

REPORT

OF

COMMISSION OF INQUIRY

ADARSH C.H.S. LTD., COLABA, MUMBAI

CONSISTING OF THE HONOURABLE

SHRI JUSTICE J.A. PATIL (RETD.) _ CHAIRMAN

AND

SHRI P. SUBRAHMANYAM, RETIRED CHIEF

SECRETARY GOVT. OF MAH. _ MEMBER

ON

TERMS OF REFERENCE NOS. 1 AND 2

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Appearance of Advocates

Shri Anil Y. Sakhare, Senior Advocate with Shri Roop M. Vasudeo, Advocate with Shri Uday Nighot, Advocate for Government of Maharashtra.

Shri Darius J. Khambatta, Additional Solicitor General with Shri Aniket Nikam, Advocate with Shri Deepak N. Salvi, Advocate with Ms. Sharon Rodrigues, Advocate with Shri Pramod Mudbhatkal, Advocate for Ministry of Defence.

(Also appeared, Shri A.J.Rana, Senior Advocate, Ms. Rajni Iyer, Senior Advocate, Dr. Gopal Sharma, Senior Advocate, Ms. Poornima Awasthi, Advocate, Shri Vishwajeet P. Sawant, Advocate, Shri Dhiren Shah, Advocate & Shri Karan Vyas, Advocate)

Shri Dipan Merchant, Senior Advocate with Shri Bharat Zaveri, Advocate for the Commission.

Shri Satish Maneshinde, Advocate with Shri Manish Desai, Advocate with Shri Saket Mone, Advocate with Ms. Tejaswini Bhakare, Advocate i/b Vidhii Partners for Adarsh CHS and its four members.

Ms. Kiran Bagalia, Advocate with Ms. Chitra Phadke, Advocate for M.M.R.D.A.

Shri Dinesh Purandare, Advocate with Shri Gaurav Shah, Advocate with Ms. Shreevardhini Parchure, Advocate i/b M/s. Negandhi, Shah & Himayatullah for Shri Vilasrao Deshmukh.

Shri Pradeep Sancheti, Senior Advocate with Shri Mustafa Doctor, Advocate with Shri Ranjit Shetty, Advocate with Shri Luckyraj Indorkar, Advocate with Shri Aniketh Nair, Advocate i/b Hariani & Co. for Shri Sushilkumar Shinde.

Shri Birendra Saraf, Advocate with Shri Shyam Mehta, Advocate with Shri Murtuza Federal, Advocate with Shri Rohan Dakshini, Advocate with Ms. Pooja Kothari, Advocate i/b M/s. Federal & Rashmikant & Co. for Shri Ashok Chavan.

Shri Kunal Bhanage, Advocate for Shri Nilangekar Patil.

Shri Vikram Chavan, Advocate for Shri Vasantryao M. Maske.

Shri Nitin Pradhan, Advocate with Ms. Shubhada Khot, Advocate with Shri Ashish Bhandari, Advocate with Shri Sooraj Hulke, Advocate for Shri P. V. Deshmukh, Ex. Dy. Secretary., U.D.D. & a member of Adarsh CHS.

Shri Vinay S. Masurkar, Advocate for Shri M. S. Chaudhari, Jt. Secy., G.A.D., and Shri K. P. Bakshi, Prin. Secy., G.A.D.

Shri Prashant Pawar, Advocate for Maj. Gen. S. S. Jog.

Shri Yogesh Chawak, Advocate with Ms. Swati Sagvekar, Advocate with Shri Hemant Oltikar, Advocate i/b Legasis Partners for Team One Architects (I) Pvt. Ltd.

Shri R. A. Malandkar, Advocate with Ms. S. J. Billimoria, Advocate for M.C.G.M.

Shri Vikram R.Chavan, Advocate for Mr. Debashish Chakrabarty, Principal Secretary, G.A.D. & Chief Electoral Officer.

Shri Narayan R.Bubna, Advocate for Dr.Jairaj Phatak, Ex. Municipal Commissioner.

Shri Raja Thakare, Advocate with Shri Dhaval A.Patil, Advocate with Mr. Madhukar P.Dalvi, Advocate for Shri Subhash S. Lalla.



COMMISSION OF INQUIRY INTO THE ALLEGED IRREGULARITIES, ETC
RELATING TO ADARSH C.H.S., COLABA, MUMBAI.

REPORT OF FINDINGS ON TERM NOS. 1 & 2
OF REFERENCE

1) INTRODUCTORY

1.1 In South Mumbai, on the western seashore, in Cuffe Parade area of Colaba, there stands tall, a 31 storeyed building abutting Cap. Prakash Pethe Marg on the east, and overlooking the Station Health Office Complex of the Army on the south, the slum area of Ganesh Murti Nagar on the west and beyond it the Arabian sea, and part of the same slum area and BEST depot on the north. This is the building of the Adarsh Co-operative Housing Society consisting of a stilt, two podiums and 103 flats. This high rise which was completed in 2010 has given rise to several controversies right from the allotment of plot to the allotment of flats. The controversies gained notoriety, thanks to the media, because of the alleged involvement of top political persons, including three former Chief Ministers, top Military Officers including two former chiefs of the Army Staff and a former Naval chief and several serving and/or retired bureaucrats and their relations. The controversy about the



title and possession of the plot was also taken to the Loksabha by way of two starred questions. The gravity of the matter took a serious turn when the CBI registered a case on 10-11-2010 against 14 of the above mentioned personalities for the offences of cheating, forgery, criminal conspiracy etc. under the I. P. Code and under sec. 13(2) read with section 13(1)(d) of the Prevention of Corruption Act 1988.

1.2 In the light of these facts, the Government of Maharashtra, in exercise of its powers under sec. 3 of the Commissions of Inquiry Act 1952 decided that it was necessary to appoint a Commission of Inquiry "for the purpose of making an inquiry into a definite matter of public importance relating to the controversy regarding allotment of land to Adarsh Co-operative Housing Society Limited, Colaba, Mumbai, various permissions and clearances given to the Society and other related issues from time to time." Accordingly by a Notification No. SIC-2010/CR-51/2010/29 A dated 8th January 2011 the present two Member Commission was appointed for inquiring and reporting into following 13 Terms of Reference.

2). TERMS OF REFERENCE:

- 1) Whether land allotted to Adarsh Co-operative Housing Society Ltd., Plot No. 87-C BBR Block No.6, Captain Prakash Pethe Marg, Near Backbay Bus Depot, Colaba, Mumbai



(hereinafter referred to as "the Society") belonged to the State Government or any other person, or organization.

2) Whether the land in question or membership of the Society was reserved for housing defence personnel or Kargil War heroes.

3) Whether the reduction of the width and the changes of the reservation from road to residential in respect of Captain Prakash Pethe Marg was in accordance with law.

4) Whether the deletion of the reservation o plot reserved for BEST and its conversion to residential purpose for allotment to the Society was in accordance with law.

5) Whether provisions of Maharashtra Regional and Town Planning Act, 1966 and Development Control Rules and Regulations framed thereunder have been contravened in utilization of FSI for items like staircase, lift, lobby etc. and raising the height of the Society's building.

6) Whether any person who was not eligible to become member of the Society, was approved to be made a member of the Society, if so, who,

7) Whether any public servant had given permissions or clearances as a quid pro quo to the Society, or which would



attract the provisions of the Prevention of Corruption Act, 1988.

- 8) Whether the land allotted to the Society, falls under the Coastal Regulation Zone (CRZ) and, if so, in which category.
- 9) Whether requisite environmental permissions and clearances had been obtained by the Society from the State Government, Central Government or prescribed authorities under Environment (Protection) Act, 1986 and Rules framed under the Act as well as Notifications issued thereunder.
- 10) Whether public servants, who themselves or their relatives are members of the Society, have violated any provisions of law including the All India Service (Conduct) Rules, or Maharashtra Civil Services (Conduct) Rules.
- 11) To enquire into any other matter which is connected with or incidental thereto.
- 12) To fix the responsibility on any person or public servant or authority and action to be taken on the basis of inquiry conducted in the matter.



13) To make suggestions or recommendations to bring in transparency and eliminate discretion in the matter of allotment of Government land to the housing societies, as well as admission of members to such societies, and such remedial measures, as the Commission may deem fit, which the State Government may follow in future.

3) PRELIMINARIES.



3.1 The above mentioned notification was published in the official gazette on 11-1-2011. The Commission was initially given three months' time to complete the inquiry and submit its report to the State Government. The said period has been extended from time to time and the last extension is upto 31-5-2012.

3.2 The office of the Commission was established on 15-1-2011. Initially it was temporarily housed in the building of MMRDA at Bandra and it was shifted to the present premises on the 3rd floor in Old Customs House, Shahid Bhagat Singh Road. Fort, Mumbai in the first week of March 2011 after all the infrastructure facilities, including the appointment of the requisite staff, were completed. Before that the Commission published a public notice in various news papers, both Marathi and English, published from Mumbai, Pune and Aurangabad and New Delhi etc., inviting affidavits from the persons who are acquainted with and/or the persons who are interested in the subject matter of the inquiry or persons who are



affected or likely to be affected thereby, and pursuant to the said public notice, 21 persons filed their affidavits before the Commission. The list of those 21 persons is at **Appendix-I** annexed hereto.

3.3 The Commission also thought it necessary, in order to have full facts regarding the controversy in question before it, to issue summonses to several persons who were acquainted with the facts of the case but who did not file their affidavits in response to the public notice, and requiring them to produce the relevant documents pertaining to the Adarsh CHS. Accordingly, 59 persons have filed their affidavits and some of them have produced documents also. The list of such persons is at **Appendix-II**. The Commission further issued notices to several departments of the Government of Maharashtra including Revenue Department, Urban Development Department (UDD), General Administration Department (GAD) as well as Municipal Corporation of Greater Mumbai (MCGM), Mumbai Metropolitan Region Development Authority (MMRDA), Bombay Electrical Supply and Transport (BEST), Defence Estate Office (DEO), Ministry of Environment & Forest (MoEF), Collector, Mumbai and Central Bureau of Investigation (CBI) etc. calling upon them to produce certified true copies of the original documents pertaining to the Adarsh CHS. In response to the said notices, in all 377 files comprising of tens of thousands of documents came to be filed before this Commission.



3.4 In exercise of the powers under Sec. 8 of the Commissions of Inquiry Act 1952, read with the Commissions of Inquiry (Central) Rules 1972, the Commission framed its Rules of procedure to be followed by it in the course of inquiry. The said Rules are at Exh. 3 and they provide, inter alia, for production of certified copies of relevant documents without formal proof of their execution. The Rules also make a provision stating that the Commission will not be strictly bound by the provisions of the Indian Evidence Act but the principles of natural justice underlying the main provisions of the said Act will be followed, mutatis mutandis, in the conduct of the inquiry. Consistent with the provisions of the Commissions of Inquiry Act, the Rules provide for right to the parties to cross examine the witnesses examined before the Commission. They also state that affidavits of witnesses will be treated as their examination-in-chief. The object of making these provisions in the Rules is to curtail delay and to free the inquiry from the unwanted technical formalities and obstacles so that more relevant material necessary for unfolding the truth can be brought on record.

3.5 Before embarking upon the work of recording evidence of witnesses, the Commission thought it necessary to take inspection of the subject matter i.e. the building of Adarsh CHS in order to understand its location and the situation existing on the spot as well as in the surroundings and help the Commission to appreciate the evidence which might be laid before it in the course of the inquiry. Accordingly the site inspection of the land in question and the building standing thereon was taken on 13-4-2011. In addition,



photographs were also taken on the spot for the purpose of better understanding of the situation. The notes of site inspection were prepared on the spot and they are at Exh.3.

3.6 The recording of evidence of witnesses was started from 2-5-2011. The parties who were interested in the dispute and /or the parties who were likely to be affected or likely to be affected by the inquiry were given opportunity to cross examine the witnesses. So far, the Commission has recorded the evidence of in all 40 witnesses and their evidence runs into over 1500 pages. In addition, several hundreds of documents have been taken on record and marked exhibit numbers.

3.7 For the sake of brevity and convenience certain departments and Acts are referred to in this report by abbreviations. The list of the abbreviations used is given in Appendix -III.

3.8 These factual details are given only with a view to show the complexity, magnitude and scope of inquiry and the time required for such an uphill task.

4. WHY A SEPARATE REPORT OF INQUIRY PERTAINING TO TERMS NOS. 1 and 2 OF THE REFERENCE

4.1 Normally, it is the practice of any Commission of Inquiry to submit its final report only after the conclusion of the inquiry.





However in the instant case the Principal Secretary (Services) GAD by his letter t. 30-1-2012 requested the Commission, on the behalf of the government, to submit its interim report. It is surprising and disturbing to find that the said letter which is of confidential nature was quoted by some news papers ad verbatim immediately on the next day. This could not have been possible but for the laxity and lapses on the part of the concerned officials to maintain confidentiality. Thereafter, an application, being Misc. Application No. 20 of 2012, was moved on behalf of the Government of Maharashtra on 18-2-2012 praying that "The Commission be pleased to hear the parties on terms of reference nos. 1 and 2 and be pleased to submit its report on the said reference to the Government of Maharashtra." It appears that the Government of Maharashtra was concerned with the feelings expressed by the Members of the State Legislature that the work of the Commission should be expedited. It may be pointed out that the recording of evidence on terms nos. 1 and 2 of the reference was already completed and the Commission was recording evidence on other terms of reference. But completing the recording of evidence of all witnesses on the remaining terms of reference would take a long time. Therefore, the Commission thought it expedient to submit its final report on terms nos. 1 and 2 of the reference before, conducting further inquiry into the matter. Accordingly the application was allowed and this report is now being submitted. It is necessary to clarify, to remove any doubt, that it is not an interim report but a final report so far as terms nos. 1 and 2 of the



reference are concerned. The final report on other terms of reference will be submitted in due course.

4.2 The Commission has given full hearing to all the concerned parties and/or their advocates to make their submissions on the said terms of reference. Accordingly, the arguments were heard continuously for 14 days, from 4-3-2012 to 28-3-2012 excluding the holidays. On behalf of the GOM, Shri Anil Sakhare the Ld. Senior Advocate, made his submissions, whereas on the behalf of the MOD the Ld. Additional Solicitor General Shri Darius Khambhata put forward their case. Shri Saket Mone the Ld. Advocate representing the Adarsh CHS and its four members made submissions on the above two issues. On behalf the Bombay Citizens' Group its representative Major S.K. Lamba (retd.) tendered a compilation of his arguments. Shri Dipan Merchant, the Ld. Senior Advocate, of the Commission summed up the submissions of the rival parties by pointing out the plus and minus points of their respective cases.

4.3 Opportunity was also offered to the other parties including the former three Chief Ministers namely Shri Sushilkumar Shinde, Shri Vilasrao Deshmukh and Shri Ashok Chavan as well as the former Revenue Minister Shri Shivajirao Nilengekar Patil to lead their evidence and make submissions, if any, on the above mentioned two issues. However, their respective advocates made statements before the Commission that the said Ministers did not want to give evidence on the said two issues nor did they want to make any submission on the said issues. In this connection



reference may be made to paras 46 to 52 of the written submission made by Major S.K. Lamba (retd.) wherein he has pointed out that the above mentioned Ministers have stated that the land in question belongs to the GOM. But they have not stepped into the witness box to substantiate their contention in this respect. Relying upon the decision in **Vidyadhar Vs. Manikrao - AIR 1999 S.C. 1441**, Major Lamba wants the Commission to draw adverse inference against the GOM on the issue of ownership to the land in question. In the said case, the ratio of the decision as laid down by the Supreme Court is, where a party to the suit does not appear into the witness box and states his own case on oath but does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct. It appears that these Honourable Ministers have no personal knowledge about the ownership of the land in question and that they have relied upon the statements of the officers of the Secretariat in the concerned departments, including the officers in their own Secretariat. Therefore, for the purposes of issues nos. 1 and 2, the evidence of the said Ministers would not have been useful and necessary. It may however be clarified that their evidence will be recorded so far as the other issues are concerned, subsequently at the appropriate time.

5) **THE STATUS AND ROLE OF COMMISSION OF INQUIRY.**

5.1 The provisions of the Commissions of Inquiry Act, 1952 make it clear that the Commission is not a court of law which conducts




trials and decides or adjudicates upon the rights of the parties. The inquiry which it conducts is not, in the strict sense of the term, a judicial inquiry though it has semblance of it in some respects. There is no *lis* before the Commission nor there are adversary parties before it. The Commission does not pass an order or a decree which has a binding effect. It is only an investigating agency, which is appointed by the appropriate government, as a fact finding body. The inquiry conducted by it is not of adversarial nature but it takes the form of inquisitorial nature. The report prepared by the Commission is not a judgment but only a fact finding report and the conclusions drawn by it are not binding upon the appropriate government which may or may not accept the same.

5.2 At this stage, it will be appropriate to refer to some of the decisions which are cited by Shri Dipan Merchant, the Ld. Senior Counsel of the Commission. The first of them is : **Shri Ram Krishna Dalmia Vs. Justice Tendolkar - AIR 1958 S.C. 538.** wherein it was observed that an inquiry necessarily involves investigation into facts and necessitates the collection of material facts from evidence adduced before or brought to the notice of the person or body conducting the inquiry and the recording of its findings on those facts in its report cannot, but be regarded as ancillary to the inquiry itself, for the inquiry becomes useless unless the findings of the inquiring body are made available to the government which set up the inquiry. It was further observed that the recommendations of a Commission of Inquiry are of great importance to the government in order to enable it to make up its

mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objectives it has in view.

