
(2003) 01 AP CK 0064

In the Andhra Pradesh High Court

Case No : Writ Petition No. 35228 of 1998

K. Jawahar Reddy and Another

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 07-01-2003

Acts Referred:

Hyderabad Municipal Corporation Act, 1955 — Section 450, 452

Citation : (2003) 3 ALD 195 : (2003) 1 ALT 712

Hon'ble Judges : S. Ananda Reddy, J

Bench : Single Bench

Advocate : S. Surya Prakash Rao, for the Appellant; Government Pleader for Municipal Administration for Respondent No. 1, G. Rama Rao, SC for MCH for Respondent Nos. 2 and 3, G.S. Rao and N. Vasanthi, for the Respondent

Judgement

S. Ananda Reddy, J.—The 1st two writ petitions are filed by the owners of the property bearing Municipal No.3-4-142/5/A, Barkathpura, Hyderabad aggrieved by the orders passed by the Commissioner and Special Officer, Municipal Corporation of Hyderabad dated 23-10-1998 under which the earlier proceedings regularising the construction made by the petitioners were cancelled. The other two writ petitions are filed by two neighbours to the above-referred property complaining violation of the Building Bye-laws and they sought for quashing of the Government Orders in G.O. Ms. No.289 dated 25-5-1998 and G.O. Ms. No.419 dated 30-7-1998 and also the revised permit Nos.172/17/80 and 172/17/79 dated 26-6-1998 as illegal, arbitrary and without jurisdiction and also further sought for a direction not to regularise the illegal constructions that were effected in the above referred property. Further a direction was also sought for to the authorities of the Municipal Corporation to take appropriate action in respect of the illegal constructions made in the above referred property by the owners and demolish the unauthorised and illegal constructions effected in the said property.

As the dispute in all the four writ petitions relates to the same property, they are

heard together and disposed of by mis common order.

2. The brief facts of the case are that the petitioners in the first two writ petitions, who are husband and wife, purchased 300 sq. metres of house-site in the premises bearing Municipal No.3-4-142/5/2, Barkathpura, Hyderabad from one Smt. G. Kamala Rao through a registered sale deed dated 26-6-1997. Thereafter, the said purchasers submitted a joint application for the construction of the building. to the Municipal Corporation of Hyderabad (for short "M.C.H") vide M.C.H.No.144/5/97. The M.C.H. sanctioned the plan submitted by them and issued permit No. 63/82, 29-9-1997. As per the sanctioned plan, constructions have to be effected in the ground floor plus two floors. It is also stated that in the ground floor the owners have to leave northern side for parking and construction has to be made on southern side. The M.C.H. while sanctioning the plan did not allow balcony on the 2nd floor and one bedroom on the eastern side and granted sanction only for the rest of the plan. According to the owners of the property (petitioners in the 1st two writ petitions), they found that the parking space shown in the sanctioned plan was not sufficient for the occupants of the building and therefore they left the entire ground floor for parking without any construction except the staircase and decided to construct one more floor on the top. Accordingly, they have constructed the additional floor instead of effecting, any construction on the ground floor, Thereafter, the owners approached the Government for regularisation under the relevant Rules of the Corporation as well as to condone the deviations. While the said application was pending before the Government, the owners came to know that the M.C.H was regularising the unauthorised constructions and deviations from the sanctioned plans, therefore the owners approached the M.C.H. As the owners of the said premises came to know that the condition for regularisation was that the site should be less than 200 sq. mtrs. then according to them there was a past oral partition and the same was reduced into writing in August, 1997. It is stated that the said oral partition was made essentially for the purpose of division of expenses for the construction between the two owners who are husband and wife, as the construction was financed by each of them. According to them, they have shown the said memo of partition and submitted the application for regularisation. The M.C.H. sanctioned the revised plan after due inspection and verification and issued Permit Nos.172/17/79 dated 26-6-1998 in favour of the wife and Permit No. 172/17/80 dated 26-6-1998 in favour of the husband. It is also stated that the M.C.H. had charged penal fee of Rs. 22,000/- from each. Thus a total sum of Rs.44,000/- was paid. It is stated that the Government issued various orders for regularisation of deviations and unauthorised constructions from time to time. As per G.O. Ms. No.289 dated 25-5-1998, the period for regularisation was extended up to 30th July, 1998 and this period was further extended by G.O.Ms.No.419 dated 30-7-1998 superseding all the previous Government Orders extending the date of regularisation of unauthorised constructions up to 31-7-1998. All these Government Orders were made applicable to the constructions made in plots up to 200 Sq.mtrs. It is also stated that the M.C.H.

also assessed the buildings to property tax and tax was also collected with reference to separate portions of the buildings which were numbered as 3-4-142/5/A-1, A-2 and A-3 for three floors respectively.

