

OSWAL AGRO MILLS LTD.

v.

HINDUSTAN PETROLEUM CORPORATION LTD. AND
OTHERS

(Civil Appeal No.10933 of 2013)

DECEMBER 10, 2013

[G.S. SINGHVI, H.L. GOKHALE AND
RANJANA PRAKASH DESAI, JJ.]

Town Planning – Maharashtra Regional and Town Planning Act, 1966 – s.37(1AA) – Development Control Regulations (DCR) for Greater Mumbai, 1991 – DCR 57(4)(c), 16 and 64 – Change of land user – Conversion from industrial zone to residential/commercial zone – Proposed construction of residential-cum-commercial complex of appellant in the vicinity of the Refinery run by respondent no.1 – Objections to the construction, from point of view of the safety and security of the refinery, and of the would-be occupants of the housing complex, as well as their health – High Court allowed writ petition filed by respondent no.1 and quashed sanction accorded by the competent authority of the Municipal Corporation of Greater Mumbai for change of user and construction of residential and commercial complex and directed the Municipal Commissioner to reconsider the application of appellant keeping in view the objections raised by the Police Department, Ministry of Petroleum, Ministry of Environment and Intelligence Bureau and the Security Control Regulations – Propriety – Held (per majority): Proper – Respondent no.1 could not be faulted for constructions permitted by respondent no.2-Municipal Corporation – Merely because some constructions were permitted at some distance from the refinery of respondent no.1, does not justify further high-rise constructions in the vicinity – Two wrongs do not make one right – Respondent no. 1 lodged their objections,

- A *and Municipal Authorities were required to consider the same but they did not – Public interest cannot be sacrificed at the altar of commercial interests – Security threat clearly placed on record, as also the possible danger to the health of the occupants of the buildings already constructed and to be constructed as well – No fault found with the judgment of High Court.*
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C **Dispute arose with respect to the proposed construction of the residential-cum-commercial complex of the appellant in the vicinity of the Refinery run by the first respondent Hindustan Petroleum Corporation Ltd. ('HPCL'). The area in question was earlier designated as a Special Industrial Zone, and commercial-cum-residential activities were not permitted therein. However, subsequently, the appellant had been permitted the change of user (conversion from industrial zone to residential/commercial zone) by the Municipal Corporation of Greater Mumbai.**

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E **The High Court allowed the writ petition filed by respondent No.1-Hindustan Petroleum Corporation Ltd. (HPCL) and quashed the sanction accorded by the competent authority of the Municipal Corporation of Greater Mumbai for change of user and construction of residential and commercial complex and directed the Municipal Commissioner to reconsider the application made by the appellant keeping in view the objections raised by the Police Department, Ministry of Petroleum, Ministry of Environment and Intelligence Bureau and the Security Control Regulations issued by the State of Maharashtra under Section 37 (1AA) of the Maharashtra Regional and Town Planning Act, 1966. Hence the present appeal.**

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H **The principal submission on behalf of the appellant was that they had been granted the change of user (conversion from industrial zone to residential/**

commercial zone) by the Municipal Corporation of Greater Mumbai, under its permission, and since this permission was as per DCR 57(4)(c) of the Development Control Regulations (DCR) for Greater Mumbai, 1991 framed under the Maharashtra Regional and Town Planning Act, 1966 which allowed such a change of user with the previous approval of the Municipal Commissioner, it should not be interfered with. The change of user was defended by the Municipal Corporation also.

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The first respondent, on the other hand, raised two-fold contentions viz. that from the point of view of the safety and security of the refinery, and of the occupants who will be residing in this housing complex, as well as their health, this development ought not to be permitted. It was their submission that such a construction would be contrary to law, apart from being potentially dangerous and, therefore, undesirable on both these counts.

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Dismissing the appeals per majority, the Court

HELD: Per Gokhale J. (for himself and Desai; J.)
[Majority opinion]

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1. The affidavit of Dr. Seema Garg, Vice President of the appellant points out that on the southern side of the refinery, the Gavanapada Village is located with a population of about 7000 people. However, this is an old village establishment and one cannot do away with it. It is stated that on the eastern side there is a slum at a distance of about 18.53 meters. On the northern side, there are two slums at Vishnu Nagar and Bharat Nagar, and on the western side, there are some shops and hutments. HPCL cannot be held responsible for these structures. In any case, they are all structures of an insignificant height. On eastern side, there is a high-rise tower of 14 storeys which is almost completed, but yet

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A not occupied, but which had all throughout been
objected to by HPCL. On the northern side, there are
more than 50 multi-storey buildings constructed in the
Slum Rehabilitation Scheme which also are not
occupied. However, because of the resistance of the first
B respondent, the upper floors of these buildings are to be
allotted to the Police department. [Para 13] [488-G-H; 489-
A-B]

1.2. The statement in the affidavit of the Assistant
Commissioner of Police as well as the extracts from the
C report of the Intelligence Bureau are quite cogent. The
view of the Police Commissioner is reinforced by the
Central Home Ministry on the background of the terrorist
attack in the city on 26.11.2008. Some other buildings are
coming up at a distance of about 800 meters from the
D refinery. All throughout these developments have been
objected to by HPCL. Therefore, HPCL cannot be faulted
for such constructions which are permitted by the
Municipal Corporation. Besides, merely because such
constructions have been permitted so far, that does not
E justify any more high-rise constructions coming up in the
vicinity. [Para 13] [489-E-G]

2. When the refinery of the first respondent came up
in the year 1952, and the other vital installations of
F national importance also came up in the nearby area, the
population over there was sparse, and that is why these
installations were permitted to be set up at locations in
the Mahul area of Chembur far away from the Island city
of Mumbai. Now the city has grown-up, as also the
G suburbs, and people are trying to occupy the vacant
spaces wherever available. The Municipal Corporation
and the State of Maharashtra ought to have checked and
stopped these constructions, particularly the high-rise
ones in the vicinity of these installations, but they have
H failed in doing the same. It cannot, however, justify further

dereliction of their responsibilities. Merely because some constructions have been permitted at some distance from the refinery of the first respondent, does not mean that further high-rise constructions should be permitted to come up nearby. Two wrongs do not make one right. [Para 14] [490-A-D]

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3. It is rather surprising that the Municipal Corporation has also chosen to file an appeal against the order of the High Court. This is on the background that appellant had given an Indemnity Bond to the Municipal Commissioner dated 7.1.2011. In view of this Indemnity Bond, the Municipal Corporation had no reason to file any appeal against the order of the High Court, and the same is disapproved. [Para 15] [490-E-F; 491-F]

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4. DCR 57 (4) (c) of the Development Control Regulations (DCR) for Greater Mumbai, 1991 framed under the Maharashtra Regional and Town Planning Act, 1966 was relied upon by the appellant and the Municipal Corporation in defence of the change of user. This DCR contains a non-obstante clause, but all that it states is that 'notwithstanding anything contained above' (i.e. earlier in the DCRs), such a change of user may be permitted. Thus, it is an enabling provision, though it does not mean that the power therein is to be exercised disregarding the objections that are raised. The power under DCR 57(4)(c) could not be exercised as a standalone power, when specific objections relating to DCR 16 had been raised. DCR No.16 falls in Part II of the DC Regulation of 1991 containing 'General planning requirements, Land uses and manner of development'. Even DCR No.64 which gives the 'Discretionary powers' to the Commissioner, does not permit him under sub-clause (b) thereof to grant relaxation which will affect safety, fire safety and public safety of the inhabitants of the building and the neighbourhood. Thus, this power is

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A coupled with the duty to give paramount importance to
safety. These provisions cast an obligation on the
Municipal Commissioner to take into consideration the
objections in this behalf. Maharashtra Regional and Town
B development, the provisions of the DCRs will have to be
read purposively and harmoniously, and not
disjunctively. The wide amplitude of a non-obstante
clause must be kept confined to the legislative policy, and
it can be given effect to, to the extent Parliament intended
C and not beyond the same. HPCL had lodged their
objections, and the Municipal authorities were required
to consider the same but they have not. Rather, they
refused to consider these objections on a totally
erroneous reading of the DCRs as can be seen from their
earlier referred letter dated 28.10.2010. Where human
D habitation is permitted in proximity of hazardous plants,
there is an immediate, as well as long term, danger of
exposure to health hazards. The planning authority
cannot ignore these aspects. The public interest cannot
E be sacrificed at the altar of commercial interests. The
submissions of the Municipal Corporation and appellant-
Oswal are clearly contrary to the regulations, and are
therefore rejected. Oswal and the Municipal Corporation
had contended that the Writ Petition was belated.
However, the I.O.D was issued to Oswal on 11.11.2010,
F and the Commencement Certificate (to start the
construction upto the stilt) was issued on 11.11.2011. The
Writ Petition filed on 16.9.2011 could not therefore be said
to have been filed belatedly. [Para 16] [493-D-H; 494-A-E]

G 5. The security threat is clearly placed on record, as
also the possible danger to the health of the occupants
of the buildings already constructed and to be
constructed as well. The order of the High Court has set
aside all the approvals in favour of Oswal. It has taken
H care of some of the issues when it directed the Municipal