5.3 The second decision cited by Shri Merchant is in the case of **Jagannath Rao Vs. State of Orissa- AIR 1969 S.C. 215** in which the inquiry was directed into various allegations against the conduct of the Chief Ministers of Orissa and their colleagues for various alleged acts of misconduct, misappropriation, fraud, negligence, favouritism, nepotism, illegalities, irregularities, improprieties and abuse of their power in the matters of administration of the State. The Supreme Court referred to its earlier decision in the case of Ram Krishna Dalmia (supra) and observed that the ratio of that case has no application to the present case, because the object to set up the Commission of Inquiry in the present case was to take appropriate legislative or administrative measures for maintaining high standards of public conduct and purity of political administration in the State.

5.4 The third decision is **Md. Ibrahim Khan Vs. Susheel Kumar & anr. AIR 1983 Andhra Pradesh 69**, wherein it was held that the inquiry before the Commission is neither a dispute nor a decision which prejudicially affects any right. There is an investigation and a mere report of the facts ascertained. The Commission is not an adjudicating body, but an assisting body that assesses the facts and assists the government in the arrival of an appropriate decision.




5.5 It may be pointed out that in the case of present inquiry, term no. 13 of the reference requires the Commission "to make suggestions and recommendations to bring in transparency and eliminate discretion in the matter of allotment of government land to the housing societies, as well as admission of members to such societies and such remedial measures as the Commission may deem fit which the state government may follow in future." However, so far as term nos. 1 and 2 of the reference are concerned, we think that at this stage there is little scope for making any suggestions or recommendations to the government in this respect. But the Commission will certainly keep in mind the implication of term No. 13 of the reference while dealing with the remaining terms of reference at later stage and make such suggestions of recommendations which it deems fit.

6) **WITNESSES RELEVANT FOR THE PURPOSE OF FINDING
ON TERM NOS. 1 AND 2 OF THE REFERENCE.**

6.1 As stated above, so far the Commission has recorded the evidence of in all 40 witnesses. But for the purposes of term Nos. 1 and 2 of the reference, the evidence of the following witnesses only will be relevant. On behalf of the Ministry of Defence (MOD), Brig. Deepak Saxena (MOD W No.1) alone filed his two affidavits of evidence; one dt. 24-3-2011 and the second dt. 18-4-2011. He has stated that both the affidavits filed by him show the stand of the MOD in the matter before this Commission. The second witness

Ms. Gita Kashyap Perti (MOD W No.2) who is the Defence Estate Officer (DEO) has stated that in spite of receiving summons from the Commission to file affidavit of evidence, she has not filed the same because, according to her, she had received instructions from the Director General, Defence Estates, New Delhi (DGDE) that only one affidavit will be filed on behalf of the MOD after taking inputs from DG, Defence Estates, Army, Navy and Air Force. The third witness examined by the MOD is Lt. Col. Vikramsingh Bhadaria, (MOD W No.3) who is the Garrison Engineer and who maintains all buildings in the charge of the Army. The fourth MOD witness is Col. Manish Mohan Erry (MOD W No.4) who claims to have made an inquiry in connection with a report, which was telecast in April 2010 by the IBN-7 News Channel, in connection with the Adarsh CHS scam. These are the only four witnesses produced by the MOD in support of their claim of title. None of the last mentioned three witnesses has filed his affidavit of evidence but they have made only short statements by way of their examination-in-chief and offered themselves for cross examination by the other side.

6.2 The Commission thought it necessary to record the evidence of Major General S.S. Jog (C.W.No.1) who is said to have given a no objection certificate to the Collector, Mumbai before allotment of the land in question to the Adarsh CHS. The Commission also thought it necessary to record the evidence of Dr. Pradeep Vyas the Collector of Mumbai from 28-8-2002 to 16-5-2005 (C.W.No.2). Similarly, Shri Debashish Chakroborty who was the Collector of Mumbai during the period from 17-6-1999 to 28-8-



2002 (C.W.No.3) also filed his affidavit of evidence. The Commission summoned Major General A.R. Kumar, (Retd.) (C.W.No.4) and Shri Saurav Ray (C.W. No.5) who was the DEO, Mumbai during the period from September 2002 to April 2004 to give evidence. Independent witness Major S.K. Lamba (retd.) (I.W.No.1) representing Mumbai Citizens Group also filed his affidavit of evidence and offered himself for cross examination. Shri Santosh Daundkar a RTI activist, (I.W.No.2) who filed his affidavit of evidence, was also examined as Commission's witness.

6.3 On behalf of the GOM, more witnesses have been examined on the above mentioned issues and they are 1) Shri Sanjay Dhikle, Superintendent of Land Record (SLR) (GOM W.No.1), 2) Shri Chandrashekhar Oak , Collector, Mumbai (GOM W.No.2) 3) Shri Jagdish Gharat, Deputy. Secretary, R&FD (GOM W.No.3), 4) Shri Appasaheb Giramkar, SLR (GOM W.No.4), 5) Shri Ramakant Asmar, Joint Secretary, R&FD (GOM W No.5) , and 6) Shri R.C. Joshi, the then Principal Secretary, Revenue Department (GOM W No.6).

6.4 These are the witnesses whose evidence may have to be considered while dealing with term nos. 1 and 2 of the reference. In addition, to the oral evidence of the above mentioned witnesses, a large number of documents have been produced and brought on record by the witnesses. The reference to them will be made as and when necessary in the course of this report.



7) **TERM NO.1 OF THE REFERENCE**

Whether land allotted to Adarsh Co-operative Housing Society Ltd., Plot No. 87-C BBR Block No.6, Captain Prakash Pethe Marg, Near Backbay Bus Depot, Colaba, Mumbai (hereinafter referred to as "the society") belonged to the State Government or any othr person, or oganisation.

7.1 This issue relates to the title in respect of the land in question which has admittedly been allotted to the Adarsh CHS. Brig. Deepak Saxena has raised a preliminary objection in para 8 of his affidavit dt. 24-3-2011 in the following words , ".....the question of title and possession of the land on which the Adarsh building is situated can only conclusively be determined by a court of competent jurisdiction and the finding of this Commission on the question of title and possession cannot be conclusive". There cannot be any dispute about this contention. However, in view of the observations made above in para 6 of this report on the question of the status and role of the Commission, it is not necessary to make any further comments on the contention raised by Brig. Saxena.

7.2 The issue regarding title of the land in question is the most crucial issue of all the 13 terms of reference. There are two contenders viz. GOM and MOD who lay their respective claims of title on the land in question. There is virtually a tug of war between the two. Since this issue is essentially of a civil nature , it will have to be dealt with on the "preponderance of probability" and not on "proof beyond reasonable doubt". For this purpose, the




Commission will have to consider and assess the evidentiary value of the statements, both oral and documentary produced by each of the two parties and then come to the conclusion as to the case of which party has more preponderance of probability.



7.3 In the above mentioned term of reference, the land in question has been described as Plot No. 87-C, BBR Block No.6. Shri Khambata, the Id. ASG for the MOD, however, brought it to our notice that the adjoining plot of BEST bears Plot No. 87-C and that in the term of reference, the land in question has been incorrectly described as being Plot No.87-C. There is obviously a mistake in describing the land in question correctly in the said term of reference. For this purpose, reference may be made to the Letter of Intent (LOI) dt. 21-1-2003 Exh. GOM-4-A under which the GOM proposed to grant to the society 3758.22 sq. mtrs. of government land in possession of the MOD situated near Plot No. 87-C in BBR Block No.6. The same description is repeated in the Letter of Allotment (LOA) dt. 9-7-2004 Exh. GOM-5-A. Therefore, it was not disputed before us, that there is a mis- description in the term of reference of the land in question. It appears that this mistake has occurred through inadvertence and it is only a clerical mistake which will not have any serious consequences since the land in question as described in the property card Exh. GOM-7 bears C.S.No.652 and it does not bear any plot number. There is no dispute about the location of the land in question as being a plot abutting Cap. Prakash Pethe Marg on the east and adjoining the BEST plot No. 87-C on the north. Another feature of the land in



question is that it lies on the seaward side of Cap. Prakash Pethe Marg but it is not a foreshore land since it does not fall between the high tide line and the low tide line. In short, the slight misdescription of the land in question as given in the term No.1 of reference is not of serious nature, since the land in question is even otherwise identifiable as explained above.

7.4 The two contenders viz. MOD and GOM have based their respective claims of title on certain factors to which a cursory reference may be made at this stage. So far as the MOD is concerned, their claim of title is mainly based on the provisions of sec. 172(1)(a) of the Government of India Act, 1935 (GOI Act). In addition, they have relied upon their alleged previous possession and use of the land in question, particularly in the form of a garden known as "Khukri Park". The MOD have also placed reliance upon the Survey of India Maps of Military Lands of 1957 Exh. AS-18, Exh. AS-18-A and Exh. AS-18-B.

7.5 The GOM, on the other hand, have based their claim of title on the following things viz. 1) Provisions of sections 20, 157 and 294 of the Maharashtra Land Revenue Code, 1966 (MLRC), 2) Section 24 of the Bombay City Land Revenue Act, 1876 (BCLR Act 1876), 3) Property Card, 4) various Survey Maps, 5) admissions given by various officers of the MOD from time to time admitting the title of the GOM to the land in question and 6) Inaction on the part of MOD to assert its alleged right. We will first deal with the case of MOD with reference to the above mentioned factors.





8) **SECTION 172 OF THE GOVERNMENT OF INDIA ACT, 1935.**

8.1 Chapter III of the Government of India Act, 1935 deals with "Property, Contracts, Liabilities, and Suits" and it contains Section 172 which states about vesting of lands and buildings. The said section reads as under:

172.- (1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date –

(a) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used, and are certified by the Governor General in Council or, as the case may be, His Majesty's Representative, to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of mere advantages disposal by sale or otherwise.



(b)

(c).....

2).....

3)

4)

5)"

8.2 Brig. Saxena has referred to the above mentioned provisions of section 172 of the GOI Act, 1935 and affirmed in para 9 of his first affidavit : "Therefore, if the land on which the said Adarsh building is situated existed prior to 1st April 1937, and was under the use for the purposes of the Federal Government or was intended to be used for federal purposes, then its title would vest in the Federal Government or the Government of India". Shri Chndrashekhar Oak, the Collector of Mumbai (GOM W No.2) has on the other hand affirmed in para 5(o) of his affidavit as follows: "I submit that the claim of the Indian Army that Block No.VI was already reclaimed in the year 1917 to year 1929 is patently wrong and falsity is proved from the plans annexed at Exh. "O", "P", "Q", "R" and "S". The Block No. VI was reclaimed somewhere in or about the year 1970.

8.3 Before dealing with the contention raised by the MOD in this respect, it will be useful to have some broad idea of the GOI Act 1935. Prior to the coming into force of the said Act, India had a




unitary Government. But after the said Act, India became Dominion with federal form of Government having several autonomous provinces. In the Dominion of India, the Governor General was the executive authority of the Dominion and he used to exercise his authority on behalf of His Majesty. Section 17(1) of the said Act states that all executive actions of the Dominion Government shall be expressed to be taken in the name of the Governor General. Chapter III of the said Act deals with the constitution of the Dominion Legislature and its legislative powers. The Seventh Schedule of the Act contains Legislative List. List- I enumerates the subjects on which the Dominion Legislature can legislate. Entry No. 10 in the said Federal Legislative List refers to works, lands and buildings vested in or in possession of, His Majesty for the purposes of Dominion (not being Naval, Military or Air Force Works). Section 46 of the said Act deals with the Governor's Provinces and section 49 (1) states that the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him. Chapter III of the said Act contains provisions regarding the Provincial Legislature and its legislative powers. The Seventh Schedule of the said Act also contains Provincial Legislative List and enumerates the subjects on which the Provincial Legislation can legislate. Entry No. 8 in the said List is "Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province." This back ground of the relevant provisions of the Act



will be useful in understanding the implications of the provisions of Section 172 (1)(a).

8.4 **In re, Ref. Under S. 213, Government of India Act - A.I.R. (30) 1943 Federal Court 13** the reason for framing such a section as Section 172 in the GOI Act , 1935 is given in the following words: "Up to 1st April 1937, when the greater part of the Act came into force , the Government of India was a unitary government, to which all Provincial Governments were subordinate; and hence all lands and buildings belonging to government or used for governmental purposes were vested in His Majesty " for the purposes of the Government of India". This had been the legal position ever since the Government of India Act , 1858: see sec. 39 of that Act and sec. 28(1) (3), Government of India Act, which immediately preceded the Act of 1935. But the setting up of a number of autonomous Provinces independent of Central Government and dividing with the latter the totality of executive and legislative powers in British India and the separation of the powers connected with the exercise of the functions of the Crown in its relations with the Indian States (which were to be hence forward exercised exclusively by His Majesty's Representatives appointed for that purpose) made an allocation necessary among those three authorities of lands and buildings which had hitherto been vested in His Majesty for the purposes of the Government of India alone. It is this allocation which was effected or attempted to be effected by the provisions of section 172 sub section (1), paras (a), (b) and (c). It will be observed that




the section purports to regulate the vesting of "all lands and buildings which immediately before the commencement of part III of the Act were vested in His Majesty for the purposes of Government of India".

8.5 A careful perusal of section 172(1)(a) makes it clear that it deals with the vesting of lands and buildings situate in a Province. It introduces a change of purpose of vesting and the date from which the change will be effective. The relevant date is the date on which Part-III of the Act which relates to "The Governor's Provinces" commenced. It is not disputed before us that the said date is 1-4-1937. All lands and buildings which were vested in His Majesty prior to the said date for the purposes of Government of India, continue to vest in His Majesty but, for the purposes of the Government of that Province. The condition is, however, that the said lands and buildings must have been then used for the purposes which thereafter i.e. after 1-4-1937 will be the purposes of the Federal Government or of His Majesty's representative for the exercise of the functions of the Crown in its relations with the Indian States. Such use must not be under a tenancy agreement between the Governor General-in-Council and the Government of that Province. Alternatively, the said lands and buildings must be such which were formerly (i) used for the aforesaid purposes or (ii) intended or formerly intended to be so used. The second requirement or condition is that such lands and buildings must have been certified to have been retained for future use for the said purposes or retained temporarily for the purposes of more

advantageous disposal by sale or otherwise. It is thus seen that the certification by the Governor General-in-Council is required only for the lands and buildings vested in His Majesty, which are situate in a Province but not for the lands and buildings falling in the first category.

8.6 It may be noted that the GOI Act, 1935 was repealed by Article 395 of the Constitution of India which came into force on 26-11-1949. However, Article 294 of the Constitution of India has made a provision for succession to property, assets, rights, liabilities and obligations in certain cases including the cases where such properties vested in His Majesty for the purposes of the Government of Dominion of India and provided that such properties shall vest in the Union of India. It is the case of the MOD that the land in question had vested in His Majesty by virtue of the provisions of section 172 (1)(a) of the GOI Act and thereafter by virtue of the provisions of Article 294 of the Constitution of India, it has vested in the Union of India.

9) **WHETHER EXISTENCE OF THE LAND IN QUESTION
AS ON 1-4-1937 IS PROVED ?**

9.1 The question whether land vested in Federal Government under section 172(1)(a) of the GOI Act is dependent on the question of the existence of the land immediately preceding the date of coming into force of Chapter III of the said Act i.e. 1-4-1937. Brig. Saxena who is the officially authorized witness of the MOD






has stated both in para 9 of his affidavit dated 24-3-2011 as well as para 10 of his evidence that the land in question existed prior to 1-4-1937 and that it was being used for the purposes of Federal Government. In para 11 of his affidavit he has affirmed, ".....the said land/ portion thereof on which Adarsh building is situated was in existence even prior to 25 th August 1821 and has always been utilized and vested in the Federal Government/ Government of India." Again in para 23 of the same affidavit he has affirmed "Admittedly, the Military authorities have been in possession of the said land for over 100 years". As against this, the contention of the GOM is to the effect that the land in question was not in existence prior to 1973 when Block VI of the Back Bay Reclamation Scheme (BBRS) was reclaimed. In para 5(O) of his affidavit Collector Oak has relied upon plan No. 310 dated 2-9-1936 and stated, " This plan will show the foreshore as on 2-9-1936 and will show that Block No 6 was under water." The GOM have further denied the claim of the MOD that the land in question has been consistently in possession/use of the military authorities since many years. It will thus be clear that the question as to when the land in question came in existence is a moot question which will be required to be dealt with on the basis of several maps and other material on record.

10) BACK BAY RECLAMATION SCHEME (BBRS)

10.1 It is historically an admitted fact that a few centuries back Mumbai was a group of seven islands including Colaba as

being the southern most island. Exh. GOM-42 which is a map of Bombay of the year 1672 which appears to have been copied from an old map also bears testimony to the said fact. There is no dispute about this fact. Later, in the course of time all the seven islands got connected with each other either by reclamation or otherwise and thus the original group of seven islands became one entity which was called as the city of Bombay (now, Mumbai).

10.2 Brig. Saxena has affirmed in para 11 of his first affidavit that the island of Colaba was declared as a Military Island and civilians were refused permission to make constructions there. He has further affirmed that on 25-8-1821, the Governor in Council was pleased to hold that the island of Colaba was a Cantonment and excluding Old Woman's Island to be a Military Cantonment and subject to Regulations of 1793 In support of his contention Brig. Saxena has annexed a loose xerox copy of a paper from some book which makes a reference to Governor General's order dt. 25-8-1821. However, the same could not be marked as exhibit number for the obvious reason. Neither the full text of the said order nor the text of Regulations of 1793 is produced before the Commission. Therefore, the said statement made by Brig. Saxena does not carry any weight. The same observation holds good in respect of copies of maps of 1897, which he claims to have obtained from the Bombay Archives.



