CASE NO.:
Appeal (civil) 6057-6058 of 2001
Special Leave Petition (civil) 20494-95 of 2000

PETITIONER:
M/S. LIVE OAK RESORT P. LTD. & ANR.

Vs.

RESPONDENT:
PANCHGANI HILL STATION MUNICIPAL

DATE OF JUDGMENT: 31/08/2001

BENCH:
A.P.Misra, U.C.Banerjee

JUDGMENT:

BANERJEE,J.

Leave granted.

The appellants herein, moved this Court under Article 136 of the Constitution of India seeking special leave to appeal against the orders of the Division Bench of the High Court of Judicature at Bombay in the matter of dismissal of the writ petition being No. 2226 of 1999 dated 10th July, 2000 as also an order of dismissal of the Review Petition dated 6th November, 2000. By the impugned order of dismissal, the High Court did lend its concurrence to an order of demolition of an additional floor constructed by the appellants in Panchgani said to be in violation of the Municipal Rules as also of the direction contained in an earlier judgment of the same High Court in a public interest litigation being No. 2754 of 1997 wherein the High Court has dealt with a circular issued by Urban Development, Public Health and Housing Department in 1971. Incidentally, be it noted that various public interest petitions have been filed before the High Court seeking to prevent construction and/or regular constructions in the Mahabaleshwar-Panchgani area in the State of Maharashtra being an ecologically sensitive belt. In the writ petition filed by the Bombay Environmental Action Group the bone of contention of the appellants had been that there was large scale illegal construction and deforestation in the Mahabaleshwar-Panchgani region resulting in wide spread environmental and ecological degradation to these two hill stations in the State of Maharashtra. The High Court upon consideration of the pleadings and the facts on record passed various orders from time to time and finally dealt with the matter in its judgment dated 18th November, 1998 containing certain directions in order to put an embargo to the constant exploitation of nature resulting in ecological imbalance in the area and thus to avoid the bio-diversity crisis. The appellants herein were also parties therein as respondent No.17.
Ecological imbalance and non-conformity of the Municipal Rules are however two independent and separate factors to invoke the jurisdiction of the law courts and either of the two factors however would prompt the law courts to pass necessary orders by reason therefor to protect the environment.
Before adverting to the contextual facts in the present appeals

under Article 136 of the Constitution, the earlier order of the Bombay High Court spoken of hereinbefore in this judgment dated 18th November, 1998 ought to be adverted to so as to appreciate the resultant culmination on to the issuance of an order of demolition by the Panchgani Municipal Council and subsequent concurrence thereof by the High Court in a writ petition filed by the appellants herein.

Incidentally, be it noted that the two hill stations of Panchgani and Mahabaleshwar recently have been acclaimed to be very popular tourist resorts and tourism has thus turned out to be a great economic benefactor to the State - and it is this possible improved economic situation that the State Government in the year 1971 issued a circular (more fully dealt with hereinafter in this judgment) under which an additional FSI was made available to the luxury hotels (with 3 star facilities and above) - obviously the State Government at the time of issuance of the circular had in its mind the long catena of cases of this Court as also that of various High Courts that while ecology cannot be given a go by, in the same vein development process cannot be ignored: As a matter of fact the law courts thus evoked the factum of striking of a balance between the development and ecology since in a developing economy there cannot be either development or ecology but both must exist and thus a balance shall have to be struck between the two, as otherwise the society will perish in the absence of either of the two elements noticed above.

In this context, two decisions ought to be adverted to briefly: one from the Calcutta High Court and the other of this Court. In the Calcutta High Court, People United for Better Living in Calcutta - Public & Anr. V. State of West Bengal & Ors.[AIR 1993 Calcutta 215] the Single Judge in paragraph 2 of the Report observed:

"2. While it is true that in a developing country there shall have to be developments but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development but no environment, which would result in total devastation, though however, may not be felt in presenti but at some future point of time, but then it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will in any event, have its toll on the lives of the people: Can the present day society afford to have such a state and allow the nature to have its toll in future - the answer shall have to be in the negative: the present day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development : time has now come therefore, to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development and more so by reason of definite legislations in regard thereto as noted hereinafter, it is a plain exercise of the judicial power to see that there is no such degradation of the society and there ought not to be any hesitation in regard thereto - but does that mean and imply stoppage of every developmental programme - the answer is again 'no' : There shall have

to be a proper balance between the development and the environment so that both can co-exist without affecting the other. On the wake of the 21st century, in my view, it is neither feasible nor practicable to have a negative approach to the development process of the country or of the society, but that does not mean, without any consideration for the environment. As noted above, there should be a proper balance between the protection of environment and the development process: the society shall have to prosper, but not at the cost of the environment and in the similar vein, the environment shall have to be protected but not at the cost of the development of the society - there shall have to be both development and proper environment and as such, a balance has tobe found out and administrative actions ought to proceed in accordance therewith and not de hors the same."

This Court, however, in Goa Foundation's decision [Goa Foundation, Goa v. Diksha Holdings Pvt. Ltd. & Ors.: 2001 (2) SCC 97] affirmatively approved the approach as stated in the Calcutta High Court judgment.

Be it noted that on this factual backdrop and by reason of the notification in 1971 there was a wide spread violation of the regional plan for Mahabaleshwar-Panchgani area wherein agricultural land was being extensively used for non-agricultural purposes such as hotels, holiday homes, luxurious private bungalows - it has been the contention of the Bombay Environmental Action Group that forestry in the Mahabaleshwar-Panchgani region being depleted at an alarming rate thus requiring protection and resultant intervention of the Court. The records further depict that the rule-nisi in the earlier matter was issued on 23rd June, 1997 and while issuing the said rule-nisi the State Government was directed to form a high level committee to find out as regards the illegal construction and user of land in violation of the Regional Town Plan for the area or the Building Bye-laws and Development Control Rules. The committee in terms of the order did submit its report on 17th November, 1997, wherein about 1060 buildings in Mahabaleshwar- Panchgani region were found to be in contravention of statutory protection and suggested various remedial measures and in terms therewith apart from the directions on to the Pollution Board, Mahabaleshwar Municipal Council were also directed to take immediate action against erring parties and it is in course of hearing that some of the persons who had received notice submitted that they were prepared to give undertakings to the High Court that basement of the construction could only be used for parking, storage, air-conditioned plants and not for any other purpose. The High Court while dealing with the matter observed:

"In our view, on such undertakings being given by the parties to whom notices were issued, no further action would be required to be taken on the ground that the basement area is to be included for built-up area calculations. It was directed that such undertakings be given to this Court and to the Chief Officer of the Municipal Council on or before 15th September, 1998. As regards the interpretation of the Bye-law, the learned counsel for the respondent sought time.

On 15th September, 1998 the parties were heard at length. With regard to the Building Bye-laws and Development Control Rules for Mahabaleshwar and Panchgani Municipal Councils, the statements made by the learned Advocate General were recorded, viz.,

(a) For deciding the permissible maximum height, the council is taking into consideration the height of average of the four corners of the surrounding ground level;

(b) The lower storey of the building, if constructed below or partly below the ground level, is considered as basement and if basement is used for the purpose specified in the Rules such as parking space, store room or air-conditioning plant room, then it is not included for calculation of total built-up area and it is also not considered as one storey or floor;

(c) The council is following Bye-law 20.6. which provides that the overall height of any building shall not be more than 9 mtrs. In Sector 1, S. No.52 and area selected for MIG/LIG/EWS housing with approval of Government and shall not be more than 11 mtrs. in all other areas.

.....

In this view of the matter, the Municipal Councils were directed to exclude the basement area from built up area calculations if the owners of the building filed necessary undertakings before this Court.....

.....As regards the violation of height restrictions, the Planning Authority was directed, at its discretion, to condone violation of 1 or 2 feet wherever such violation was there and that it was not to be treated as a license to grant permission to violate the height limit. Further height should be counted by taking average height of the four corners of the plot. The applications for condonation of such height violations were required to be filed on or before 30th September, 1998. Such condonation was directed to be granted on recovering a penalty of Rs.1,000/- to Rs. 25,000/-. It was also clarified that this would not give the authority to the Councils to sanction plans in violation of the height regulation.

