
(2015) 05 SHI CK 0021
In the High Court Of Himachal Pradesh
Case No : CWPIL No. 14 of 2014

Courts on its own motion

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 22-05-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 215
Criminal Procedure Code, 1973 (CrPC) — Section 133
Himachal Pradesh Municipal Corporation Act, 1994 — Section 227, 228, 242, 396
Himachal Pradesh Police Act, 2007 — Section 114
Penal Code, 1860 (IPC) — Section 268, 283

Citation : (2015) 4 RCR(Civil) 111

Hon'ble Judges : Rajiv Sharma, J; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : Vinay Kuthiala, Senior Advocate (Amicus Curiae) and Gaurav Sharma, for the Appellant; Shrawan Dogra, Advocate General, Romesh Verma, Additional Advocate General and J.K. Verma, Deputy Advocate General, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Tarlok Singh Chauhan, J.—Spread across seven hills in the northwest Himalayas among lush valleys and forests of oak, rhododendron and pines is "Shimla" the capital of Himachal Pradesh that once was the summer capital of colonial India.

2. The Town and Country Planning Department introduces heritage of Shimla in the following manner:-

"Perceived and established by the British during colonial period in first half of 19th century as their Summer Capital, Shimla acquired global fame by the time they left in the year 1947. At the dawn of independence, Shimla was known as "Capua of India", the Indian Mount Olympus, the Viceroy's "shooting box" "Home of the heaven born", "abode of little tingods". It was popularly known as "Jewel of Orient", "Queen of Hill Stations", "Star of Hill Resorts" and "Town of Dreams". Located at a commanding site in the interior Himalayas, connected by

road, rail and air, it has traditionally been a preferred destination for tourists from all over the world. Thousands of miles away from their mother land, amidst picturesque Himalayan environs, Shimla can be called "a Wonder of Colonial Era". The British established many architectural masterpieces such as Vice Regal Lodge, Gorton Castle, Railway Board Building, Gaiety Theatre, Town Hall, Auckland House, Ellerglie, Barnes Court, Bungalows, Churches and Challet Day School. Shimla also has a building called North Bank where in 1907 Nobel Laureate writer Rudyard Kipling lived in 1907. It was a dreamland of cool comfort in a very hot land, and full of promise of fun and frivolity. The 96.5 kilometre section of Kalka-Shimla railway line with 103 tunnels is an engineering feat and provides unique experience to those who travel by this historic route. It is the most spectacular narrow gauge railway line in the world. The city possesses distinct British heritage including institutional buildings, bungalows, churches, socio-cultural spaces, hotels, cemeteries, coffee houses, clubs, theatres, schools, hospitals, street pattern and street furniture, immensely add to grace of the city with their distinct expressions. The facades of buildings, sloping roofs, dormers, windows, doors, entrances and chimneys of numerous types replicated from European buildings leave an ever-lasting impact on one's mind and provide an opportunity to understand the Western saga of art and architecture. Shimla has become a multifunctional city alongwith dominance of tourism, administration and institutional activities."

3. A popular holiday destination not only for domestic but overseas tourists also, Shimla is a place where one would love to visit any time of the year and it is for this reason that Shimla finds a place in the global tourists map. Why then is the Administration permitting it to be converted into a slum? Why have the authorities at the helm of affairs turned a blind eye to the encroachments being made and have not cared to remove the same in the Bazars of Shimla despite repeated directions issued by this Court.

4. More than three decades back, this Court on 28th September, 1983, in the case of Yoginder Lal Sharma Vs. Municipal Corporation Shimla and Others, (1983) 12 ILR HP 457 had passed the following directions:-

"21. A grievance has been made that the Corporation has failed to ensure that the Lower Bazar is kept free from various types of projections, obstructions and encroachments with the result that during the day even the ambulances cannot move in that Bazar to help the sick. Of this fact we can take judicial notice. This Bazar is the one which is frequented by everyone in Shimla. The shopkeepers are in the habit of displaying their goods on a part of the street. Some of them are in the habit of setting up projections during the day for the same purpose. Some also store their goods on the road. Unauthorized hawkers are in such abundance that at places it becomes difficult even to walk. We were informed that some of the shopkeepers have the backing of some political persons and, therefore, nothing can be done. It is unfortunate indeed that the Corporation has failed to keep this Bazar clear of the encroachments etc. The authorities must remember

that a very substantial part of population of Shimla lives near about this Bazar and in case of need it is impossible for the needy to be removed to the hospital etc. God forbid if at any time a fire breaks out in this overcrowded place since all the houses and shops are of wood and there will be a very heavy loss of life. It is, therefore, necessary to keep this Bazar clear in order to ensure that the ambulances as well as the fire brigade can easily move. We have already referred to section 242 of the Act which prohibits projections upon the streets and the powers of the Commissioner to remove all obstructions. We direct the Commissioner to start performing his duties to keep this Bazar clear of all projections etc. in order to ensure the free movements of ambulances and the fire brigade. Again, since the malady has existed for a long time, we will expect the commissioner to ensure that within the next one month this Bazar is cleared of all obstructions."