10.3 Without going into the minute details of the history of reclamation, it will be sufficient to state that there were successive proposals for the reclamation, right from the year 1863. The Government was convinced of the necessity of reclaiming the Back Bay and other foreshore areas, in view of the paucity of land on account of growing population, industries and other similar reasons. We have on record a copy of the report of the **Committee** appointed by the Government of India to enquire into the Bombay Back Bay Reclamation Scheme, 1926, (Exh. I.W-29) which gives a detailed history of successive reclamations. This Committee was **headed by Sir Grimwood Mears**, the Chief Justice of Allahabad High Court and Sir M. Visvesvaraya who was one of the members of the said Committee. It is seen from para 63 of the said report that the Secretary of State in Council approved the scheme for reclamation of Back Bay on 4-5-1920 subject to satisfactory financial arrangement and at the same time sanctioning the placing of order for the dredging plant. Para 97 of the said report states that two main features of the work were the construction of a retaining sea wall on a rubble mound from Colaba to Marine Lines of a length of about four and half miles and the dredging of material from the harbour by means of a rotary cutter suction dredger which, having displaced the mud or clay from the bed of the sea would pump it to a distance of 5000 ft. The initial object of the sea wall and the rubble mound was to retain the material pumped into it and the whole enclosed area of 1145 acres was to be sub divided into eight blocks by means of cross bunds run



out from the foreshore and meeting the wall at right angles, thus creating eight relatively small areas or lagoons. Block No. I was the nearest to Marine Lines while Block No. VIII was at the Colaba end. There is no dispute of the fact that the land in question falls in Block No. VI. The said Committee submitted its report dt. 1-12-1926, making recommendations, inter alia, for future operations. It was emphasized that for financial reasons, the completion of Block No. VIII was most urgent work. It was recommended that the foreshore portion along with Block Nos. III to VI should be filled in to an average width of 300 ft. seaward of the present shoreline and brought up to the ground level of the reclamation. The strip should cover at both ends, so as to join on with Block No. II at the northern and Block No. VII at the southern end. Along with the said report, a plan of Back Bay Reclamation Scheme is also attached and it shows the locations of all the eight Blocks in the said Scheme along with the surrounding area and the sea wall. A copy of the said plan is attached with this report as Appendix IV

10.4 We also have on our record a copy of **Barve Committee** Report (Exh. I.W-30) dt. 26-2-1959. It is seen from it that the Government appointed a Study Group of eight members with Shri S.G. Barve, Secretary to Government, PWD as the Chairman "to consider problems relating to congestion of traffic, deficiency of open spaces and playing fields, shortage of housing and over concentration of industry in the metropolitan and suburban areas



of Bombay city and to recommend specific measures in this regard". The report of the Committee refers to various reclamation schemes including Colaba reclamation scheme- Block Nos. III to VI; 575 acres and observed that so far as the Colaba reclamation area is concerned, the remaining Blocks are a part of the unfinished scheme of the late Development Department. A part of seawall for the completion of these Blocks of reclamation is already constructed. Some portion on the northern fringe of Block No. III has been reclaimed in recent years by the depositing of debris obtained from the collapsed or demolition of buildings. The Committee recommended that it was essential for securing relief in the existing situation of congestion and concentration of industry in the island to undertake reclamation wherever practicable for increasing the pool of available land within and in the immediate vicinity of the island of Bombay. The Committee made a recommendation of reclamation proposals relating to large areas of land and it included Block Nos. III to VI of BBRS (about 575 acres).

10.5 We have on our record, also the report of the "Ad Hoc Committee on the revision of the lay out for the BACK BAY RECLAMATION SCHEME" (Exh. MMRDA-24.) (hereinafter referred to as the **Kale Committee** Report). The report refers to eight Blocks of BBRS ; Block - I and II covering the area from Chowpaty to Sachivalaya as also Block VII and VIII, which later vested in the Ministry of Defence, were reclaimed before the Scheme was




abandoned in 1930. This report states that the Government has completed reclamation of 64 acres in Block- V along the Cuffe Parade Road. In addition, the allottees themselves have realized a further reclamation of about 11 acres in Block-V. The report further mentions that a large number of plots in Block-III (opposite Sachivalaya and upto Nariman Point) aggregating to about 113 acres have either been reclaimed or are under reclamation. The report also states : " A strip of land along the Cuffe Parade Road in Block IV has also been reclaimed mainly to provide for services, widening of the road and a marginal provision of additional plots". It is further stated that an area of about 200 acres out of the total area of 550 acres between Blocks - III, IV, V and VI together is either under reclamation or already reclaimed. The report gives a table of the approximate area to be reclaimed in Block- III to VI as 128 acres with the approximate costs of Rs. 532 lacs. It appears that the Kale Committee submitted its report sometime in May 1975.

10.6 The object of referring to the above mentioned three reports prepared by three different Committees at different points of time during the period from 1926 to 1975 is only to give a broad idea of the BBR Scheme and its implementation. It certainly has relevance to the question as to when the land in question came into existence for the purpose of deciding whether there was vesting of it in the Federal Government or not. One thing which



needs to be noted is that except a small portion of Block No. VI, the major portion of the said Block had remained to be reclaimed.

10.7 The SLR Shri Dhikle stated in para 30 of his evidence that he would check whether his office has a copy of the BBRS. At that stage, Shri Dipan Merchant, the Id. Senior Counsel for the Commission, called upon Shri Vasudeo, the Id. Counsel for the GOM to produce the files of BBRS along with the plans. Thereafter, at the next hearing, Shri Dhikle stated in para 47 of his evidence that he checked in his office but the files of BBRS of the year 1920 along with the plans were not available. In view of the said statement, the Commission issued summons to Shri S.V. Chobe, Executive Engineer, Presidency Division, Mumbai, calling upon him to file the relevant original files pertaining to the work of reclamation from the date it started till its completion in plot No. 87-C, BBRS Block VI. Shri Chobe then filed his affidavit on 18-8-2011 stating that after due search in the office, the files called for were not available in the office of the Presidency Division as the said project was not handled by this office. In short, for some reason or the other the files of BBRS were not produced before this Commission.

10.8 On the basis of this fact, Shri Khambata submitted that the witnesses have admitted the existence of record of reclamation but the GOM have failed to produce the same. He further pointed out that the GOM did not lead any evidence to explain why the crucial record pertaining to the land in question could not be



produced before the Commission. Shri Khambata therefore, relied upon the decision in **Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif & ors. - AIR 1968 S.C. 1413** wherein it was held that if a party in possession of best evidence which would throw light on the issue in controversy, then an adverse inference against him is liable to be drawn notwithstanding that onus of proof does not lie on him. In the instant case, we find that the GOM have not produced the relevant files of reclamation without giving any satisfactory reason for the non production thereof. It is not the case of the GOM that the said files are either lost or destroyed. Therefore, under these circumstances, adverse inference against the GOM is liable to be drawn for the non production of the reclamation files.

10.9 The question is, as to what should be that adverse inference against the GOM. It will be only to the effect that, had the said files been produced before the Commission, they would have falsified the claim of the GOM that the land in question was submerged till 1970-73 and that it was more probable that the land in question had been reclaimed much earlier to that. We are, however, unable to draw an adverse inference stretching the fact of reclamation and consequently the existence of the land in question as far back as the year 1935 when the GOI Act came into force. Although, the relevant reclamation files were, for some reason or the other not forthcoming before the Commission, still, as discussed above, we have the report of the Barve Committee and Kale Committee as




well as several survey maps referred to by Shri Dhikle which go to show that the land in question was not reclaimed and in existence prior to 1-4-1937 which is the date of coming into force of Part -III of the GOI Act, 1935. Therefore, the adverse inference which arises against the GOM does not help the MOD to establish its claim of title under sec. 172(1)(a) of the GOI Act.

Acquisition of Block VII and VIII in BBRS by MOD.

10.10 There is no dispute of the fact that Block No. VII and VIII of the BBRS have already been transferred by the Government of Bombay in favour of the Government of India after they were reclaimed. It appears that there was some dispute between the two in connection with the reclamation carried in Block No. VIII with the result that the dispute was required to be referred to an Arbitrator who passed his award dt. 26-5-1930 Exh. AS-14, opining that the Government of India should take over Block No. VIII as it stands and that the Government of Bombay be relieved of any further responsibility in regard thereto. It was further opined that the date of transfers shall be held to be 15-10-1929, after which date the Government of Bombay shall be relieved from paying interest on any loan from the Government of India in respect of the provision of the reclamation of Block No. VIII.

10.11 As regards Block No. VII of the BBR Scheme, we have on record G.R. of the Revenue department dt. 12-3-1956 (Exh. GOM-




63) which mentions that sanction was accorded to the transfer of Block No. VII of Colaba to the Government of India, Ministry of Defence on payment of the value of the land (including the unreclaimed area) of Rs. 3.5 crores. It further states that the exact area will be determined by joint measurements by the representatives of the Collector of Bombay and Government of India, Ministry of defence. Then there is a certificate (Exh. GOM-64) regarding handing/taking over possession of land in Block No. VII of BBRS, admeasuring approximately 129 acres to the MOD, Government of India on 22-3-1956. The possession receipt also states, "the sea wall and a strip of land about 100 ft. in width required for the Marine Drive extension is excluded." The possession of the land was handed over subject to the joint survey of the land at a later date. It will thus be seen that the MOD has been in possession of Block No. VII and VIII of BBRS. The MOD does not make any claim of ownership to Block Nos. I to V and Block No. VI except the land in question which forms part of Block NO. VI.

11) **EVIDENCE OF SHRI SANJAY DHIKLE, S.L.R.
(GOM W. NO.1)**

11.1 Since we are on the question as to whether the land in question was in existence prior to 1-4-1937, it would be advantageous to refer to the evidence of Shri Sanjay Dhikle who is the Superintendent, City Survey & Land Records, (SLR) Mumbai city. It is true that Shri Dhikle took charge of the said post on 1-6-2011 and that he cannot have personal knowledge of certain facts




regarding reclamation and survey of the lands included in the BBRS. However, he has stated that he has familiarized himself with the record. Shri Dhikle has stated and/or produced a number of maps covering the lands in BBRS right from the year 1916. He has stated that there was necessity of making survey of the whole island of Bombay for conducting scientific resurvey. His evidence further shows that in all 790 sheets of measurements were prepared and out of them 70 sheets of survey, cover the entire area of Colaba. The importance of all these maps about which Shri Dhikle has given his evidence cannot be underestimated or doubted for the simple reason that the said maps were prepared in due course of the official business and when the present dispute regarding the title of the land in question could not have been in contemplation at that time.

11.2 It may also be noted that section 83 of the Evidence Act speaks about presumption as to maps or plans made by authority of Government and it states "*The court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate ; but maps or plans made for the purpose of any cause must be proved to be accurate.*" In the instant case , the above mentioned maps/ plans were prepared by the authority of the Government and that too much before the present dispute arose and not after the dispute and for the purpose of this dispute . Therefore the presumptive value of the said maps/plans cannot be doubted. (**Vide Prabhakar**



V. Satyanarayan 2004(6) Bom CR 813] The relevance of the said maps is from the view point of the situation of the western foreshore of Colaba where the land in question is situate.

11.3 The first map about which Shri Dhikle has stated is Exh. GOM-23 which was prepared in the year 1916. This map was produced by Collector Shri Oak but Shri Dhikle has explained the situation as it existed at the relevant time, and apparent from the map. In this map the Back Bay is seen on the west side. He has further stated that Back Bay starts from the boundary line of C.S. No.4. It appears that the area of C. S. No.4 was/is in possession of the Military. This map however does not show Cuffe Parade Road (which is now called Captain Prakash Pethe Marg).

11.4 The second map about which Shri Dhikle has stated is plan No. 310 Exh. GOM-24. According to him this map was prepared under the BBR Scheme for alignment of road on 2-3-1936 in Block No. VI. The purple coloured horizontal lines appearing on this map show the alignment of the proposed road. Shri Dhikle has stated that this map shows a vertical east-west line which is the boundary of Block Nos. V and VI. As per this map, the then existing foreshore line starts from the point marked by letter X and it runs towards east and passes through and parallel to the proposed alignment of the road towards north. As per this map there is land at the south -west corner of Block No.VI and for the purpose of identification, the said triangular portion of land has been marked




by hatched lines. It will not be out of place to mention at this stage only that the triangular portion is, what is called SHO complex and which has admittedly been in possession of the Army. We shall deal with the SHO complex a little later. This map does not show existence of any land towards west of the alignment of the road on the western side.

11.5 The third map referred to by Shri Dhikle is Exh. GOM-25 which is a joint survey map prepared on 9-9-1937. The portion verged in yellow line as shown in this map, is the area which was proposed to be handed over to Military department. It is important to note that the said portion is situated towards the west of the Cuffe Parade Road which is north-south in direction and Block No. VI is located towards west of the said road. In para 44, while replying to a question put by Shi Dipan Merchant, the Ld. Senior Counsel for the Commission, Shri Dhikle stated : "It is correct that the land in question is under sheet No.12 but, Captain Prakash Pethe Marg is not shown in this plan. I cannot say whether in the year 1969 Captain Prakash Pethe Marg was in existence or not". It is also necessary to note what Shri Dhikle has stated about the fourth map Exh. GOM-26 in para 7 of his evidence. He has stated that the original map is of the year 1916 but there have been changes on account of road widening, sub divisions, constructions, giving of numbers etc. and therefore the map is required to be updated. It will thus be seen that the map Exh.

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GOM-26 is an updated copy of the map Exh. GOM-23 which was prepared in 1916.

11.6 The fifth map produced by Shri Dhikle is Exh. GOM-27. It is a Development Plan prepared by MCGM on 4-2-1967 under section 31 of the MR& TP Act 1966 . In para 8 of his evidence before the Commission, Shri Dhikle has stated about the procedure of finalizing a map prepared by the Planning Authority. It may be pointed out that in the year 1967 it was MCGM who was the Planning Authority for the BBRS and it was only after 1985 that the MMRDA became the Planning Authority. The procedure for sanctioning the Development Plan, as stated by Shri Dhikle is to the effect that first a draft plan is prepared and published inviting objections , if any and thereafter changes are made in the plan accordingly and the plan is sent to the Government for sanction under section 31 of the MR & TP Act. Even at that stage, the MOD had not raised any objection to the proposed changes to be made in the Development Plan. After the sanction is received from the Government, then the final Development Plan is published. According to Shri Dhikle ,this procedure was followed in the instant case and therefore the plan Exh. GOM-27 has statutory value. In this connection, reference may be made to para 79 of the evidence of Brig. Saxena, who has stated that the Government of Maharashtra had issued a notification inviting suggestions/objections of narrowing the proposed width of Capt. Prakash Pethe Marg from 60 mtrs. to 18 mtrs. He further stated



that the Army authorities as well as the MOD were aware of the said notification issued by the GOM but in spite of this fact no objection was filed on behalf of the Army and MOD against the proposed reduction of the width of the said road. While explaining the plan, Shri Dhikle has stated that on the western side, there are Block Nos. III to VI and to the west side of these Blocks, there is the proposed sea wall. Shri Dhikle has marked the Cuffe Parade Road on this map by letters A and B. He has stated that the dotted line coming from west to east and turning towards north is the foreshore line. He has marked the said line by letters C.D.E. According to Shri Dhikle, Block No. VI was under water at the given time. This map does not show the existence of the land in question in Block No. VI.

11.7 The next and sixth map about which Shri Dhikle has deposed is Exh. GOM-28 which was prepared by the Town Planning & Valuation Department in 1973. Shri Dhikle has stated that the land reclaimed and allotted is shown by blank boxes and the land not reclaimed but committed is shown by hatched lines in this map. He has further stated that Block No. VI which is shown by hatched lines was under sea water in 1973 as per the plan. In para 57 of his evidence Shri Dhikle has stated that he has marked Captain Prakash Pethe Marg on this plan in green ink and the site of Adarsh CHS by orange colour. What is important to be noted is that the portion of the land towards west of the said road is marked by hatched lines meaning thereby that it was not reclaimed.

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11.8 In para 11 of his evidence Shri Dhikle has referred to the memorandum dt. 12-9-1973 issued by Revenue & Forest Department (RFD) in connection with Block No. VI of the BBRS for the purpose of BEST depot. He has stated that by this memorandum the Government of Maharashtra decided to hand over advance possession of the area of 5.14 acres from Block No. VI along 200 ft. wide proposed road and Cuffe Parade Road respectively to the BEST for the purpose of the Bus Depot. Para 2 of this memorandum states; "The area is under water and would become a plot of proper shape if the filling in work is undertaken for the adjoining area measuring 22.25 Ares (0.505 acres) reserved for the Sewage Pumping Station in consultation with the authorities concerned. The collector is therefore requested to allow the BEST to arrange for a combined filling in work if it so desires."

11.9 As against the above referred evidence led on behalf of the GOM which apparently does not show existence of the land in question on the specified date i.e. 1-4-1937; the MOD has placed much reliance upon the following evidence. The first is the survey of India Map of Military lands, Colaba which was prepared in the year 1957 (Exh.AS-18). This map mentions the area of Block VI as 128 acres. Ms. Gita Kasyap, DEO was shown this map and she has located the SHO Complex and marked the same by letters "AA" on the map. There is no dispute of the fact that the SHO Complex is



located at the south west triangular portion of Block VI, adjoining Block VII, which is admittedly purchased by and in possession of the MOD. Ms. Gita Kashyap has further marked on this map the location of Khukri Park by a square which is marked by letters "KP" during the course of her evidence. She has admitted that the marking is not accurate and it is approximate. It is the case of the MOD that the portion of land upon which Khukri Park was situate is the same land which has been allotted to the Adarsh CHS. We will deal with the contentions regarding the said Khukri Park in due course of this report, in order to avoid deviation of discussion. The map Exh. AS-18 was also shown to Brig. Saxena, who stated that the map indicates all the Military lands in possession of the defence. There are thick red lines on this map which appear to be the boundary lines. Brig. Saxena marked the boundary line on the southern and eastern side of Block VI by letter A and B. According to him, it is not a high water line but it shows the gradient of the land. He has also referred to two thin lines above the thick red line which he marked by letters G and H on the map. But according to him, the said letters do not show Cap. Prakash Pethe Marg which was constructed in the year 1966-67 as per his knowledge. He is unable to say whether the said thin lines connecting the letter G and H in the map is the Cuffe Parade Road. Brig. Saxena then admitted that the map does not show the existence and demarcation of the land in question. However, immediately thereafter he changed his version and stated "Now I say that the map shows existence of the land in question".



