10000 square meters.

137. To the question, which we posed, viz., whether what is involved is acquisition of the property or an exercise of the power of eminent domain, we are of the view that stipulating the conditions that a person who seeks to develop his property in a sprawling and ever-growing urban metropolis which is sought to be

regulated by a law relating to a town planning cannot be viewed as acquisition of land within the meaning of Entry 42 in List III. Acquisition of land involves, no doubt, compulsory divesting of the rights of a person in his property.

138. We must bear in mind that while right to hold and enjoy property was a Fundamental Right under Article 19(1)(f), w.e.f. 1978 it ceased to be a Fundamental Right. Equally, Article 31, which was also a Fundamental Right in regard to property, including the right to compensation as provided under Article 31(2) stood deleted. Article 300A was inserted resurrecting only Article 31(1). The right to property has been described by this Court as a Statutory Right; a human right and also a constitutional right. We must therefore proceed on the basis that a person would continue to have despite the Forty-Fourth Amendment, a statutory right, a human right and a constitutional right to property.

139. An acquisition is a compulsory vesting of the property of a person with the state. It is traceable undoubtedly to the power of eminent domain assured to

every sovereign. It can undoubtedly be exercised only for securing public interest as contrasted with promotion of private interest (See *K.T. Plantation* (supra)[66]).

140. ***K.T. Plantations*** **(supra) was a case which involved the validity of a law which provided for compulsory acquisition under the State enactment. The understanding of this Court in *K.T. Plantations* (supra) was that a person cannot be deprived of his property merely by executive fiat without any specific legal authority or without support of law made by a competent Legislature (See paragraph-168). We must notice here that law for the scope of Article 300A has been explained by this Court in *Bishambhar Dayal Chandra Mohan and others v. State of Uttar Pradesh and others*[67] (paragraph-41) as follows:**

> **"41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property.**

[66] (2011) 9 SCC 1
[67] (1982) 1 SCC 39

Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State legislature, a rule, or a statutory order, having the force of law, that is positive or State made law. The decisions in *Wazir Chand* v. *State of H.P.* [AIR 1954 SC 415: (1955) 1 SCR 408 : 1954 SCJ 600 : 1954 Cri LJ 1029] and *Bishan Das* v. *State of Punjab* [AIR 1961 SC 1570 : (1962) 2 SCR 69 : (1963) 1 SCJ 405] are an authority for the proposition that an illegal seizure amounts to deprivation of property without the authority of law. In *Wazir Chand case* [AIR 1954 SC 415 : (1955) 1 SCR 408 : 1954 SCJ 600 : 1954 Cri LJ 1029] the police in India seized goods in possession of the petitioner in India at the instance of the police of the State of Jammu & Kashmir. The seizure was admittedly not under the authority of law, inasmuch as it was not under the orders of any Magistrate; nor was it under Sections 51, 96, 98 and 165 of the Code of Criminal Procedure, 1898, since no report of any offence committed by the petitioner was made to the police in India, and the Indian police were not authorised to make any investigation. In those circumstances, the Court held that the seizure was not with the authority of law and amounted to an infringement of the fundamental right under Article 31(1). The view was reaffirmed in *Bishan Das case* [AIR 1961 SC 1570 : (1962) 2 SCR 69 : (1963) 1 SCJ 405]."

141. **What this Court in *K.T. Plantations* (supra) meant was to distinguish 'law' as a legislative measure as distinct from mere Executive fiat.**

142. **The intention of Parliament was to do away with the Fundamental Right to acquire, hold and dispose of property (See paragraph-179). Deprivation of property must take place for public purpose primarily (See paragraph-180). Public purpose must be given an expansive meaning (See paragraph-181). Payment of compensation is a constitutional requirement under Article 30(1)(A) and under the second *proviso* to Article 31(A)(1) unlike Article 300A. After the Forty-Fourth Amendment, the constitutional obligation to pay compensation to a person deprived of his property is dependent on the Statute. (See para 183). We may refer to the following observations in paragraph 188:**

> **"188. We find no apparent conflict with the words used in List III Entry 42 so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under List III Entry 42. Right to claim compensation, therefore, cannot be read into the legislative List III Entry 42."**

143. **This would mean that the argument of the parties, based on the impugned provisions being violative of Article 254 of the Constitution, is untenable. We may equally notice paragraph-189:**

> **"189. Requirement of public purpose, for deprivation of a person of his property under Article 300-A, is a precondition, but no compensation or nil compensation or its illusiveness has to be justified by the State on judicially justiciable standards. Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300-A, it can be inferred in that article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors."**

144. **We may also recapture paragraphs-191 and 192:**

> **"191. The legislation providing for deprivation of property under Article 300-A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. Thus in each case, courts will have to examine the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above."**

> **"192. At this stage, we may clarify that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the Government to establish validity of such law. In the latter case, the Court in exercise of judicial review will test such a law keeping in mind the above parameters."**

145. A perusal of the paragraphs, which we have adverted to, would reveal that, while in paragraph-189, it is made to appear that no compensation or nil compensation or its illusiveness has to be justified on judicially justifiable standards, in paragraph-192, it is held that a law providing for acquisition of private property for public purpose cannot say that no compensation could be paid. At this juncture, we consider it apposite to refer to paragraph-141:

> **"141. Eminent domain is distinguishable alike from the police power, by which restriction are imposed on private property in the public interest e.g. in connection with health, sanitation, zoning regulation, urban planning and so on from the power of taxation, by which the owner of private property is compelled to contribute a portion of it for the public**

purposes and from the war power, involving the destruction of private property in the course of military operations. The police power fetters rights of property while eminent domain takes them away. Power of taxation does not necessarily involve a taking of specific property for public purposes, though analogous to eminent domain as regards the purposes to which the contribution of the taxpayer is to be applied. Further, there are several significant differences between regulatory exercises of the police powers and eminent domain of deprivation of property. Regulation does not acquire or appropriate the property for the State, which appropriation does and regulation is imposed severally and individually, while expropriation applies to an individual or a group of owners of properties."