"It seems that the Municipal Corporation has forgotten that such directions were issued by this Court. In fact the position has worsened in the last few years. The unauthorized hawkers have now invaded the Mall Road also. Unscrupulous shopkeepers are projecting their goods and storing their goods on the Mall Road. We reiterate the directions given by this Court in Yoginder Lal Sharma's case (supra) and direct the Commissioner, Municipal Corporation to ensure that all obstructions and over-hanging projections and unauthorized covering on the drains on the Mall Road and in the Lower Bazar are removed positively by 28th February, 2008. The Commissioner, Municipal Corporation shall also ensure that in future no such projections are allowed and unseemly display of goods is not permitted especially on the Mall Road.

We are well aware that some shopkeepers do not mind paying fines off and on and continue to violate the law with impunity. We would therefore impress upon the Municipal Corporation to consider framing some bye-laws where if any shopkeeper continues to violate such directions his license to run the shop can be suspended for some period and in case of repeated violations can be cancelled permanently. It is only if such deterrent punishment is provided that the traditional glory of Shimla can be revived."

5. The aforesaid directions were conveniently forgotten by all stakeholders including the Municipal Corporation till the time a public interest litigation again came to be filed at the instance of one Smt. Neelam Sharma, who as a pro bono publico complained about the encroachments made in Shimla town, she also complained about the alleged inaction on part of the Municipal Corporation to remove the encroachments. She specifically alleged that the shopkeepers had extended their shops over the road and were displaying their goods on road and placing over hangings over the roads and public drains. This petition was registered as CWP No. 300 of 2006 and this Court on 02.01.2008 passed a detailed order, the relevant portion whereof reads as follows:-

"Another prayer made in this application is that in the markets of Shimla some shopkeepers are in the habit of projecting their goods for sale on to the road and

over the drains. The petitioner complains that in fact these shopkeepers are encroaching upon the Mall Road and have covered the drains which leads to blockage of the drains. Some photographs have been attached along with this application which show that the projections have been made by a number of shopkeepers over the drains as well as the public street including the Mall Road and Lower Bazar.

Section 227 of the H.P. Municipal Corporation Act, 1994 reads as follows:

"227.(1) Except as provided in section 228, no person shall erect, setup, add to or place against or in front of any premises any structure or fixture which will--

(a) overhang, jut or project into, or in anyway encroach upon and obstruct in any way the safe or convenient passage of the public along, any street; or

(b) jut or project into or encroach upon any drain or open channel in any streets so as in any way to interfere with the use or proper working of such drain of channel or to impede the inspection or cleansing thereof.

(2) The Commissioner may by notice require the owner or occupier of any premises to remove or to take such other action as he may direct in relation to any structure or fixture which has been erected, set-up, added to or placed against, or in front of the said premises in contravention of this section.

(3) If the occupier of the said premises removes or alters any structure or fixture in accordance with such notice, he shall be entitled, unless the structure or fixture was erected, set-up or placed by himself, to credit into account with the owner of the premises for all reasonable expenses incurred by him in complying with the notice."

A bare perusal of this section clearly shows that no person can erect, setup or place any structure or fixtures which will overhang, jut out or project on or in any way encroach upon the passage of any public path or drain. Any construction which can impede the inspection or cleansing of a drain is also not permitted.

Shimla has a hoary past. The Mall Road of Shimla is the prime attraction of Shimla. Visitors from all over the world visit Shimla. It should be the endeavour of all, including the residents, the shopkeepers, the Municipal Corporation as well as the State Government to ensure that the pristine glory of Shimla is maintained. The Mall Road has buildings built in a traditional style of architecture. We feel that there should be some uniformity in the way the shops are designed so that the whole Mall Road gives a uniform look. This should make the market look neat and clean. This would also result in preserving the heritage of Shimla. We, therefore, direct the Commissioner, Municipal Corporation to frame a policy in consultation with the Mayor for maintaining uniform and proper facades of the buildings on the Mall Road.

As noted by us above many shopkeepers on the Mall Road as well as the Lower Bazar are hanging their articles meant for sale in such a manner that they

project and jut out on to the road. This mars the beauty of the market and also impedes the free flow of the pedestrian traffic in these markets. This also prevents the effective cleansing of the drains. As already pointed out above no person can even raise or place any "fixture" in such a manner. This practice must be got stopped immediately since it is against the law.

In respect of the Lower Bazar this Court as far back as 28th September, 1983 in case Yoginder Lal Sharma Vs. Municipal Corporation Shimla and Others, (1983) 12 ILR HP 457 , had given the following directions:....." (quoted supra).

6. Subsequently, when this petition came up for consideration on 03.08.2009, a detailed order to the following effect was passed:-

"On 6.5.2008, the Commissioner, Municipal Corporation filed an affidavit in which it was stated that the policy for maintaining uniform and proper facades of the buildings on the Mall Road has been referred to the Heritage Advisory Committee. We had directed the Heritage Advisory Committee to finalize the entire guidelines within a period of six weeks and the Commissioner was directed to convey the order of this Court to the members of the Heritage Advisory Committee. Notices to 118 persons, who had either engaged in overhanging or encroachment in lower bazaar, were issued and all those 118 persons have been served personally or by affixation. A large number of shopkeepers had filed undertakings that they will not violate the municipal laws and shall not encroach upon or raise any overhanging on the public drains and streets.

Now, an application has been filed before us being CMP No. 3026 of 2007. Alongwith this application photographs have been annexed which show that both on the Mall Road as well as in the Lower Bazar people have not only encroached upon the road but they have also displayed their wares/goods for sale by putting platforms over the municipal drains and some of them on the road itself. The petitioner is directed to co-relate the photographs with the names of the persons and inform us whether such persons have filed any affidavit before us or not.