**12 EVIDENCE OF MOD ON THE POINT OF EXISTENCE
OF LAND IN QUESTION PRIOR TO 1-4-1937.**



12.1 Brig. Saxena has referred to and relied upon in his affidavit of evidence two maps; one of the year 1897 and the other of the year 1909. It appears that the map of the year 1897 which Brig. Saxena has annexed to his affidavit at Exh. I is a xerox copy of an image obtained from Google which is not certified to be true and correct. He has admitted in para 87 of his evidence that the authenticity of the maps published Google is not recognized by the Government of India or any State Government. As regards the map of the year 1909, which according to Brig. Saxena is Edinburg Geographical Institute's map also shows the existence of the land in question. He has annexed a xerox copy of two maps marked as Exh. J to his affidavit. However, the same is so faint that it is difficult to make out from it, the locations under reference. Moreover, it is only an ordinary xerox copy which does not bear any authentication and as admitted by Brig. Saxena himself in para 11 of his evidence, he has done some imposition on them. Therefore the same cannot be of any help to Brig. Saxena to substantiate his contention in this respect.

12.2 In para 11 (IV) of his affidavit, Brig. Saxena has affirmed as follows: , " From the said map of 1897 it can be seen that even at that point of time there was a strip of land appurtenant towards the seaward side of the said road called Cuffe Parade



Road/Cap.Prakash Pethe Marg. Admittedly the Adarsh building is situated on a thin strip of land directly touching the Capt. Prakash Pethe Marg on its seaward side. That being so, it is undeniable that the said Adarsh building has been constructed on the land which was existing even in 1897 before any reclamation took place and is the land which forms part of original island of Colaba and which land is declared to be the land belonging to the Federal Government and is a Military land."

12.3 While arguing the case of behalf of the MOD and supporting the contention of Brig. Saxena, the Id. ASG Shri Khambata placed reliance upon two maps . The first is the survey of India Map of Military lands , Colaba which was prepared in the year 1957 (Exh. AS-18). This map mentions the area of Block No. VI as 128 acres. The map Exh. AS-18 was also shown to Brig. Saxena, who stated that the map indicates all the Military lands in possession of the defence. There are thick red lines on this map which appear to be the boundary lines. Brig. Saxena marked the boundary line on the southern and eastern side of Block No. VI by letter A and B. According to him , it is not a high water line but it shows the gradient of the land. He has also referred to two thin lines above the thick red line which he marked by letters G and H on the map. But according to him, the said letters do not show Capt. Prakash Pethe Marg which was constructed in the year 1966-67 as per his knowledge. He is unable to say whether the said thin lines connecting the letter G and H in the map is the Cuffe Parade Road.



Brig. Saxena then admitted that the map does not show the existence and demarcation of the land in question. However, immediately thereafter he changed his version and stated "Now I say that the map shows existence of the land in question". (vide para 99 of his evidence)

12.4 Shri Khambhata drew our attention to the narrow strip situated towards the west of the above mentioned two thin lines marked by letters G and H on the plan Exh. AS-18 and he submitted that the land in question forms part of this strip. The map Exh. AS-18 appears to have been prepared in 1957 by the Surveyor General of India. There is no good reason to discard this map showing the situation as it existed in the year 1957 but we cannot lose sight of the fact that for the purpose of application of the provisions of section 172 of the GOI Act, *the vesting of the land in question in the Federal Government and its use by it immediately before the specified dated i.e. 1-4-1937 have to be established. Obviously the map Exh. AS-18 which was prepared in the year 1957 cannot show the situation which existed on the spot immediately preceding 1-4-1937.*

12.5 Shri Khambata further relied upon another map Exh. GOM-114 which describes "Back Bay Reclamation Scheme Details of existing road and filling in Block No. VI". This map shows the location of SHO Complex where a number of Army buildings are situated. The SHO Complex is seen on the left i.e.



southern side. On the northern side there is Dhobi Ghat and in between there appears to be a strip of land joining the SHO Complex to Dhobi Ghat. There is a north-south road, most probably the present Capt. Prakash Pethe Marg which abuts the said strip on the eastern side. The map shows the structures of Armaments in purple colour and the unauthorized occupation in blue colour. The land in question falls on the western side of the road shown in the map and admittedly it is at a distance of not more than 100 mtrs. from SHO Complex. We however fail to understand how the map Exh. GOM-114 could be of any help to the MOD to establish the existence of the land in question preceding the relevant date i.e. 1-4-1937. In the first instance there is no evidence on record to show as to in which year this map was drawn. This map was annexed to the letter Exh. GOM-114 colly. Dt. 6-4-1973 addressed by the Superintending Engineer, B and C Circle, Bombay to the Chief Engineer, (S) and the Joint Secretary to the Government of Maharashtra. The subject of the letter is "Back Bay Reclamation Scheme/Reclamation of a strip of land of 7.15 hectares in Block No. VI of BBR Scheme". Para 3 of this letter states "The Executive Engineer, Reclamation Project Division and this office requested the Collector of Bombay to take necessary action to get the Dhobi Ghat and Military offices vacated from the Government land". In para 4 of this letter it is stated "Further the Executive Engineer, Reclamation Project Division and this office requested the Military Estate Officer to inform if any permission is obtained



by the Military Authorities from the State Government for occupying the land. There is no response from the Military Estate Officer, in spite of reminders....." The enclosures to this letter include the above mentioned map which shows four unauthorized structures in the SHO Complex and three just near the Dhobi Ghat on the strip of land. The unauthorized structures are shown in blue colour in this map and have been simply described as "Unauthorizedly" without specifying who is the unauthorized occupant. Taking into consideration the above mentioned letter dt. 6-4-1973 there is reason to believe that this map was prepared sometime around 6-4-1973. Therefore, although this map shows existence of a north-south strip of land connecting Dhobi Ghat and SHO Complex, it cannot prove the existence of the land in question which forms part of the said strip as on or just preceding the relevant date i.e. 1-4-1937. The MOD has not led any evidence to show that the land in question was indeed a part of that strip; nor could it lead any evidence to show that the said land had been in their use. Mere argument by the Ld. ASG cannot carry any evidentiary value. A copy of the map Exh. GOM-114 is annexed with this report as Appendix-V.

12.6 The net result of the foregoing discussion is that there is no evidence on record to establish the existence or use of the land in question immediately preceding 1-4-1937. Therefore, the first requirement contemplated by section 172 (1) of the GOI Act is not fulfilled. Hence there is no question of the land in question being



"vested in His Majesty for the purposes of Government of India" or for the purposes of the Provincial Government.

12.7 In this respect, Shri Sakhare the Id. Senior Counsel for the GOM placed reliance upon two notifications dt. 1-4-1937 issued by the Defence Department (Exh. GOM-2). The said notifications have been issued for the purposes of clause (a) of sub section (1) of section 172 of GOI Act 1935 and the Governor General-in-Council has certified that the lands specified in the Schedule together with buildings situated thereon have been retained by the Governor General in Council for future use which will thereafter be for the purposes of the Federal Government. So far as the lands and buildings situated in Bombay are concerned, we find entries thereof at Serial No. 1 to 12. Suffice it to say, that none of these 12 entries includes the land in question or even any portion of Block No. VI of BBRs. Thus the important condition of certification by the Governor General in Council is not fulfilled in the present case. Consequently, the very basis of the MOD's claim of title to the land in question does not exist. Hence it cannot be said that the MOD acquired title to the land in question by virtue of the provisions of section 172 of the GOI Act 1935.

13) **CLAIM OF TITLE BY MOD ON THE BASIS OF
PREVIOUS POSSESSION.**





13.1 The second limb on which the claim of the MOD to the title of the land in question is their alleged previous possession. In this respect reference may be made to certain statements made by Brig. Saxena in paras 16 to 24 of his affidavit. He has affirmed that the land in question has always been in possession of the military authority and this fact, according to him is clear from certain letters to which he has made reference in paras 17 to 22 of his affidavit. Going by the chronological order, the earliest document referred to by him is the letter dt. 30-12-1983 addressed by the Collector, Mumbai to the Adm. Commandant, Station Head Quarters, Colaba (Exh. MOD-2). The subject of this letter is "LANDS; BOMBAY, Strip of land adjoining Cuffe Parade and near BEST Bus Depot to hand over the BMC". By this letter the Collector informed the Adm. Commandant that the land was required to be handed over to the BMC for road widening. But at the time of site inspection it was mentioned that part of the said land was fenced with barbed wire by the Army. The reply to this letter was given by Lt. Col. S. R. Bidkikar on 13-1-1984 (Exh. MOD-3) wherein it was contended; "The land on either side adjoining the BEST Bus Depot is defence land and is in occupation of the Army since long. Since it is being used as training area, it has been kept vacant. However part of this land was occupied by the civilian employees. Since they had a tendency to further encroach on this land, the area has been fenced by us to prevent this". There is no cross examination of Brig. Saxena either by the GOM or the Adarsh CHS with reference to these two letters



and there is absolutely no reason as to why in these two letters there is reference to Army's possession of some portion of the land as back as the year 1983. Therefore, due evidentiary value deserves to be given to these two letters.

13.2 Brig. Saxena has also referred to and relied upon four letters dt. 21-9-1999 addressed to the Chief Minister (Exh. GOM-87), dt 13-1-2000 addressed to the Revenue Minister (Exh. GOM -169), dt. 7-2-2000 addressed to the Chief Minister (Exh. GOM-67) and dt. 2-6-2000 addressed to the Chief Minister (Exh. IW-4). All these letters addressed on behalf of the Adarsh CHS were for allotment of government land in Block No. VI of Colaba. What Brig. Saxena has emphasized is the fact that all these four letters contain a clear admission on the part of the Society to the effect that the physical possession of the land sought to be allotted has already been with Army for the last 25/30 years. The letter Exh. GOM-87 dt 21-9-1999 contains a statement "Presently this land is duly fenced with a compound wall and in physical possession of Local Military Authorities.....we have negotiated with the Local Military Authorities who have expressed their willingness to allow the society to go ahead with the project if certain amount of accommodation is also provided for Army welfare.....". The letter dt. 13-1-2000 Exh. GOM-169 reiterates the same facts of Army's possession. The same is the case with regard to the third letter dt. 7-2-2000 Exh. GOM-67.



13.3 The fourth letter dt. 2-6-2000 Exh. I.W-4 contains a request to the Revenue Minister "To kindly allot this piece of land which is already in physical custody of Local Military Authorities who have been protecting the land from encroachment since last 25/30 years". There is absolutely no valid explanation given by the Adarsh CHS to explain these admissions. The Society's Chief Promoter however, made a feeble attempt to explain that it was his impression that the Army was in possession of the land in question. Shri Debashish Chakraborty C.W. No.3 who was the Collector of Mumbai city from 17-6-1999 to 28-8-2002 referred to the above mentioned recital regarding Army's possession of the land in question as mentioned in the letter Exh. GOM-67 and opined that the said statement is a correct statement. Earlier he stated that the land in question was secured by a compound wall with a gate of galvanized iron pipes. The Collector Shri Chakraborty has also stated about his own report dt. 12-5-2000 Exh. GOM-17 wherein he has mentioned that the MOD has taken unauthorized possession of the land in question and set up a garden by constructing a wall. The Collector Shri Oak GOM W No.2 stated in para 18 of his evidence that "As per our correspondence, the Army had constructed a wall around the land in question and there was a garden known as Khukri park as claimed by the Army". Again in para 27 of his evidence, Shri Oak admitted that on 24-8-2004 the physical possession of the land in question was with the Defence Department. Further in the same para on page 246 Shri Oak has admitted that "It is correct that



on 19-7-2004 the Government was fully aware that the physical possession of the land in question was with the Local Military Authority".

13.4 Thus the above mentioned correspondence as well as the statements made by the two Collectors viz. Shri Chakraborty and Shri Oak clearly show that since prior to the allotment of the land in question in favour of the Adarsh CHS, it was in physical possession of the Army.

14) **POSSESSION OF THE LAND OCCUPIED BY
SHO COMPLEX**

14.1 We have seen above in para 10.7 and 8 that Block VII and VIII of the BBRS were transferred to the Government of India and that they have been in possession of the MOD. There is no dispute of this fact. It is seen from the map Exh. GOM-114 that adjoining the northern boundary of Block No. VII there is a triangular portion which falls in Block No. VI abutting Capt. Prakash Pethe Marg. It is also not in dispute that upon this triangular portion there are certain structures of the MOD. We have on record a letter dt. 19-7-1967 Exh. MOD-79 addressed by the Garrison Engineer to the Military Estate Officer (MEO) Colaba on the subject "Back Bay Reclamation Scheme of areas in Block No. III to VI". This letter gives the following description of the then existing structures in Block No. VI as under:



S.No	Bldg.No	Officenow functioning	Year of Construction	Authority
1.	T/1	Office IWT 6 Dock	1940/41	No authority for the occupation of the land is available.
2.	T/2	Guard Room for POL Depot	1940/41	
3.	T/88	Office 6 Dock	1940	
4.	N.Y.A.	CICA Office new.	1966	
5.	N.Y.A.	Plinthforoffice RDE	1965	
6.	N.Y.A.	Plinthforoffice RDE	1965	
7.	N.Y.A.	Latrine Block for RDE	1966	

14.2 Lt. Col. Vikram Singh Bhadaria (MOD W.No.3) who is the Garrison Engineer (West) Colaba since April 2009 has stated that the Garrison Engineer maintains all buildings in charge of Army and that he also maintains two registers in respect of the structures in the station area. The first is Register of Temporary Military Buildings (RTMB) and the second is Register of Permanent Military Buildings (RPMB). He produced a copy of the relevant entries from RTMB at Exh. MOD-116 colly. which gives details of buildings in old SHO Complex. It appears from the two documents i.e. Exh. MOD-79 and MOD-116 colly. that the oldest building in the SHO Complex is of the year 1940-41. As regards the location of the SHO Complex, Lt. Col. Bhadaria has




stated that it is located adjacent to the Adarsh CHS and is on the right hand side of Capt. Prakash Pethe Marg while going towards Colaba Military Station. The location of the SHO Complex is clear from the map Exh. GOM-114. The above mentioned documentary evidence regarding SHO Complex clearly shows that the triangular area of Block No. VI in the south-west corner where SHO Complex is located has been in possession of the MOD at least from the year 1941. It is not the case of the MOD that the said portion of land was allotted to them by the State Government. In fact the MOD does not have any oral or documentary evidence as to how they came in possession of the land under SHO Complex. But the fact is that the MOD has been in continuous possession thereof, though their possession is apparently unauthorized.

14.3 The land occupied by the SHO Complex and the land in question are very close to each other. Brig. Saxena has stated in para 112 of his evidence that the SHO Complex is at a distance of about 20 mtrs. south of the Adarsh CHS building. It appears that the MOD has tried to contend that they were also in occupation of the land in question probably because of the proximity between the SHO Complex and the land in question. However, the two portions of the land, though they form part of Block No. VI, are different from each other. The SHO Complex is enclosed by a wall around it. It would be too much to presume that the land in question must have been in possession of the MOD because they



have been in possession of the adjoining area occupied by SHO Complex. The MOD has laid no evidence to show as to for what purpose they were making use of the land in question before the Khukri park was set up there in the year 1996.

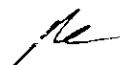
14.4 In this connection reference may be made to an office note dt. 15-5-1968 Exh. MOD-73. It is not clear from the said office note as to who has prepared and signed it and to whom it is addressed. But it is important to note that this document has come from one of the files i.e. file No. Exh.A-323 produced by the MOD. The subject of the office note is "Regarding 128.56 acres State Government land, Block No. VI Colaba; Bombay-5". The officer making this note has referred to certain enquiries made by the State Government Departments as well as from the Reclamation Project Division, Bombay and observed, "According to them none of the areas in Block . VI has so far been reclaimed. Only about 3.8 acres of land along Cuffe Parade Road had been filled up. But this is ear marked in their Development Scheme for widening the Cuffe Parade Road as well as for Bombay Municipal Corporation Sewage Purification Plant." It thus appears that the narrow strip of land connecting SHO Complex to Dhobi Gat was not a regularly reclaimed land but it was filled up for widening of the Cuffe Parade Road. If that is so, then the claim of the MOD that they were making use of the said strip becomes difficult to accept.



15) **KHUKRI PARK**

15.1 It is the case of the MOD that there was a park or garden upon the land in question before it was allotted to the Adarsh CHS. It is also their case that the said park was an Eco park known as Khukri park which was inaugurated by Major General B.A. Kariappa in 1996. The said park was being maintained by the Garrison Battalion. The witnesses of the Adarsh CHS have been hesitant and reluctant to admit the existence of such a park on the land in question. Their hesitancy to admit this fact is understandable. However, the evidence of Collector Shri Oak corroborates the MOD's case in this respect. In para 18 of his deposition Shri Oak has stated that "As per our correspondence, the Army has constructed a wall around the land in question and there was a garden known as Khukri Park as claimed by the Army." Thereafter in para 19 of his evidence Shri Oak has fairly admitted the existence of the garden on the land in question in the following words, "It is an admitted position that there was a garden and a wall surrounding the land in question. It is true that in the subject of this letter (Exh. GOM-17), the Collector had admitted that the land in question was in unauthorized possession of the Army. Since 1980-85 the Army was in unauthorized possession of the land in question."