.....

.....However, it is clarified that if the benefit of the Government Resolution of the year 1971 is already given then those cases are not to be disturbed and are not to be reviewed. Henceforth, the benefit of the said

Resolution is not to be given." (Emphasis supplied)

It would be convenient to note the true scope and effect of 1971 circular spoken of earlier at this juncture. The circular incidentally pertains to higher floor space index to luxury hotels within the jurisdiction of the Municipal Corporations and Municipal Council in the State of Maharashtra. Relevant extract of the circular however is noticed herein below. The circular reads:

"Government has been receiving requests from several Hotels in Maharashtra that they should be allowed higher F.S.I. for their buildings than is normally permissible. Government decided that all the Municipal Corporations - Municipal Councils in the State of Maharashtra should be advised to allow higher FSI for luxury hotels with a grading of 3 star and above within their jurisdiction provided the request is recommended by the Department of Tourism. Government is also pleased to advise that the additional FSI to be allowed should not exceed 50 per cent of the normal FSI allowed in such cases. Government is further pleased to direct that the minimum area of the plot should not be less than 1/4 acre or 1000 sq. meters in respect of hotels having 10 rooms and where the number of rooms is more than 10, the plot size should be larger as may be required by the Department of Tourism.

Government is further pleased to advise the Municipal Corporations (other than Bombay), Municipal Councils that if any Development Control Rules, Town Planning Regulations, Building regulations applicable in their area do not permit a higher FSI for luxury hotels as indicated above, the higher FSI may be allowed in anticipation of suitable modifications in the rules/regulations etc."

Admittedly, the appellants herein had commenced the construction of an additional floor in the existing hotel premises after conferment of a 3 Star status. Mr. Ganguly, learned senior counsel, appearing in support of the petition for special leave contended that the commencement of the construction of the additional floor in the hotel was on bonafide belief since the plan furnished by them had in fact being sanctioned by the Director, Town Planning and as such question of issuance of the order of demolition would not arise and it is the issuance of this order of demolition, the appellants herein moved the High Court at Bombay in a petition under Article 226 of the Constitution which however was negatived by the High Court with an order of dismissal of the same and hence the special leave petition before this Court as noticed earlier.

Mr. Ganguly addressed this Court in detail on two specific counts challenging the dismissal of the order of the writ petition by the High Court: the first count being that the High Court's refusal to entertain the writ petition has been totally on a misreading of the earlier judgment of the High Court and on the second it has been contended by Mr. Ganguly that the finding of violation of the Municipal Rules warranting a demolition in the contextual facts have been totally unjustified.

Needless to record that Panchgani, a hill station in Satara district of the State of Maharashtra has recently been facing a tremendous influx of people as noticed herein above: a virgin land having all round beauties of nature thus turned out to be a tremendously popular tourist centre. Admittedly the High Court,

however, in order to stop further exploitation of nature directed a restraint order effective from the date of the order viz., 18th November, 1998 in regard thereto. It is only a prospective order and not a retrospective one.

Incidentally, Mr. Dushyant Dave, learned senior counsel appearing for the intervenor in the matter with his usual felicity of expression very strongly objected to the submissions of Mr. Ganguly, upon reliance on the earlier judgment of the High Court as noticed herein before. Equally forceful however have been the submissions of Mr. Deshpande appearing for the Government and Mr. Singh for the Municipal Council.

Before going into the main thrust of submissions of the parties, a brief look to the order impugned would be convenient at this stage: the relevant extracts are as below:

"3. We have gone through the original files of the Municipal Council and the record of the case with the assistance of the learned counsel for the parties. We have also perused the photographs of the structure constructed by the petitioners. The respondent No.1 has sanctioned for construction of only ground plus one storey and basement. However, it appears that the petitioners have constructed a building of ground plus 3 stories. The so-called basement is actually a ground floor which is being used for the purpose of residence contrary to the Development Control Rules. It is also seen that the petitioners have violated high restriction and there is excess construction to the extent of 107 sq. meters. It seems that this construction was carried out inspite of stop work notice given by the respondent no.1 and when the writ petition No.2754 of 1997 was pending before this Court.