We can also take notice of the fact that despite the orders passed by this Court, the encroachments by the shopkeepers on the roads and municipal drains have become rampant and the time has now come when we may have to use the powers vested in us under Article 215 of the Constitution of India and the Contempt of Courts Act to take action against those persons who violate our orders.

Before we do so, we would like to give one last opportunity to the persons who have violated the orders of this Court. We direct the Commissioner, Municipal Corporation and all functionaries of the Corporation to ensure that the orders of this Court passed from time to time in this writ petition especially the order dated 2.1.2008, quoted here-in-above, are complied with in letter and spirit. We shall hold the Commissioner, Municipal Corporation personally liable for the implementation of these orders. We had also requested the Heritage Advisory Committee to decide the matter regarding uniform and proper facades on the

Mall Road within six weeks. We direct the Secretary (Town and Country Planning) as well as the Secretary of the Heritage Advisory Committee to file their affidavits in this regard within two weeks from today.

We had in our earlier orders noted that the shopkeepers are willing to pay small fine of Rs. 50/- and Rs. 100/- for encroaching on the road and the time has now come to ensure that more serious penalties are levied upon them, such as, penal provision like being sent to jail or canceling of the license to run a shop. If a person does not run a shop in a manner which is convenient to the general public, in our opinion, he has no business to run such a shop and his license should be revoked. People, who have shops on the Mall and on the lower bazaar, put their wares and goods on the roads, obstructing the public street, which makes it very difficult for the pedestrians to even cross the markets. The situation in the lower bazaar is very deplorable and it is difficult for any person, especially ladies, to cross the bazaar. There is another human angle involved. In case of disaster, like fire, etc. the fire brigade or ambulance cannot even reach the scene of occurrence because by the time the wares are taken away and encroachments are removed, the damage is done. This Court is concerned with the larger public interest. This Court also wants to ensure that the rule of law prevails and bye-laws, etc. framed by the Corporation are not flouted by the shopkeepers and other persons who are doing so right now.

We may make it clear that the Commissioner, Municipal Corporation can approach the Superintendent of Police, for police assistance, if required to remove the encroachments/over-hangings on the Mall Road/Lower Bazar. We further direct the Superintendent of Police to ensure that the requisite police force is made available to the Municipal Corporation for ensuring the compliance of the orders of this Court.

The Commissioner, Municipal Corporation, Shimla, the Principal Secretary (Town and Country Planning) and the Secretary of the Heritage Advisory Committee are directed to file their respective affidavits giving the latest status regarding the compliance of these orders latest by 20th August, 2009.

List the matter on 26th August, 2009. Affidavits by all concerned, be filed by 24th August, 2009. We may make it clear that after today any citizen of the city can bring to our notice the fact that any person has disobeyed our orders and has encroached upon the Municipal street or drain or displayed his goods in such a manner as to overhang on the Municipal drain/street, by writing a plain letter alongwith photographs giving the date of encroachment to the Registrar General of this Court and this Court shall take action on the basis of the same.

We direct the Commissioner, Municipal Corporation, to ensure that the gist of this order is published and circulated widely in the town of Shimla as well as broadcast on the radio and cable T.V. network within four days from today to make the general public as well as the shopkeepers aware of their rights and duties."

7. When the matter came up again on 28.08.2009, this Court passed further directions, relevant portion whereof reads as under:-

"We have passed a detailed order on 3.8.2009 directing the Municipal Corporation, Shimla to remove the encroachments/over-hangings made by the Shopkeepers on the roads and municipal drains on the Mall Road and Lower Bazaar in Shimla. We are happy to note that the Municipal Corporation, Shimla has earnestly and sincerely complied with the directions given by us and there is a visible impact of this drive in Shimla town. We place on record our appreciation for the work done by the Officers and staff of the Municipal Corporation, Shimla. We are satisfied with the action taken by the Municipal Corporation and the affidavit of Sh. A.N. Sharma, Commissioner, Municipal Corporation in this regard.

Having said so, we are also firmly of the view clear that such a drive to keep public property free from encroachments and the streets clean should not be a one time affair. This effort must continue and in future also no encroachment should be permitted. In fact, the time has now come to extend the orders passed by us to the entire Municipal area falling within the jurisdiction of Municipal Corporation, Shimla. We therefore direct that the Municipal Corporation in a phased manner, keeping in view the staff available with it, shall take action to remove encroachments and over-hangings etc. as detailed in our previous order in the entire Shimla Town.

Section 227 of the H.P. Municipal Corporation Act prohibits any person from erecting, setting up or placing any structure or fixture which overhangs, juts out or projects on or in any way encroaches upon the passage on any public path or drain. We therefore, direct that now the Municipal Corporation may enforce the provisions of this Section in the entire municipal area of Shimla. Though it is for the Municipal Corporation to prioritize the areas, we may at the outset mention a few of the areas where such action is immediately required:

- 1) Sanjauli bazaar
- 2) Ram Bazaar and Bus Stand Shimla
- 3) Boileauganj
- 4) Totu Bazar
- 5) Khalini
- 6) Chhota Shimla Bazaar
- 7) Kasumpti Bazaar
- 8) Lakkar Bazar

In addition thereto the roads connecting the circular roads to the Mall Road shall also be taken up on priority basis.