15.2 The reference to Exh. GOM-17 by Shri Oak is to the report dt. 12-5-2000 made by the then Collector Shri Chakraborty to the Principal Secretary, Revenue. The said report is in Marathi



and para 2 of the said letter contains a statement which, on translation in English, would read as follows: "The land adjoining plot No. 87-C in BBR Block No. VI has been presently unauthorizedly occupied by the office of the Head Quarters of Maharashtra and Gujarat Area of the Defence Department who have set up a garden upon it and also constructed a wall around it." It appears from the said letter that Collector Shri Chakraborty made this report after the GOM made a reference to him pursuant to the demand of allotment of the said land by the Adarsh CHS. The report further states that it was prepared after site inspection and perusal of the report submitted by the Cadestral Surveyor. During his cross examination the Collector Shri Oak was confronted with several letters Exh. MOD-59, Exh. GOM-67, GOM-86 and GOM-87, GOM-5 and GOM -68 and was asked the following question by Shri A.J. Rana, the Id, Senior Counsel for the MOD. The question put to Shri Oak and the answer given by him to it is as under:

"Q. All the above mentioned documents which are shown to you establish two things viz.

- (1) That the land in question was in possession of the Army, and
- (2) That there was a compound wall around the land in question. Is it true ?

Ans: It is true."



In view of the above mentioned clear cut admissions by the Collector Shri Oak regarding the existence of the Khukri park and its possession by the Army, the questions put to the witnesses of the MOD by the Id. Advocate of the GOM to the effect that there is no documentary evidence to show that the said garden was set up and maintained by the Army at their own costs and that there is no documentary evidence to show that wall around the said park was constructed by the Army etc., lose their efficacy and become inconsequential.

15.3 As stated earlier, the Khukri park was inaugurated in the year 1996. Brig. Saxena has stated in para 85 of his evidence that it was set in 1996. We have on record two important letters, which throw ample light on this question. The first is dt. 13-10-1988 Exh. MEM-3 addressed by Shri Marazban Patrawala, the then Minister of State for GAD, Government of Maharashtra etc. to the Commandant, Military Sub Area, Colaba on the subject "Boundary wall constructed near road side of Ganesh Murti Nagar No. 2", wherein the Honourable Minister referred to some discussion which had earlier taken place in connection with the boundary wall constructed by the Army near the road side of Ganesh Murti Nagar No.2. By this letter Shri Patrawala requested the Commandant not to shift the said wall and bring it near the hutment side of Ganesh Murti Nagar No.2, assuring "The land from this boundary wall to the hutments is a Military land and it will not be utilized by the slum dwellers for constructing any






more huts on it. As per discussion, this land will be developed for garden purposes."

15.4 The second letter is dt. 8-11-1988 Exh. MEM-2 addressed by Brig. A.S. Sumra, Station Commandant to the M & G Area, Provost Unit on the subject "Construction of boundary wall and boundary". This letter refers to the boundary wall constructed and states: "The MIL area left on the other side of wall from which encroachment has been now removed, will be kept free from encroachment by constant vigilance by Pro. Pers and under no circumstances any hut or other structure will be allowed to come up in this area."

(For the purpose of understanding the abbreviated words used in this recital, it is explained that "MIL area" means "Military area", and "Pro. Pers" means "Provost Persons of Personnel". Brig. Saxena has stated that "Provost" means "Army Police")

15.5 The above mentioned two letters explain the background on which the Khukri park came to be set up in or about 1996. The site inspection report Exh. 3 prepared by this Commission shows that the land in question and incidentally the Adarsh building which is surrounded on its three sides by sprawling slum areas, called Ganesh Murti Nagar and Gita Nagar. It appears quite possible that in order to stop further encroachment being made by the slum dwellers, the Army decided to set up a garden on the land in question and take care thereof. It is not necessary to refer to other evidence regarding



the Khukri park as from the foregoing discussion its existence and its possession by the Army is quite clear. Therefore, there should be no difficulty in concluding that the MOD was in possession of the Khukri park since around 1996.

15.6 The net result of the above discussion is that the Army was in possession of the land in question sometime around 1996. There is no evidence of Army's possession of the land in question prior to 1996, though it is clear that the Army has been in possession of the SHO Complex which forms part of Block No. VI since about 1941-42. However, possession of the land in question cannot be tagged with possession of the SHO Complex. As discussed above, the land in question falls on the strip of land connecting the SHO Complex to the Dhobi Ghat. It appears that the Army lost its possession of the land in question on 27-10-2004 when the GOM handed over possession to the Adarsh CHS pursuant to the allotment made in its favour. It is, however not that the Army was dispossessed of the Khukari Park by the GOM in order to give possession to the Adarsh CHS ; nor there is any evidence on record to show that the said society itself forcibly dispossessed the Army and took possession of the Khukari Park . There appears discontinuance or relinquishment of possession of the Khukari Park by the concerned Army personnel who were looking after it .

15.7 The question which, therefore, arises for consideration is whether the Army could be said to have acquired title to the



land in question on the basis of its possession for a period of 8 to 10 years. It was tried to be contended on behalf of the MOD that the Army was in possession of the land in question since 1930, which means that the Army was in possession of the land in question for more than 70 years before it lost the same in the year 2004. Assuming for the sake of argument that this contention is factually true, the question is whether such a long standing possession of the land in question by the Army can confer title upon it. In this respect reference may be made to what Brig. Saxena has stated in para 94 of his evidence. He has stated, "There are three recognized modes of acquisition of lands for Defence and they are (i) By statute, (ii) By acquisition by the State Government or the Central Government and (iii) By purchase. The British had handed over certain lands to the Defence and by virtue of that fact the lands are vested in the Defence. These are the four recognized modes for acquiring title of any land by the Defence. Whenever title in respect of any land is acquired by the Defence in any of the above mentioned modes, then that fact is reflected in the MLR." Admittedly, the land in question is not acquired by the Army in any of the above mentioned four modes nor it is entered in the Military Lands Register (MLR). It will have, therefore, to be seen whether under the general law, the Army could be said to have acquired title to the land in question on the basis of its alleged long standing possession.



16) **WHETHER MERE LONG STANDING POSSESSION
CAN CONFER TITLE ON THE MOD .**

16.1 The concept of possession has certain implications in law. A possession *in fact* must be distinguished from a possession *in law*. A possession may exist in fact but not in law. The jurisprudential concept of possession involves two elements. The first is *animus possidendi* and the second is *corpus possession*. The former is the mental element and consists of the intent to possess ; whereas the latter is the physical element and it consists in the concrete realization of the intent by actual user of the thing or property sought to be possessed. It therefore follows that acts of user without the *animus possidendi* or the intent to possess do not constitute possession at all. The mere act of trespass or casual use without any intent to possess does not constitute possession and much less adverse possession.

16.2 Relying upon section 110 of the Evidence Act , Shri Khambata, the Ld. ASG, submitted that the presumption as to ownership of the Army of the land in question on account of long standing possession has not been displaced or rebutted by the GOM. Section 110 of the Evidence Act reads as under:

110. ***Burden of proof as to ownership:-*** When the question is whether any person is owner of anything of which he is shown to be in possession, the




burden of proving that he is not the owner is on the person who affirms that he is not the owner.

This section only speaks of the burden of proof as to ownership when one person is in possession of a property, then burden lies on the other person who denies ownership of the first person and affirms his own title, to prove that the first person is not the owner. Possession is, therefore, prima facie, a good title against all except the true owner. This is what is recognized by section 110 of the Evidence Act. Shri Khambata relied upon the decision in **Ranjit Singh Vs. Jhori Singh reported in AIR 1929 Patna 601.**, in which the position was considered in the light of section 110 of the Evidence Act in the following words :

"The Plaintiff brings a suit in ejectment. It is quite true that he can only succeed by the strength of his own title. He satisfies the court of facts that he was in possession of the disputed property before he was forcibly dispossessed. Section 110 assumes that he might be taken to be the owner till the contrary is established. It follows therefore, that if the case attracts operation of section 110, Evidence Act, the onus must be upon the defendants to show that the plaintiff who has proved that he was in possession before his forcible dispossession, is not entitled to the disputed property."



16.3 In the instant case there are umpteen number of admissions given by different officers of the MOD at different points of time over a period of about 40 years acknowledging the title of the GOM in respect of the land in question which is a part of Block No. VI of the BBRB. We shall point out those admissions and deal with the same in details a little later. For the present, it is sufficient to say that the presumption contemplated by section 110 of the Evidence Act, if at all it arises in favour of the Army, has been totally rebutted and displaced by those admissions.

16.4 Shri Khambata submitted that admissions do not create or confer title in anybody. In support of his submission, Shri Khambata relied upon two decisions i.e. **Ambika Prasad Thakur Vs. Ram Ekbal Rai -1965 (0) AIJEL-SC 1103** and **Thayyil Mammo Vs. Kottiath Ramunni - 1965 (0) AIJEL-SC 31997**. In the former case, it was held that when an admission is made in suspicious circumstances, it has weak evidentiary value and title would not pass by mere admission. There is no doubt or dispute about this proposition as well as the submission made before us by Shri Khambata. At this stage reference may be made to the decisions cited by Shri Dipan Merchant in this respect. The first is **Bharat Singh Vs. Bhagirathi - AIR 1966 Supreme Court 405** wherein it was held that admission is substantive evidence even though party is not confronted with the statement. This decision was followed by the Bombay High Court in the case of **Murlidhar Bapuji Vs. Yallappa Lalu - AIR**




1994 BOMBAY 358. The third decision cited by Shri Dipan Merchant is **Nagindas Ramdas Vs. Dalpatram Ichharam - (1974) 1 Supreme Court Cases 242** wherein it was observed that admissions, if true and clear, are by far the best proof of the facts admitted. The fourth decision in this respect is **United India Insurance Co. Ltd. Vs. Samir Chandra Chaudhary - (2005) 5 Supreme Court Cases 784** wherein it was held that an admission is the best evidence that an opposing party can rely upon. The effect of admission is that it shifts the onus on to the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. It will thus be seen that even though admissions can never pass or confer title upon a party, they cannot be ignored altogether and they certainly operate estoppels against the party making such admissions. Therefore, even assuming that the MOD had been in possession of the land in question for a long time, the presumption under sec. 110 of the Evidence Act would not arise in their favour in view of the fact that the admissions regarding title of the GOM in respect of the land in question. Those admissions, clearly rebut the said presumption.

16.5 The settled position of law is that mere possession is not sufficient to confer title upon the concerned person in possession. In this respect, reference may be made to the following decision cited by Shri Dipan Merchant, the Id. Senior Counsel of the




Commission, **in State of Orissa Vs. Ram Chandra** reported in **AIR 1964 SC 686**. The Supreme Court observed that:

“Mere possession of the property for however long a period it may be, will not clothe the possessor with any legal right if it is shown that the possession is under a grant from the State which is resumable. Such long possession may given him a legal right to protect his possession against third parties, but as between the State and the grantee, possession of the grantee under a resumable grant cannot be said to confer any right on the grantee which would justify a claim for a writ under Article 226 where the grant has been resumed”.

In short, it can be safely concluded that mere long standing possession of the land in question as claimed by the MOD, will not confer title upon them.

17) **PLEA OF ADVERSE POSSESSION.**

17.1 In para 23 of his first affidavit Brig. Saxena has affirmed, “Admittedly, the Military Authorities have been in possession of the said land for over 100 years. That being so, even under the Rule of adverse possession, the title to the said land rests with the Government of India/Military Authorities”. However, under Article 112 of the Limitation Act, 1963 the said period is 30 years as against the Government and the said period beings to run




when the period of limitation begins to run against a like suit by a private person. In other words it begins to run from the date when possession becomes adverse to the Government. In the instant case, neither the MOD is the plaintiff nor the GOM is the defendant, nor the present proceeding is a suit. But while dealing with term No.1 of the reference, the Commission has to consider the plea of adverse possession as raised on behalf of the MOD.

17.2 The Encyclopaedia of the Laws of England defines "adverse possession" as holding possession under a claim of title inconsistent with that of the true owner. Black's Law Dictionary defines "adverse possession" as possession in opposition to the true title and real owner and it implies that it commenced in wrong and is maintained against the right. The principle that in order to constitute adverse possession, the possession must be in denial of the title of the true owner and this has been recognized by numerous decisions of the various High Courts and Supreme Court. Mere unauthorized possession even for a period of more than 12 years is not enough to confer title upon the person in possession. Such possession must fulfill certain requirements which constitute adverse possession. **In S.M. Karim vs. Mst. Bibi Sakina reported in AIR 1964 SC 1254**, the Supreme Court held,

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least




to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea."

To constitute adverse possession, there must be some overt act on the part of the person in possession showing that he has been denying the title of the true owner and claiming adverse title in himself.

17.3 Shri Sakhare the Id. Senior Counsel for the GOM submitted that the MOD has raised inconsistent pleas which cannot be allowed to be made. In this respect he placed reliance upon the decision in **Pandit Tukaram Vs. Shankar Raoji - CDJ 2009 BHC 1441** which indirectly lays down that inconsistent pleas cannot be taken. However, in the particular facts of that case the High Court held that, the plea of adverse possession raised against the respondent is not inconsistent with the appellant's claim of title of the suit property under a sale deed. Shri Dipan Merchant the Id. Senior Counsel for the Commission in this respect cited the decision in the **Karnataka Wakf Board Vs.**




State of Karnataka & ors- AIR 1996 Karnataka 55, wherein it was observed that it is well settled that the plaintiff can take an alternative pleas . The plea regarding title and the plea of adverse possession pleaded by the plaintiff in that case was held not to be inconsistent with one another. In the instant case, the MOD has claimed title to the land in question on the basis of the provisions of Section 172(1)(a) of the GOI Act, 1935 and alternatively claimed title by adverse possession. We do not think that there is any legal bar prohibiting the MOD from raising such alternative pleas in connection with the issue of title.

17.4 Bearing in mind the above mentioned requirements of adverse possession, we now turn to the factual aspect of the alleged adverse possession of the Army in respect of the land in question. In his affidavit, which is treated as the examination-in-chief, Brig. Saxena has made a solitary and bald statement that the Army has been in possession of the land in question for more than 100 years and that its possession is adverse. In this connection, it is pertinent to note that adverse possession itself implies that the true owner of the property is different from the person who claims adverse possession. (**Vide K.V. Swamynathan & ors. Vs. E.V. Padmanabhan & ors.- 1990 SCR, Supl. (3) 709**). The affidavit does not give any particulars regarding the alleged possession of the Army. It does not even specify the starting point of adverse possession and purpose for which the land was being used by the Army nor does it contain even a whisper that the title of the true owner in respect of the land in question was






denied by the MOD. Nothing is spelt out by Brig. Saxena in his affidavit as to what acts of ownership qua the land in question were done by the MOD and in what manner the title of the GOM was denied. It will thus be seen that the plea of adverse possession as set up in the affidavit of Brig. Saxena lacks in material details particularly, in terms of the requirements referred to above. It is material to note that Brig. Saxena is the only witness on behalf of the MOD to speak about the alleged adverse possession. The other witnesses do not speak about the same in any manner.

17.5 Moreover the version of Brig. Saxena in this respect is very vague and inadequate. Para 1 of his evidence shows that he was not stationed in Mumbai during the period from 2000 to 2009 and that from 1-12-2009 he has been Brig. In-charge Adm. (Pring Adm.) at Head Quarters, Maharashtra Gujarat and Goa Area (MG&G Area). He admitted ; "It is correct to say that the evidence which I will be giving in respect of Adarsh CHS relating to the period from 2000 to 2009 is not based on my personal knowledge. It is a matter of record." Brig. Saxena has further stated in para 8 of his evidence that in June/July 2010 he, for the first time, came to know that the Army was claiming right on the plot in question. He further stated that the Army realized at that time that it has proprietary right in the land in question. The further version of Brig. Saxena in the same para is to the effect that when the scam in respect of Adarsh CHS was reported in newspapers, the Army started looking into the record and





realized that the land belonged to it for centuries and had been in their physical possession till it was made over to Adarsh CHS by dubious means. In para 10 of his evidence Brig. Saxena stated that the land in question was being used by the Federal Government. He clarified that the said statement made by him is based on the map of 1897 and the Survey of India Map 1957 and the Arbitration Award annexed to his affidavit. We have already dealt with the said two maps in para 12.1 above and pointed out that it cannot be concluded from both the maps that the land in question was in existence at the relevant time and that it was in possession of the MOD. As regards the Arbitration Award to which Brig. Saxena has made a reference, relates to Block No. VIII of the BBRS which is admittedly in possession of the Army. It is not known as to how these three documents can spell out and substantiate the plea of adverse possession as set up by Brig. Saxena in his affidavit.

17.6 The conduct of the Army/MOD in connection with the land in question is not at all consistent with their claim of ownership, much less ownership by adverse possession. Admittedly, the MCGM which was then the Planning Authority for the area under the BBRS had prepared a draft Development Plan and published it in the newspapers inviting objections from the persons/parties affected or likely to be affected thereby. It is not in dispute that the original Cap. Prakash Pethe Marg which was then in existence was around 30 feet in width but in the draft Development Plan it was proposed to be widened upto 200 ft. by



including the adjoining land . It is to be noted that the land in question abuts the said road. Now if it is the claim of the MOD that they were in adverse possession of the land in question, then it would have been most natural for them to have raised objections to the draft Development Plan so far as it related to the proposed inclusion of part of the land in question in Capt. Prakash Pethe Marg. But nothing of that sort was admittedly done by the Army or MOD. Brig. Saxena has admitted in para 139 of his evidence, "The Army Head Quarters was fully aware of the fact that the land in question was ear marked by the State Government in the Draft Development Plan. It is true that the Army did not object to the inclusion of the land in question in the Draft Development Plan in spite of having knowledge of the same." It is another thing that later on the proposed widening of the said road was reduced from 200 feet to 60 feet (18.4 mtrs) by the Planning Authority. There is no explanation why the Army/MOD allowed the Planning Authority to deal with the width of Capt. Prakash Pethe Marg first by proposing to widen it and later by reducing the proposed width to a considerable extent. The proposed width of the said road certainly affected major portion of the land in question but no objection or protest was made by the Army nor any suggestion was made by them in connection with the proposed widening of the road. This inaction and apathy on the part of the Army/MOD is certainly not consistent with their claim of being owner of the land in question.