146. **What is of interest to this Court in these cases is the observation that eminent domain is to be contrasted with police power, where restrictions are put in public interest, in connection with zoning regulations, urban planning, *inter alia*, by which the owner of a private property is compelled to contribute a portion of it for public purpose. No doubt, it is also held that Regulation does not acquire or appropriate the property.**

147. **We must appreciate the issues before us in the light of the said exposition.**

148. **The impugned provision does not represent in our view, a case of compulsory acquisition of land. A case of compulsory acquisition would be without there being any volition or consent of a person. The State purports to divest his rights in property and vest the rights with the State. The impugned provision does not appear to us to be a case of such acquisition as is contemplated in a law which is made with reference to Entry 42 in List III. In this context, we must also deal with the case based on Section 20 of the Act. Section 20 deals with contents of detailed development plan. Section 20 (d) reads as follows and it provides, *inter alia*, the contents:**

> **"Section 20(d). The acquisition by purchase, exchange or otherwise of any land or other immovable property within the area included in the detailed development plan whether required immediately or not."**

149. **From a perusal of the said provisions, what it contemplated, can be summed-up as follows. A detailed development plan can propose or provide to purchase or exchange any land or immovable property. The land may be required immediately or it may be not so immediately**

required. What is important is apart from purchase and exchange, the property may be 'acquired otherwise'. We are not concerned with a challenge to Section 20. As Section 20 stands acquisition by way of a gift cannot be said to be incongruous merely by reference to the two other expressly articulated modes of transfer of title, *viz.*, purchase and exchange. Undoubtedly, a gift is a transfer of property without there being any valuable consideration. It is an act of volition of the owner. In other words, if a plan does provide that right in land or other immovable property may be acquired in terms of a gift which may be executed, it may not involve straining the plain language, and also involve pouring meaning into the width of the expression 'otherwise' just as much as it avoids placing a narrow connotation on a word of wide import.

150. The decision in *Pandit Chetram Vashishta* (supra) was a decision, which turned on the absence of any power under which the open space or park was to stand vested in a corporation or to stand transferred to it. In fact, this Court found that the effect of the reservation was that the donor ceased to be the legal

owner of the land in dispute. He held the land for the benefit of society or the public in general. The donor became essentially a trustee preventing alienation of his right. The court however drew a distinction between the owner being transformed into the trustee and being prevented from transferring his rights and the local body being vested with the rights of the owner. As far as the impugned provisions in these cases are concerned, the DCR not only obliges setting apart a certain percentage (10 per cent) for the communal and recreational purposes in respect of very large projects but also a transfer, is to be made of the property so set apart by the owner. We will delve upon the impact of this decision at a later point of time in a different context. At the same time, we must also bear in mind, the Judgment of this Court *in* Yogendra Pal and others (supra). In Yogendra Pal and others, we have already noticed the facts. What was involved there was the violation of Section 192(1)(c) of the Punjab Municipal Act, 1911. The provision provided that the Municipal Committee may prepare a building scheme, which may, *inter alia*, provide that the amount of land in unbuilt

area shall be transferred to the committee for public purposes including use as public streets by owners of land either on payment of compensation or otherwise, provided that the total amount so transferred shall not exceed thirty-five per cent, and the amount transferred without payment shall not exceed twenty-five per cent, of any one owner's land within such unbuilt area. What appealed to this Court as the basis for transgression of Article 14 has been adverted to by us and which is contained in paragraphs-14 and 15 of the said Judgment. It must be remembered that the principal plank of attack against the provision in question was that it fell foul of Article 19(1)(f) read with Article 31 of the Constitution as the Articles stood then. The transfer effected in the said case, it may be noticed was prior to 20.06.1979 on which date the Forty-Fourth Amendment came into being. Therefore, the case was that it amounted to acquisition of property. This Court found merit in the contention that what was involved was actually acquisition and the transfer was not merely for a limited purpose. It was found that there was no provision in the Act to suggest that despite

employment of the land for public purpose, the ownership and possession or occupation continued with the landowner. The landowner was compelled to enjoy rights only as a member of the public. The Court also rejected the case of the transfer being only for a limited purpose. A perusal of Section 192(1)(c) reveals that the said provision is not comparable with the provision impugned in the cases before us. Section 192(1)(c) of the Punjab Tenancy Act, 1911 was clearly in the nature of acquisition. The rights of the person were extinguished effectively. The provision vested power or a discretion to acquire land either on payment of compensation or otherwise. As already noticed, this was done at a time when Article 19(1)(f) and Article 31 of the Constitution, both being Fundamental Rights, continued to hold the field. No doubt, the decision is rested ultimately on the impugned provision being found to be contrary to Article 14. What is pertinent, however, is that, in the case of the Rule/Regulation impugned, as we have already found, is not a case of exercise of power of eminent domain, and it is not a case of acquisition by means of compulsory exaction of

the property. What is involved in these cases, is a different factual matrix. A person or a group of persons, owning an extent of land, which is in excess of 10,000 square metres in a fast-growing urban metropolis, wish to develop the land. It is, apparently, a commercial venture. They put-up, what is called, special buildings or group development. This involves making optimum use of the land by putting up vertical constructions. In other words, ordinarily, large number of persons would come to occupy the area with a layout of more than 10,000 square metres. The Law Giver has contemplated provision of roads within the layout of roads. In fact, the roads are themselves to become public. Interestingly, even in the challenge made by the Writ Petitioner in Writ Petition No. 651 of 2015, *viz.*, the petitioner has specifically limited the challenge to the regulation to the requirement of gifting the area comprised in the land for communal and recreational purposes. The Regulations, as did the Rules, provide for the roads to become public and become open to the members of the public. A gift, in this regard, is not ironically objected to.