It has been brought to our notice at the Bar that when the Officers/officials of the

Municipal Corporation were implementing our orders certain persons objected to the same by raising slogans etc. We may make it clear that if any person is aggrieved by any portion of our order and has a genuine grievance he is free to approach this Court for modification/clarification of the orders passed by us by filing an appropriate application. However, no person can be permitted to take the law in his own hands. When the Officers and staff of the Municipal Corporation are implementing the orders of this Court they are acting on our behalf i.e. under the orders of the Court and in case any person raises slogans or causes obstruction to the implementation of our orders we may be compelled and would not hesitate to take action under the Contempt of Courts Act against such person(s).

At the same time we expect the Officers of the Municipal Corporation to act fairly treating all persons equally. They should also not be unnecessarily harsh. It has been contended before us that sometimes while removing the encroachment/obstruction/over-hanging, damage is caused to the property of the shop owners. We therefore direct that in case the Municipal Corporation finds some encroachment, overhanging etc. of a type which has to be removed by breaking it, then if the person concerned files an undertaking with the Municipal Corporation undertaking to remove the encroachment, over-hanging etc. himself within a period of 48 hours the officials of the Municipal Corporation will grant such time to the person concerned to remove the encroachment. However, in case such a person does not remove the encroachment within the aforesaid period then the Officers of the Municipal Corporation shall take immediate action thereafter to remove the encroachment.

We also direct that no Civil court in Shimla shall entertain any proceedings or pass any stay order in any proceedings filed in regard to encroachments which are being removed under the orders of this Court. The persons aggrieved can approach this Court. A copy of this order be sent to the District Judge, Shimla and to all the courts subordinate to him for information and necessary action.

We further direct that the Municipal Corporation shall not permit unauthorized hawkers to sell their goods/wares in any bazaar in Shimla town. The Municipal Corporation may before the next date identify certain spots where fruit vendors can be relocated.

It has been brought to our notice that a number of shopkeepers allow hawkers to sit outside their shops and in fact some of them charges money from the hawkers on daily basis. We make it clear that it shall be the responsibility of the Shopkeeper in front of whose premises the hawker is doing business, to inform the Municipal Corporation immediately to take appropriate steps to remove him and deal with him in accordance with law. In case the shopkeeper fails to do so it shall be presumed that the hawker is working with his approval and on his behalf and therefore such shopkeeper may be liable for having disobeyed our orders under the Contempt of Courts Act. However, this portion of the order shall not be applicable in respect of Sundays when the market is closed.

The Municipal Corporation shall also ensure that under the garb of removing the encroachments the shopkeepers do not raise the height of their buildings or add mezzanine floor to their buildings/premises. Such floors are not only illegal but also a fire hazard and cannot be permitted.

We had in our orders requested the "Heritage Advisory Committee" to decide the matter regarding the maintenance of uniform and proper facades within six weeks. All that has been done in response is that the "Heritage Advisory Committee" in its meeting reiterated its guidelines. We are unhappy with the manner in which the Members of the "Heritage Advisory Committee" treated the orders of this court. They have made no effort whatsoever to suggest some proper facades for the shops. We again direct the "Heritage Advisory Committee" to consider this matter in another meeting. Their job is not only to reiterate the guidelines given but to make a positive suggestion with regard to the maintenance of the facades of the shops. Some of the facades have already been changed and the Advisory Committee should make specific suggestions with regard to each block of shops starting from the CTO Building till the shops near the Combermere Bridge. The mere reiteration of the guidelines is not sufficient. The "Heritage Advisory Committee shall consider this matter and make necessary recommendations by 30th September, 2009 on the affidavit of the Secretary of the "Heritage Advisory Committee."

Ms. Sarojini Ganju Thakur, Principal Secretary, Town and Country Planning has filed an affidavit that the Government has taken up a proposal with the Director, "Kamla Raheja Vidyanidhi Institute for Architectural and Environmental Studies" to take up a project and develop a proposal for uniform shop frontages on the Mall. We hope and expect that such a proposal is ready by the next date. The Principal Secretary (TCP) shall file her affidavit on or before the next date giving latest status in this regard.

We have impleaded the Beopar Mandal Shimla as a party respondent in this case. We may make it clear that in case all the shopkeepers comply with the law and the orders passed by this Court then on special occasions such as Diwali etc. if appropriate application is moved we may permit certain shopkeepers to display their goods outside their shops for a short period up to a limited extent. We may make it clear that in case in regular course encroachments are found and the goods are displayed on the roads and drains then we shall not grant such permissions even during festivals.

We further direct the Special Magistrate and other officials of the Municipal Corporation, Shimla to ensure that they visit the areas in question especially the Lower Bazaar, Ram Bazaar etc. on regular basis at random at least twice in a week. Some of these visits can be made in the evening hours also. If they find violation of these orders or violation of the Municipal Laws they shall take action against the offending persons and also bring the same to the notice of this Court.

We reiterate our earlier directions that the Superintendent of Police, Shimla shall

provide adequate police force to the Municipal Corporation as and when required."