17.7 The same attitude of indifference on the part of the Army/MOD is seen in connection with the allotment of the land in question to the Adarsh CHS by the GOM as well as the subsequent construction of building started by it upon the said land. We have already seen that the GOM issued Letter of Intent dt. 18-1-2003 Exh. GOM-4-A and Letter of Allotment dt. 9-7-2004 Exh. GOM-5-A to the Adarsh CHS. But no objection was raised by the Army/MOD or the Local Military Authority (LMA) on the ground that it was illegal on the part of the GOM to make such allotment when the land in question was in actual possession of and belonged to the Army/MOD. Brig. Saxena has admitted in para 106 of his evidence that prior to and after the allotment of the land to Adarsh CHS, the MOD was aware of the land being proposed to be allotted and actually allotted to the said society. It was pointed out by Shri Khambata, that when several top officers of the Army and Navy themselves were interested in getting flats in the said Society, the lower officers would not dare to raise a voice of protest against the allotment of the land in question. There may be some substance in this explanation but, this inaction on the part of the Army/MOD is not consistent with their claim of title to the land in question.



17.8 The evidence on record further shows that after the allotment of the land in question, the society undertook construction work of the building which ultimately went upto 103 mtrs. high in the sky. The said construction of the Adarsh building is in close vicinity of the Army units and apparently a



threat to its security. But even then no word of protest was uttered by the Army/MOD, who allowed the construction work to come up.

17.9 The Army claims that it was in possession of the land in question and that it had set up an Eco park called Khukri garden upon it which was inaugurated in 1996. The evidence on record shows that sometime around 2004 the said garden was demolished by pulling down the compound wall and fencing around it as well as by cutting trees standing thereon. The Army who claims to have been looking after the maintenance of the said garden did not try to stop such a destructive act being done on the property which according to them was of their ownership. There is nothing on record to show that the Army made any representation to the GOM for stopping the demolition of the said park nor did they approach any court of law for the relief of injunction to prevent the garden from being demolished. Is this conduct of inaction on the part of the Army in keeping with their claim of ownership? Certainly not.

17.10 There is another important aspect of this matter which cannot be ignored at all. Para 24 of the evidence of Brig. Saxena shows that in 1958 the Government of Bombay had allotted a plot of land at Santacruz to the MOD on certain terms and conditions. There is evidence on record to show that the said land was admeasuring about 41 acres and was being used by the Army as rifle range. It appears that the GOM wanted the said



Santacruz land for the purpose of the Western Express Highway and accordingly a proposal was made to the MOD/Government of India. The said proposal was acceptable to the Government of India but in the shape of an exchange proposal. The letter dt. 31-12-1953 Exh. MOD-4 addressed by the Jt. Secretary to the Government of India to the Secretary of the Government of Bombay on the subject "Transfer of surplus Ministry of Defence land at Santacruz to Govt. of Bombay and acquisition of Govt. of Bombay land Block VI at Colaba for defence purposes" speaks of the terms and conditions of the proposed transfer and exchange of land. Para 3 (ii) of the said letter states "In case the proposal for exchange of Bombay Government land in Block VI Colaba with the Santacruz land materializes, the valuation of the Colaba land would also be made in a similar manner by the Committee and the difference between the two valuations would be paid to the Government concerned".

17.11 The material question which arises in this connection is, if the land in question which forms part of Block VI of the BBRS was in possession of the Defence and belongs to them, then where was the question of exchanging the Santacruz land for the land in Block VI? In that case, the proposal would have been for exchange of the land in Block VI sans the land in question. Shri Khambata the Id. ASG submitted before us that the proposed exchange of land in Block VI was excluding the land in question and what was sought to be obtained by way of exchange was the remaining land in Block VI. It is not possible to accept this

submission which has no basis anywhere in evidence. There is not a single document which spells out that the proposed exchange was of the land in Block VI, excluding the land in question. The letter Exh. MOD-4 also does not contain even a single recital suggesting that the proposed exchange was excluding the land in question which was already in possession of and belonged to the MOD. If the land in question was really in adverse possession of the MOD, and if it belonged to them, then they would never have made such proposal for exchange of the land in Block VI for the Santacruz land.

17.12 The net result of the foregoing discussion is that the MOD have miserably failed to establish their adverse possession of the land in question. In the first instance, the possession of the land in question in the form of Khukri park by the Army was not in the nature of adverse possession since there was no denial of the title of GOM nor any assertion on the part of MOD that the land belonged to them. The Commission is of the opinion that it was not proper and ethical for the MOD to raise such a plea of adverse possession against the State Government as it is not in keeping with the maintenance of harmonious relations between the Centre and the State. The land in question is not the land belonging to or occupied by an enemy but it is very much part and parcel of the land of this country. Therefore the plea of adverse possession raised does not appear to be fair and smacks with unwarranted inimical attitude.



17.13 In **P.T. Munichikkanna Reddy & ors. Vs. Revamma & ors - CDJ 2007 SC 487**, it was observed that a person pleading adverse possession has no equities in his favour . Since he is trying to defeat the right of true owner , it is for him to clearly plead and establish all facts necessary to establish his adverse possession. It was further observed that adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Therefore, it is important to take into account before stripping somebody of his lawful title whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the proper owner of the property.

17.14 In this connection it will be appropriate to refer to a latest decision of the Apex Court in State of **Haryana Vs. Mukesh Kumar - AIR 2012 S.C. 559** which was cited before us by Shri Dipan Merchant. The Supreme Court strongly condemned the plea of adverse possession which India inherited from the British by observing that a person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. Terming the plea of adverse possession as "bad faith", the Supreme Court pointed out that adverse possession achieved through intentional trespassing sends a wrong signal to the society at large . It was further observed that adverse possession allows a trespasser , a person guilty of a tort , or even a




crime in the eye of law, to gain legal title to land which he has illegally possessed for 12 years. The Supreme Court further observed; "We fail to comprehend why the law should pay premium on dishonesty by legitimatizing possession of a rank trespasser and compelling the owner to lose his possession only because of his inaction in taking back the possession within limitation....." How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon the conduct that the ordinary citizen would find reprehensible". The Supreme Court, therefore, recommended to the Union of India, either to abolish the law of adverse possession and in the alternative, to make suitable amendments in the law of adverse possession. It is in the light of the above mentioned observations of the Supreme Court that our opinion that it is improper and unethical for the MOD to raise a plea of adverse possession, needs to be appreciated.

18) **THE CLAIM OF GOM TO THE TITLE
TO THE LAND IN QUESTION.**

18.1 This brings us to the plea raised by the GOM in respect of their claim of title to the land in question. It must be noted that the failure on the part of the MOD to establish their case of title does not ipso facto or automatically establish the plea of title raised by the GOM. A party can succeed on the issue of title only




on the strength and merit of its plea and not on the failure or weakness of the case of the other side. It, therefore, becomes necessary for the Commission to examine the plea of title raised by the GOM.

18.2 While affirming the GOM's stand on the issue of title to the land in question, Collector Shri Oak (GOM W No.2) has stated in his affidavit of evidence that the State of Maharashtra is the owner of the land on which the building of Adarsh CHS stands. Shri Oak has based his contention on the following factors which, according to him go to prove the title of the GOM. They are : 1) Property Card in respect of Block No. VI of BBRS, 2) Presumption of correctness of an entry in the Record of Rights under section 157 of the Maharashtra Land Revenue Code, 1996 (MLRC 1966), 3) Sections 20 and 294 of the MLRC , 1966 and section 24 of the Bombay City Land Revenue Act, 1876 (BCLRA), 4) Admissions given by the officers of the MOD regarding title of GOM, 5) Absence of any entry in respect of the land in question in the MLR, 6) Failure or inaction on the part of the MOD either to establish its title or to recover possession of the land in question.

Property card Exh. GOM-7

18.3 The GOM has produced the Property Card in respect of the land in question at Exh. GOM-7. In the said Property Card, the name of the street or locality where the land in question is situate is mentioned as "Capt. Prakash Pethe Marg, BBR- VI, near Plot No.




87-C" and the cadastral survey number is stated to be 652. In the column of "Tenure" the entry is "Govt. land given on occupancy price". In column 6 of the said Property Card, the area is mentioned as 3824.43 sq. mtrs. In column No.10 which relates to "Name of person in Beneficial Ownership", two names are given as "(A) X-Governor of Maharashtra" and (B) "A Adarsh Co-operative Housing Society Ltd". In coloumn 11 which relates to "Mode of Acquisition by Present Owner" the following entry is made, "(B)- The Govt. in R & F.D. vide it's Memorandum No. LBL-25200/C-R-912/3-2 dated 9-7-2004 accorded sanction to grant the land admeasuring 3758.82 sq. mtrs (approx.) to "A" in Col.10 on occupancy price and terms and condition mentioned therein. The possession of the land handed over on 27-10-2004 vide Supdt. Memorandum, No. CSLR/Rev-1/LND-2832/87/D-04 dt. 30-09-2004 vide H.R.No.99/2004". The column No. 16 of the Property Card which is for "Supdt. Initial", the date is mentioned as 22-11-2004. The said Property Card is prepared under sec. 282 of the MLRC 1966 and it is the survey register for the town and island of Bombay. It will thus be seen that the Property Card Exh. GOM-7 in respect of the land in question was prepared on 22-11-2004.

Presumption of correctness of an entry in Record of Rights.

18.4 Shri Sakhare the ld. Senior Counsel for the GOM referred to sec. 157 of the MLRC 1966 and submitted that it being an entry in the Record of Rights, it shall be presumed to be true until the






contrary is proved or a new entry is lawfully substituted therefor. Shri Dipan Merchant the Id. Senior Counsel or the Commission however, submitted that reliance on the provisions of section 157 is misplaced one in view of the fact that the said section falls under Chapter X of the MLRC 1966 and by virtue of the provisions of section 1(2) of the MLRC 1966, the provisions of Chapter X inter alia do not apply to the city of Bombay. The Property Card Exh. GOM-7, which appears to have been prepared under section 282 of the MLRC 1966 falls under Chapter XIV which contains "SPECIAL PROVISIONS FOR LAND REVENUE IN THE CITY OF BOMBAY". However, no provision from Chapter XIV is brought to our notice as per which the entries in the Property Card Exh. GOM-7 carries presumption of correctness like the one stated in section 157 of the MLRC 1966.

Procedure for preparation of Survey Maps and Property Cards

18.5 Chapter XIV of the MLRC 1966 contemplates a procedure for preparation of Survey Map and Register. Section 282 states that the Superintendent shall prepare a map and a register of all lands which have been surveyed under Chapter XIV. It further states that to every piece of land separately shown on the map and entered in the register an indicative number shall be assigned, and the name of the person appearing to be the holder thereof at the time of the survey shall be entered in the register. It is seen from the provisions of section 280 that before entering on any land for the purposes of survey the Superintendent may



cause a notice in writing under his hand to be served on the holder or occupier of the land about to be surveyed calling upon him within a specified time or the purpose of pointing out boundaries and affording such information as may be needed for the purposes of Chapter XIV. Section 281 lays down that after due service of notice under sec. 280, the Superintendent or such officer as may be authorized by him may proceed with the survey whether the person upon whom notice has been served is present or not. Section 283 states that the Superintendent may at any time cause to be erected, on any land which is to be, or has been surveyed under Chapter XIV temporary or permanent boundary marks of such materials and in such number and manner as he may determine to be sufficient for the purpose of survey. Section 286 requires the Superintendent to deposit with the Collector all maps, registers and other documents connected with the survey after the same is completed. Sub clause (2) of section 286 states; "Such deposit shall be notified in the official gazettee , and any person interested in the survey may, at any time within two months from the date of such notification inspect such maps, registers and other documents free of charge." Section 287 states about maintenance of survey map and register. Section 293 states that the proceeding undertaken under sec. 278 to 292 (both inclusive) shall not be affected by reason of any informality , provided that the provisions in these sections are in- substance and effect complied with.



18.6 It will thus be seen that the MLRC 1966 provides for a methodic and elaborate procedure for preparing maps and register of all lands situate within the city of Mumbai. It is true that in the instant case the property card in respect of the land in question was prepared after the allotment was made in favour of the Adarsh CHS. Normally, that should have preceded the allotment order but for the reasons best known to the concerned authority the allotment order was made first and then the survey and preparation of the property card was done. This was not only an irregularity but illegality on the part of the concerned Revenue Officers. Moreover, there is nothing in the evidence of SLR Shri Dhikle and Collector Shri Oak that before preparing the property card Exh. GOM-7, the above mentioned procedure laid down in sections 277 to 287 of the MLRC, 1966 was scrupulously followed. On the contrary, it appears that property card Exh. GOM-7 was prepared to substantiate the allotment of the land in question in favour of the Adarsh CHS. The novel procedure followed by the authorities of issuing the allotment letter first in the name of the Adarsh CHS and thereafter make an entry in the name of the said society in the property register without following the due procedure prescribed in that behalf by the MLRC 1966 weakens the evidentiary value of the property card itself. Therefore the Commission is not inclined to place much reliance upon the property card Exh. GOM-7.

Provisions of BCLR Act, 1876 and MLRC, 1966



18.7. The third ground on which the GOM have based their claim of title is certain provisions of the BCLR Act 1876 and MLRC 1966. First we shall refer to section 24 of the BCLR Act 1876 which came into force on 26-10-1876 and was applicable only to the city of Bombay. Section 24 reads as under:

24. *"All unoccupied lands within the City of Bombay, and every unoccupied portion of the foreshore below the high-water mark, shall be deemed, and are hereby declared to be, the property of (a) the crown for the purposes of the province (a) subject always to the rights of way and all other rights of the public legally subsisting."*

We fail to understand how the GOM can press into service the provisions of Section 24 to make out a case of title in their favour. It is the case of the GOM that the land in question was not in existence prior to 1973 and it was submerged under the sea water. It is also their case that reclamation of Block -VI of BBRS was made in 1973 and that the land in question came into existence only thereafter. If that is their stand, then it is futile for them to rely upon the provisions of section 24 of BCLR Act 1876 to show that the land in question was deemed and declared to be the property of the Crown. How can a nonexistent property be deemed to be the property of the Crown under sec. 24 of the BCLR Act 1876? The said Act has nowhere defined the word "Land" and therefore, it will have to be attached the ordinary meaning as




given by dictionaries which is to the effect "The solid part of earth's surface, as distinct from seas, lakes, rivers etc." The BCLR Act 1876 was in force till the MLRC 1966 came into operation with effect from 15-8-1967. In short, therefore, reliance on section 24 of the BCLR Act 1876 is of no use to the GOM.

18.8 Reliance is then placed by Shri Sakhare the Id. Senior Counsel for the GOM on the provisions of section 20 (1) of the MLRC 1966 which as follows:

20 "Title of State in all lands, public roads, etc., which are not property of others:- (1) *All public roads lanes and pathes, the bridges, ditches, dikes and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below the high water mark, and rivers, streams, nallas, lakes and tanks and all canals and watercourses, and all standing and flowing water and all lands wherever situated, which are not the property of persons legally capable of holding property, and except in so far as any rights if such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby declared to be, with all rights in or over the same, or appertaining thereto the property of the State Government and it shall be lawful for the Collector, subject to the orders of the Commissioner to dispose of them in such manner as may be*




prescribed by the State Government in this behalf, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting."

Here again, a misplaced reliance is placed on the provisions of law which do not apply to the city of Bombay by virtue of section 1(2) which inter alia states that the Code extends to the whole of the State of Maharashtra, but the provisions of Chapter III (except the provisions relating to encroachment on land) and other Chapters specified, shall not apply to the city of Bombay.

18.9 This takes us to section 294 of the MLRC 1966 which reads as under:-

294. "Right of Government to lands and foreshore :-

All unoccupied lands within the City of Bombay, and every unoccupied portion of the foreshore, below high water mark, shall be deemed, and are hereby declared to be, the property of the State Government, subject to the rights of way and all other rights of the public legally subsisting.

For the avoidance of doubt, it is hereby expressly declared that nothing in this section shall be taken to affect the right of the State Government to unoccupied lands declared to be the property of the State Government by any earlier law."

Section 2(41) of the MLRC 1966 defines "Unoccupied land" as the land in a village other than the land held by an occupant, a tenant




or a Government lessee. Section 2(43) defines "Village" as including a town or city and all the land belonging to a village, town or city. The MLRC 1966 does not define the word "Foreshore" appearing in section 294. The dictionary meaning of the word "Foreshore" is the part of a seashore between high tide and low tide marks. The land in question, though situate on or near the seashore cannot be regarded as the "Foreshore" in the absence of any evidence to show that it lies between the high tide line and low tide line. It is therefore, just a land.

18.10 Now the material question is whether under section 294 of the MLRC 1966, the land in question can be regarded as the property of the State Government? The answer to this question depends on the fact whether the land in question was an unoccupied land within the meaning of section 2(41) read with section 294 of the MLRC, 1966. We have upon consideration of scrutiny of the evidence on record, rejected the MOD's case of being in possession of the land in question since about 100 years or at least since prior to the coming into force the GOI Act, 1935. As stated earlier the MLRC, 1966 came into force on 15-8-1967. Therefore, for the purposes of considering the right of State Government under section 294 of the MLRC, 1966 that is the relevant date. If it is shown that on the said date or thereafter the land in question was not reclaimed, then there was no question of it being occupied by anybody. The question of occupying the same would arise only after the land was reclaimed. It is in this




respect that the date of reclamation of the land in question becomes relevant and material .