Commissioner to reconsider the application made by Oswal after considering the objections of the Police Department, Ministry of Petroleum, Ministry of Environment and Intelligence Bureau report, and also the Security Control Regulations framed by the State of Maharashtra. The High Court has also directed that the Municipal Commissioner will pass the order after hearing the parties and after considering the views expressed by the High Court and in accordance with law. In addition, the Municipal Commissioner is directed to consider the issue of possible danger to the health of the occupants of the buildings already constructed, and those to be constructed by the appellants. It is stated in the affidavit of Vice-President of the appellant that HPCL is seeking to make the property of Oswal sterile and unbuildable without acquiring the same. The parties can certainly utilise the time now available for appropriate and fruitful negotiations in this behalf. And, in any case, Oswal can certainly use the land for an agro-industry or any permissible industry. [Para 17] [494-G, H, A-D]

Per Singhvi, J. (Minority Opinion)

1.1. The High Court has not considered the issues of security and possible adverse impact on the health of those who may occupy the buildings to be constructed by the appellant due to existence of the refineries and industries in the area in a correct perspective. A reading of additional affidavit dated 12.12.2011 filed by Dr. Seema Garg, Senior Vice-President of the appellant and photographs annexed with it shows that large number of multi-storied buildings have been constructed near the refineries of respondent No.1 and BPCL and over 3,50,000 persons are living in those buildings. The photographs marked 'Exhibit D' clearly demonstrate the existence of several buildings in the vicinity of the refineries of respondent No.1 and BPCL. These include

A the colony of the officers and employees of respondent
No.1 which is at a distance of 30 meters from BPCL
refinery. The photographs further show that Mono Rail is
being constructed at a distance of 18 meters from BPCL
refinery. [Para 22] [478-F-H; 479-A]

B 1.2. The averments contained in the affidavit of Dr.
Seema Garg on the issue of existence of multi-storeyed
buildings in the vicinity of the refinery of respondent No.1
and BPCL remained substantially uncontroverted, but the
C Division Bench of the High Court virtually ignored the
same and allowed the writ petition of respondent No.1 by
relying upon the report of Intelligence Bureau and the
affidavit filed by the Assistant Commissioner of Police, a
reading whereof shows that the report as well as the
D affidavit are not based on any scientific study. It is
extremely difficult, if not impossible, to visualise any
security threat from the buildings being constructed by
the appellant when no such threat is perceived from the
buildings already constructed in the close vicinity of the
two refineries. Gavanpada Village having a population of
E 7,000 is just adjacent to the refinery. On East and North,
several buildings have been constructed at a distance of
18.53 meters to 130 meters. Lakhs of people are residing
in these buildings. Respondent No.1 did not get any
F scientific study conducted by experts to find out the
effect of gases emanating from the refineries and other
industrial units operating in the area on the health of the
people occupying the building. Not only this, the said
respondent did not explain as to how the security
G persons who may occupy some of the buildings already
constructed will not be affected by the pollution caused
due to operation of the refineries and industries. This
being the position, the bald assertions made on behalf
of respondent No.1, the report of the Intelligence Bureau
and affidavit filed by the Assistant Commissioner of
H Police on the issues of security threat and public health

could not have been relied upon for recording a finding that the buildings proposed to be constructed by the appellant would pose security threat and adversely affect the health of the prospective occupants of the buildings. [Para 23] [479-B-H]

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2. The omission on the part of respondent No.1 to challenge the sanction/permission accorded by the Corporation and other public authorities for construction of other residential buildings is inexplicable. If the buildings proposed to be constructed by the appellant at a distance of 800 meters from the refinery are considered future security threat to the establishment of respondent No.1, the buildings already constructed in the close vicinity of the refinery etc. would certainly pose greater security threat. The solution found by the State and its functionaries as also the officers of the Corporation, i.e., use of upper floors of the buildings for housing the members of Police force and other security agencies can equally be applied to the case of the appellant and there is no rational reason to discriminate the appellant vis-à-vis others, who have already constructed the buildings. Similarly, the plea of respondent No.1 that the operation of refineries would adversely affect the health of the occupants of the buildings proposed to be constructed by the appellant will be equally relevant for the occupants of the buildings already constructed. Respondent No.1 has not placed any report of the experts to prove that the residents of the buildings already constructed have become prone to various kinds of diseases and, therefore, it is opposing the construction of new buildings which may be occupied by the members of public. Therefore, this objection cannot be pressed into service for restraining the appellant from constructing the buildings. [Para 24] [480-A-F]

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3. The impugned order is set aside and the matter is remitted to the High Court for deciding the writ petition

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- A of respondent No.1 afresh after considering the material produced by the parties on the issues of security threat and possible danger to the health of the occupants of the buildings already constructed and those who may occupy the buildings to be constructed by the appellant.
- B [Para 25] [480-F, G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10933 of 2013.

- C From the Judgment and Order dated 12.04.2012 of the High Court of Bombay in WP No. 1973 of 2011. .

WITH

C.A. No. 10934 of 2013

- D Dushyant A. Dave, Rakesh Tiku, Shekhar Naphade, Pallav Shishodia, H.N. Salve, Rakesh Dwivedi, Nimay Dave, Saleem Hasan, Suhail Malik, Sanjay Kumar, Manjusha Wadhwa, Bhargava V. Desai, Shreyas Mehrotra, J. J. Xavier, Sanjay Kapur, Ashmi Mohan, Devan Khanna, Shubhra Kapur, Sanjay
- E V. Kharde for the Appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

- F 2. These appeals are directed against order dated 12.4.2012 by which the Division Bench of the Bombay High Court allowed the writ petition filed by respondent No.1- Hindustan Petroleum Corporation Ltd. (HPCL) and quashed the sanction accorded by the competent authority of the Municipal Corporation of Greater Mumbai (for short, 'the Corporation') for change of user and construction of residential and commercial complex on land bearing CTS Nos. 381 and 381/1 to 22, Village Anik, Taluk Chembur, MSD, Mumbai and directed the Municipal Commissioner to reconsider the application made
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- H by Oswal Agro Mills Ltd. (hereinafter described as "the

appellant") keeping in view the objections raised by the Police Department, Ministry of Petroleum, Ministry of Environment and Intelligence Bureau and the Security Control Regulations issued by the State of Maharashtra under Section 37 (1AA) of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'the 1966 Act').

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3. The appellant purchased the land in question from Union Carbide Ltd. in 1989 with the permission of the State Government. In the development plan of the area, the land was shown as included in Special Industrial Zone (I-3 Zone). In 2005, respondent No.1 acquired land bearing CTS Nos. 382 and 382/1 to 66 of Village Anik, which is located at a distance of 430-450 meters from the appellant's land from Ahmedabad Printing and Calico Mills Company Ltd. for construction of storage tanks.

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4. On 17.3.2006, the appellant made an application to the Industries Department of the State Government for change of land use. The State Government informed the appellant that the Industries Department can give NOC for industrial purpose keeping in view the locational policy, which did not contain any provision for change of land use and that change of user was within the jurisdiction of the Planning Authority.

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5. The appellant also made an application to the Maharashtra Pollution Control Board (MPCB) for grant of environmental clearance. Thereupon, MPCB issued notice dated 19.6.2006 and invited objections against the proposed grant of environmental clearance to the appellant's project. Respondent No.1 filed objections dated 11.7.2006 and pleaded that permission sought by the appellant should be rejected because its refinery was very close to the appellant's land and construction of building would be a security threat to the large tanks proposed to be installed for storage of crude oil and finished petroleum products on the plot purchased from Calico Mills Company Ltd. Another plea taken by respondent No.1 was that there were several major industrial units in the

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A industrial zone and setting up residential or commercial complex in that zone next to the refineries was risky and hazardous and was not in public interest. Respondent No.1 sent similar communication dated 17.7.2006 to the Corporation. The latter sent communication dated 26.10.2006
B to the Under Secretary, Urban Development Department informing him about the objections raised by respondent No.1 and pointed out that proposal of the appellant cannot be withheld under the existing rules and regulations because issues of safety and security were not within its jurisdiction. The
C Corporation also suggested that a strip of land could be left around the premises as buffer for additional safety of the installation of the refinery and surveillance could be kept by installing CCTV cameras, etc. The Labour Commissioner, to whom a copy of application dated 17.3.2006 had been
D forwarded, sent communication dated 18.11.2006 to the Corporation that he had no objection to the issue of NOC to the appellant. He also mentioned that dues of workers had already been paid.

E 6. After one year and one month of the submission of application by the appellant, the Corporation addressed letter dated 21.4.2007 to the Under Secretary, Urban Development Department seeking his advice on the objections raised by respondent No.1. In that letter it was mentioned that colony of HPC^L officers was situated on North-East side of the
F appellant's plot, residential quarters of Maharashtra State Electricity Board were abutting the plot and a number of Slum Rehabilitation Schemes were in place around the disputed plot.