151. We have noticed from the pleadings that the appellants and the petitioner substantially do not challenge the setting apart of land for the purpose of communal or recreational purpose. The objections appear to be as follows. The word 'communal' must be contextually interpreted to confine the benefit of reservation for the occupants of the buildings and it must not be made available to the members of the public. In the case of Vasanth Apartments, they object to the land set apart under the gift deed, being used to cater to the members of the public in general, by converting it into a public road. In fact, it must be remembered that in the case of Vasanth Apartments, as rightly pointed out by Shri Jayant Muth Raj, learned Senior Counsel, the gift was not executed by the members of the Association. The property was gifted by the developer as a condition for developing the land. The developer, in other words, who put together the project or developed the project, is the person who would have a right to have the property revested. He accepts the gift. It is obvious that having been a party to the gift it may not lie in his mouth to impeach the same.

[See in this regard the Judgment of this Court in *Narayanrao Jagobaji* (supra)]. It is not as if the members of the Vasanth Apartment Owners Association claim to have an assignment of the right over the land which is gifted from the original owner. Therefore, as far as the members of the Vasanth Apartment Owners Association are concerned, on the factual basis available, it may not lie in their mouth, noticing two other features as well, to contend that the Court must invalidate the Rule. The gift was executed in the year 1994. The Writ Petition is filed almost 12 years after. Secondly, the first Writ Petition, filed by the members of the Vasanth Apartment Owners Association, was by drawing support from the gift deed. They wanted that the property must be continued as recreational and OSR area. A learned Single Judge allowed the writ petition. Thereafter, there were two Writ Appeals filed, one by persons who claimed that the area was being used as a public road, and another, by the Corporation of Chennai and the CMDA. There was an interim Order passed by the Division Bench. It is thereafter, that the second Writ Petition is filed by them challenging the Rule. While,

it is true that mere passage of time will not make an unconstitutional provision valid, the delay, with which a prevailing Statute is impugned, becomes a factor, which the Court would not ignore. In this case, as if such factors were not sufficient, we notice the further development. The Rules came to be repealed by the Regulations in the year 2008 and the Regulation stood repealed in the year 2019 by Statutory Rules made in the said year. The challenge to the Rule, on the basis of Article 300A and, indeed, Article 14 as well by Association of Vasanth Apartment Owners Association must fail, as it cannot even be their case that their right in property was deprived. The appellants never had any proprietary right in the property to allege deprivation of the same. Even if the Rule is found bad, there can be no question of voiding the gift at the appellant's instance.

152. In the case of M/s. Keyaram Hotels Pvt. Ltd., their complaints, apart from those dealing with legality of the Rule on other grounds, which we had noticed and discussed, remain the following.

Before we go to the other complaints, we have already noticed, in paragraph 10 of the Writ Petition, the appellant/petitioner (M/s. Keyaram Hotels Pvt. Ltd.) has expressed its willingness for stipulating open space as required for communal and recreation use of the occupiers and lawful uses of the building and it was specifically averred that it would satisfy the public interest. It is specifically undertaken that they will keep 10 per cent of the area as open space for communal and recreational purpose. However, they have raised the complaint that further, apart from the direction to execute the gift, the condition, imposed to provide exclusive frontage for the said open space into the main road, is unsustainable in law. It is the complaint that the attempt to the third respondent is to gain entry into the property of the petitioner to make use of the open space reserved, detrimental to the rights of the property owner.

153. The matter may be viewed in the following manner. In the facts in *Pandit Chetram Vashishta* (supra), it was held that the position of the developer, would be that of a trustee. It was so held in the absence of a

statutory mandate. Now, in this case, there is a statutory mandate to execute a gift deed. The question would arise as to what would be the nature of the rights of the donee, *viz.*, the local authority. Would the donee become an absolute owner? Can the local authority transfer the land? Can the local authority build on the OSR area? The answer to all these questions is only in the negative. Unlike the donee, in the case of a gift, the local authority cannot in anyway acquire the right as the absolute owner. Just as in the case of *Pandit Chetram Vashishta* (supra), where the developer would be a trustee, we would think that the Rule, if is to be upheld, in the conspectus of the law and bearing in mind the object, the transfer by way of a gift to the donee will be only for the purpose of ensuring that the object of the law is attained, *i.e.*, the property is maintained as OSR. The local authority, under the gift deed, would be a mere trustee. As trustee, it will be the obligation of the local authority to ensure that all such lands, set apart under the impugned Rules/ Regulations, are effectively maintained as such. In

this regard, in the Open Space Act, 1906, a U.K. Law, Section 3 reads as follows:

> "3 Transfer to local authority of spaces held by trustees for purposes of public recreation.
>
> (1) Where any land is held by trustees (not being trustees elected or appointed under any local or private Act of Parliament) upon trust for the purposes of public recreation, the trustees may, in pursuance of a special resolution, transfer the land to any local authority by a free gift absolutely or for a limited term, and, if the local authority accept the gift, they shall hold the land on the trusts and subject to the conditions on and subject to which the trustees held the same, or on such other trusts and subject to such other conditions (so that the land be appropriated to the purposes of public recreation) as may be agreed on between the trustees and the local authority with the approval of the Charity Commission.
>
> (2) Subject to the obligation of the land so transferred being used for the purposes of public recreation, the local authority may hold the land as and for the purposes of an open space under this Act."