While so, the Chief City Planner issued notice dated 27-8-1998 to both the owners of the premises in question alleging that they had obtained the regularisation order dated 26-6-1998 by material suppression of facts and by playing fraud and called upon the owners of the property to submit their representation or explanation within 10 days of the receipt of the notice. Thereafter, the petitioners submitted their explanation disputing the allegations made in the notice about the misrepresentation of facts or playing any fraud while obtaining regularisation orders in respect of the constructions effected by them. However, the Commissioner passed orders dated 23-10-1998 in respect of both the orders in question, cancelling the permits granted to them regularising the deviations or unauthorised constructions by order dated 26-6-1998. Questioning the said action of the Commissioner, the 1st two writ petitions are filed by the owners.

3. The other two writ petitions are filed by the two neighbours of the above referred property complaining the deviations as well as the unauthorised constructions effected by them thereby affecting their rights apart from alleging that the said deviations and unauthorised construction are in contravention of the provisions of M.C.H. Act and the Building Bye-laws. Their grievance is that though representations were made to the concerned officials of the Corporation, they did not take any action and therefore they were constrained to approach this Court seeking Writ of Mandamus, In these writ petitions they are also assailing the jurisdiction and powers of the Government in issuing various Government Orders including the one G.O. Ms. No.289 dated 25-5-1998 as well as G.O. Ms. No.419 dated 30-7-1998 which empowers the Commissioner of the Corporation to regularise the constructions that are effected in deviation of the sanctioned plan as well as unauthorised constructions effected by the owners of plots below an extent of 200 Sq. mtrs. According to these petitioners, the Government has no jurisdiction either to relax the existing laws or to regularise the illegal and unauthorised constructions. Hence, they sought for quashing of the Government Orders authorising the Commissioner of M.C.H. to regularise the deviated and unauthorized constructions. The Petitioners in these writ petitions also sought for a direction to take appropriate legal action to demolish or to remove the unauthorised and deviated constructions effected by the owners in the above referred premises.

4. The learned Counsel Sri M.R.K. Chowdary appearing for the owners of the premises in question contended that the impugned order dated 23-10-1998 passed by the Commissioner is in violation of the principles of natural justice. According to the learned Counsel though a show-cause notice dated 27-8-1998 was issued by the Commissioner except stating that there was misrepresentation and playing fraud no details of the said alleged misrepresentation and the fraud

played by the owners were not specified in order to give an opportunity to the owners to explain the said alleged misrepresentation and the fraud played. In the absence of any such clear reference to the alleged misrepresentation or fraud played by the owners, the impugned order passed by the Commissioner is liable to be struck down on that simple ground of violation of principles of natural justice. It is contended that the purpose of issuing a notice is to give an effective opportunity to the affected party before passing any order to explain the allegations made against them, but the notice is silent about the allegations. The vague reference of material misrepresentation of facts or playing fraud would amount to denial of opportunity to explain those allegations. Further, the learned Counsel contended that the impugned order was passed on 23-10-1998 cancelling the regularisation of the deviations/ unauthorised constructions on the grounds which are not specified in the notice. It is contended that the owners of the premises submitted their application jointly for the sanction of a plan for the construction of the building in question. As there were certain deviations or additions over and above the sanctioned plan, in fact they made an application to the Government for regularisation but before any order is being passed by the Government, as the Government issued various Government Orders for regularisation of deviations and unauthorised constructions, the owners made their application to the Commissioner and thereafter those applications were considered and after due verification of the constructions effected on the ground, passed orders regularising the deviations, therefore, there is absolutely no misrepresentation of facts or fraud played by the owners. Hence sought for quashing of the impugned proceedings.