G 7. While the appellant's application was pending, respondent No.1 addressed letters dated 26.10.2007 and 3.6.2008 to the State Government raising objections against the proposal of M/s. Metal Box Ltd. and M/s. Apar Industries to construct residential and commercial complex on plots adjacent to its refinery. In reply, the Corporation sent letter dated
H 22.7.2008 to the Chief Manager of respondent No.1 for issue

of NOC for construction of tenements meant for project affected persons under the Slum Re-development Scheme under Clause 33(10) of Development Control Regulations (for short, "DC Regulations") . A

8. By letter dated 25.7.2008, the Corporation informed the Director of Refineries, HPCL that Slum Rehabilitation Authority had approved the plan on the Metal Box plot and letter dated 26.10.2007 sent by respondent No.1 has been forwarded to the Executive Engineer (SRA). B

9. Vide letter dated 21.10.2008, the Ministry of Environment and Forests (MoEF) granted environmental clearance to the proposed construction of commercial buildings consisting of Wings A, B, C and D (G+7), office building (S+8), amenity building (G+2) and S1-S8 buildings (G+7) on the appellant's plot under category 8 (b) of EIA notification 2006 subject to strict compliance of specific and general conditions contained in the letter. C D

10. In the meanwhile, Bharat Petroleum Corporation Limited (BPCL) filed Writ Petition No.1891/2007 against the State of Maharashtra and others. BPCL also applied for an interim injunction against the construction of residential building. One of the grounds taken by BPCL was that Development Plan had been altered ignoring the threat perception to its refinery. By an order dated 11.12.2008, the Division Bench of the High Court declined the prayer for interim injunction by recording the following reasons: E F

"2. The land which is the subject matter of dispute belonged to Mafatlal Group. Mafatlal's entered into M.O.U. with Petitioner No. 1 to sell the land for housing of the Petitioner's staff and workers by agreement dated 23.5.1982. On 25.1.1990, an order came to be passed under the Urban Land Ceiling Regulation Act, 1976 granting exemption to the land for development for housing the staff of the Petitioner No. 1. In the D.P. Plan notified in H

A the year 1992, it was shown as reserved for housing of the staff of the Petitioner. As the Petitioner did not show interest, Mafatlal entered into an agreement with Eversmile who proposed to the Petitioner to purchase the flats which they would construct, which proposal however was not accepted.

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The Petitioner thereafter sought to acquire the land and this was informed by communication dated 4.8.1992 by the Petitioner to Respondent No. 1. The land was not acquired by the Petitioner though the persons who had acquired interest in the land were willing for acquisition. One of the reasons appears to be that the Petitioners did not want to pay for the land which was to be kept open.

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3. On 17.7.1999, a corrigendum was issued to the exemption Notification under Urban Land Ceiling Act and the land consisting part-A was to be developed as per the policy of S.R.A. and the land occupied at Part-B was to be developed as per order of the Government.

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The Petitioner was also in touch with NEERI who in their communication dated 19.1.2000 noted that the construction of housing complex for 2000 buildings was in full swing. They had raised some objections from the environment point of view. The Petitioner also approached the Intelligence Bureau. By letter dated 5.7.2000, the Intelligence Bureau informed that considering the threats and as the land belonged to private persons, it should be purchased along with the existing structure.

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The Petitioner in a communication dated 4.12.2006 addressed to the Secretary, Ministry of Environment and Forest, Government of India pointed out that the construction activities were going on since 1999-2000 but the work was stopped because of CRZ violation and the construction activities are likely to be resumed.

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4. The main contention urged on behalf of the Petitioners has been that while making alterations in the D.P. Plan, the threat perception to the refinery of the Petitioners ought to have been taken into consideration and that due notice was not given to them. In the instant case, as may be noted, the plan as notified in the year 1992 itself showed that the land was reserved for housing of the staff of the Petitioner. This has now been changed for S.R.A. and other purposes which are residential. Therefore, the land since the year 1992 was reserved for residence. The Petitioner in the year 1992 did not raise any objection to the land which was reserved for residence and on the contrary they wanted the land for housing their staff. The correspondence further indicates that the construction activities has commented from the year 1999-2000, though for some time in view of C.R.Z. violation that could not be proceeded with.

5. Further from the material before us, it is clear that in the vicinity of the Petitioner's project, there are other constructions which are existing including residential buildings. Eversmile has commenced construction of buildings under .S.R.A. project. The Petitioners allowed the said construction to come up by maintaining silence for long period of time. They have neither purchased the land nor acquired it. Considering the fact that there are already other buildings and as the respondent developers have commenced construction by spending large amount of money, in our opinion, the contention of the Petitioners that on account of "security risk" the respondent should be restrained at the interim stage from constructing on the land on facts here cannot be granted. The delay must be held against the Petitioners, as also the fact that since 1992, the land has been reserved for housing. Though we have granted rule that by itself cannot result in granting interim relief, which must be considered on the basis of well known principles of grant of interim relief.

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A 6. On behalf of the Respondents, their counsel had sought
to argue that the Petition itself ought not be admitted and
had relied on a large number of judgements including the
judgment of this court in the case of BEST Workers Union Vs.
State of Maharashtra 20085 All M.R. 848. Considering the
B contentions advanced based on the D.C. Regulations which
though were also under consideration in the case of BEST
Workers Union (supra), we have admitted the Petition.
However, as noted earlier the gross delay and the fact that
Respondent Builders have invested large amounts on the
C project which is being constructed under the S.R.A. Project,
would be a relevant fact not to exercise discretion in favour of
the Petitioner.”

11. After grant of environmental clearance, respondent
No.1 sent letters dated 14.1.2009 and 23.2.2009 to Deputy
D Director, Town Planning reiterating its objection to the
construction of buildings by the appellant. On 27.2.2009, the
State Government issued notice in the light of the
recommendation made by Upa Lokayukta to prepare Security
Control Rules and accepted the report of the Expert Committee
E for framing Special Regulations for safety of the buildings from
terrorist attack, the requirement for electrical and electronic
system, fire, etc. Thereafter, the State Government issued
instructions vide letter dated 21.3.2009 addressed to the
Municipal Commissioner for implementing the Security
F Regulations.

12. In view of the communications sent by the State
Government, respondent No.1 sent letter dated 5.5.2009 to the
Chief Secretary to highlight the security threat to its refinery due
to the SRA Scheme and requested that 56 SRA buildings be
G acquired for housing police personnel as has been done in the
case of SRA buildings constructed near the BPCL refinery.

13. By an order dated 1.9.2009, the Municipal
Commissioner accorded sanction for change of user of the
H appellant's plot in the light of Regulation 57(4) (c) of the DC

Regulations subject to the requirement of obtaining NOCs from different authorities. After about two months, appellant submitted proposal for amalgamation / sub-division of the plot. The Corporation considered the proposal and approved the same vide letter dated 10.6.2010 subject to the additional conditions including the one that amenity space shall be handed over to the Corporation. On 11.11.2010, the Corporation issued Intimation of Disapproval to the appellant and on 28.12.2010, the Corporation granted permission to the appellant for handling, storage, transportation and disposal of waste generated due to construction of building. Subsequently, the Corporation vide its letter dated 7.1.2011 issued NOC to the appellant regarding fire protection and fire fighting requirements in respect of the proposed construction of high rise residential building No.9. The Corporation also granted commencement certificate to the appellant.

14. In the meeting held on 5.2.2011 under the Chairmanship of the Principal Secretary, Home Department, representatives of respondent No.1 and BPCL protested against the permission granted for construction by the appellant and others on the property adjacent to the refinery of HPCL and pleaded that construction activity should be immediately halted. It was also suggested that a distance of 500 metres as buffer zone was required to be maintained. Thereafter, the Principal Secretary asked the representatives of respondent No.1 and BPCL to make necessary representation to the Brihanmumbai Mahanagar Palika to maintain the distance. The Principal Secretary also directed the representative of respondent No.1 to inform the Urban Development Department within 15 days whether the company was willing to take possession of a portion of 500 metres from the neighboring property for buffer zone and plant trees, etc. so that the State Government could take an appropriate decision. The same was also conveyed to respondent No.1 vide letter dated 15.2.2011.

15. Having failed to convince the State Government and

- A the Corporation to stop construction of buildings on the land purchased by the appellant, respondent No.1 filed Writ Petition No.1973/2011 for quashing all approvals and permissions granted to the appellant and for restraining the official respondents from granting further permissions or approvals or
- B renewing the approvals / permissions already granted. Respondent No.1 heavily relied upon the report prepared by the Intelligence Bureau highlighting the threat perception to the refinery and its installations. Respondent No.1 also challenged validity of Regulation 57(4)(c) of the DC Regulations in terms
- C of which the Commissioner of the Corporation can permit any open land in special industrial zone to be used for any of the permissible users in residential zone.

16. The appellant, the Principal Secretary, Urban Development and the Deputy Director, Town Planning, BMC
- D filed affidavits to oppose the writ petition. In the affidavit filed on behalf of the MPCB, it was pleaded that the clearance was granted after due consideration of the record in the light of the clearance granted by the Ministry of Environment and Forests (MoEF), Government of India. Secretary, Department of
- E Environment, Maharashtra also referred to the recommendations of the State Level Environment Impact Assessment Authority and claimed that in view of the clearance accorded by several agencies, permission sought by the appellant was granted. Labour Commissioner filed an affidavit
- F stating that he was only concerned with the payment of dues of the workers and in the report submitted by him it was made clear that the dues of workers have already been paid. The Additional Director, MoEF filed affidavit to the effect that State Expert Appraisal Committee has accorded environmental
- G clearance in terms of EIA Notification 2011. In a separate affidavit, Principal Secretary, Home Department pointed out that HPCL refinery was Category 'A' vital installation and had been declared as prohibited area under the Official Secrets Act. The Principal Secretary also submitted that construction
- H of high rise building on the plot in question will be a threat to

the installation of respondent No.1. In an additional affidavit filed on behalf of the appellant, its Senior Vice-President Dr. Seema Garg averred that large number of buildings have already been constructed in the vicinity of the plot purchased by respondent No.1. Paragraphs 9 to 18 of the affidavit of Dr. Seema Garg which have bearing on the decision of these appeals read as under:

"9. I say that Development Control Regulations 1991 (Regulation 29) provides that in case of change of user from Industrial to Residential/Commercial zone, the Corporation can insist for maintaining distance of 52 metres between the proposed development and the obnoxious or hazardous industries. I say that plans provide for a safe distance of far more than 52 metres between the boundary wall of the said land and the boundary wall of the petitioner's existing refinery.