154. The very goal of town planning requires nothing less. Once the goal of executing the gift and the results it produces in law, are appreciated in the above manner, we find that the apprehensions and the contentions of the appellant/petitioner lose their

sheen. We are unable to accept, in the context of the Act of the Rules/ Regulations, that, in such a large project, when the layout is more than 10,000 square metres, executing a gift deed, which would ensure compliance, would fall foul of the requirement of either Article 14 or Article 300A. The developer/owner, remained only a trustee even without a gift. The provision for setting apart 10 per cent, is invulnerable. The area will even without a gift remain out of bounds for the project proponent/owner. The OSR, being an inviolable requirement, the additional requirement, meant and understood as a measure to ensure compliance and prevent misuse and or disuse, must not be understood as deprivation. As already discussed, the gift will not convert the Local Body into an absolute owner. Instead, in place of the original owner, continuing as a trustee, the Local Authority becomes the trustee. The purpose and the nature of the obligation will remain and haunt both the Local Body as also the original owner. The Rule/Regulation at any rate also, is a law which sanctions deprivation even assuming there is

deprivation. However, we are of the view that, in substance, the Rule/Regulation cannot be understood as deprivation under Article 300A.

155. We have indicated earlier that this Court has recognised Right to Property as a Constitutional Right on account of insertion of Article 300A. In the context of the Principle of Unconstitutional Condition, as recognised in the United States, could it be said that the impugned Rule/Regulation presents a case of an unconstitutional condition? While, as already found by us, the impugned provisions, do not make out a case of acquisition as it is not a compulsory divesting of title and a gift is executed on the basis that the project proponent/owner volunteers to execute the gift deed and no doubt, in view of the Rule, the execution of the gift deed, finally, brings in the element of consent and takes the transaction out of the Doctrine of Eminent Domain, which requires compulsory acquisition *de hors* the consent of the person having interest in the property, but then the question arises, whether the impugned provisions involves a person having a Constitutional Right under Article 300A,

having to sacrifice his Right as a condition to obtain the development permit. This Court has declared the right of a person to construct a building, is a right under the law, viz., the Statute, which governs the same. In the said sense, it becomes a Statutory Right. The right is hedged in necessarily with limitations and conditions. Now, superimposing the mandate of Article 300A, the question arises, whether the instant case involves employment of an unconstitutional condition. In *Ahmedabad St. Xavier's College Society v. State of Gujarat*[68], Justice Mathew while dealing with the content of the right guaranteed under Article 30(1) in regard to recognition or affiliation held inter alia as follows:

> **"158. The doctrine of "unconstitutional condition" means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right. This doctrine takes for granted that 'the petitioner has no right to be a policeman' but it emphasizes the right he is conceded to possess by reason of an explicit provision of the Constitution, namely, his right "to talk politics". The major requirement of the doctrine is that the person complaining of the condition must demonstrate that it is unreasonable in the special sense that it takes**

[68] (1974) 1 SCC 717

away or abridges the exercise of a right protected by an explicit provision of the Constitution (*see* William W. Van Alstyne: "*The Demise of the Right-Privilege Distinction in Constitutional Law*" [81 Harv Law Rev 1439])."

156. In a case involving exercise of power to terminate service of a permanent employee of public/semi government undertaking or statutory corporations only by giving a month's notice, this Court inter alia held in *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*[69] as follows:

> **283. The problem also could be broached from the angle whether the State can impose unconstitutional conditions as part of the contract or statute or rule etc. In (1959-60) 73 *Harvard Law Review*, in the Note under the caption 'Unconstitutional Condition' at pages 1595-96 it is postulated that the State is devoid of power to impose unconstitutional conditions in the contract that the power to withhold largesse has been asserted by the State in four areas i.e. (1) regulating the right to engage in certain activities; (2) administration of government welfare programme; (3) government employment; and (4) procurement of contracts. It was further adumberated at pages 1602-03 thus:**
>
> > **"The sovereign's constitutional authority to choose those with whom it will contract for goods and services is in effect a power to withhold the benefits to be derived from economic dealings with the government. As**

[69] (1991) Suppl.1 SCC 600

government activity in the economic sphere increases, the contracting power enables the government to control many hitherto unregulated activities of contracting parties through the imposition of conditions. Thus, regarding the government as a private entrepreneur threatens to impair constitutional rights…. The government, unlike a private individual, is limited in its ability to contract by the Constitution. The federal contracting power is based upon the Constitution's authorisation of these acts 'necessary and proper' to the carrying out of the functions which it allocates to the national government. Unless the objectives sought by terms and conditions in government contracts requiring the surrender of rights are constitutionally authorised, the conditions must fall as ultra vires exercise of power."

Again at page 1603, it is further emphasised thus:

"When conditions limit the economic benefits to be derived from dealings with the government to those who forego the exercise of constitutional rights, the exclusion of those retaining their rights from participation in the enjoyment of these benefits may be violative of the prohibition, implicit in the due process clause of Fifth Amendment and explicit in the equal protection clause of the Fourteenth Amendment against unreasonable discrimination in the governmental bestow of advantages. Finally, disabling those exercising certain rights from participating in the advantages to be derived from contractual relations with the government may be a form of penalty lacking in due process. To avoid invalidation for any of the above reasons, it must be shown that the conditions imposed are necessary to secure the legitimate objectives of the

contract, ensure its effective use, or protect society from the potential harm which may result from the contractual relationship between the government and the individual."