4. Mr. Reis the learned counsel for the petitioners strenuously contended that the petitioners constructed an additional floor in view of the no objection granted to the Director of Town Planning. He contended that although technically there was no sanction from the Municipal Council, keeping in mind the fact that no objection was granted by the Director of town Planning and also the fact that the petitioners had invested additional funds for the construction of the extra floor and having regard to the observations made by the division bench in para 27 of the order dated 18.11.1998, the construction of the extra floor by the petitioners should be regularised. We do not find any merit in the submission of the learned counsel. In the first place petitioners had constructed extra floors and not one as contemplated by the circular dated 7.10.1971. As indicated above petitioners have not constructed basement and instead they have constructed a ground floor. Secondly the observation of the division bench in para 27 of the order are of no help to the petitioners. The division bench has categorically held that the benefit of the additional FSI could not have been given to any 3 Star hotels after the commencement of the Development Control Rules. The division bench has merely clarified that if the benefit of the circular of 7.10.1971 was already given then those constructions were not be disturbed. In the instant case it is an admitted position that the plans for

additional floors were not sanctioned by the respondent No.1. In the circumstances the observations made by the Division Bench are not applicable to the present case and the petitioners are not entitled to claim any benefit of the said Government Circular. The construction of additional two stories is totally unauthorised and contrary to the Development Control Rules. We do not find any infirmity in the impugned orders passed by the respondent No.1."

It is this order which is under challenge in this petition under Article 136. Incidentally, upon issuance of notice and the interim order passed in the presence of the parties, all the parties agreed that the matter under consideration ought to be disposed of at the notice stage itself and hence the final disposal in terms of this judgment.

Turning on to the factual score it appears that the rejection of the plan by the letter dated 20.3.1997 emanating from Panchgani Hill Station Municipal Council has had four specific grounds and the same are set out hereinbelow:

"1. The present F.S.I. of the present building's Ground Floor and First Floor is more than the F.S.I. given by Hon'ble Director, Town Planning, Maharashtra State, Pune.

2. It is not correct to grant permission/permissible for Health Club and Sanitation House.

3. Alongwith the annexed Plan of the construction some measurements are shown in feet. The feet measurements must be shown in Metric.

4. Sanitation House is not permissible in Kitchen."

A plain look at the grounds mentioned however, depict that the principal objection centres round the first of the four grounds. It is in this respect that one ought to fall back upon relevant correspondence either inter-departmental or intra parties. First of the series however is a letter dated 8/13th June, 1995 from the Director, Town Planning to the Assistant Director, Town Planning, Satara, the letter though inter-departmental stands disclosed in the proceedings and pertains to the circular dated 7th October, 1971 spoken of earlier since Mr Ganguly's principal defence against so-called violation of Municipal Act is dependant on this document. Let us have a clear view of the matter in a broader perspective - A letter dated 6th April, 1995 was sent by the Municipal Council to the Town Planning Department expecting guidance whether additional FSI can be granted for the construction of a three Star hotel at a final plot No.414-E - Town Planning Scheme No.3 Panchagani by Director, Town Planning, Maharashtra State, Pune. The same in turn was placed before the Director, Town Planning, Pune for his opinion and guidance by the Assistant Director, Town Planning, Satara and which was in turn replied to by the Director by the letter noticed above dated 8/13th June, 1995, wherein the issue of grant of additional FSI was considered and an opinion expressed therein by way of a sanction. The relevant extract of the letter dated 8/13th June, 1995 are set out hereinbelow for appreciation of the submissions and being the main plank of defence against the order of demolition as noticed above. The relevant extracts whereof, however are as below:

"Holder of the property consisting of the piece and parcel of land bearing final Plot No.414-E, Town Planning Scheme No.III situated within limits of Panchgani Hill Station Municipal Council has been granted permission for the Hotel by the Municipal

council and he has submitted proposal for the additional FSI for carrying out construction of star Category Hotel and in that connection guidance has been expected from this directorate.