8. It appears that certain difficulties regarding implementation of the aforesaid orders during festival days were being faced by the shopkeepers which led to the impleadment of the "Beopar Mandal", Shimla and on their application this Court on 29.09.2009 passed the following orders:-

"Keeping in view all these factors in mind, we are of the view that even during these festival days if the Shopkeepers are to be permitted to display their goods/items outside the shops, the projection on the road should not be more than two feet in any event. In case the road is narrow, the projection can be less than two feet. To ensure that on the spot this is actually done, we hereby direct the Assistant Commissioner, Municipal Corporation Shimla to visit the Lower Bazar. He will after measuring the road, in case the same is wide enough, earmark a space of two feet in front of the shop for the shopkeeper(s) to display their goods/items for the short period when the Courts specifically permits the shopkeepers to do so. It is for him to decide whether the space to be granted is two feet or less, keeping in view the total width of the Lower Bazar at the particular point. In case there are shops on both sides and it is not possible to permit any display of goods/items on the road, he shall also indicate accordingly in his report to be submitted to us. The Assistant Commissioner Shimla shall submit his report to us within the next one week, in which he shall clearly indicate that in front of which shops display of goods can be allowed during the festival season. He will also clearly indicate where display can be of two feet and also the shops where the display is to be less than two feet. He shall also clearly state where the road is narrow and no permission can be granted."

9. The petition filed by Smt. Neelam Sharma came to be closed by the order of this Court dated 09.12.2013. However, it appears that the orders passed by this Court from time to time for some reason did not expressly form part of the final order. Resultantly, certain unscrupulous encroachers taking advantage of this fact had again resorted to encroachment and this fact was highlighted in the news item carried out in the Hindi daily "Amar Ujala" in its edition dated 30th October 2014. It is reported that as against the time of five minutes, it took Fire Brigade more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazar to the other corner. This Court took suo motu cognizance of the news item and issued notice to the respondents.

10. In response to the notice issued by this Court, the Municipal Corporation, Shimla, in its reply admitted the contents of the news item and pointed out that during removal of encroachments/overhanging projections, it had been observed that certain shopkeepers/hawkers are in the habit of encroachment/overhanging projections on the streets and drains. These hawkers immediately remove overhanging projections and temporary encroachments before the entry of Corporation Staff in the area and start re-encroaching the drains/streets immediately after the Corporation Staff leave the market. This practice is common in Lower Bazar and Ram Bazar, especially, in odd hours.

11. It was further pointed out that the Corporation had identified certain points in Lower Bazar area where the problem of overhanging projection and temporary encroachment on the street was required to be dealt with on top priority as in this area the movement of unauthorized hawkers was frequent and the shopkeepers had been violating the directions of this Court.

12. It was also averred that certain shopkeepers had extended foldable tarpaulin outside their shops by projecting the same towards street/road and certain shopkeepers are putting articles for sale in a hanging position under the said tarpaulin which are causing unnecessary hindrance to the general public as well as free flow of emergency vehicles.

13. The Chief Fire Officer in compliance to the orders of this Court on 24.11.2014 filed a status report wherein he not only pointed out obstruction points in the Lower Bazar but he also made certain startling disclosures. It was pointed out that fire vehicles were plied from D.C. Office to "Sher-e-Punjab" on 23.08.2013, 19.10.2013, 29.10.2014, 27.11.2014 and it took about 40 minutes, 50 minutes, 40 minutes and 53 minutes respectively, whereas, the reasonable time to reach at the scene of fire incidence from Fire Station Office, on the Mall Road, should be 3-6 minutes or to say should not be more than six minutes in any way. It was also pointed out that a fire broke out in Lower Bazar in a liquor shop on 28.01.2014 and the fire tenderers faced a lot of difficulties and obstructions to reach the spot due to the material displayed by the vendors and shopkeepers outside the shops and also because of the permanent projection of angle iron outside the shops.

14. It is well settled that the hawkers have no fundamental right under Article 21 of the Constitution of India to carry on business at the place of their choice and convenience. The rights of hawkers, kiosk-users and vendors can never be absolute, but have to be limited and subservient to over all public interest.

15. In the Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, AIR 1965 SC 1147 : (1965) 2 SCR 242 the Hon"ble Supreme Court observed that the roads and its sidewalks are laid for passage only and for no other purpose.

16. In Bombay Hawkers" Union and Others Vs. Bombay Municipal Corporation and Others, AIR 1985 SC 1206 : (1985) 2 SCALE 59 : (1985) 3 SCC 528 : (1985) 1 SCR 849 Supp : (1986) 1 UJ 427 , the Hon"ble Supreme Court has held that:

"8.No one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business. If hawkers were to be conceded the right claimed by them, they could hold the society to ransom by squatting on the center of busy thoroughfares, thereby paralyzing all civic life. Indeed, that is what some of them have done in some parts of the city. They have made it impossible for the pedestrians to walk

on footpaths or even on the streets properly so-called."

17. In the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, AIR 1986 SC 180 : (1985) 2 SCALE 5 : (1985) 3 SCC 545 : (1985) 2 SCR 51 Supp , the Hon"ble Supreme Court has held that a municipality is empowered to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. In the said case, the Hon"ble Supreme Court also observed that:-

"43.In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets....."

18. The Hon"ble Supreme Court rejected the misplaced arguments resting on life and liberty by those who were claiming occupation of the public streets. In this regard, it was observed that:

"43.There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up construction on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter....."

19. In *Municipal Corporation of Delhi Vs. Gurnam Kaur*, AIR 1989 SC 38 : (1988) 4 JT 11 : (1988) 2 SCALE 1155 : (1989) 1 SCC 101 : (1988) 2 SCR 929 Supp : (1988) 2 UJ 713 , the Hon"ble Supreme Court reiterated the law that to remove an encroachment to the public road is the obligation of the municipality and that an injunction could not be granted to suffer an encroachment of a public place like a street which is meant for the use of the pedestrians. The Hon"ble Supreme Court rejected the plea of life and liberty raised in the context of carrying on trade or business on a public road. The Hon"ble Supreme Court further held that there can be no fundamental right of a citizen to occupy a particular place where he can squat and engage in trading business.