10. I submit that the apprehensions sought to be expressed by the Petitioners in the Petition to the effect that the proximity of the said land to the Petitioners' refinery causes an environmental and security threat is misplaced and unwarranted. This would be apparent if the neighborhood of the Petitioners' refinery is considered. The Petitioners' refinery is surrounded by dense human habitation i.e. more than 350,000 occupants & a floating population of approx 50,000. This has been stated by the Asst. Engr. (DP) ES of the BMC in the affidavit filed in Writ Petition No. 1891 of 2007. The affidavit of the Assistant Engineering (D.P.) E.S. Mumbai filed in Writ Petition No. 1891 of 2007 by BPCL was to the effect that:

"...population in the locality is estimated to be 3.5 lakhs. In addition, there is estimated to be floating population of approximately 50,000 persons comprising of employees and visitors. It is pertinent that touching the refinery of Hindustan Petroleum Corporation Ltd., 7,500 flats have been constructed

A with more than 7,500 persons residing there. The situation has not caused any breach of or threat to the security of Hindustan Petroleum's refinery."

B 11. Moreover there are a number of multistoried/high rise buildings which are situated much closer to the Petitioners refinery. The distance between the boundary wall of the Petitioners refinery and the said land is approx 470 mtrs. Moreover as stated earlier the Respondent No.20's actual construction site is an additional 400-500 mtrs away from its plot boundary: i.e. the aggregate distance from the Refinery wall to the said buildings is 800-900 mtrs. As compared to this, there are multistoried buildings and even a high rise situated much closer to the Petitioners refinery. Some of such buildings/habitations which surround the Petitioners' refinery are set out hereunder:

D On the South:At the distance of zero metres /i.e. almost adjoining the refinery there exist a Gavanpada village with a population of about 7000 people.

E On the East: a)At the distance of 18.53 metres, there exist slums; namely Paryag Nagar and Prakash Nagar with a population of approximately 5000 people.

F b) At the distance of about 125 mtrs., situated on raised ground/a hill, is the residential high rise tower of 14 storey constructed on the Metal Box plot. This building is almost complete and ready for occupation.

G On the North: a)At the distance of 30 to 130 mtrs. there are more than 50 multi storey buildings constructed for Slum Rehabilitation by RNA SRA Scheme and Videocon SRA Scheme consisting more than 6000 housing units and hundreds of shops.

H b) At the distance of 50 mtrs. there exists Vishnunagar Slum having a population approximately of 10,000

people.

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- c) At the distance of approx. 400 metres, there exists Bharat Nagar slum having a population of approx. 20000 people.

On the West: Across the road and opposite the main Gate of Refinery are the shops and hutments with a population of about 200 people.

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Hereto annexed and marked Exhibit "A" is the satellite map showing the location of the Petitioners refinery and its surroundings. Some of those developments have taken place as recently as 2009-2010. Also, annexed hereto as Exhibits "B-1" to "B-13" are some of the photographs clearly showing the extent of residential development and the surroundings of the Petitioners' refinery.

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12. The Petitioners after making initial objections in 2007, have not filed any proceedings to stop or obstruct the construction and completion of the SRA High Rise project constructed on the land of Metal Box which is at the distance of only 125 mtrs. from the Petitioners' refinery.

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13. I say that that on the Northern side touching the boundary of Respondent No.20's land which is notified as Residential Zone, there is the MSEB Colony, buildings constructed for MHADA and various SRA Projects. Even the Petitioners' own residential colony falling within the Residential zone is situated only a few metres away from the Boundary wall of Respondent No.20's land. Not only that, Bharat Nagar and New Bharat Nagar residential areas having population of approximately 20,000 people is also in the vicinity.

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14. I say and submit near the refinery of the Petitioners, there is a refinery of Bharat Petroleum Corporation Limited (BPCL). I say that just opposite to their refinery, the area

A as sanctioned under the Development Plan was shown for
residential use. As a matter of fact, BPCL itself required
the area near the refinery to house their workmen and staff
quarters. I therefore, say and submit that statutory
authorities while finalizing the Development Plan had taken
B all required steps to safeguard the hazardous industries
by providing for maintaining safe distance under the DCR.
I say that the said area has now have been developed with
construction of multi storey buildings. I say that the Plans
annexed hereto clearly show the nature of constructions
surrounding the BPCL refinery also. Not only that monorail
C route is passing just outside the boundary wall of BPCL
refinery and a railway station is also built which is having
direct line of site vision into refinery. I say that Exhibits "C-
1 to C-3" are some of the photographs clearly and
unequivocally show that there are number of buildings
D already constructed near the refinery of BPCL and also the
monorail track. I therefore, say and submit that the
Petitioners carrying on similar activities as that of BPCL
cannot allege the environment or the security concerns
more particularly when all the authorities have sanctioned
E the project of Respondent No.20.

15. I say that despite repeated requests, the Petitioners
have not shared with Respondent No.20 the alleged report
of Intelligence Bureau with regard to the Security concerns.
F I say that in absence of such report the Petitioners are
unable to deal with the same. I submit that unless, the
Petitioners disclose the IB report, this Hon'ble Court should
not take cognizance of the alleged extracts relied on /
referred to. I however say that the issue regarding the
proposed construction posing a security risk to the Refinery
G (being within its line of sight) is misconceived and
untenable. I say that the Petitioners' property is enclosed
on all sides by a boundary wall. Adjoining the boundary
wall there is a public road, which is used by the public at
H all times of the day and night. Heavy vehicular traffic is also

a constant phenomenon on the said road. The said road does not have any security checks or any persons patrolling it. I say that in order to enable any person a direct line of site vision into refinery areas, one does not require to climb multistoried buildings, as the refinery/storage tanks are clearly visible & in the line of sight of a pedestrian walking along the road or any occupant of a vehicle using the said road had a clear line of sight to the Petitioners storage tanks. The Petitioners have also not raised any security issue in respect of the buildings/multi storeyed buildings built on almost three sides of the refinery at a distance ranging from 50 mtrs to 300 mtrs. In these circumstances the Petitioners cannot contend that construction being carried out by these Respondents at a distance of 800 to 900 mtrs constitutes a security risk and is required to be stopped. Hereto annexed and marked Exhibit, "D" is the satellite image of the Petitioners refinery along with photographs of the residential colonies, SRA projects, commercial establishments, slums around the same as also the developments opposite BPCL refinery.

16. I say that the Petitioners are merely apprehending that use of fire crackers by residents would pose constant hazard and threat to the refinery. The Petitioners have rather ignored the fact that the proposed development of Respondent No.20 shall be at the distance of more than 800 mtrs.

17. I say that as the project on the said property is covered by the Notification issued under the Environment Protection Act, 1986. Accordingly, the Environment Impact Assessment (EIA) was necessary to be obtained from MoEF, and Respondent No.20 had applied for the said sanction for the said project. I say that the said process of EIA also requires a public hearing. I say that Petitioners participated in the public hearing conducted by the Maharashtra Pollution Control Board.

A 18. The petitioners have acquired land admeasuring
 2,30,407.40 sq. metres bearing CTS No.382, 382/1 to 22
 belonging to one Ahmedabad Printing and Calico Mills
 Co. Ltd. A part of this land falls between the exiting refinery
 of the Petitioners and the said land of Respondent No.20.
 B Considering this area, which is as on date an open area
 there is a distance of more than 500 metres between the
 Petitioners' existing refinery and the said land. It is not open
 to the Petitioners to now carry on construction of additional/
 new storage on the said Calico and thereafter contend that
 C safety distances are not being maintained. The Petitioners
 are seeking to render the Petitioners buildable land sterile
 without acquiring and paying for the same."

(reproduced from the SLP paper book.)

D The details of the buildings existing in the vicinity of the
 refineries of respondent No.1 and BPCL, to which reference
 has been made in the affidavit of Dr. Seema Garg, are given
 hereunder in the form of the following table:

Location from the Refinery	Distance from the Refinery	Name of building/ habitation	Population
South	0 metres; i.e.,	Gavanapada almost adjoining the refinery	7000 village
East	a) 18.53 metres	Slums of Paryag Nagar and Prakash Nagar	5000
	b) 125 metres	On a raised ground-resid- ential high rise tower of 14	Almost complete and ready for

		storey on the Metal Box plot	occupation
North	a) 30-130 metres.	More than 50 multi storied constructed under the SRA scheme	6000 housing units and hundreds of shops
	b) 50 metres	Vishnunagar Slum	10,000
	c) 400 metres	Bharat Nagar Slum	20,000
West	Across the road and opposite the main gate of the refinery	Shops and hutments	200

17. The Division Bench of the High Court allowed the writ petition and quashed the permission accorded by the Corporation and other authorities for conversion of the appellant's land from Special Industrial Zone (I-3) to Local Commercial Zone (C-1) under Regulation No. 57(4)(c) of DC Regulations, approval granted for amalgamation / sub-division of the plot and sanction accorded to amended building plans for construction of residential buildings. The High Court also quashed NOC issued by MPCB and environmental clearance granted by MoEF and directed the Municipal Commissioner to re-consider the applications made by respondent No.1 for change of land use and for sanction of plan and decide the same afresh after considering the objections raised by various Departments and the provisions of Security Control Regulations.