Admissions of the officers of MOD acknowledging title of GOM.

18.11 One of the limbs on which the claim of GOM regarding title to the land in question is concerned, is the admissions given by the officers of the MOD at different points of time admitting that the land in question belongs to the GOM. In this respect the counter argument made by Shri Khambata the Id. ASG for the MOD is that title cannot be established on the basis of mere admissions. He relied upon two decisions of the Supreme Court in support of his submission and the reference to those decisions has already been made in para 16.5 of this report. It is therefore, not necessary to repeat the same. We have no difficulty to accept the submission of Shri Khambata. It cannot, however, be ignored that admissions made by the officers of the MOD is not the sole basis of the claim of title made by the GOM. It is one of the grounds on which their claim of title is based. Therefore, the admissions sought to be relied upon by the GOM cannot be ignored or lightly brushed aside but they will have to be considered in the proper perspective in order to find their evidentiary value. It may be recalled that as per the decisions referred to earlier in para 16.4 above, admission is substantive piece of evidence and it has corroborative value.

18.12 The earliest admission by the MOD in favour of the GOM is to be found in the letter dt. 31-12-1958 Exh. AS-5 and Exh.




MOD-4. It is addressed by the Jt. Secretary to the Government of India, Ministry of Defence to the Secretary of Government of Bombay on the subject of transfer of surplus MOD land at Santacruz to GOM and acquisition of the land in Block No. VI, Colaba for Defence purposes. By this letter a proposal of exchange of Santacruz land belonging to the MOD was made for the equal acreage of Bombay Government land from Blok VI in Colaba. The letter further states that in case the proposal of exchange of Bombay Government land in Block VI Colaba materializes, the valuation of the Colaba land would also be made and the difference between the two valuations would be paid to the Government concerned. It is an undisputed fact that the land in question is a part and parcel of Block VI. Therefore when the MOD sought to exchange its Santacruz land for the Government of Bombay's land in Block VI, it goes without saying that the MOD thereby admitted that Block VI including the land in question belonged to the then Government of Bombay.

18.13 The next admission on the part of the MOD is contained in the letter dt. 21-6-1963 Exh. AS-6 which was addressed by Major Genl. Chand N. Das, GOC, M&G Area, Colaba on the same subject i.e. transfer of the State Government land in Block VI to the MOD in exchange for their Santacruz land on the ground of increased requirement of land for Army and Navy. It is therefore clear that this letter also admits the title of the GOM in respect of the land in question way back in the year 1963. The third letter in sequence of time which contains MOD's






admission is dt. 24-1-1968 Exh. MOD-10 addressed by the MEO , B&G Circle, Colaba to the Garrison Engineer, Colaba clearly stating that Block VI does not vest in the MOD nor is it held on hire of acquisition. The fourth and a more positive admission on the part of the MOD is found in the letter dt. 6-8-1971 Exh. MOD-29 which is addressed by the Dy. Director, Military Lands and Cantonment , Southern Command, Pune to the Under Secretary to the GOM. It is stated in this letter that the hutments erected in Block VI of BBRS are neither Military buildings nor the LMA had allowed the Dhobies to use the land in Block VI. The letter further says "As such and as the land in Block VI of Colaba, Bombay belongs to the State Government at present , you may take necessary action to evict the above mentioned Dhobies....." The fifth admission is in another letter dt. 7-11-1997 Exh. MOD-46 addressed by Shri M. Gurusamy the then DEO, Mumbai Circle to the Station Head Quarters, Colaba regarding half yearly progress report on regularization of land under unauthorized occupation of the Army. The letter states, "There is no private land under unauthorized occupation of Army in Mumbai. However, a pocket of the State Government land in Block VI of Colaba Division is in unauthorized occupation by 8 Gahwal in the form of a garden." It may be recalled that it is the same garden which is earlier referred to in this report as Khukri park upon which the present building of the Adarsh CHS stands.

18.14 This brings us to certain recent admissions made by the MOD. Exh. MOD-59-A is a letter dt. 29-3-2000 addressed by the




Collector of Mumbai city to the GOC, Head Quarters M&G Area, in connection with the request made by the Adarsh CHS for allotment of a plot in Block No. VI. The Collector has written that at the time of site inspection on 27-3-2000 it was found that the Military department has constructed a wall around the plot and therefore the Government land was protected from encroachment. By this letter the Collector asked the GOC, "You are therefore requested to confirm that there is no objection to allot the land to the proposed society of the service personnel by the Government of Maharashtra". Exh. MEM-6 is a letter dt. 30-3-2000 addressed by Major B.S. Rao for Conl. Q to the DEO, Mumbai calling upon him to confirm the status of the land in question i.e. whether State Government or defence land. The then DEO Shri N. Gurusamy sent his reply dt. 30-3-2000 Exh. MOD-30 stating, "It is verified from our records that the land in question forms part of Block VI of Colaba Division (Back Bay Reclamation Scheme-VI) which belongs to Government of Maharashtra and falls outside the defence boundary." Then there is another letter Exh. MOD-38 which was sent immediately on the next day i.e. 31-3-2000 by Lt. Col. R. Srihari, S.O. (Land and Legal) to the HQ, M&G Area (Q) which is on the same subject. By the said letter Lt. Col. R. Srihari informed, "As per records available with this office, the Army land does not fall in Block VI of Colaba Division." He further informed that the Army land in Colaba forms part of Block VII, Block VIII and Colaba Promontary.



18.15 Then follows the much disputed document, which is a letter dt. 5-4-2000 Exh. MOD-7 addressed by Col. S.S. Jog (as he then was) (C.W. No.1) to the Collector, Mumbai city. After referring to the Collector's letter dt. 30-3-2000, Col. S.S. Jog writes as follows: "The said land falls in Block No.VI of Colaba Division (Back Bay Reclamation Scheme-VI) which falls outside the defence boundary. Necessary action at your end may be taken as deemed fit for the welfare of service personnel/servicemen/their widows." Here it is necessary to point out that the Chief Promoter of the Adarsh CHS while addressing the Collector for allotment of Government land had represented that the land was required for residence of staff members of defence service personnel.

18.16 Major Gen. A.R. Kumar (C.W. No.4) who was GOC of M&G Area, Colaba at the relevant time made a note on the Collector's letter requesting Col. (Q) who was incidentally Col. Jog to check the status of the land from Adm. Comdt./STN. Cell and DEO and to get it in writing and also to speak. It is on the basis of these instructions given by Major Gen. A.R. Kumar that Col. S.S. Jog addressed the letter dt. 5-4-2000 Exh. MOD-7 to the Collector, Mumbai as stated above. Leaving aside the question whether the said document amounts to a no objection certificate or a mere letter; there cannot be any dispute of the fact that it contains an admission by Col. S.S. Jog that the land in question does not belong to the MOD. Col. S.S. Jog has filed his affidavit before this Commission and also given oral evidence in connection with the



said letter. In para 9 of his deposition he stated that the statement in the letter Exh. MOD-7 that the said land falls outside the defence boundary is based on the letters Exh. MOD-30 and Exh. MOD-38 addressed by the DEO and Station Cell HQ. respectively. In para 10 of his deposition Col. S.S. Jog stated that he wrote the letter Exh. MOD-7 on the instructions of Brig. Sharma who was the officiating GOC at that time. In para 16 of his deposition Col. S.S. Jog went on to state that at the time of writing the said letter, the Army was in occupation of the land in question and in spite of being aware of this fact he wrote the said letter on the direction of the then GOC Major Gen. A.R. Kumar. The evidence of Col. S.S. Jog further goes to show that he has tried to get out of the liability of having written such letter which was treated as NOC of the MOD. In para 40 of his evidence he stated that Major General A.R. Kumar shouted at him on phone and asked him to sign the letter otherwise it would be signed by the office. It is surprising to note that Col. S.S. Jog who later on became Major Gen., felt intimidated and passively submitted to the alleged threat given by Major Gen. A.R. Kumar. It is pertinent to note that the affidavit of Col. S.S. Jog which was admittedly prepared on the instructions given by him to his lawyer is totally silent on the point of alleged threat given and pressure brought upon him by Maj. Gen. A.R. Kumar to sign the said letter. Therefore the suggestion given to him in the cross examination by Shri Sakhare the Id. Senior Counsel of GOM that the theory of alleged pressure brought upon him is an afterthought, carries



much substance. We are, therefore, not inclined to accept the theory of alleged pressure as stated by Col. S.S. Jog. The result is that his letter Exh. MOD-7 cannot be brushed aside and the admission contained therein does not stand wiped. In short, the letter Exh. MOD-7 is a valid document containing admission of a responsible officer of the MOD that the land in question does not belong to the MOD. It is a different question whether the said document can be treated as a valid NOC from the MOD.

18.17 There are admissions galore by the various officers of the MOD at different points of time. It is not possible and also not necessary to refer to each of them to avoid monotonous repetition and prolixity. However, before concluding the discussion on this topic, we may refer to the letter dt. 5-4-2010 Exh. MOD-49 written by Ms. Gita Kashyap, the present DEO to the HQ. Mumbai Sub Area. In the said letter she has categorically stated, "It is verified from our records that land in question forms part of Block VI, Colaba Division (Back Bay Reclamation Scheme VI) which belongs to the Government of Maharashtra and falls outside the defence boundary". This admission is patently unambiguous though in para 8 of her deposition she has tried to explain that the said statement is based on the MLR in which there is no entry of the land in question. In our opinion, such an explanation by Ms. Gita Kashyap is of no consequence when in her letter Exh. MOD-49 she has certified from the records of her office.



18.18 The discussion on the above mentioned point will not be completed without reference to the reply given by the Hon'ble Defence Minister in the Parliament to starred question No. 568 and 572 in December 2003. Exh. MOD-150 (Colly.) is the text of the said Parliament questions and it is to the effect "Whether it is a fact that the Adarsh CHS has been allotted 41308 sq. mtrs. plot in Khukri Eco Park, behind Colaba bus stand, Cuffe Parade, Mumbai which has been under the occupation of Defence Ministry. The text of the answer given to the said question which is also found in the correspondence made by Army Officers in their reports is "The land belongs to Maharashtra Government....." The reports of Brig. Parvinder Singh for COS dt. 13-12-2003, P. Thapa DAQ MG (L) for GOC-in C, Col. R.K. Bakshi, SO (Land), Col. Kapil Deo, (Col Q) clearly state that the land in question has never been/is not under occupation of the Army. The report made by Col. Kapil Deo dt. 16-12-2003 in this respect states that the land belongs to the Government of Maharashtra. These are the admissions given by the responsible officers in connection with the starred Parliament question. Brig. Saxena has stated in para 25 and 26 of his evidence that the interested parties had made a compromise on the security threat to the Army. According to him, the interested parties means the person who were/are the members of the Adarsh CHS. It appears that the above mentioned Army Officers were or are members of the Adarsh CHS. However, it is difficult to persuade us to believe that because of their so called interestedness, they made false




reports acknowledging the title of the GOM to the land in question. Even assuming the contention of Brig. Saxena in this respect to be true, it cannot be ignored that these are the only admissions in favour of the GOM. Therefore, even if we discard the above mentioned admissions given by the Army Officers in connection with the starred Parliament question, there are several other admissions given by the Officers of the Army and MOD at different points of time over a period of 40 years acknowledging the title of GOM to the land in question and they stand unaffected.

18.19 Thus after having dealt exhaustively with the admissions of the MOD relating to the title of GOM to the land in question, we are of the view that the said admissions are substantive pieces of evidence and they go to corroborate the case of GOM that the land in question belongs to them.



Absence of entry of the land in question in the MLR.

18.20 Brig. Saxena has stated in para 6 of his evidence that there is a register maintained in respect of the property owned and possessed by the Military. He has further stated that the said register is called Military Land Register (MLR) and it is maintained by the DEO. According to him, the said register contains each and every entry in respect of properties possessed and acquired by the Military. Brig. Saxena has added that the only circumstance about the omission of any property to be mentioned in the said register would be negligence on the part of



the authority making the entries. On being called to produce the said register, Brig. Saxena produced the original register on the next day and stated that the register has been maintained since 3-8-1889. The original register was returned to him after inspection and true Xerox copies thereof have been retained on the file of the Commission and marked as Exh. MOD- 20 colly. In para 31 of his evidence Brig. Saxena admitted that there is no entry of the land in question in the said register.

18.21 Another witness of the MOD on this point is Ms. Gita Kashyap Perti (MOD W No.2) who has been working as Defence Estate Officer (DEO), Mumbai Circle since October 2008. In para 2 of her evidence she stated about the functions of DEO and one of them is management of all defence lands. She further stated that the DEO maintains the MLR for all defence lands outside Cantonment and General Land Register (GLR) for defence lands outside the Cantonment. The evidence of Ms. Gita Kashyap shows that the maintenance of MLR is mandated by Acquisition, Custody, and Relinquishment Rules of 1944 (ACR Rules). She has also stated about the general procedure for making entries in the said register. She has admitted in para 34 of her evidence that the MLR does not contain any entry in respect of the land in question. However, she denied the suggestion that if for any reason certain land is not entered in the MLR, it does not necessarily mean that the said land does not belong to the defence.



18.22 In short, it is an admitted fact that the land in question does not find any entry in the MLR. It is on the basis of this fact that the GOM has tried to derive support to their claim of title to the land in question. It was submitted on behalf of the GOM that the absence of entry in the MLR of the land in question negatives the claim of title by the MOD and lends assurance to that of the GOM. Shri Khambata the Id. ASG for the MOD, on the other hand, submitted that the absence of any entry in the MLR is not conclusive but at the highest, it may be considered as one circumstance along with all other circumstances and evidence in the matter. We have no hesitation in accepting this submission.

18.23 Shri Khambata then submitted that MLR is not a statutory record nor does it have any statutory or legal force. This submission needs to be examined in the light of Rule 14 of the ACR Rules 1944. Part III of the said Rules relates to custody of Military lands. Rule 14 states that the duties appertaining to the custody of Military lands will be shared between (i) the Government department, (ii) their representatives- the DEO and (iii) the departments of the Army which use or occupy the land. Sub clause (1) of Rule 14 states that the DEO will maintain a register in the form given in Schedule-I, of all Military lands in India classified under commands and districts group according to the holdings of each of the department mentioned in Rule (2). It further states that the said register will contain all Military lands which are the absolute property of the Government of India in defence department which are held by them on semi permanent



basis. Sub clause (2) of Rule 14 states that the DEO will be responsible for the preparation of an inventory of all Military land in his circle in the form of the Registers referred to above. It further states that necessary alterations in the Register shall be made by the DEO when transfers of land are sanctioned by the defence department and the DEO will remove any item that has been disposed of from the register. The other provisions contained in the said Rules are not very much relevant for the purpose of this discussion.

18.24 The important thing to be borne in mind in respect of the said Rules is that they are not framed in exercise of the powers conferred by any statute of the Parliament. They are only instructions as is clear from the preamble of the said Rules which reads as under:-

The Secretary to the Government of India in the Defence Department is directly responsible for the general administration of all military lands both inside and outside cantonments. The arrangements necessary to give effect to this are prescribed in the following instructions which are issued for the information and guidance of all concerned.

Therefore, Shri Khambata is right when he submitted that "There is no presumption with regard to any entries made in the MLR either as to the correctness or otherwise unlike section 157 of the Maharashtra Land Revenue Code which confers a rebuttable




presumption of correctness in respect of entries made in the statutory land records."

18.25 Reference may also be made to two decisions relied upon by Shri Khambata in this respect. The first is **Union of India Vs. Vasavi Cooperative Housing Society Limited & Ors. -2002 (5) ALD 532** and the second is **Smt. Roshan Minoo Patel Vs. Union of India -2011(5) ALD 626**. Both the decisions are rendered by the Andhra Pradesh High Court and they deal with the status and evidentiary value of the entries in the General Land Register maintained by the DEO. The ratio of both the decisions is the same and it is to the effect that the entries made in the General Land Register are only mere pieces of evidence to be taken along with other evidence and such entries by themselves do not constitute any title.

18.26 In the present case we are not dealing with any entry in the MLR register but with the absence of any entry in respect of the land in question. Leaving aside the question of presumption, one thing cannot be denied that whereas presence of an entry of the land in question in the MLR register would have lent corroboration to the case of MOD; the absence of such an entry, lends assurance to the plea of GOM particularly when a reasonable explanation for the said absence is not forthcoming. Therefore, we are inclined to hold that the absence of entry of the land in question in the MLR register is certainly a piece of



evidence which can be taken into consideration along with other factors in favour of the GOM.

18.27 Shri Khambata posed a question as to why the GOM failed to give survey number to the land in question for nearly 31 years after its reclamation. In this respect the reply given by Collector Shri Oak (GOM W No.2) is, "Normally we give CS number to the plots but in BBR Scheme, MMRDA might have given plot number. The land which was proposed to be allotted to Adarsh CHS was probably not surveyed. The other probable reason for not giving survey number to this land might be that the land was in possession of some third party". Collector Shri Vyas (C.W. No.2) has stated in para 5 of his evidence as follows: "In the case of properties submerged under water or situated on the foreshore, the CS number is given to the property after it is reclaimed. If a land is not assigned or allotted to anybody and it vests in the Government then survey number may not be given to the land. There can be lands belonging to the Government without bearing any survey numbers." In view of these replies given by the two Collectors, we do think that the delay in giving survey number to the land in question by the GOM cannot be equated with the failure of the MOD to make entry of the land in question in their MLR at any point of time.