20. In *Ahmedabad Municipal Corporation Vs. Dilbagsingh Balwantsingh and Others*, (1992) 2 JT 363 : (1992) 1 SCALE 721 : (1992) 2 SCC 630 Supp : (1992) 2 SCR 322 : (1992) 1 UJ 710 , the Hon"ble Supreme Court negated the plea of a occupier of a public street when he obtained an injunction in a suit to prevent the removal of an encroachment. Reaffirming and reiterating its earlier decision, the Hon"ble Supreme Court upheld the removal of encroachment.

21. In *M/s. Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee*, AIR 1993 SC 2313 : (1993) 4 JT 233 : (1994) 106 PLR 76 : (1993) 3 SCALE 208 : (1993) 4 SCC 69 : (1993) 1 SCR 237 Supp , the Hon"ble Supreme Court while dealing with a case where the verandah in front of the shop had been for long used for passing and re-passing by the public, it was held that this space could be held to be a street under the Municipal Act.

22. In Maharashtra Ekta Hawkers Union and Another Vs. Municipal Corporation, Greater Mumbai and Others, AIR 2004 SC 416 : (2003) 10 JT 1 : (2003) 10 SCALE 56 : (2004) 1 SCC 625 : (2003) 6 SCR 581 Supp : (2004) 1 UJ 676 , the Hon"ble Supreme Court while holding that every municipal corporation has a statutory obligation to provide free flow of traffic and pedestrians to pass and re-pass freely and safely; as its concomitant, the corporation/municipality have a statutory duty to have the encroachments removed.

23. On the basis of the aforesaid exposition of law, it can safely be concluded that the respondent Corporation is expected to be vigilant and cannot and should not allow encroachments in any form, be it the illegal extension of shops, its projections, eaves, the pavements or even the footpaths. Public streets and road cannot be blocked or encroached by any one, not even by the government and they are to be kept clear for the purposes of passage only and for no other purpose.

24. It appears that the temptation and enticement to indulge in lateral, vertical and horizontal illegal expansion of structures is on account of the retention/regularization policy introduced by the successive governments which in the teeth of the judgment rendered by this Court in CWP No. 122 of 1995 titled Raj Kumar Singla versus State of Himachal Pradesh and another, decided on 16.09.1997 wherein this Court held as under:-

"18. It is rather surprising that the State Government should think of legalizing an illegal act and part with the government property or public property in favour of those persons, who are guilty of committing such illegal acts. It is the duty of the government to prevent encroachment on public property. If the government decides to make a gift of the public property to those, who have encroached thereon it will tantamount to the government accepting and admitting its inability to prevent the encroachment....."

25. It was further held that:-

"20. Though in this case, the State Government has not expressly pleaded its inability to prevent encroachments on government land and the public property and the encroachment policy issued by the State Government would only show that the government is not in a position to handle the situation. It is a pity that the government with its powerful machinery is not in a position to protect its property, which is really a property of the people of the State and goes to the extent of making a gift of the property on which unscrupulous people have encroached by violating the provisions of law. We cannot but express our anguish and exclaim woe unto the government which seeks to legalize an illegality by an executive action."

26. Lastly, it was held that:-

"28. On the facts of the case, it is evident that the encroachment policy issued by the government cannot minimize the vice of encroachment on the government

land or other public property, but on the other hand, it will only encourage the members of the public to encroach upon such land and wait for regularization or legalization of such encroachments. It will also lead to corruption among the officials of the State Government."

27. Further, the respondents do not seem to have learnt any lesson from the recent earthquakes which have devastated the Himalayan region, particularly, Nepal. As per the latest studies, majority of Himachal Pradesh falls in Seismic Zone-V and the remaining in region-IV and yet this fact has failed to shake the authorities in Shimla out of their slumber. The quake-prone erstwhile summer capital of Raj cannot avert a Himalayan tragedy of the kind that has killed thousands and caused massive destruction in Nepal.

28. It has been reported that Shimla's North slope of Ridge and open space just above the Mall that extends to the Grand Hotel in the West and Lower Bazar in the East is slowly sinking. We can only fasten the blame on the haphazard and illegal construction being carried out and all out efforts being made for converting the once scenic seven Himalayas of this Town into a concrete Jungle. A high intensity quake can turn Shimla into a tomb of rubble as it falls in its Seismic Zone IV-V.

29. Fourteen major localities in Shimla are located at 70-80 degree slope, whereas, the majority of the buildings infringe byelaws and building norms and have not even adhered to the seismic building norms. Most buildings are precariously hanging on the steep slopes and clinging to one another. A moderate and high intensity temblor can be catastrophic for congested settlements with no escape routes and they are likely to collapse like a pack of cards, more particularly, when none of the authorities has ever cared to carry out the seismic pounding effects in buildings aimed at studying seismic gap between adjacent buildings by dynamic and push over analysis. No particular parametric study has been conducted to investigate the minimum seismic pounding gap between two adjacent structures.

30. According to the report prepared by the Himachal Pradesh State Disaster Management Authority, seismically, the State lies in the great Alpine-Himalayan seismic belt running from Alps Himalayan through Serbia, Croatia, Turkey, Iran, Afghanistan, Pakistan, India, Nepal, Bhutan and Burma.