18. One of the grounds which found favour with the High Court was that the Corporation is duty bound to ensure that large human habitation does not grow around the refinery,

A which comes within the definition of hazardous industries. The
other ground accepted by the High Court was that while
sanctioning change of land use and building plans, the
Corporation did not pay due attention to the issue of security
of the refinery and health of people likely to reside in the newly
B constructed buildings. The High Court also held that even in the
absence of specific provision in DC Regulations, the Municipal
Commissioner was duty bound to keep in mind the larger public
interest, i.e., health of the people living in the vicinity before
granting permission for construction of residential and
C commercial complex. The High Court accepted the affidavit filed
by the Assistant Commissioner of Police that the proposed
construction would pose serious threat to the refineries of
respondent No.1 and BPCL and held that such construction
cannot be allowed. The High Court rejected the appellant's
D contention that the restriction proposed to be imposed in the
name of security threat amounted to violation of its property
rights⁷. The High Court referred to the incidents like Bhopal gas
tragedy, terrorist attack in Mumbai and the reports of the
Intelligence Bureau and the Ministry of Home Affairs and held
that the Municipal Commissioner had approved change of user
E and sanctioned the building plan without applying mind to
various issues.

19. R.D. Dhanuka, J., who authored the main judgment
recorded the arguments of the learned counsel in 35 pages.
F He rejected the objection raised on behalf of the appellant that
the writ petition was not maintainable because respondent No.1
had not approached the Court with clean hands. The learned
Judge then referred to several judicial precedents on the
interpretation of the 1966 Act and held:

G "In our opinion even these above-referred provisions
clearly provides that even if the relaxation in respect of the
dimensions in case of hardship, can be granted by the
Municipal Commissioner, Municipal Commissioner is
prohibited from granting such relaxations if such relaxation
H affects health, safety, fire safety, structural safety and public

safety of the inhabitants of the building and the neighbourhood. In our view, the Learned Counsel for HPCL is right in his submission that this prohibition against the Municipal Commissioner in relaxing certain conditions even in case of hardship, if it affects the public safety, health etc. should be read in the powers of Commissioner under Regulation 16(a) (b) and (n). We are of the opinion that the issue of security and health aspect, which is for members of the public at large and is in public interest and therefore, by not considering the security and health aspect or refusing to consider such aspects while sanctioning the plan or while permitting change of user, is totally illegal and contrary to Regulations 16(a) (b) (n) read with section 64(b) of the D.C. Regulations.

From the perusal of the aforesaid judgments and applying the principles thereof to the facts of this case, we are of the opinion that the learned counsel for Oswal as well as Municipal Corporation are not right in their submission that the security aspect should not have been considered at all by the Municipal Commissioner while sanctioning the plan for development or while permitting change of user under any of the provisions of the D.C. Regulations or Mumbai Municipal Corporation Act or Maharashtra Regional Town Planning Act. We are of the opinion that it is not only the power but also duty of the Municipal Commissioner to consider the security aspect in public interest before granting permission to development any land as well as permitting change of user from one zone to another zone. Under Regulation 16(a), (b), (n) read with Regulation 64(b) read with section 46 of the M.R.T.P. Act. We are, therefore, unable to accept the submission of the learned counsel for Oswal as well as B.M.C. that there was no enabling provisions under the present D.C. Regulations or any other provisions to consider security and health aspect before sanctioning the plan or before permitting change of user by the Municipal Commissioner."

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A The learned Judge then referred to the judgment of the Division Bench of the High Court in an un-reported judgment titled TCI Industries Limited v. The Municipal Corporation of Greater Bombay and others and held:

B “The principal argument of the petitioner was that none of
C the authorities have considered Intelligence Bureau report
D categorically pointing out that any planning to construct
E high rise residential buildings at the site of demolished
F factory of M/s. Oswal Agro Mills Limited, Anik, Chembur
G (Near HPCL Refinery) would be detrimental to the security/
H safety of the vital installation and that the Mumbai terrorist
attack in November, 2008 had exposed vast coastline of
Mumbai to danger through the sea due to which oil
installations have become more vulnerable to threat from
inimical forces and such installations and other public
places were likely to be targeted. In spite of petitioner
bringing these facts to the notice in the public meeting held,
strongly objecting to the permissions if any being granted
to Oswal for development, none of the authorities have
even bothered to look into the security aspect while
granting the approval to Oswal and have taken very casual
approach in the matter. The learned counsel for the HPCL
as well as learned counsel appearing for Government of
India invited our attention to the instructions given by the
Government of India, Ministry of Home Affairs to their
advocate appearing in this matter requesting its advocate
to appraise this Court of the view of the Ministry of Home
Affairs about the security aspect. Even in the said letters,
it is made clear that vital installations including located
near the coastline are vulnerable to threats from inimical
forces in view of the prevailing security situation. It is
recorded that the construction of building at the site of
Oswal cause security hazard to vital installations in HPCL
Refinery. The Ministry of Home Affairs have also addressed
separate letter and has advised to the State Government
of Maharashtra requesting to review the matter of

permissions and clearance granted to Oswal for change of user and construction of such high rise construction in view of the safety reasons involved. We have also perused the affidavit in reply filed by Mr. Didarsingh, Assistant Commissioner of Police, stating that as per police record, HPCL is "A" category vital installation in terms of National importance and has been declared as prohibited area in the Official Secret Act, 1923. It is further stated that the high rise buildings, if permitted on the Oswal Mills land may enable direct line of sight vision into not only HPCL Refinery area but also BPCL Refinery area which is also close to Oswal Agro Mills Ltd. towards south direction. It is further stated that any upper floors of complex on Oswal land if permitted may provide an ideal launching pad for any external subject to be directed or targeted at the said refinery storage tank which may contain highly inflammable substances like LPG, Naptha, Crude oil etc. The Police department have placed reliance upon the threat assessment as per the report of the inspection of the Industrial Security carried out by the Intelligence Bureau, Government of India in the said affidavit. However, the learned counsel appearing for Oswal submitted that the so called assessment of Intelligence Bureau regarding security threat to refinery of petitioner is of no significance as according to him, the ministry of Environment had granted approval to the project of Oswal much after the said report of Intelligence Bureau and while granting such approval the Ministry of Environment had considered all aspects including the security aspect. On the other hand, the learned counsel appearing for the HPCL strongly canvassed that this court is not an expert in the issue of security aspect. The serious threats of life and security perceived by the Intelligence Bureau can not be brushed aside by the authorities as well as by this Court. Oswal has not alleged any malafides on the part of Petitioners in raising issue of security or health or in placing reliance upon Intelligence Bureau Report or has not made such

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A allegations against Intelligence Bureau. Oswal has also not produced any other report from expert showing different position.”

B 20. P.B. Majmudar, J., who agreed with R.D. Dhanuka, J. referred to Section 37 of the 1966 Act which contains the procedure for modification of final development plan, Clause 57 of the D.C. Regulations and observed:

C “4. It is required to be noted that in the instant case, after due application of mind, the area in question was placed under 13 Zone, considering the fact that it is surrounded by industries which include hazardous industry like the refinery. It is not in dispute that the refinery in question is considered as a hazardous industry. In an industrial zone, commercial-cum-residential activities are not permitted.

D Respondent No. 20 after purchasing the property decided to use the said property for its commercial benefits. The Commissioner who is empowered to consider such request for change of Zone is required to apply his mind in an appropriate manner. The concerned Commissioner

E at the relevant time, for the reasons best known to him, failed to take into consideration various aspects such as hazardous activity being carried out by the Refinery as high fumes are going in the sky, refinery which is prone to security threats, etc. simply because one may apply for

F conversion from one zone to another and simply because the Commissioner is empowered to grant such permission, he is not required to grant such conversion mechanically. The Commissioner is required to take into consideration various aspects such as security threats, fire, safety, health, etc. While considering such aspects, one cannot

G lose sight of as to what had happened in Bhopal few years back. It is required to be noted that the Commissioner is not having unfettered and uncontrolled powers, while taking such decision. Once these powers are there, it is required to be exercised sparingly by application of proper mind

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while taking into consideration various other aspects in the matter. In a given case, for the purpose of residential quarters of the employees of a particular industry or for providing food facilities, permission to carry out commercial-cum-residential activities can be granted but it should not mean that large scale commercial activities by putting high rise buildings for the purpose of residence also can be permitted in a mechanical manner. In my view, while permitted the developer to put high rise buildings, the Commissioner was required to apply his mind in an appropriate manner instead of deciding the question in a mechanical manner. It is the duty of the authority to see that by permitting conversion from industrial zone to commercial-cum-residential zone, it may not result into health hazards or security threats. On going through the voluminous records and photographs, it cannot be denied that the area is surrounded by a large scale refinery and large fumes are also going in the sky. When the question relates to the town planning, those who are in the charge of town planning should see to it that after 50 or 60 years, the future generations may not curse those who were in charge of planning as the planning authority is required to consider the future needs and interest of the future generation also. It is not out of place to mention at this stage that before independence when Baroda State was in existence, its ruler Sayajirao Gaekwad, who was a great visionary, never permitted any industries within the city limits as, according to him, if the industrial activities are permitted near the residential area, it is bound to affect the health, safety and security aspects. The said aspect was considered by the said Ruler more than 70 years ago. In the instant case, since the area is surrounded by industries and is in an industrial zone, the authorities are required to consider as to whether it will create any nuisance to the people who are permitted to reside, if high rise buildings are constructed near such industries. The planning

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A authority in its wisdom is required to consider this aspect
in an appropriate manner. The Commissioner was
required to consider even the aspect of security threat as
it is pointed out that so far as refinery is concerned, there
is also a security threat. In my view, therefore, the
B Commissioner was required to consider the matter
appropriately and should not decide the matter
mechanically simply on the basis of discussions during the
meeting with the officers of the Petitioner Company.”