In accordance with the Circular dated 7.10.71 of the Government, an additional FSI is permissible for the Three Star and higher grade hotel and applicant has submitted proposal in accordance with this circular, there is no objection to sanction the same. (Emphasis supplied)

In connection with this proposal as suggested by the Deputy Director, Town Planning, Maharashtra State, Pune Region, Pune it will be appropriate to charge fees @ 50% of the existing markets rate for the additional FSI.

As because of this permission of additional FSI as one floor will be more than the sanction and height of the building is more by 3.20 mtrs. than sanction, it is unavoidable but to give relaxation.

In accordance with provision No.28.2 of the Development Control Regulations and Certified Construction Bye-laws which are applicable for "B" and "C" Class Municipal Councils, relaxation is being granted as of the special case. Enclose herewith all papers of the branch office." (Emphasis supplied)

This decision of the Director, Town Planning as above, was in turn communicated to the Chief Officer, Panchgani Hill Station Municipal Council by a letter from the Assistant Director, Town Planning dated 23rd February, 1996 wherein it has been categorically mentioned that the letter of the Director dated 13.6.1995 has provided guidance and a copy whereof was also sent therewith. The Assistant Director by the said intimation dated 23.2.1996 also requested the Municipality to deposit a sum of Rs.7,442/- for the additional FSI granted in the letter of the Director in terms of Section 360-B of the B.C.S.R fees. A further intimation has also been effected to the effect that the aforesaid sum of Rs.7442/- being the additional premium is to be recovered from the applicant - The sanction thus stands acted upon by the parties. The record further depicts that by letter dated 3rd June, 1996, the Assistant Director, Town Planning did call for the construction plans of the existing building and in terms therewith the Municipal Council, Panchgani forwarded the same upon obtaining copies of the same from the appellants herein. It is only thereafter however that the Town Planning Department by a letter dated 31st December, 1996 informed the Chief Officer of the Municipal Council that the permission for construction ought not to be granted, the reason being the total area of construction is more than the construction area which is permissible and sanctioned by the Director, Town Planning, Maharashtra State vide letter dated 8/13th June, 1995 and in terms therewith Panchgani Hill Station Municipal Council wanted a further clarificatory order from the town planning authority who in turn by its letter dated 6th March, 1997 recorded the 4 point objection as noticed hereinbefore and the subsequent application dated 9th September, 1997 regarding the grant of permission for construction of the 3 star hotel at the premises in question stood rejected. Representation made by the appellants but to no effect and subsequently order of demolition of the portion constructed said to be unauthorisedly was issued which was brought to challenge before the High Court and the factual score thereafter stands already noted

in this judgment and as such we do not think it expedient to repeat the same once again.

It is in this factual matrix, the High Court dealt with the matter. At the first stroke, it seems rather significant though the High Court in the earlier judgment has categorically recorded that if the benefit of the Government resolution of the year 1971 has already been given, then and in that event, those cases are not to be disturbed and thus not to be reviewed. The High Court while incorporating the same recorded that it is an admitted position that the plans for additional floors were not sanctioned by the respondent No.1 and as such, the issue does not seem to have any benefit from the order of the Division Bench - at the first sight, it seems no exception can be taken on this but on a closer scrutiny of the record displaces such an observation of the High Court. By the letter dated 8/13th June, 1995, the Director, Town Planning has categorically recorded grant of permission of additional FSI and having regard to an additional floor, it would obviously be more than the sanctioned height of the building. The appellants were not only authorised to construct an additional flour but the memo also contained a relaxation on the height as well to the extent of 3.20 meters than the permissible sanction limit The letter in question stands extensively quoted in the earlier part of the judgment and the emphasised portion would depict the conclusion as has been noticed hereinbefore. The situation therefore, turns out to be that the Director, Town Planning being the authority in terms of the provisions of law did grant sanction of an additional floor with an additional height of 3.20 metres upon proper relaxation being granted. This aspect of the matter, the High Court has not considered at all and thus clearly fell into an error. It is to be placed on record that Director himself as a matter of fact did place reliance on provision 28.2. of the bye-laws applicable to 'B' and 'C' class municipalities in the State of Maharashtra. The entire reference to the Director was by reason of the above said provision and all the statutory agencies have acted thereupon. The above noted provision 28.2 reads as below:

"28.2 The Director of Town Planning may permit special relaxation to any of the bye-laws, provided the relaxation sought does not violate the health safety, fire safety, structural safety, public safety of the inhabitants and the buildings and the neighbourhood" -

The proviso noticed above having the definite application in the contextual facts, sanction from the Director, Town Planning in terms of the Standardised Building Bye-laws for "B" and "C" Class Municipal Council of Maharashtra supersedes any further power of the council. As a matter of fact, the power conferred under 28.2 being supreme, the Council is under statutory obligation to abide by the directions as contained in the Director's letter as above, and grant sanction in terms of Section 45 of the MRTP (for short) but in accordance therewith : This power stands absolute and there is no escape from that situation. We however, ought not to be understood to record the unguided power of the Director - The powers of the Director also stand circumscribed by and under the provision 28.2 itself and to the effect that exercise of such a power pertains to the grant of additional FSI and correspondingly authority and jurisdiction to grant relaxation as regard the height.

It is on this score, Mr. Ganguly, contended that the provision as contained 28.2 of the bye-laws as noticed above does not recognise any superior authority than the Director in the matter of grant of additional FSI and since the Director has granted, the Council has no other alternative or option but to follow the same and grant sanction in accordance therewith and not de hors the same. Additional FSI stands granted and the plan on the basis of such grant, ought in the ordinary course of events to have been sanctioned. It is on this score that Mr. Dave appearing for the intervenor alongwith the learned Advocates appearing for the State

of Maharashtra and the Municipal Council in one voice also very strongly contended that since the Municipal Council is the ultimate sanctioning authority in terms of the Maharashtra Regional and Town Planning Act, 1966, the question of acting in excess of jurisdiction so far as the Council is concerned would not arise - obviously there is some confusion persists by reason wherefor the High Court has also fallen into an error : the reason being failure to distinguish between the grant of sanction of additional FSI and the sanction of the building plan. The additional FSI stands granted and in the event of such a grant, can the Council sit over the decision of the Director and refuse permission - on an analysis of the different statutory provisions, our answer cannot but be in the negative. Bye-law 28.2 clearly recognised the power to grant such a sanction for additional FSI and the decision of the Director is final on that score and the Council is to implement such a decision and not act de hors the same. In the event the respondents' contentions are to be accepted, then there exist no justifiable reason for forwarding the application of the appellants to the Town Planning Department of the State Government for guidance neither there was any justification for the Council to deposit the regulation fee of Rs.7,442/- in terms of the letter of the Town Planning Department as additional levy for grant of additional FSI - These issues however remain unanswered: Mere silence however will not provide a solace to the appellants herein. It is in this aspect of the matter that the High Court has also fallen to a great error. The High Court by its earlier judgment has clarified that in the event of the benefit of the Government resolution of 1971 has already been given, then those cases are not to be disturbed and not to be reviewed - in fact, such a benefit has been given by the Director who happened to be the proper authority to confer such benefit, there ought not to have been any confusion between the conferment of benefit of the additional FSI and the grant of sanction of building plans - two issues are separate in nature and the authorities are also separate - whereas the Director, Town Planning happened to be the deciding factor in the matter of grant of sanction of additional FSI and power to relax the height issue, the Municipality in terms of section 45 of the Act remained and still remains the authority to sanction or reject the plan in the ordinary course of events. There is thus no conflict between the provisions - Mr. Deshpande however significantly contended that the Director, Town Planning being the authority who is consulted by the Government before it finalises the draft development plan of the Municipal Council has a very limited function to discharge and only to provide technical guidance to the local authority: the submission however runs counter to statutory rules and as such we are unable to concur therewith.