31. On April 4, 1905, an earthquake of 7.8 magnitude hit Kangra killing 20,000 people, 53,000 domestic animals while one lakh houses were destroyed. Economic Cost of recovery was estimated at Rs. 29 lakhs during that time. On January 19, 1975, a quake of 6.8 magnitude hit Kinnaur killing 60 people while 100 others were badly injured. About 2,000 dwellings were devastated and more than 2,500 people were rendered homeless. On April 26, 1986 in Dharamshala a tremor of 5.5 magnitude had killed six people and caused extensive damage to buildings and the loss was estimated at Rs. 65 crore. In Chamba, on March 24, 1995, an earthquake of 4.9 magnitude had left over 70% houses with cracks.

Similarly, on July 29, 1997, a quake of 5.0 magnitude had left around 1,000 houses damaged in Sundernagar.

32. Once such gruesome realities exist, can the unauthorized structures still be regularized by encouraging violators only to contribute to the rapid haphazard urban growth in the hope that the government will finally regularize the structures? This simply cannot be done. It cannot be denied that haphazard, unplanned and illegal constructions have marred the beauty of hill towns in Himachal Pradesh, more particularly, its capital Shimla. It is high time that the building byelaws are suitably amended by taking into consideration the recent seismic activity that has taken place in the entire Himalayan region.

33. It has been noticed that even though the buildings are connected by road, yet no provision for parking even for one vehicle has been kept. In many cases, building or part thereof is put to commercial use, while the vehicles are parked on the roadside that too without paying for the same. Therefore, it becomes imperative that the byelaws be suitably amended by making it mandatory for all the buildings connected by road to have parking space for atleast one vehicle that too without permitting encroachment upon public property.

34. Despite the settled legal position and repeated directions from this Court, the respondents have failed to take care of these problems and the only reason which can be ascribed for such failure is lack of will to efficiently implement the directions as passed by this Court from time to time.

35. The Criminal Procedure Code, 1973, the Indian Penal Code and the Himachal Pradesh Police Act, 2007, apart from the Municipal Corporation Act, all contain provisions for removal of obstruction on a street, or committing a nuisance or obstruction in general. There are penalties provided like simple fine or even arrest or imprisonment for non-appearance before the Court.

36. Section 133 of the Code reads as follows:-

"133. Conditional order for removal of nuisance.--(1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order--

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or,

if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court. Explanation.- A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

37. Section 268 IPC reads as follows:-

"268. Public nuisance.--A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property

in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

A common nuisance is not excused on the ground that it causes some convenience or advantage."

38. Similarly, Section 114 of the Himachal Pradesh Police Act, 2007 reads as follows:-

"114. Powers of Police Officers in respect of certain offences on roads or public places.

(1) It shall be lawful for any Police Officer in uniform to take into custody, without warrant, any person who within his personal view, has committed any of the following offences on any road, public place or thoroughfare causing obstruction, annoyance, risk, danger or damage to residents or passersby, namely:--

(i) slaughters or wantonly commits cruelty to any animal: or

(ii) drives or rides furiously any cattle or horses; or

(iii) obstructs the taking up or setting down of passengers at a public transport halting place; or

(iv) exposes any good for sale; or

(v) is found drunk and incapable or riotous; or

(vi) indecently exposes himself, urinates or defecates in a public place or in public view; or

(vii) unauthorizedly affixes any bill, notice or other paper to, or defaces, any property belonging to the State or Central Government or any public authority; or

(viii) commits willful trespass into any property belonging to the State or Central Government or any public authority; or

(ix) willfully damages any public alarm or any other public emergency assistance system; or

(x) harasses or stalks a woman or makes indecent advances or makes obscene remarks or gestures to a woman; or

(xi) begs or seeks alms."

(2) Any person, so arrested, if not immediately released on bail, shall be produced as soon as possible, but not later than 24 hours, before the nearest Judicial Magistrate having jurisdiction."

39. Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994, reads as follows:-

"396. Penalty for breaches of bye-laws. 1(1) Any bye-law made under this Act may provide that a contravention thereof shall be punishable,-

(a) with fine which may extend to 2 [fifty thousand] rupees; or

(b) with fine which may extend to [fifty thousand] rupees and in the case of continuing contravention, with an additional fine which may extend to [five thousand] for every day during which such contravention continues after conviction for the first contravention; or

(c) with fine which may extend to [five thousand] for every day during which the contravention continues, after the receipt of a notice from the Commissioner or any Corporation Officer duly authorized in that behalf by the person contravening the bye-law requiring such person to discontinue such contravention.

(2) Any such bye-law may also provide that a person contravening the same shall be required to remedy, so far as lies in his power, the mischief, if any, caused by such contravention."

40. During the course of arguments, the learned Amicus Curiae has pointed out that it is not streets in the bazar area of Shimla which alone have been encroached, but even public roads have been choked making it difficult for the emergency vehicles like ambulance, fire brigade etc. to reach their destination on time.

41. After decades of haphazard development (if at all it can be called development) and environmental degradation-destroying activities, both by the Municipal Corporation as also the residents of Shimla, there is finally a ray of hope in the prospects of Shimla getting the "UNESCO World Heritage Site Tag". We have learnt that US Government Agencies for international development has selected three cities from across the world as resource cities for development-Town Ville in Australia, Summer Ville at Massachusetts and Shimla, the only city in the entire South area, but can the city get the status in the current scenario where the encroachers are having a heyday and the roads are completely choked?