C The learned Judge further observed that the concerned
authority did not apply mind while sanctioning change of land
use of the plot owned by the appellant.

21. We have heard S/Shri Dushyant A. Dave, Rakesh Tiku,
Shekhar Naphade and Pallav Shishodia, Senior Advocates
D appearing for the appellants and S/Shri Harish N. Salve and
Rakesh Dwivedi, Senior Advocates appearing for the
respondents and carefully scrutinized the records.

22. Although learned counsel for the parties raised several
E contentions, I do not consider it necessary to deal with the same
because the High Court has not considered the issues of
security and possible adverse impact on the health of those who
may occupy the buildings to be constructed by the appellant due
to existence of the refineries and industries in the area in a
correct perspective. A reading of additional affidavit dated
F 12.12.2011 filed by Dr. Seema Garg, Senior Vice-President
of, the appellant and photographs annexed with it shows that
large number of multi-storied buildings have been constructed
near the refineries of respondent No.1 and BPCL and over
3,50,000 persons are living in those buildings. The photographs
G marked ‘Exhibit D’ clearly demonstrate the existence of several
buildings in the vicinity of the refineries of respondent No.1 and
BPCL. These include the colony of the officers and employees
of respondent No.1 which is at a distance of 30 meters from
BPCL refinery. The photographs further show that Mono Rail
H is being constructed at a distance of 18 meters from BPCL

refinery.

23. The averments contained in the affidavit of Dr. Seema Garg on the issue of existence of multi-storeyed buildings in the vicinity of the refinery of respondent No.1 and BPCL remained substantially uncontroverted, but the Division Bench of the High Court virtually ignored the same and allowed the writ petition of respondent No.1 by relying upon the report of Intelligence Bureau and the affidavit filed by the Assistant Commissioner of Police, a reading whereof shows that the report as well as the affidavit are not based on any scientific study. It is extremely difficult, if not impossible, to visualise any security threat from the buildings being constructed by the appellant when no such threat is perceived from the buildings already constructed in the close vicinity of the two refineries. GaVanpada Village having a population of 7,000 is just adjacent to the refinery. On East and North, several buildings have been constructed at a distance of 18.53 meters to 130 meters. Lakhs of people are residing in these buildings. Respondent No.1 did not get any scientific study conducted by experts to find out the effect of gases emanating from the refineries and other industrial units operating in the area on the health of the people occupying the building. Not only this, the said respondent did not explain as to how the security persons who may occupy some of the buildings already constructed will not be affected by the pollution caused due to operation of the refineries and industries. This being the position, the bald assertions made on behalf of respondent No.1, the report of the Intelligence Bureau and affidavit filed by the Assistant Commissioner of Police on the issues of security threat and public health could not have been relied upon for recording a finding that the buildings proposed to be constructed by the appellant would pose security threat and adversely affect the health of the prospective occupants of the buildings.

24. The omission on the part of respondent No.1 to challenge the sanction/permission accorded by the Corporation

A and other public authorities for construction of other residential
buildings is inexplicable. If the buildings proposed to be
constructed by the appellant at a distance of 800 meters from
the refinery are considered future security threat to the
establishment of respondent No.1, the buildings already
B constructed in the close vicinity of the refinery etc. would
certainly pose greater security threat. The solution found by the
State and its functionaries as also the officers of the
Corporation, i.e., use of upper floors of the buildings for housing
the members of Police force and other security agencies can
C equally be applied to the case of the appellant and there is no
rational reason to discriminate the appellant vis-à-vis others,
who have already constructed the buildings. Similarly, the plea
of respondent No.1 that the operation of refineries would
adversely affect the health of the occupants of the buildings
D proposed to be constructed by the appellant will be equally
relevant for the occupants of the buildings already constructed.
Respondent No.1 has not placed any report of the experts to
prove that the residents of the buildings already constructed
have become prone to various kinds of diseases and,
therefore, it is opposing the construction of new buildings which
E may be occupied by the members of public. Therefore, this
objection cannot be pressed into service for restraining the
appellant from constructing the buildings.

25. On the premise aforesaid, the appeals are allowed,
F the impugned order is set aside and the matter is remitted to
the High Court for deciding the writ petition of respondent No.1
afresh after considering the material produced by the parties
on the issues of security threat and possible danger to the
health of the occupants of the buildings already constructed and
G those who may occupy the buildings to be constructed by the
appellant. The High Court shall decide the writ petition afresh
uninfluenced by the observations and findings contained in the
order of the High Court and this judgment. The parties may, if
so advised, file additional affidavits and documents within six
H weeks from today.

26. Since the construction of buildings by the appellant had been halted pursuant to the interim order passed by this Court, the High Court is requested to decide the writ petition afresh as early as possible but latest within a period of four months from the date of receipt of copy of this order in the Registry of the High Court.

27. The Registry is directed to send a copy of this judgment to the Registrar General of the Bombay High Court who shall place the same before the Chief Justice for appropriate order.

H.L. GOKHALE J. 1. We have gone through the judgment prepared by our Learned Brother G. S. Singhvi, J. wherefrom we have benefited. Yet with great respect, we are unable to persuade ourselves to agree therewith for the reasons which we record herein below.

2. Both these appeals seek to challenge the judgment and order dated 12.4.2012 rendered by a Division Bench of Bombay High Court allowing Writ Petition No.1973 of 2011 filed by respondent No.1 in these appeals. For the sake of convenience, we will refer to the facts as disclosed in the appeal filed by Oswal Agro Mills Ltd. ('Oswal' for short). The dispute in this matter is essentially with respect to the proposed construction of the residential-cum-commercial complex of the appellant herein, which is permitted by the Municipal Corporation of Greater Mumbai to come up in the vicinity of the Refinery run by the first respondent Hindustan Petroleum Corporation Ltd. ('HPCL' for short) at Mahul, Chembur, Mumbai. The refinery is situated on B.D Patil Marg, Mahul, on a property comprising of various CTS Numbers. Apart from the refinery, the first respondent has about 117 storage tanks on this property which store, at any given point of time, oil and petroleum products of over 118883860 KL. The proposed construction is to come up on the adjoining property of Oswal bearing CTS No.381, 381/1 to 21 of Village Anik, in 'M' Ward at R.C. Marg, Chembur, Mumbai. The project involves

A construction of four commercial buildings, one office building, one amenity building, and eight more buildings for residential purposes, consisting of about 3000 flats. The principal contention of the first respondent is two-fold viz. that from the point of view of the safety and security of the refinery, and of the occupants who will be residing in this housing complex, as well as their health, this development ought not to be permitted. It is their submission that such a construction would be contrary to law, apart from being potentially dangerous and, therefore, undesirable on both these counts.

C 3. The refinery of the first respondent was set up in this area way back in year 1952 on an area of about 416 acres. The refinery of BPCL is opposite the refinery of the first respondent. The factory of Rashtriya Chemicals and Fertilizers is in the vicinity. Bhaba Atomic Research Centre at Trombay is also close by. When all these vital installations were set up, there was hardly any population in this area, and in any case there were no tall buildings. The only nearby locality which was occupied was a village by name Gavanpada. All these installations were set up in this area principally because it was sparsely populated and it is far away from the main island city of Mumbai.

F 4. This area was designated as the Special Industrial Zone, and the commercial-cum-residential activities were not permitted therein. The appellant was owning the concerned property since about 1989, and its factory thereon, but it moved for the construction of a residential-cum-commercial complex therein, only in the year 2006. The requisite change of user has been permitted by the Municipal Corporation and hence, this litigation between the parties.

G 5. As can be seen from the synopsis of the SLP No. 14202 of 2012 filed by the appellant, it specifically states as follows:

H *"The petitioners' said plot is located approximately 500*

OSWAL AGRO MILLS LTD. v. HINDUSTAN PETROLEUM 483
CORPORATION LTD. [H.L. GOKHALE, J.]

mtrs north of the boundary wall of the HPCL Refinery. The building moreover being constructed by them is a further 470 mtrs to the north of the Petitioners' plot boundary i.e. at about 970 mtrs (almost 1 kilometer away) from wall."

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6. The appellant has contended that at the most, the first respondent is seeking a buffer zone of 500 meters along its refinery, and they also referred to the construction of some other buildings which have come up and are coming up in the vicinity. The proposal of the appellant is to construct buildings of 7 to 8 storeys, and it is their submission that when other similar constructions are permitted in the vicinity, there is no reason why their construction should be objected. The first respondent has, however, pointed out in their affidavit before the High Court that whatever may be the initial proposal of the appellant, some of these buildings would be going upto 24 floors. As against that, the appellant has tried to explain this high-rise construction on the basis of utilization of F.S.I., but they have not denied the existence of such a subsequent proposal. In this behalf, it is to be noted that the first respondent has objected to all the similar constructions in the vicinity all throughout.