5. A detailed counter has been filed on behalf of the 2nd respondent-Commissioner disputing and denying the allegations made by the owners. In the counter, it was mentioned as to the violation of the sanctioned plan with reference to the open space to be left as per the rules as well as the sanctioned plan and the deviations. As per the counter, the owners have effected constructions deviating the setbacks on all the directions. It is further stated in the counter that when the Corporation was about to take action in respect of the deviated constructions, the owners filed a suit in the Civil Court as O.S.No.4610 of 1997 on the file of the II Assistant Judge, City Civil Court, Hyderabad and obtained injunction restraining the M.C.R from interfering with the construction and bringing down the constructions made. Subsequently, the owners approached the Government seeking relaxation of zoning regulations and the Government asked for the remarks of the Corporation by Memo dated 9-4-1998. Meanwhile certain objection petitions were received from the neighbours and in the meanwhile G.O. Ms. No.423 dated 31-7-1998 was issued introducing a new policy, as a result of which the regularisation requested by the owners was not considered by the Government. Thereafter, the owners filed applications for regularisation of the building under G.O. Ms. No.289 dated 25-5-1998. In the said representations, the owners have represented that the site was less than 20 sq. mtrs., and therefore basing on the said representation the deviated

constructions were regularised. In the counter it is admitted that as the deviated constructions were regularised due to misrepresentation of facts, notice was issued and thereafter the regularisation orders were cancelled.

6. The learned Standing Counsel for the Corporation contended that the owners of the property in question are aware that originally they made an application for construction of a single building without reference to any partition alleged to have taken place but subsequently a partition was invented for the purpose of attracting the Government Order for regularisation to show that the site in question is less than 200 sq. mtrs. In addition, the owners have played fraud as if constructions were completed much before the stipulated date of 30th September, 1997 which is the cutoff date for constructions effected for regularisation. It is stated that the owners have obtained original permit for construction on 29-9-1997 and therefore it is impossible to complete the construction prior to 30-9-1997. Insofar as the extension is concerned, it was contended that, that is only for the purpose of making applications to those persons who failed to make their applications on the earlier occasion and there was no extension as to the period of constructions. Insofar as G.O. Ms. No.419 dated 30-7-1998 is concerned, it is stated that a Division Bench of this Court has already quashed the said G.O. holding that the Government has no jurisdiction and in that view of the matter, there is no case for the owners of the property in question to regularise their deviated or unauthorised constructions any more. Hence, it is contended that there is absolutely no merit in the claim of the owners of the property in question that the notice issued by the Commissioner or the consequential order passed by him is in violation of the principles of natural justice.

7. Coming to the other two writ petitions, the learned Counsel Sri G.S. Rao appearing for the petitioners contended that the owners purchased an extent of 300 sq. yards jointly who are husband and wife. In respect of the said property, a plan was got sanctioned by the Corporation for the construction of a single building but while effecting the construction, they have violated and deviated the sanctioned plan and constructed an additional floor violating the Building Bye-laws and that when the Corporation attempted to take action, they obtained orders from the Civil Court and carried on the deviated constructions even contrary to the orders of the Civil Court which passed the order of status quo. Thereafter, to take advantage of the Government Orders for regularisation, the owners have fraudulently misrepresented to the Commissioner as if there was an oral partition and each of the owner is having less than 200 sq. mtrs., and accordingly submitted separate applications and obtained orders of regularisation by playing fraud as well as misrepresenting the facts. As the authorities noticed the misrepresentation of facts as well as the fraud played on the Corporation issued a notice and thereafter cancelled the regularisation of deviated constructions. The learned Counsel contended that the owners made the construction without leaving the setbacks as per the Building Bye-laws and constructed almost touching the boundary walls. It is also stated that as per the

Building Bye-laws as the width of the road is less than 12 mtrs., abutting the property in question, the maximum permitted height of the building is only 33 feet, but the owners have built up to 44 feet by putting almost an additional floor thereby affecting the light and ventilation to the neighbours. The learned Counsel also contended that as per the various Government Orders, the floor area ratio as fixed is only 1:1.25 which was fixed in G.O. Ms. No.249 dated 23-5-1996 but subsequently even the said ratio was reduced in G.O. Ms. No.423 dated 6-8-1998 to 1:1, but the owners of the property in question effected the constructions far exceeding the floor area ratio 1:1.25. The learned Counsel also contended that as the Division Bench of this Court has already held that the Government has no power to grant any regularisation and quashed G.O. Ms. No.419 dated 30-7-1998. The other G.Os. issued such as G.O. Ms. No.289 dated 25-5-1998 which is on the similar lines must also be held as without jurisdiction and the same is liable to be quashed. Further, according to the learned Counsel as the regularisation of deviated constructions was already cancelled by the Commissioner, the structures already effected deviating the original plan are to be directed to be removed either by the owners of the building failing which the Corporation has to take action to remove or demolish such deviated portions of the structures.