157. The Doctrine of Unconstitutional Condition involves a person having to give-up a Constitutional Right as a condition to obtain a benefit he is otherwise entitled to. While it is in the context of Article 300A, to be understood that the Right to Property cannot be deprived except in accordance with law and even as held in *K.T. Plantations* (supra) that such law must be fair and reasonable, once it is found that there is such a law, then, even if there is deprivation, it cannot be found that Article 300A is violated. We have already found, in fact, that there is no deprivation in the context of the impugned Rules/Regulations. In the conspectus of the DCR/ Regulation, the nature of the right to property available under the Constitution as expounded in *K.T. Plantations* (supra), the seemingly never ending imperative needs of an urban metropolis, the indisputable need to set apart 10% for the recreational purpose and the discussion we have already made with

regard to the effect of the gift and the purpose it serves, we are of the view that the rule/regulation may not give rise to any room for invoking the doctrine of unconstitutional condition. We must continue to remain alive to the vital dimension which we have already indicated that the impugned provision essentially pertains to what can be described as purely commercial projects though it is linked with property rights. In other words, particularly from the stand point of invoking the doctrine of unconstitutional condition, the distinction between the person putting up a residential building and the proponent of a complex, commercial project in a metropolis cannot be lost sight of. At any rate, we cannot in the conspectus of the Rule/Regulation and the salutary purpose, it seeks to achieve hold the requirement as an "unreasonable condition in a special sense". [See para 155]

158. The case of the CMDA is that in view of the benefits which accrue, it could be a case of nil compensation. The distinction between nil compensation and no compensation has been laid down to be that in the former it is permissible on the basis that it becomes liable

to discharge the liability in regard to the person/property. In the context of the rule/regulation, we would not think that there would be violation of Article 300A on the basis of it being a deprivation of property involving breach of a mandate to pay compensation. It must be at once noticed that what is involved is the need to execute a gift. By its very nature, in the case of a gift, there cannot be any valuable consideration. If compensation is to be paid then it would cease to be a gift. Having regard to the discussion we have made regarding the validity of the rule/regulation otherwise, we do not think that execution of the gift which we have found transformed the donee not as the absolute owner but as trustee would require having regard to the salutary purpose, the need to pay compensation. It may not be a case where the respondent discharges any liability as such. It is another matter that the project proponent stands to make a considerable profit as a result of the permission granted.

159. In case there is no requirement to execute a gift of OSR area in terms of *Pandit Chetram Vashishta*

(supra), the project proponent/owner would remain in the position of a trustee. As a trustee in law is the legal owner, and therefore this being the position in law, he may not be disabled from transferring the property in any manner. However, as he is under obligation as a trustee to maintain the property as OSR, he cannot defeat the obligation by transferring the same and it can lead to abuse. No doubt, he would be prohibited from raising any construction over the OSR area. One of the bundle of rights of an owner, however, which would survive after the owner steps into the shoes of a trustee, could be said to be the power to exclude 'others' from the OSR area. The attribute of ownership of property consisting of the power to exclude others may continue with the project proponent in the absence of a gift. Now, interestingly, this again would depend upon the interpretation of the words 'communal and recreational purpose'. This is for the reason that if the OSR area can be accessed by members of the general public as contended by the respondents, then, the project proponent cannot possibly have the right of an owner to exclude them. Equally, even with

the requirement to maintain the OSR area in the absence of the demand for a gift, it could be said that the sole project of proponent could have the right to remain in possession. Another dimension may be noticed. What would happen if the OSR area is acquired in the exercise of the power of eminent domain for the public purpose? Who would be entitled to the compensation, if a gift is made in terms of the impugned Rule/Regulation? We would think that since the interpretation we are placing is that the gift under the Rule/Regulation is intended only to ensure due compliance with the requirement of the OSR area being effected and to prevent misuse by the owner, as between the original owner and the local authority, it would be the original owner, who may be entitled to the compensation.

160. The time, therefore, is ripe to deal with the meaning of the words open space reservation of land for communal and recreational purposes.

161. Group development falls under Rule 19(b)(2) of the DCR. Group development is defined as accommodation for residential or commercial or combination of such

activities housed in two or more blocks of buildings in a particular site irrespective of whether these structures are interconnected or not. Rule 19(b)(ii) proceeded to provide for the minimum width of the public road on which the site abuts. The vehicular access way including passage if any within the site was to have a minimum width. It also referred to set back requirements. Parking standards were prescribed [See 19(b)(ii)(v)]. It is, thereafter, that the open space requirement was provided by declaring that reservation of land for communal and recreational purposes shall be as follows and it must at this juncture be noticed that there is an explanation, which reads as follows: -

> **"Explanation: -**
>
> **(1) For the purposes of this rules, existing development defined as one "Where the extent of ground area covered by structures already existing (prior to application) in 25% and above of the total site area".**
>
> **(2) In case of existing development where it is difficult to leave the 10% area as open space for communal / recreational purposes, the Authority reserves the right to collect the market value of equivalent land in lieu of the land to be reserved. However, if on a future date the developer wants to demolish the existing structures and raise new structures**

on the site in question, the communal and recreational space shall be reserved, as per rule.

(3) The land so reserved shall be free from any construction by the owner or promoter or developer. The land for communal and recreational purposes shall be restricted at ground level in a shape and location to be specified by the Chennai Metropolitan Development Authority."

162. In the case of Writ Petition No. 691 of 2015 wherein the regulation of the year 2008 has been challenged as we have noticed there is no challenge to Regulation 29(6)(a), which, *inter alia*, provides how the land reserved is to be restricted at the ground level. It is true that there is a challenge to Annexure XX, which we have extracted in paragraph 118 of the judgment. But the absence of challenge to Regulation 29(6) is fatal. We must proceed on the basis that there is no challenge to the terms of the explanation to Rule 19(b)(II)(vi) which in Clause (iii) provides that the land so reserved shall be free from any construction by the owner, promoter or developer, and what is more important, the manner in which the land is to be provided for communal and recreational purpose

is that it is to be restricted at ground level in a shape and location to be specified by the Chennai Metropolitan Development Authority. This provision has not been expressly challenged. In the absence of a challenge, what is contained in a rule and also the like provision in the regulation, the resultant position would be the exact shape and the location is to be determined by the CMDA.