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7. As stated above, the first respondent objected at all stages when it came to know about the proposed development of the appellant. Firstly, when the public notice was issued on 19.6.2006 for environmental public hearing, the first respondent lodged their objection by letter dated 11.7.2006. They pointed out that a residential-cum-commercial complex next to oil/petroleum refinery was inherently not environment friendly. It has been their submission that the operation of the refinery and ancillary installations, including storage facilities, release Volatile Organic Compounds into the atmosphere, some of which are carcinogenic, particularly at the height of funnel chimney. It was also pointed that a construction overlooking the refinery was not desirable from the point of view of the safety and security of the refinery. When the first respondent learnt about the other development projects such as those on the

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A Metal Box Co.'s plot and on that of Apar Ltd., they had
B protested by their letters dated 26.10.2007 and 3.6.2008 to the
Chief Secretary of the State of Maharashtra. By their
subsequent letter dated 26.8.2008 to the Additional Chief
C Secretary, they lodged their objections once again. The first
respondent by their letter dated 15.10.2010 requested the
Municipal Corporation to intervene and stop the construction
of residential/commercial complex of the appellant near their
refinery. However, the Municipal Corporation by their letter
dated 28.10.2010 informed the first respondent that the
D development around the refineries was being carried out by
Oswal in accordance with the Development Control Regulations
(DCR) for Greater Mumbai, 1991 framed under the
Maharashtra Regional and Town Planning Act, 1906 ('MRTP
Act' for short), and legally the development could not be
stopped by the Corporation.

8. Ultimately, when the first respondent learnt that
permission had been granted to the appellant for conversion
of the land from industrial to residential-cum-commercial
purposes, the first respondent filed the earlier referred Writ
E Petition in the Bombay High Court bearing No.1973 of 2011.
The prayers in the Writ Petition were to set aside the approvals
and permissions granted by various statutory authorities, and
particularly the approvals and permissions granted for the
development purpose and for the change of user as disclosed
F from exhibits Q to Z to the Writ Petition. Prayer (b) of the petition
was that the permission to develop the residential-cum-
commercial complex on the said plot be set aside. The Writ
Petition having been allowed, these two appeals have been
G filed. Mr. Dushyant Dave, learned senior counsel has appeared
for the appellant Oswal, Mr. Harish Salve, learned senior
counsel has appeared for HPCL, Mr. Shekhar Naphade,
learned senior counsel has appeared for the Municipal
Corporation of Greater Mumbai, and Mr. Sanjay Kharde,
learned counsel has appeared for the State of Maharashtra.

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9. The principal submission on behalf of the appellant A
Oswal was that they had been granted the change of user
(conversion from industrial zone to residential/commercial zone)
by the municipal corporation, under its permission dated
1.9.2009, on this parcel of land (exhibited at Annexure P-23 to
the Writ Petition). Since, this permission was as per DCR 57(4) B
(c), which allows such a change of user with the previous
approval of the Municipal Commissioner, it should not be
interfered with. This change of user was defended by the
Municipal Corporation also through the affidavit of the Assistant
Engineer, Development Plan, 'M' Ward, dated 19.11.2011. It C
was stated in paragraphs 4 (c) and (d) of this affidavit that
various complaints had been received from HPCL/BPCL
concerning the issue of security, and a reference was therefore
made to the Urban Development Department of the State of
Maharashtra, vide letters dated 26.10.2006 and 21.4.2007. D
However, no clarification as sought was received from the
Government, and hence in view of the order of the Municipal
Commissioner dated 24.8.2009, the conversion from Special
Industrial Zone (I-3) to Commercial Zone (C-1) was granted.
That was on an undertaking from Oswal, that if the Government E
issues an adverse clarification, that will have to be complied
with, and also on an indemnity, as against any legal
consequences arising out of any action initiated by HPCL.

10. Various submissions were advanced on behalf of the F
first respondent, though the principal ones from amongst them
were as follows:

(i) Firstly, it was submitted that the permission for G
conversion of the land from industrial to residential-cum-
commercial purpose was granted even prior to the public
hearing in pursuance to the notice issued by the
Maharashtra Pollution Control Board. Besides, the
conversion from Special Industrial Zone (I-3 Zone) to Local
Commercial Zone (C-1) under regulation 57 (4) (c) of the
DCR 1991 required a certain procedure to be followed H
which had not been followed, and it could not be without

A considering the objections of Respondent No 1.

(ii) Secondly, the likely health hazards for the occupants were not considered at all, as pointed out earlier.

B (iii) Last but not the least, they emphasised the security aspect. In paragraph 28 of the Writ Petition, the first respondent specifically relied upon the inspection carried out by the Intelligence Bureau of Government of India in the refinery on 10.1.2011. The report stated in paragraph 3 thereof as follows:

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"3. Threat Assessment

D *The Mumbai terrorist attack of November 26, 2008 has exposed our vast coastline to danger through the sea due to which oil installations have become more vulnerable to threat from inimical forces. This was revealed during interrogation of various arrested militants in the country over last few years.*

E *David Coleman Headly disclosed during his interrogation that during his nine visits to India (2006-09), he has identified a large number of sensitive establishments including economic targets like Mumbai Stock Exchange, World Trade Tower, Oil Installations, BARC Mumbai, etc.*

F *Several multi storied buildings (57) constructed under SRA scheme near the HPCL Refinery, presently not allotted to anybody due to security concerns, if allotted to persons other than security agencies, may be misutilised to cause damage to the Refinery.*

G *Any planning to construct high rise residential buildings at the site of demolished factory of M/s Oswal Agro mills Ltd., Anik, Chembur (Near HPCL Refinery) would be detrimental to the security/safety of the vital installation." (emphasis added)*

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11. It is relevant to note that on the security aspect, the first respondent referred to their letter dated 13.4.2011 to the then Chief Secretary, Government of Maharashtra, wherein they drew his attention to the recent incident of fire at Indian Oil Depot at Jaipur resulting into loss of life and damage to property. They relied upon the letter dated 1.3.2012 by the Deputy Secretary, Ministry of Home Affairs, Government of India which specifically stated in Paragraph (2) (ii) as follows:

“(ii) With specific reference to the construction of within building at the site of demolished factory of M/s Oswal Agro Mills Ltd., Anik Village Chembur near HPCL refinery, they pose a security hazard to the above vital installation in HPCL refinery. Accordingly, MHA has already issued an advisory in this regard to the State Government of Maharashtra vide letter No VI 23014/448/2011-VS dated 16.1.2012 (copy enclosed). As regard the possibility of such construction being used by security agencies, the matter, needs to be examined in depth in consultation with all concerned.”

Lastly, they relied upon the affidavit of the Assistant Commissioner of Police of Trombay filed in the Writ Petition. In paragraph 3, he has specifically stated that any upper floors in the complex on Oswal land, if permitted, may provide an ideal launching pad for any external object to be directed or targeted at the said refinery storage tanks which may contain highly inflammable substances like LPG, Naphtha and Crude Oil.

12. The Division Bench of the High Court considered all these aspects, and by a very detailed judgment came to the conclusion that such a construction could not be permitted as it would be hazardous to health, and would also create a threat to the security of the refinery. It came to the conclusion that the development permission in favour of Oswal was granted without any application of mind, and without considering the security aspect. All these considerations led the High Court to allow the

A Writ Petition. In paragraph 60 (a) of its judgment, the High Court set aside all the orders/permissions which were issued from 2006 onwards, and which were annexed at exhibits Q to Z to the Writ Petition. The High Court, thereafter, specifically directed in paragraphs 60 (b) and (c) as follows:

B *(b) The Municipal Commissioner is directed to reconsider the application made by Oswal for change of user and also application for sanction of plan after considering the objections of the Petitioners, Police Department, Ministry of Petroleum, Ministry of*
C *Environment and Intelligence Bureau Report referred by HPCL and also Security Control Regulations issued by State of Maharashtra, issued under Section 37 (1AA) of the Maharashtra Regional and Town Planning Act, 1996 and after hearing the parties concerned, pass the fresh*
D *order after considering the views expressed by us and in accordance with law within a period of eight weeks from today.*

E *(c) Ministry of Environment is also directed to reconsider their decision while considering the permission applied for by Oswal after considering the views expressed by us and after hearing all the concerned parties including HPCL and should pass a fresh order within a period of eight weeks in accordance with law."*

F 13. (i) Our Learned Brother Singhvi, J. appears to have been persuaded to accept the submissions of the appellant in view of the affidavit of Dr. Seema Garg, Vice President of the appellant. The affidavit points out that on the southern side of the refinery, the Gavanapada Village is located with a
G population of about 7000 people. We must, however, note that this is an old village establishment and one cannot do away with it. It is stated that on the eastern side there is a slum at a distance of about 18.53 meters. On the northern side, there are two slums at Vishnu Nagar and Bharat Nagar, and on the
H western side, there are some shops and hutments. In our view,

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HPCL cannot be held responsible for these structures. We must, in any case, note that they are all structures of an insignificant height. On eastern side, there is a high-rise tower of 14 storeys which is almost completed, but yet not occupied, but which had all throughout been objected to by HPCL. On the northern side, there are more than 50 multi-storey buildings constructed in the Slum Rehabilitation Scheme which also are not occupied. We must, however, note that because of the resistance of the first respondent, the upper floors of these buildings are to be allotted to the Police department.