8. The learned Counsel relied upon the following decisions in support of his contentions:

S. Narsimha Reddi v. Corporation of Hyderabad, 1981 (1) An. WR.166, K. Srinivasan and others Vs. Executive Officer, Cantonment Board, Sec"bad and others, , C. Kulsum Reddy and Others Vs. State of A.P., ; Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others, , Delhi Development Authority Vs. Skiper Construction Company (P) Ltd. and another, , Bimala Devi v. Allahabad Development Authority, 1998 All IC 2580, Tajuddin v. District Collector, Kannur, 1996 All I.C 4614, Aditya Constructions Vs. The Secretary, Housing, Municipal Administration and Urban Development Dept. and Another, , P. Saina and Others Vs. Konderi and Others, ; Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, . M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, .

9. The learned Counsel Sri M.R.K. Chowdary appearing for the owners opposed the contentions of the neighbours by contending that they have no locus standi. According to the learned Counsel, one of the neighbours did not even file a representation against the owners of the property and therefore he cannot maintain a writ petition. The learned Counsel also contended that no public loss is alleged in the present proceedings and as long as there is no public loss, the neighbours cannot complain in the present proceedings. On the other hand, it is a private loss to them and the remedy lies elsewhere and not in the present proceedings. The learned Counsel also contended that if their grievance is as to the loss of amenities such as air, ventilation, etc., the neighbours have to approach appropriate Civil Court to have the redressal and the present

proceeding is not one to seek such relief.

10. The learned Standing Counsel for the Corporation though agreed with the contention of the neighbours that the deviated constructions have to be removed or demolished in view of the cancellation of the regularisation of the deviated constructions, but however contended that it is not a matter for issuing any directions as the Corporation would act according to its priorities, therefore stated that insofar as the implementation of the proceedings or to take consequential action pursuant to the cancellation of the regularisation orders, it is to be left to the discretion of the Corporation.

11. A separate counter has been filed by the 1st respondent-Government stating its version, but however it is not relevant to refer to the detailed contentions as the main issue in dispute is to be resolved basing on the contentions advanced by the writ petitioners and the Corporation.

12. From the above rival contentions, the issue to be considered is whether the cancellation of the regularisation orders dated 26-6-1998 are issued in violation of the principles of natural justice and whether any further orders are required to be issued to the Corporation for the demolition or removal of the deviated constructions and whether G.O. Ms. No.289 dated 25-5-1998 requires to be declared as having been issued without jurisdiction.

13. In order to appreciate the rival contentions, it would be proper to refer to the show-cause notice, the relevant portion of the explanation filed by the Petitioner as well as the impugned order. As the proceedings issued to both the first writ petitioners are identical, the show-cause notice, explanation and the impugned order in respect of one of the Petitioners is extracted here for convenience-

Show-cause notice:--

Officer of the Chief City Planner, Municipal Corporation of Hyderabad (Town Planning Section), Tank Bund, Hyderabad.

No.889/TP3/MCH/Govt/98/2085, dated 27-8-1998.

To

Sri K. Jawahar Reddy, Ho.No.3-4-1445/5/A. Barkathpura, Hyderabad.

Sir,

Sub: MCH - T.P. Section -Regularisation of construction of stilt +3 Upper Floors at Pr.No.3-4-142/5/A/1 to A/3 situated at Barkathpura, Hyderabad - Show-cause notice - Issued - Reg.

Whereas, it has been brought to my notice that you have obtained permission for regularisation of the construction in Pr.No.3-4-142/5/A-I to 3-4-142/5/A3, situated at Barkathpura, Hyderabad regularised vide permit No.172/17180, dated 26-6-1998 in file No.289/65/TP/R8/HQ/98 by material misrepresentation of facts and by playing fraud. You have submitted plans and undertakings to the

effect that the building site is less than 200 sq.m. in area, to take advantage of G.O. Ms. No.249, M.A., dated 25-5-1998, even though you have actually constructed apartment building consisting of Six Flats in the site of 250 sq. mtrs., area along with your wife.