163. The problem, however, still persists in the form of the meaning of the words 'communal and recreational purpose' in the case of a site having an extent between 3,000 square metres to 10,000 square metres. Rule 19 (b)(vi) to 19(2)(b)(vi) contemplate that the space so required is to be transferred to the authority or local body designated by the authority free of cost through a deed. It is further provided that the local body may provide the residents association or flat owners association for maintaining such reserved space as park. Significantly, in the case of a site having an extent between 3,000 to 10,000 square metres, the Rule declares that public access to the area as earmarked will not be insisted upon. When it comes to the extent

of the site with which this Court is concerned, *viz*, where the extent of site exceeds 10,000 square metres, the requirement in the Rule, *viz.*, is common to 10 per cent of area excluding road had to be transferred by a gift is insisted upon. It is provided that it is obligatory to transfer the reserved 10 percent of the site area. No charges can be accepted in the case of new development or re-developments. It will be noticed that in the case of Rule 19(b)(II)(vi) in the case of site having extent between 3,000 square metres to 10,000 square metres, the CMDA or the local body may permit the residents association or flat owners association for maintaining the reserved space as parks. In the case of site having extent of above 10,000 square metres under the column 'reservation', it is not provided that the flat owners or residents association may be permitted to maintain the reserved park. However, it will be noticed that Rule 19(b)(II)(vii) reads as follows: -

> **"(vii) The Authority reserves the right to enforce the maintenance of such reserved lands by the owner to the satisfaction of the Authority or order the owner to transfer the land to the Authority or any local body**

designated by it, free of cost, through a deed, the Authority as the case may be, reserve the right to decide on entrusting the maintenance work to institution/individual on merits of the case.

Explanations under DCR 19 (b):-

(1) For Economically Weaker Section group housing, the set back shall be 4.5 metre from the site boundary and the spacing between the blocks shall be a minimum of 3 metres. The vehicular access way within the site shall have a minimum width of 4.5 metres. Other stipulations shall be as in rule 19(b) (II) above. But, this shall be applied only in sites duly declared for Economically Weaker Section housing by Government.

(2) The corridor within the buildings shall be accordance with the standard prescribed in Annexure XII-A.

(3) In matter of standards other than specified in these rules, the stipulation and the specifications laid down by the Indian Standards Institutions shall apply.
(4) Structures incidental to the main activities such as water-closet, bath and pump room shall not be construed as individual blocks for the purpose of these rules. But, these structures shall not be permitted in the prescribed set back spaces.

III (a) Notwithstanding anything mentioned above layouts for group housing, Economically Weaker Section Housing, sites and services projects, slum improvement schemes may be approved, subject to such conditions as may be stipulated by the Authority."

164. The impact of Rule 19 (b)(II)(vii) is as follows. It empowers the CMDA to enforce the maintenance of the reserved areas by the owner to the satisfaction of the authority or to order the owner to transfer the land to the authority or any local body free of cost through a deed. The authority also reserves the right to decide on entrusting the maintenance work to institutions/individual on the merits of the case. It is noteworthy that there is no challenge to Rule 19(b)(II)(vii). It would appear that when a gift is executed then the duty of maintaining can be given to institution/individual on the merits of the case. This would mean that even the project proponent or other individual/individuals who may have an interest as in the case of Vasant Apartments Owners Association, the said Association could be asked to maintain the open area.

165. The impression we gather on reading the contents of reservation to be made in respect of site having an extent between 3,000 to 10,000 square metres is that the reserved area is to be maintained as a park. When it comes to the site having more than 10,000 square

meters, the provision that public access for area shall not be insisted upon is not to be found. This means that when it comes to the layout which in the wisdom and the policy of the Rule Maker, which as we have seen, has been made after the process undergone under the Act, as we have noticed, and apparently, after hearing objections, if any, and with the approval of the government that, were a large chunk of land be developed for group development, as defined, and certain percentage, which in these cases is 10 per cent or 1/10th of the total layout excluding roads is to be set apart as the OSR area. The word park is not in any way inconsistent with recreational purpose. It does not require much imagination to conclude that in an urban area and with a site being in excess of 10,000 square metres (nearly two and a half acres) where group development takes place, there would be a large number of people who would occupy the said area. Group development can be substantially conflated with flats and apartments comprised in two or more blocks or buildings as required to satisfy the requirement of group development under Rule 19(b)(II). A large number

of people would occupy the said land. This is understandable having regard to the size of the layout and the definition of group building. Planned development, particularly, when it is informed by deep vision about the future does call for an expansive approach. Congestion in urban areas is a foreseen certainty. The requirement for lung space and that too the need for the same being available in the close vicinity of the area of residents is not difficult to conjure. Planned development has a considerable deal to do with the quality of the lives of the residents in an urban area, as can be perceived from provision made for aspects relating to parking, setback, roads, all of which do apparently make inroads into absolute right of property of developer. They are indispensable necessities from the standpoint of the town planner as much as it is for the residents in an urban area. While we are conscious of the fact that the DCR did contemplate open space zones which must be understood as parks, etc., as one of the zones, the idea, apparently, was to avoid concentration and the consequent need to undertake avoidable travel for the

residents of an area to the site of the open space zone. An open space requirement is stipulated world over based on very formidable considerations. The fact that no construction is to be put up is the very corollary of and is in consonance with an 'open' space requirement. Still further, parks inevitably would have trees. Trees ensures a steady supply of much needed oxygen. Providing other recreational measures, which are at the heart of quality of a person's life, in keeping with modern demands, are critical elements of a legitimate public interest.

166. Having made these observations, we pass on to consider further aspects. In the case of Vasanth Apartments, i.e., Civil Appeal Nos. 1890-1891 of 2010, the developer undoubtedly executed a gift deed. A contention is taken on behalf of the respondents including Shri Jayant MuthRaj that the donor has gifted the land for roads and parks from the perusal of the gift deed. It would appear that the donor has indeed gifted the land in question and provided that the donee may peacefully and quietly enjoy the said land 'of roads/parks' free from all encumbrances. At this

juncture, we bear in mind the actual terms of the gift deed executed in the case of Association of Vasanth Apartments, which we have adverted to in paragraph-47 of this Judgment.