(ii) The affidavit of Dr. Seema Garg has emphasized all these aspects which have been quoted in the order prepared by our Learned Brother, but he has not considered the above explanation of HPCL in that behalf. It has been stated in paragraph 22 of his judgment that the High Court has allowed the Writ Petition by relying upon the report of Intelligence Bureau and the affidavit of the Assistant Commissioner of Police, but according to him they are not based on any scientific study or expert analysis. In our view, the statement in the affidavit of the Assistant Commissioner of Police as well as the extracts from the report of the Intelligence Bureau are quite cogent. The view of the Police Commissioner is reinforced by the Central Home Ministry on the background of the terrorist attack in the city on 26.11.2008. It has also been mentioned in paragraph 23 of his judgment that some other buildings are coming up at a distance of about 800 meters from the refinery. As stated above that all throughout these developments have been objected to by HPCL. Therefore, HPCL cannot be faulted for such constructions which are permitted by the Municipal Corporation. Besides, merely because such constructions have been permitted so far, that does not justify any more high-rise constructions coming up in the vicinity. We are aware of the serious accidents which took place at the IOCL refinery at Jaipur, and also at the Union Carbide Factory, Bhopal. Any such accident would cause serious loss of life and property, and would be hazardous to the occupants of these constructions.

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A 14. What is most relevant to note is that when the refinery
of the first respondent came up in the year 1952, and the other
earlier referred vital installations of national importance also
came up in the nearby area, the population over there was
sparse, and that is why these installations were permitted to
B be set up at locations in the Mahul area of Chembur far away
from the Island city of Mumbai. Now the city has grown-up, as
also the suburbs, and people are trying to occupy the vacant
spaces wherever available. The Municipal Corporation and the
State of Maharashtra ought to have checked and stopped these
C constructions, particularly the high-rise ones in the vicinity of
these installations, but they have failed in doing the same. It
cannot, however, justify further dereliction of their
responsibilities. Merely because some constructions have
been permitted at some distance from the refinery of the first
D respondent, does not mean that further high-rise constructions
should be permitted to come up nearby. Two wrongs do not
make one right.

15. Having dealt with the appeal filed by Oswal, we may
now deal with the appeal filed by the Municipal Corporation. In
E this behalf, we must say at the outset, that we are rather
surprised that the Municipal Corporation has also chosen to file
an appeal against the order of the High Court. This is on the
background that Oswal had given an Indemnity Bond to
theMunicipal Commissioner dated 7.1.2011 which reads as
F follows:-

"INDEMNITY BOND

To,

G *The Municipal Commissioner,*
M.C.G.M. "Municipal Office, Mahapalika Marg, Mumbai
Hon'ble Sir,"

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Sub: Request to allow the users permission in Local Commercial Zone (C-1) on the land bearing CTS No. 381, 381/1 to 21 of Village Anik, in 'M' Ward at R.C. Marg, Chembur, Mumbai. M/s Oswal Agro Mills Ltd.

Ref: File No. CHE/683/DPES"

I, the undersigned Shri Mahesh Rawal, Authorised Signatory of M/s Oswal Agro Mills Ltd, of the above mentioned property whose office situated at Sea Building, Off Carter Road, Behind Cafe Coffee Day, Opposite Chandni Building, Bandra (W) Mumbai-400 052, hereby undertake to indemnify MCGM of any legal consequences arising out of HPCL or any other organization/person moves any court of law restraining development on the land under reference.

This Indemnity Bond is binding to me, to my heirs, executors, assignees, assigns and to everybody derives title through or under me.

Dated this 7th day of January, 2011

Yours faithfully

Oswal Agro Mills Ltd."

In view of this Indemnity Bond, the Municipal Corporation had no reason to file any appeal against the order of the High Court, and we disapprove of the same. We refrain from saying anything more.

16. (i) It was contended on behalf of Oswal, as well as on behalf of the Municipal Corporation, that the Corporation is not required to go into the security aspect and the environmental clearance as a pre-requisite before any such proposal is cleared. It was submitted that this was outside its jurisdiction. In this behalf, we may refer to the relevant portion of DCR No.16

A which falls in Part II of the DC Regulation of 1991 containing 'General planning requirements, Land uses and manner of development'. The relevant portion reads as follows:

"16. Requirements of Sites

B *No land shall be used as a site for the construction of buildings*

C *(a) if the Commissioner considers that the site is insanitary or that it is dangerous to construct a building on it or no water supply is likely to be available within a reasonable period of time;*

(b)

(c)

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(d)

(e) if the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the health and safety of the inhabitants of the neighbourhood;

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(f)

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(n) if the proposed development is likely to involve damage to or have deleterious impact on or is against urban aesthetics or environment or ecology and/or on historical/architectural/ aesthetical buildings and precincts or is not in the public interest.”

Even DCR No.64 which gives the ‘Discretionary powers’ to the Commissioner, does not permit him under sub-clause (b) thereof to grant relaxation which will affect safety, fire safety and public safety of the inhabitants of the building and the neighbourhood. Thus, this power is coupled with the duty to give paramount importance to safety. These provisions cast an obligation on the Municipal Commissioner to take into consideration the objections in this behalf.

(ii) DCR 57 (4) (c) was relied upon by the appellant and the Municipal Corporation in defence of the change of user. We are conscious that this DCR contains a non-obstante clause, but all that it states is that ‘notwithstanding anything contained above’ (i.e. earlier in the DCRs), such a change of user may be permitted. Thus, it is an enabling provision, though it does not mean that the power therein is to be exercised disregarding the objections that are raised. The power under DCR 57 (4) (c) could not be exercised as a stand alone power, when specific objections relating to DCR 16 had been raised. MRTP Act being an act to provide for planned development, the provisions of the DCRs will have to be read purposively and harmoniously, and not disjunctively. The appellants had relied upon paragraphs 41 and 42 of the judgment of this Court in *Bombay Dyeing & MFG Co. Ltd. Vs. Bombay Environmental Action Group and Ors.* reported in 2006 (3) SCC 434. However, all that these paragraphs state is that DCR 57 (4) (c) is *pari materia* with DCR 56 (3) (c), which is on the General Industrial Zone (I-2 Zone). However, the judgment does not lead us anywhere further on the issue in hand. As against that, we must note that this Court has held that the wide amplitude of a non-obstante clause must be kept confined to the legislative

A policy, and it can be given effect to, to the extent Parliament intended and not beyond the same (See Para 36 of *ICICI Bank Vs. Sidco Leather Ltd.* 2006 (10) SCC 452). HPCL had lodged their objections, and the Municipal authorities were required to consider the same but they have not. Rather, they refused to consider these objections on a totally erroneous reading of the DCRs as can be seen from their earlier referred letter dated 28.10.2010. Where human habitation is permitted in proximity of hazardous plants, there is an immediate, as well as long term, danger of exposure to health hazards. The planning authority cannot ignore these aspects. The public interest cannot be sacrificed at the altar of commercial interests. The submissions of the Municipal Corporation and Oswal are clearly contrary to the above regulations, and are therefore rejected.

(iii) Oswal and the Municipal Corporation had contended that the Writ Petition was belated. With reference to this submission, we must note that the I.O.D was issued to Oswal on 11.11.2010, and the Commencement Certificate (to start the construction upto the stilt) was issued on 11.11.2011. The Writ Petition filed on 16.9.2011 could not therefore be said to have been filed belatedly.

17. Our Brother Singhvi, J. has apart from allowing the appeal and setting aside the order, directed the High Court to re-hear the matter after considering the material produced by the parties on the issue of security threat and possible danger to the health of the occupants of the buildings already constructed and that of the prospective occupants of the appellants' buildings. As stated above, in our view the security threat is clearly placed on record, as also the possible danger to the health of the occupants of the buildings already constructed and to be constructed as well. The order of the High Court has set aside all the approvals in favour of Oswal. It has taken care of some of these issues when it directed the Municipal Commissioner to reconsider the application made by Oswal after considering (a) the objections of the Police

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Department, Ministry of Petroleum, Ministry of Environment and Intelligence Bureau report, and also the Security Control Regulations framed by the State of Maharashtra. (b) The High Court has also directed that the Municipal Commissioner will pass the order after hearing the parties and after considering the views expressed by the High Court and in accordance with law. In addition, we further direct the Municipal Commissioner to consider the issue of possible danger to the health of the occupants of the buildings already constructed, and those to be constructed by the appellants, as desired by Singhvi, J.. He has referred to the statement in the affidavit of Vice-President of the appellant that HPCL is seeking to make the property of Oswal sterile and unbuildable without acquiring the same. The parties can certainly utilise the time now available for appropriate and fruitful negotiations in this behalf. And, in any case, Oswal can certainly use the land for an agro-industry or any permissible industry.

18. This being the position, we cannot find any fault with the impugned judgment and order of the High Court, and it need not be set aside. On the contrary, these two appeals deserve to be dismissed. Accordingly, we pass an order dismissing these two appeals. The parties will bear their own costs.

Bibhuti Bhushan Bose

Appeals dismissed.