Inaction of the MOD

18.28 The discussion on this point has already been made in para 17.6 to 17.9 above and it is pointed out as to how the



Army/MOD has been sleeping over their alleged right in respect of the land in question since the preparation the Development Plan till actual construction of building was started on the land in question. It is, therefore, unnecessary to repeat the same discussion. The inaction on the part of the MOD to assert their right cannot, however, be a ground on which the GOM can base their claim of title. However, it is a factor which certainly affects the claim of MOD. If the MOD had shown any vigilance and taken proper steps to protect their alleged right in respect of the land in question, that would have been consistent with their claim of being owner of the land in question. In the absence of any such action on the part of the MOD, the claim of the GOM in this respect gains strength. In this connection reference may be made to the decision in **M/s. Kamakshi Builders Vs. M/s. Ambedkar Educational Society & ors.- AIR 2007 Supreme Court 2191**. Cited by Shri Khambata wherein it was observed that acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence of estoppels on the part of other.

19) **WHETHER THE DOCTRINE OF ACCRETION
APPLIES IN THIS CASE.**

19.1 Shri Khambata the Ld. Additional Solicitor General who has tried to defend the MOD so well, would not leave any arm




unused in his weaponry. He pressed into service the doctrine of accretion to prove the title of the MOD to the land in question. It may however be noted that none of the witnesses of the MOD and other officers of the MOD, has not stated anything about acquisition of title by accretion. As per the meaning of the word "**Accretion**" as given in Concise Law Dictionary, Accretion is the increase of land or estate by the addition of portions of soil through the operation of natural causes, to that already in possession of the owner. The principle of accretion is that the land form gradually and imperceptibly by the action of water goes to the owner of adjacent soil, such newly formed land being said to become his property. Shri Khambata relied upon the decisions in **Sansudhin Rahman Vs. Bihari Das -AIR 1996 SC 2535**, **State of Andhra Pradesh Vs. Koneru Suryanarayana and ors.- AIR 1963 AP 94**, **Secretary of State for India Vs. Kadiri Kutti ILR 13 Madras 369** and **State of Andhra Pradesh Vs. Raju Saheb of Pithapuram 1959 Andhra Law Times 305** and submitted that the doctrine of accretion has been accepted in India and held to apply even to land accruing by way of reclamation. We are, however, not impressed by this submission. Whether any accretion has taken place is a matter of fact to be proved by evidence and there is no presumption that accretion must have taken place in the present case. The reclamation made in Block No. VI sometime around 1973 cannot be regarded as accretion in favour of the MOD in the absence of evidence to show that they were already in possession of some portion of




land to which there was accretion. As discussed above, the Army/MOD appears to have come in possession of the land in question when the Khukri park was set up upon it in the year 1996. The reclamation had taken place about 20 to 23 years before that. Therefore, we are of the opinion that it is futile to press into service the doctrine of accretion.

**20) THE CONCLUSION ON THE ISSUE OF TITLE
TO THE LAND IN QUESTION**

20.1 To conclude the foregoing discussion, it may be said that the MOD have failed to establish their claim of title to the land in question. However, this is not so with the claim of GOM. Their claim stands established in view of the provisions of section 294 of the MLRC, 1966. As pointed out earlier, the MLRC, 1966 came into force on 15-8-1967 and there is no evidence to show that on that date the land in question was occupied by anybody. Moreover, the same has been corroborated by other factors viz. admissions on the part of the MOD, absence of entry in respect of the land in question in the MLR maintained by the DEO and the inaction on the part of the Army/MOD to assert their alleged right. The Commission therefore, holds that the land in question belongs to the GOM and accordingly records its finding on term No. 1 of the reference.



21. TERM NO.2 OF REFERENCE.

Whether the land in question or the membership of the Society was reserved for housing defence personnel or Kargil War heroes.



21.1 Shri R.C. Thakur (A.S. W.No.2) who is the Chief Promoter of the Adarsh CHS has affirmed in his affidavit dt. 15-2-2011 to the following effect. "I state and submit that the Society was proposed much prior to Kargil War and hence there was no question of this society being formed for the purpose of Kargil heroes and/or the flats to be constructed would be only for Kargil heroes. I further state and submit that to the best of our knowledge even the State Government had not reserved this plot for Kargil heroes. I further state and submit that no such condition is imposed on the society by the State Government in the Letter of Intent dt. 18th January 2003....." Earlier Shri Thakur has stated that the Adarsh CHS was formed in 1994 and registered on 28-9-2004. Shri Kanhaiyalal Gidwani (A.S.W.No.1) who is a member of the Adarsh CHS and the main sponsor who made efforts at all levels to secure the land in question for the Adarsh CHS also has stated in his affidavit of evidence that there was no reservation of defence personnel or Kargil War heroes for the land in question or for the membership of the Adarsh CHS. The letter dt. 25-9-2000 Exh. AS-35 addressed to Shri Vilasrao



Deshmukh the then Chief Minister states "The Society basically of serving and retired Defence Officers, including officers having served in "Operation Vijay" at Kargil, have been struggling for allotment of a small piece of land in Block VI of Colaba Division....." There are similar references to the Army Officers who are dedicated to the service of mother land, in other letters addressed on behalf of the Adarsh CHS to the Chief Minister, Revenue Minister etc.

21.2 The LOI Exh. GOM-4-A dt. 21-1-2003 as well as the LOA Exh. GOM-5-A dt. 90702004 contained terms and conditions subject to which the land in question was proposed to be allotted/ allotted to the Adarsh CHS. But they do not contain any term of condition requiring the said society providing reservation for housing Defence Personnel or Kargil War heroes. Similarly, there is no G.R. or notification issued by the GOM providing reservation of the land in question for the defence personnel or Kargil War heroes. In fact at the time of the arguments the Id. Counsel for the MOD, GOM or even Adarsh CHS uniformly submitted that there was no such reservation. In view of this position, there is no difficulty in recording a negative finding on term no.2 of the reference.

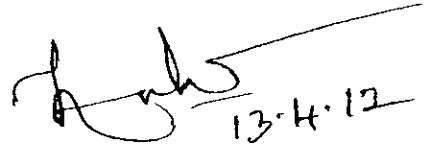
22. Before concluding, the Commission places on record its sincere thanks for the valuable co-operation and assistance given



by the ld. Advocates who appeared for various parties and participated in this inquiry.

MUMBAI

DATED ; 13th April 2012.



13.4.12

JUSTICE J. A. PATIL (Retd.)
Chairman of the Commission of Inquiry



P. SUBRAHMANYAM
Member of the Commission of Inquiry.



APPENDIX - I**List of Affidavits received in response to Public Notice**

Sr. No.	Names
1	Shri Pradeep Laxman Singh Thakur
2	Shri Sanjay Kumar Damodar Surve
3	Shri Vishwanath Shankar Gujar
4	Shri Azizali Akbarali Udaipurwala
5	Shri Shoeb Ahmed Khan
6	Shri S.T. Bhide
7	Dr. Jairaj Moreshwar Phatak
8	Shri Anil Vedvyas Galgali
9	Shri Mahendra Singh
10	Shri Santosh Daundkar
11	Shri Subhash Lalla
12	Shri R.C. Thakur
13	Smt. I.A. Kundan
14	Shri Syed Haider Imam
15	Dr. Archana Tiwari
16	Dr. Pradeep Vyas
17	Shri Jayant Jariwala
18	Major S.K. Lamba
19	Shri P.V. Deshmukh
20	Shri Ramanand Tiwari
21	Brig Deepak Saxena



APPENDIX - II**Affidavits filed in response to
summonses issued by the Commission**

Sr. No.	Names
1	Shri Sitaram Rajaram Shinde Dy. Secy., L & J Deptt.
2	Shri C.V. Oak (Two Affidavits) Collector, Mumbai
3	Dr. B.N. Patil Secy., Environment Deptt.
4	Shri Vithoba Vasudeo Bobhate Dy. Secy., P.W.D.
5	Shri M.S. Chaudhari Joint Secy., G.A.D.
6	Shri Pradeep Kumar Joint Secy., Revenue Deptt.
7	Shri Vilas R. Vedpathak Dy. Secy., Public Health Deptt.
8	Shri Milind Gawade Dy. Secy., Revenue Deptt.
9	Shri R.N. Deshmukh Joint Secy., Home Deptt.
10	Shri Suresh M. Kakani Dy. Secy., U.D. Deptt.
11	Shri Sanjay R. Kurvey Dy. Director, Town Planning Brihan Mumbai
12	Shri Satish Baliram Adakmol Dy. Secy., School Edu. & Sports Deptt.
13	Shri Santosh Daundkar Social Worker

14	Shri Kanhaiyalal Gidwani
15	Dr. Pradeep Kumar Vyas Secy., Finance Deptt.
16	Shri D.N. Surve Supdt. City Survey Office Mumbai
17	Major General Sunil S. Jog
18	Shri Sushilkumar Shinde
19	Shri Sunil Tatkare
20	Shri Sanjay Dhikle City Survey & Land Record, Mumbai
21	Shri Vilasrao Deshmukh
22	Shri Ashok Chavan
23	Shri Pradeep M. Yadav (Two Affidavits) Sr. Planner, M.M.R.D.A.
24	Shri P.V. Deshmukh Ex. Dy. Secretary, U. D. Deptt.
25	Shri Subodh Kumar Municipal Commissioner
26	Shri Parish Kapse Director, Team One Architects
27	Shri Debashish Chakrabarty Pri. Secy., G.A.D.
28	Shri Datta Khandekar (Two Affidavits) Architect
29	Shri Jagdish Gharat Dy. Secy., Revenue & Forest Deptt.
30	Shri A.B. Giramkar Suptd. City Survey & Land Record, Mumbai
31	Shri Umesh Vasant Luktuke Ex. Chief Town & Country Planning, MMRDA.



32	Shri SVR Shrinivasan Addl. Metropolitan Commissioner, M.M.R.D.A.
33	Shri Uttam Khobragade Ex. G.M., BEST.
34	Shri R.C. Thakur
35	Shri D. K. Sankaran Ex. Pri. Secy, Revenue Deptt.
36	Shri Ajit Nimbalkar Ex. Chief Secretary
37	Shri Rakesh Chandra Joshi Ex. Pri. Secy., Revenue Deptt.
38	Shri Thomas C. Benjamin (Two Affidavits) Pri. Secy, U.D. Deptt.
39	Shri Swamidas V. Chobe Exe. Engr. Presidency Divn., PWD.
40	Shri Ratnakar Y. Gaikwad Chief Secy., GOM.
41	Shri Swadheen S. Kshatriya Pri. Secy., Revenue Deptt.
42	Shri S. J. Kunte Pri. Secy., Planning Deptt.
43	Shri Shivajirao B. Nilangekar Patil Ex-Chief Minister
44	Brig. (Retd) M. M. Wanchu
45	Shri Suresh R. Kini Under Secy., U.D. Deptt.
46	Shri Narayan V. Kulkarni Ex. Dy. Director, Town Planning
47	Shri Ramakant Manik Asmar Joint Secy., Revenue Deptt.



48	Smt. Seema Y. Ukarde Jt. Secy., School Education Deptt.
49	Smt. Valsa Nair Singh Secy. Environment Deptt.
50	Shri Simpreet Singh National Alliance of People's Movement, Mumbai
51	Shri Vasantryao M. Maske Ex. Dy. Director, General Registration
52	Shri C.B. Mhatre Ex. Dy. Secy. Revenue & Forest Deptt.
53	Shri A.P. Sinha Ex-Prin. Secy. U.D. Deptt.
54	Shri Ajit Warty Ex. Metropolitan Commissioner MMRDA.
55	Dr. A. Senthil Vel Director, MOEF, Govt. of India
56	Smt. Chitkala Zutshi Ex. Additional Chief Secretary
57	Shri C.Y. Khandare, Sr. Planner, MMRDA.
58	Dr. Suresh V. Joshi Ex. Metropolitan Commissioner, MMRDA.
59	Shri Bharat S. Yamsanwar Principal Architect Team One Architect

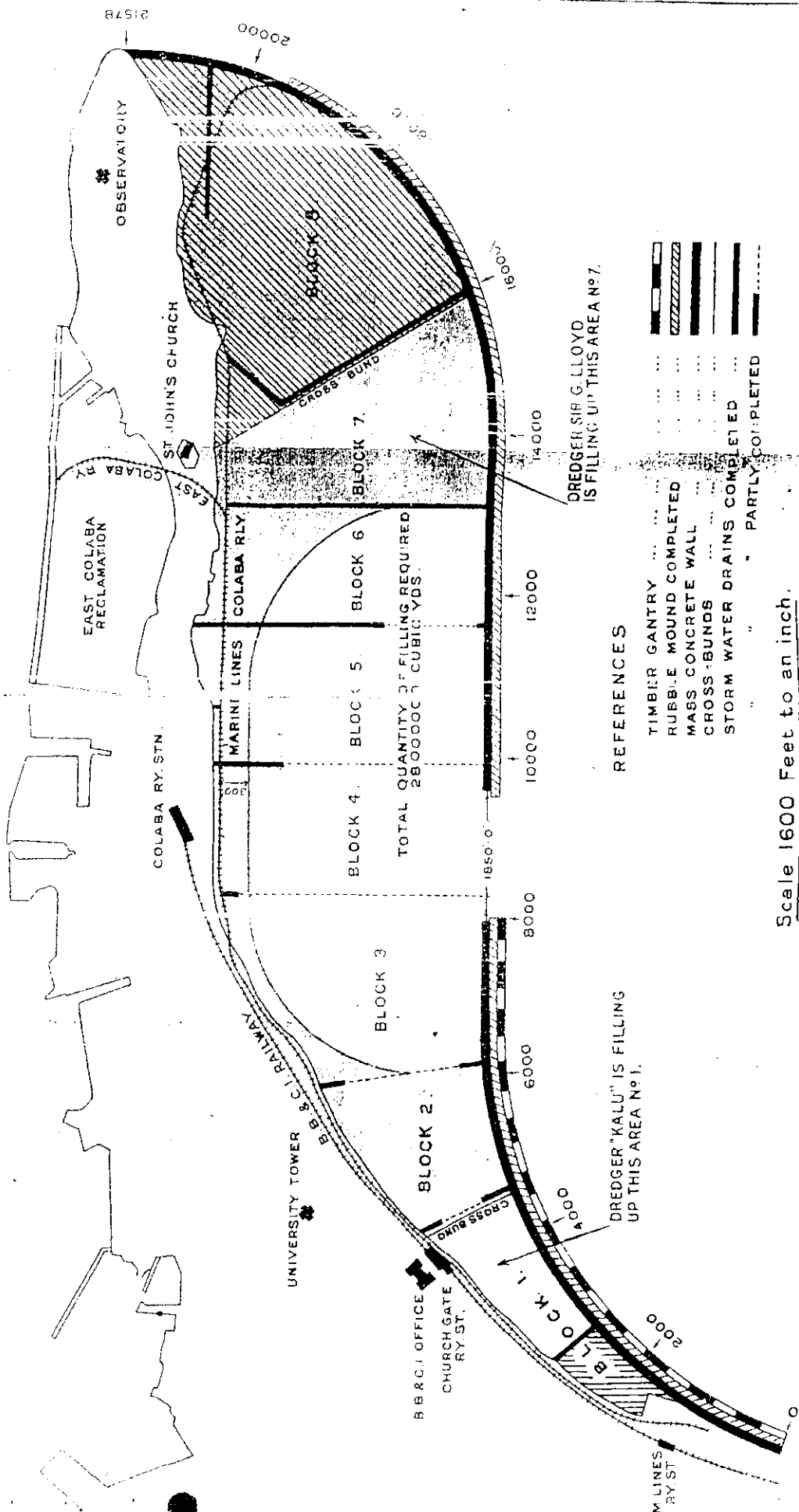
APPENDIX - III
LIST OF ABBREVIATIONS USED IN
THIS REPORT AND EVIDENCE

A.A.I	Air Port Authority of India
A.S.	Adarsh Society
B.B.R.S.	Back Bay Reclamation Scheme
B.E.S.T.	Bombay Electric Supply and Transport
C.B.I.	Central Bureau of Investigation
C.O.A.S.	Chief of the Army Staff
C.R.Z.	Coastal Regulation Zone
C.T. & C.P	Chief of Town & Country Planning
C.Z.M.P.	Coastal Zone Management Plan
C.W.	Commission Witness
D.E.O.	Defence Estates Officer
D.G.D.E.	Director General of Defence Estates
G.A.D.	General Administration Department
G.O.C.	General Officer in Command, GOI Act, 1935
G.O.M.	Government of Maharashtra
I.W.	Independent Witness
M.C.G.M.	Municipal Corporation of Greater Mumbai
MG & G Area	Maharashtra, Gujarat and Goa Area
M.L.R.	Military Land Register
MLRC, 1966	Military Land Register Code, 1966
MEM	Member
M.O.D.	Ministry of Defence
M.M.R.D.A.	Mumbai Metropolitan Regional Development Authority
M.R.T.P. Act.	Maharashtra Region Town Planning Act
M.S.R.D.C.	Maharashtra State Road Development Corporation
M.O.E.F.	Ministry of Environment and Forests
P.M.C.	Project Management Consultant
Q.M.G.	Quarter Master General
S.D.E.O.	Subordinate Defence Estates Officer
S.H.O.	Station Health Office
S.P.A.	Special Planning Authority
R. & F.D.	Revenue and Forest Department
R.T.M.B.	Register of Temporary Military Buildings
R.P.M.B.	Register of Permanent Military Buildings
U.D.D.	Urban Development Department



APPENDIX-IV

BACK BAY RECLAMATION SCHEME AREAS COLOURED RED SHOW THE EXTENT OF THE RECLAMATION NOW PROPOSED BY THE COMMITTEE



APPENDIX-IV



5) Office of the officer commanding
 33 company A.S.C. shown this

authorised by
Senior Inspector of
Armaments

APPENDIX-V

Line No. V.

[Signature]
 Executive Engineer,
 Documentation Project Division,
 Bombay.

Back Bay Rec...
 Details of ...
 and filling in block No. ...