167. The Division Bench has considered the report of the Advocate Commissioner also to find that there existed a kachha pathway and that is a road which is being used by thousands in terms of the gift deed which came into effect. It is their contention that even if it is found by this Court that in terms of the OSR requirement of 10 percent of the land, it can only be used as open space for communal and recreational purpose and not for a road, this Court may not interfere.

168. Firstly, we must consider the ambit of the words communal and recreational purpose and find whether it could take in a public road for being used by members of the public generally. Equally, we must consider whether the word communal is capable of extending the benefit of the open space requirement to the members of the general public or whether it must be confined to the beneficiaries of the group development. In other

words, if the word communal is interpreted as the community of the beneficiaries of the group development, then it must be understood as meaning that members of the general public cannot be permitted to partake of the benefits flowing from the open space reservation. For instance, if adjoining the site and as indicated in the explanation in a shape and location determined by the CMDA, a park is constructed. By use of the word communal and interpreting it to mean a community which is larger than the mere beneficiaries of the group development as such, then the benefit of the open space may become available to the general public in the nearby area. This would have the advantage of facilitating the members of the public avoiding travelling to the areas where there is recreation or open space, as for instance, under the zoning requirements. Undoubtedly, the absence of any construction which is indispensable to make it an open space area and which is insisted upon also will provide a large chunk of space for all the people in the area. Making available the facilities on the basis that when development is permitted, it brings in its train

certain responsibilities for the project proponents which can be appreciated as legitimate State interests, is one way of approaching the issue. It must be understood in all these cases that setting apart of 10 percent of the area is actually as such not objected to. This means all parties are agreed that the law providing for setting apart of 10 percent of the total area excluding roads in the case of group development in excess of 10,000 square metres is legitimate and valid, unless we find favour with the arguments that it is otherwise constitutionally infirm. We have already found that the provision does not offend Article 14 on the ground that it represents a species of class legislation. We are unable to also find that the provision is manifestly arbitrary. If in other words, there is no other basis to find the impugned rule vulnerable, we can safely proceed to hold that the requirement of OSR is not unjustified. We have noticed the stand of the two appellants and the writ petitioners also in this regard. We find that it is their stand that they are prepared to maintain the 10 percent area as OSR. What is objected is to the

execution of the gift deed and allowing the property rights to change hands. This is apart from the objection to the chosen site being made accessible to the general public.

169. We have noticed that in *Pandit Chetram Vashishta* (supra), this Court has held that in the absence of valid provision under which the gift in the said case could be supported, the mere resolution was not sufficient. The position still was found to be that the original owner would continue to be a trustee. He cannot transfer or change the nature of the property. In fact, in the decision reported in *Virender Gaur* (supra), this Court discountenanced conversion of what was an OSR area into land on which construction though for what was projected as a laudable object was carried out. We are of the view that bearing in mind the laudable object the law relating to town planning which has been the very basis for our reasoning otherwise, we must clarify that what the Rule and the Regulation mandatorily stipulated was the dedication and maintenance of 10 percent of the area for communal and recreation purposes area only. There is inviolable duty

on the part of all including the local body and the CMDA to ensure that an area which is set apart or purported to be set apart in terms of the OSR requirement under the Rule/Regulation in question is used only for communal and recreational purpose. We notice in, this regard, the complaint of Ms. V. Mohana, learned Senior Counsel, as indeed the other counsel that only lip service is being paid to the projected sublime object of maintaining OSR. This cannot be permitted.

170. Unrelentingly persevering is the aspect relating to the contours of the word communal in the setting of the Rules/regulations and Act. Rules do shed some light in Rule 19 (b)(II)(vi). In regard to plots having a size of 3,000 square metres to 10,000 square metres, the law giver has provided that it shall not be necessary to provide access to the public. When it comes to the impugned Rule, *viz.*, Rule 19 (b)(II)(vi) providing for plot size in excess of 10,000 square metres, it is apparent that the access of the members of the general public to the OSR area is to be permitted. This result is inevitable having regard to

the fact that unlike the immediate predecessors, *viz.*, plot size having 3,000 to 10,000 square metres wherein it has been indicated that public access shall not be insisted upon such a relaxation is conspicuous by its absence. The wisdom and the value judgement, which underlies permitting or contemplating public access to the OSR area, can be understood only in terms of the difference in the size. Once wisdom and a value judgment are beyond the pale of judicial review and scrutiny, and further, it is found that the project developer and also the beneficiaries of the group development are duty-bound for maintaining an OSR area, then the matter goes to the legitimacy of the public or State interest. The consequences of executing the gift deed and the underlying purpose have been adverted to by us already. In fact, apart from it being a legitimate public purpose, even the rough proportionality concept in Nollan (supra) would appear to be satisfied.

171. **In the case of M/s. Keyaram Hotels Pvt. Ltd., the terms of the gift deed provide that the gift is made so that the donee may at all times, peacefully and**

quietly, possess and enjoy the said portion only as open space, free from all encumbrances, without any lawful eviction, interruption, claim whatsoever from the donor. A perusal of Rule 19 (b)(II)(vi) in relation to the extent of size between 3,000 and 10,000 square metres contemplates that the reserved area is to maintained as a park.

172. We notice that under Rule 61 of the Andhra Pradesh Group Development Scheme, sub-Rule (7) reads as follows:

> "61(7) Minimum of 10% of site area shall be earmarked for organised pen space and be utilised as greenery and shall be provided over and above the mandatory setbacks at suitable location accessible to entire community to the satisfaction of the competent authority. Such open space shall be open to sky and shall not be over cellar floors.
>
> (Emphasis supplied)

173. We may also notice sub-Rule 61(14):

> "(14) All roads and open spaces mentioned in this Rule shall be handed over to local body at free of cost through a registered gift deed before issue of occupancy certificate. The society / association may in turn enter into agreement with the local authority for utilizing, managing and maintaining the roads and open spaces. In case of any violation of

encroachment, the local authority shall summarily demolish the encroachments and resume back the roads and open spaces and keep it under its custody."