In this context a public notice No.VI/999-95-96 in terms of resolution No.71 dated 28th November, 1995 ought to be noticed. The public notice reads as below:

"PANCHGANI HILL STATION MUNICIPAL
COUNCIL, PANCHGANI
PUBLIC NOTICE

Under Section 37 of Maharashtra Regional and Town Planning Act, 1966.:

No.VI/999-95-96. - All citizens residing in Panchgani Hill Station Municipal Council's limit are informed by this public notice, that the Panchgani Hill Station Municipal Council intends to suggest the following addition to the development control and Buildings Byelaws in Chapter XII-B after Law No.52.

In the sanctioned (Revised) Development Plan of Panchgani Hill Station Municipal Council which has been sanctioned by the Director of Town Planning, Maharashtra State's Notification No.DP/Panchgani

(R) /49-88/TPV-II dated 12th May 1988 and came into force with effect from 1st July, 1988.

Proposed addition in Byelaws is given below:

Particulars of Additional Bye-laws

For star category Luxury Hotels in independent plots and under one establishment with a raling of 3 and above as approved by the Department of Tourism, Government of India or the State Government, additional F.S.I. to the maximum extent of 50 per cent over and above the permissible F.S.I. in the area in which such hotel plot is situated may be permitted provided that such extra F.S.I. shall be subject to payment of such premium as may be fixed from time to time by the Municipal Council in consultation with the Director of Town Planning, Pune provided further that permissible height of 9.15 m. may be relaxed if necessary and only to facilitate use of extra F.S.I. in consultation with the Director of Town Planning. No condonation in the required open spaces, parking spaces and any other requirements of the Development Control Rules except the height as provided above shall be allowed in case of grant of such additional F.S.I."

Mr. Deshpande next contended that the letter dated 8/13th June, 1995 cannot but be read as a mere direction to consider the grant of relaxation of height and not a sanction - we are however unable to record our acceptance thereto by reason of the specific language of the Director's letter noted above.

Mr. Dave for the Intervenor further contended that Bye-law 28.2 of the Development Control Regulation as noted above does not have any manner of application to Panchgani and contended that even if it does so applied, the same cannot have any manner of application by reason of Sections 45, 154 and 156 of the Maharashtra Regional and Town Planning Act, 1966. Grant or refusal of permission stands vested with the planning authority and there cannot be any manner of dispute in regard thereto by reason of the provisions of Section 45 of the Act of 1966 - This aspect of the matter has already been dealt with herein before as such we need not further dilate on the issue excepting recording that the Director did not act on its own initiative but the ball has been set to roll by the Municipal Council itself, since they wanted guidance and opinion apropos the application for additional FSI: It is not that the petitioner applied before the Town Planning authority but the application was made to, as in the normal course of events it has to be, to the Municipal Council and who in their turn sent it to the Department of Town Planning which ultimately was placed before the Director, Town Planning and the latter granted while expressing opinion in regard thereto also granted sanction as also relaxation in terms statutory conferment of power as noticed more fully hereinbefore. Mr. Dave's definite submission however has been that the appellants are not entitled to get the additional FSI and thus resultantly no relaxation on heights also is permissible. We are however, unable to record our concurrence therewith by reason of the factum of the issuance of the letter by the Director, Town Planning Department in terms of provision of Rule 28.2 and the entitlement follows therefrom.

The issue of res-judicata as urged by Mr. Dave need not detain us for long since in our view, the doctrine or even constructive res

judicata cannot possibly be have any application in the contextual facts.

The other aspect of the matter requiring consideration pertains to the letter dated 31.12.1996 addressed to the Chief Officer, Municipal Council, Panchgani by the Assistant Director, Town Planning, Satara wherein the latter intimated the Municipal Council that sanction should not be granted taking into consideration the sanctioned development plan of the Panchgani city. The reason for such a refusal as available therefrom has been stated to be:

"Area of the construction of the building of the first floor and ground floor carried out at the said premises i.e. total area of construction is more than the construction area which is permissible and sanctioned by the Hon'ble Director, Town Planning, Maharashtra State, Pune vide letter No.DS/Panchgani/Star Hotel/final Plot No.414-E, T.P.S.3/TPV-2/3060/dated 13.6.95."