42. Law breakers and law abiders cannot be placed at an equal pedestal. It is unfortunate that despite repeated directions passed by this Court in more than three decades back in Yoginder Lal Sharma's case (supra) and thereafter in Neelam Sharma's case, the same has not had the desired effect upon the encroachers. It, therefore, makes it imperative that we issue certain stringent directions.

43. Accordingly, the following directions are issued which shall apply to the entire Municipal Area of Shimla:-

i) That no shopkeeper(s)/hawker(s) throughout Shimla irrespective of its locality would be permitted to display his/their goods on the drains and the sides of the streets.

- ii) No shop will be permitted to have overhanging projections including collapseable tarpaulin.
- iii) No unauthorized hawkers shall be permitted to sit outside a shop by encroaching upon the public drain or sell their goods/wares in any bazaar in Municipal area of Shimla.
- iv) The Municipal Corporation shall strictly implement the provisions of Section 227 of the Himachal Pradesh Municipal Corporation Act, 1994, as also byelaws called "Overhanging Project Byelaws" and in case of first three violations, the fine as envisaged under the aforesaid provisions shall be levied. But, in case of fourth default, the licence to run the shop shall be suspended for one month and in case of another default for another six months and in case there is yet another default, then his licence shall be permanently revoked.
- v) It is only once that the action would be taken against the encroachers under Section 133 Cr.P.C., Section 283 IPC or Section 114 of the H.P. Police Act or Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994 and thereafter recommendations for suspension of licence shall be made and the Municipal Corporation shall thereafter act in accordance with the direction No. (iv).
- vi) The persistent defaulters already identified by the Corporation shall be given only one chance to improve and thereafter their licences shall be suspended in a manner set out in direction No. iv.
- vii) The Municipal Corporation shall demolish within a period of six weeks all illegal projections including projections in the form of collapseable tarpaulin as have come to the notice of the Corporation including those projections as mentioned in the affidavit of the Chief Fire Officer. After demolition of the illegal structure, the Corporation would conduct G.P.S. demarcation of the entire area so that the same works as a ready referencer in dealing with fresh encroachments.
- viii) It is made clear that during the festival days, the order passed by this Court on 29.09.2009 in Neelam Sharma's case shall be applicable.
- ix) The Special Magistrate and Officials of the Municipal Corporation, Shimla shall visit the areas in question, especially, Lower Bazar, Ram Bazar etc. on regular basis at random atleast in a week.
- x) The Municipal Corporation in light of the observations made in this judgment shall suitably frame/amend its byelaws, till and so long the respondents do not frame the byelaws, no building or part thereof which is unauthorized shall be permitted to be regularized under any policy, guidelines or instructions. Till the building byelaws are not framed, the Municipal Corporation will be authorized to have the electricity and water connections of these illegal structures disconnected and any instruction issued on behalf of the Corporation to the HPSEBL or the IPH will be imperative and mandatory.

xi) The Chief Fire Officer shall carry out an unscheduled and unannounced mock-drill every month where the Fire Brigade shall be made to pass through the entire length and breadth of the Lower Bazar and any hindrance in its movement shall be dismantled and demolished there and then at the spot.

xii) The respondents are directed to ensure that there is no undue let, obstruction or hindrance in plying of emergency vehicles like the fire brigade, ambulance etc. It is clarified that any vehicle carrying a serious patient would be treated as an ambulance for all intents and purposes.

xiii) While implementing the orders of this Court, the Officers of the Municipal Corporation shall act uniformly and fairly by treating all persons equally.

xiv) We also direct that no Civil Court in Shimla shall entertain any proceedings or pass any order in any proceedings filed with regard to encroachments which are being removed under the orders of this Court. However, the person(s) aggrieved is/are free to approach this Court.

xv) The respondents shall ensure that no unauthorized construction is carried out within the Municipal limits of Shimla.

xvi) The Commissioner, Municipal Corporation and Superintendent of Police, Shimla, shall work in tandem to give effect to the aforesaid orders and quarterly status reports shall be submitted by them to the Registry of this Court.

xvii) Any violation of this order needless to say shall be viewed seriously and any person is free to approach this Court by addressing a letter and appending therewith his name and permanent address as also the photographs of the encroacher alongwith his other details like name, address etc. etc.

xviii) It shall be the personal responsibility of the Collector, Superintendent of Police and the Commissioner, Municipal Corporation, Shimla that the directions issued hereinabove are carried out in their letter and spirit.

xix) The respondents are further restrained from introducing any retention/regularization policy, guidelines or instructions thereby permitting regularization of unauthorized structures.

xx) The respondents shall not permit any free parking on the main public road and it is only after proper identification the parking would be permitted that too subject to payment.

xxi) We direct that henceforth no new vehicle which is intended to be plied primarily within Shimla Municipal area will not be registered in the State unless the intending purchaser produces a certificate from the Collector, Shimla that he has a parking space and the said certificate shall be issued only after a report to this effect that too after physical inspection and verification is issued by the SHO of the Police Station in whose jurisdiction the area falls.

xxii) We also direct that our directions should be implemented in letter and spirit

and any dereliction of duty or negligence on the part of the authorities concerned will amount to contempt of this Court's orders for which necessary action shall be initiated.

44. The petition is accordingly disposed of in the aforesaid terms, so also the pending application(s), if any.