

As discussed with Adr (WB) & OC (BB), we may not wait for the post why. Pl send this letter in file to legal counsel (or NAR) to enable him to prepare opinion on issues raised in this letter.

My dear Minister,



CONFIDENTIAL AND PRIVILEGED
URGENT - BY FAX & SPEED POST

D. J. KHAMBATA
 ADDITIONAL SOLICITOR GENERAL OF INDIA
 SENIOR ADVOCATE, LL.M (HARVARD)

Attorney General
 Dated 11th March, 2011

Re: Writ Petition No.369 of 2011
 Adarsh Co-operative Housing Society Ltd. & Anr.
 Vs. Union of India & Others

[Handwritten signature]

14/3

It was a pleasure meeting you last Sunday, 06.03.2011 and extremely heartening to see how you and your Ministry's officials are acting decisively to safeguard our environment.

2. I write further to my letter dated 18.01.2011 to set out the position that arises in the above matter and which we discussed at the aforesaid meeting.

3. The Petitioners ("Adarsh") have challenged the order dated 14.01.2011 passed by Dr. Bharat Bhushan, Director ("the MoEF order") on several grounds including breach of natural justice. This breach is alleged on, most importantly, the following five grounds :-

firstly, that a copy of Dr.Nalini Bhat's report dated 13.01.2011 (on which the MoEF order relies) was not furnished to Adarsh;

secondly, that statements of Shri J.C. Benjamin and Shri Kunte (respectively, Principal Secretaries UDD and Revenue, Government of Maharashtra) though relied on in Dr. Bhat's report were not furnished and no opportunity of cross examination was given to Adarsh;

thirdly, that although Dr. Bhushan passed the MoEF order he gave no hearing;

fourthly, that the MoEF order though ostensibly issued by Dr. Bhushan was in reality passed by you and therefore Dr. Bhushan himself did not apply his mind to the matter. This ground is based primarily on a press statement dated 16.01.2011

issued by you (which we discussed at our meeting). Consequently Adarsh was not heard on, amongst other things, the three options;

fifthly, that the decision to demolish was pre-meditated.

4. These five grounds can be resolved if a fresh hearing is given.
5. A fresh hearing, if given by Dr. Bhushan, may resolve grounds (1), (2) and (3) :-
 - (i) he can give Adarsh the opportunity of dealing with Dr. Bhat's Report;
 - (ii) he need not rely on the statements of Shri Benjamin and Shri Kunte - basing his findings of the quantum of FSI used disclosed from Adarsh's own plans on the basis of which the occupation certificate was given.
 - (iii) by giving a hearing Dr. Bhushan also meets ground (3). The hearing should not be limited to any particular aspect.

6. However a hearing by Dr. Bhushan will not resolve grounds (4) and (5). To resolve all five grounds it seems clear that you would have to give a hearing. To have Dr. Bhushan give a hearing would still not get rid of the allegation that in reality the decision is yours and not Dr. Bhushan's. It is a cardinal principle of law that he who hears must be the one that decides. In other words if a hearing is required in a matter it must be given by the person who ultimately passes the order or takes the decision. Thus if the decision is yours the hearing would have to be given by you. The parameters of the hearing can be as stated above.

7. I am fully conscious of the fact that as a matter of policy it is not advisable for you to personally involve yourself in either giving hearing or passing orders and that you will do so only in certain exceptional cases. However, the Adarsh case, which I believe to be exceptional, has received personal attention from you and it is because of this that it necessary for you to give a hearing in the matter and pass a fresh order replacing the order passed by Dr. Bhushan dated 14.01.2011.

8. I understand that there are reservations about this course of action since it might create a precedent for the future. In my opinion the suggested course will not establish

any precedent to the effect that the Minister must in all cases give hearings and pass orders. The position in law is that a Ministry's order may be passed by any authorized officer of the Ministry. This will remain unaffected provided it is that authorized officer who gives a hearing and then passes the order. The order will be his own order on behalf of the Ministry and will not be an order at the instance of the Minister. That is the essential difference between future practice and the present case.

9. At a meeting held on 05.03.2011 in Mumbai with the Hon'ble Attorney General (attended by me and Shri Muhammad A. Khan) the Hon'ble Attorney General confirmed that it was necessary for you to give a hearing and pass a fresh order.

10. I add that in my opinion if a fresh hearing is not given and a fresh order not passed by you, the present MoEF order dated 14.01.2011 is vulnerable and could be set aside.

11. I urge that a decision be taken as soon as possible and that a notice for a fresh hearing before you be issued in the next few days. If this is done a fresh order can be passed by you even before 25.03.2011 when the Bombay High Court has now fixed the matter.

12. The hearing and order will give Adarsh an opportunity of dealing with Dr. Bhat's report and will resolve grounds (1) to (5) as stated above. You should also put any other specific issues that arise, to them such as conditions (A) (2) and (4) of the Memorandum dated 05.08.2005 issued by the Government of Maharashtra and the two MMRDA notifications (please see my letter of 18.01.2011).

13. If however a decision is taken not to give a hearing then it will become necessary to file a detailed affidavit in reply to the Petition which too will have to be done before 25.03.2011. It may also be necessary for you to then file a personal affidavit denying the allegations made against you in the Petition (to the effect that it was your decision and not Dr. Bhushan's). It is precisely to avoid filing such an affidavit that I strongly advise that you give a hearing and pass a fresh order.

14. I thought I should put down these thoughts on paper so that it will make it easier for you to take a final decision in the matter. If any further clarification is required I am always available to all on the phone.

With warm regards,

Yours sincerely,

Jaini

(D.J.Khambata)

Shri Jairam Ramesh,
Hon'ble Minister of State (Independent Charge),
Ministry of Environment and Forests,
Paryavaran Bhawan,
CGO Complex, Lodi Road,
New Delhi-110 003.

Copy to:

1. ✓ Shri J.M. Mauskar, Special Secretary, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, Lodi Road, New Delhi-110 003.
2. Dr.Nalini Bhat, Adviser, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, Lodi Road, New Delhi-110 003.
3. Dr. Bharat Bhushan, Director, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, Lodi Road, New Delhi-110 003.
4. Shri Muhammad Ali Khan, Advisor (Law & Policy) to MOS, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, Lodi Road, New Delhi-110 003.
5. Shri Dhiren Shah, Advocate, Bombay High Court, Mumbai.