174. Under Regulation 23 of the DCR for Greater Bombay, 1991, open space is to be provided, in fact, for any layout, starting from 1001 square meters to 2500 square meters, wherein 15 per cent is to be kept as open space. For an area of 2501 square meters to 10000 square meters, 20 per cent has to be kept as open space. In the case of residential and commercial layout for area above 10000 square meters, '25' per cent has to be maintained as open space. There are certain exceptions. The ownership, no doubt, is to vest by a deed of conveyance in all the property owners on account of whose holdings, the recreational space is assigned. It also appears to provide that the remaining area of recreational open space or playground (that is after excluding structures providing for pavilions, gymnasium, clubhouses, etc.), is to be made accessible to all members as a place of recreation, garden or playground.

175. **The words 'communal and recreational purpose', for which the OSR area is to be used, in the case of the impugned Rule/Regulation, appears to indicate that the word 'communal' is to be given a meaning, which would be in keeping with the object of law, enable members of the public as well, to gain access when the layout is more than 10000 square meters. In this regard even in *Pt. Chetram* (supra) we recapture the following:**

> **"6. Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. …"**

176. Rule 61(7) of the Andhra Pradesh Rules in Andhra Pradesh, which we have referred to, is unambiguous that the area used as 'greenery' shall be accessible to the 'entire community'. It is to be secured by means of the gift contemplated in Rule 61(14). While, we cannot be sitting in Judgment over the said Rule, we would think that the purport of the impugned Rule/Regulation must be understood as persuading the Court to not place a narrow interpretation.

177. In this regard we find reassurance in the view taken by the courts in the United States even in the presence of the taking clause under the 5th Amendment to the U.S. Constitution. In an Article titled "Techniques for Preserving Open Spaces" published in 75 Harv. L. Rev. 1622, we find the following:

> "Required Dedication and Reservation. — A municipality can require the developer of a new subdivision to provide such facilities as roads, streets, sewers, and playgrounds as a condition to plat approval. In the leading case of Ayres v. City Council a requirement that the subdivider dedicate land for road and street purposes and leave undeveloped an accompanying area for trees and shrubbery was approved on the theory that since the new subdivision created the need for and would specially benefit from the improvements, the developer and ultimate purchasers rather than the entire

> community should bear the cost of providing them. In a case involving required reservation of land for a public park the argument that this would be an unconstitutional taking of land was rejected on the theory that the subdivider would be compensated by the share of the benefits to the whole community which accrued to his particular development. The Pennsylvania Supreme Court has taken a contrary view, however. And where the need for a particular improvement is a general one, not specifically attributable to the subdivider's activity, the entire municipality must bear the cost."

We would therefore come to the conclusion that the word 'communal' must be understood as where the layout exceeds 10000 sq.meters entitling members of the general public also to avail the benefit of the OSR area. Once, the word 'communal' is so understood it further fortifies us in our conclusion that there would be no infraction of Article 300A or Article 14 as understanding the execution of the gift deed as obligating the donee only to act as a trustee to ensure the fulfilment of the sublime goal of the law and since the owner/developer would not have a right to exclude others or to claim exclusive right to possession which would be incongruous to recognising the right of the members of the general public to access to the OSR

area. This discussion furnishes our rationale to uphold the Rule / Regulation and to hold that it can withstand the challenge based on Article 300A on the basis that properly appreciated the "so called compelled gift" would be valid. Even proceeding on the basis that a challenge to Rule 19(b) would imply a challenge to the Explanation as well, on the reasoning which has appealed to us, namely, about the nature of the right under the Gift Deed as also finding that the word 'communal' is intended to reach the benefit of the OSR area to the members of the public as well, there would be no merit in the contention.

THE UPSHOT OF THE ABOVE DISCUSSION:

178. The upshot of the above discussion may be summed-up as follows:

I. **Rule 19 of the DCR, which is impugned, is statutory in nature;**

II. **Rule 19 is not *ultra vires* the Act;**

III. **The impugned Regulation is not *ultra vires* the Act;**

IV. **Neither the impugned Rule nor the Regulation violates Article 14 of the Constitution of India;**

V. **The impugned Rule/Regulation does not violate Article 300A of the Constitution of India;**

VI. **The areas covered by the OSR cannot be diverted for any other purpose. The respondents are duty-bound to ensure that the area set apart as OSR is stringently utilised only for the purpose in the Rule/Regulation. We direct that no area meant for OSR shall be utilised as dumping yards or any other purpose other than as OSR;**

VII. **As far as Civil Appeal Nos. 1890-1891 of 2010 are concerned, we are of the view that in view of the fact that there appears to have been a *kachha* road, even at the time of the gift executed as early as in February, 1994 and it was being used as a road by large numbers of members of the public to reverse the position on the ground, may produce a great deal of injustice, which we would avoid by resorting to the principle enunciated in the decision of this Court referred to in**

Taherakhatoon (D) By LRs. v. Salambin Mohammad[70]**.**

However, if the property gifted is in excess of the area used for the road, we direct that the excess land shall be used for the purpose of OSR only. We also direct that the Authority may consider making available the maintenance of the said area to the appellants, namely, Association of Vasanth Apartments Owners, if they are prepared to maintain it in terms of the observations contained in this judgment.

179. Civil Appeals 1890-1891 of 2010 are disposed of. The other Appeals and the Writ Petition will stand dismissed subject to the observations/directions we have made earlier. No order as to costs.

……J.
[K.M. JOSEPH]

……J.
[PAMIDIGHANTAM SRI NARASIMHA]

NEW DELHI;
DATED: February 13, 2023.

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[70] **(1999) 2 SCC 635**