Needless to record and as noticed hereinbefore that the Council acting on the basis of such an intimation rejected the plan and issued the impugned notice. Even a cursory look at the sanction letter dated 8/13.6.1995 belies the contents of the letter under reference dated 31.12.1996. The sanction pertains to the additional FSI vis-a vis the circular issued by the Government dated 7th October, 1971. The sanction letter dated 8/13.6.1995 did not speak of construction or grant of sanction pertaining to the ground and first floor at the said premises. The Director, Town Planning by the letter dated 8/13.6.1995 never sanctioned any construction area in the ground and first floor at the same premises. As a matter of fact, the letter under reference dated 31.12.1996 seems to be overriding the order of the Director. Significantly, however the letter dated 31.12.1996 corroborates the stand of the appellants that there was in fact a sanction by the Director, Town Planning vide letter dated 8/13.6.1995. While it is true that sanction was granted for additional FSI as also increased height but there was never any mention or any sanction conveyed for ground and the first floor construction in the letter. It cannot thus but be termed to be the brain child of the Assistant Director who has, in fact, superseded the order of the Director - is this a permissible state of affairs? Mr. Deshpande offered us an answer in silence! Obviously he does not have anything else at his disposal to justify the issuance of the letter. Provision No.28.2 of the Development Control Regulation has been taken recourse to and the Assistant Director not been able to avoid the same, simply recorded the factum of construction area on the ground and first floor being in excess of the sanction granted by the Director, Town Planning. The act or acts on the part of the Assistant Director by reason of the contents of the letter dated 8/13.6.1995 cannot but be said to be wholly without jurisdiction and consequently the action on the basis thereof as taken by the Municipal Council cannot also be sustained.

The observations as noticed hereinbefore thus stands supported by the municipality's own public notice This aspect of the matter has also escaped the attention of the High court and as such, the High Court fell into a clear error.

As regards the issue of deemed sanction, the High court answered it in the negative recording therein that the appellants were refused of any sanction though beyond the period as such deemed sanction would not arise. Unfortunately, we cannot lend our concurrence thereto. Panchgani Municipal Council being a 'C' Class Municipal Council of Maharashtra in its Standardised Buildings Bye-laws, in particular, bye-law 9.2 records that while the authority may sanction or refuse a proposal, there stands an obligation on the part of the authority to communicate the decision and where no orders are communicated within 60 days

from the date of submission of the plan either by way of a grant or refusal thereto, the authority shall be deemed to have permitted the proposed construction. In view of our observations noticed hereinbefore, we are not inclined to go into this issue in any detail suffice however to record that the submissions pertaining to deemed sanction has substance and cannot be brushed aside in a summary fashion. Eventual rejection does not have any manner of correlation with deemed sanction - it is only that expiry of the 60 days that the sanction is deemed to be given, subsequent rejection cannot thus affect any work of construction being declared as unauthorised. The deeming provision saves such a situation. As noticed above, we are not inclined to detain ourselves any further on this score.

Incidentally, be it noted that even though at the initial stage of hearing, environmental degradation was spoken of but the same have not been adverted to at all at the time of final submissions - the same were restricted to municipal violations. Environmental Audit Report has not seen the light of the day. Obviously, there would not be any such affectation and we also thus do not feel it expedient to deal with that aspect of the matter.

In the view we have taken, we are unable to record our concurrence with the submissions of both the Intervenors and Municipal Council as well the State Government. The Appeals are thus allowed. The order of the High Court stands set aside. It is however made clear that in the event of there being any infraction of the order of the Director pertaining to additional F.S.I. and the height as relaxed by the Director and in the event of there being any infraction of the Building Rules concerning the ground and the first floor or the basement thereof, the municipality would be at liberty to take appropriate steps in accordance with law. We do feel it expedient to direct further that the appellants should furnish a fresh undertaking as regards the user of the basement in this Court within a period of four weeks from the date of the availability of a copy of this judgment. The Registry is directed to make available a copy of this judgment to the appellants with utmost expedition.

No order however as to costs.