You are therefore hereby directed to stop or stay the erection of the building or execution of the work or further construction of building from the date of serving of this notice.

You are hereby called upon to show-cause in writing either by yourself or by your authorised agent within (10) ten days after serving of this notice on you, why the permit No. 175/17180 dated 26-6-1998 issued to you for construction of building should not be cancelled.

Your attention is invited to Section 450 of H.M.C. Act, 1955 and take notice that if you fail to show cause within the stipulated time the permission referred to will be cancelled on the presumption that you have no cause to show or no explanation to offer.

Yours faithfully,

Sd/-

Chief City Planner, M.C.H.

Copy to:

The Asst. City Planner, Circle No.3, M.C.H.

Relevant Portions of the Explanations:

"Myself and my wife jointly submitted the building plan. First, we wanted to construct the ground floor and two floors and submitted the plan. However, later, we wanted to leave entire ground portion as stilt and construct three floors. All along, we were contemplating division of portions between myself and my wife. In fact, we divided the property of 150 sq. yards each on paper. However, for the sake of convenience, we undertook joint construction to save material, labour and expenses. We constructed stilt and three floors and applied to the competent authority for relaxation of Rules and Regulations of deviations.

.....

.....

While it is so, the Government announced the policy to regularise unauthorised construction and deviation from sanctioned plans by levying penalty. Since myself and my wife already divided the site into 150 sq. yards each, we approached the Commissioner with revised and individual plans for 150 sq. yards each. The Commissioner regularised our plans quoting G.O.Ms.No.249,MA, dated 25-5-1998. Under this G.O., the constructions made prior to 25-9-1997 were directed to be regularised on payment of penalties. This date was extended from

time to time by the Government and now the Government permitted the Commissioner to regularise constructions made up to 30-6-1998, the Commissioner had regularised several unauthorised constructions and still the process is going on.

Impugned Order:

Municipal Corporation of Hyderabad

O/o. Commissioner (Town Planning Section) Tank Bund Road, Hyderabad.

No.889/TP3/MCH/Govt/98/2611

dated 23-10-1998

To

Sri K. Jawahar Reddy, H.N0.3-4-144/5/A. Barkathpura, Hyderabad.

Sir,

Sub: MCH - T.P.S. - Regularisation of construction of stilt + 3 Upper Floors at Pr.No.3-4-142/5/A/I to A/3 situated at Barkathpura, Hyderabad - Cancellation of permission - Reg.

Ref: (1) This Office show-cause Notice No.889/TP3/MCH/Govt/98/ 2085, dated 27-8-1998

(2) Your reply dated 4-9-1998.

It is to inform that your reply to this office show-cause notice vide reference 1st cited is not convincing and satisfactory. You have obtained permission for construction of individual building (Non-Group Housing building) with Ground, First and Second floors in Pr.No.3-4-144/5/A, situated at Barkathpura, Hyderabad for 300.00 sq. yards extent of site vide permit No.63/82, dated 30-9-1998, jointly with your wife Smt. K. Vinayasree. During the course of construction you have deviated and completed the construction of apartments with entire stilt for parking +3 Upper floors by reducing the all-round open spaces and with other deviations from permitted plan.

2. Further you have approached the Government seeking relaxation of deviations made and the Government vide Memo No.7825/MI/98-I, MA, dated 9-4-1998 have called for remarks from MCH. Without waiting for relaxation orders, you have applied for regularisation under G.O. Ms. No.289 M.A. dated 25-5-1998 for half portion of the building misrepresenting the facts and splitting of the building into two parts on paper so as to get the benefit of regularisation of building under less than 200.00 sq. mtrs, extent. The regularisation orders issued are applicable for the building constructed before 30-9-1997 only.

3. In this case, the Original permission for construction of building was released

on 29-9-1997 i.e., one day before the cut-off date of 30-9-1997 for regularisation of unauthorised constructions and there is no possibility of construction of building before 30-9-1997. Therefore, it is evident that the building was constructed after 30-9-1997 and you have suppressed the fact and applied for regularisation of the building. Your claim that the extent of building site is less than 200.00 sq.mtrs. was based on an unregistered memorandum or oral partition and division which does bestow title and it was invented for the purpose of obtaining regularisation of building by fraud.

In view of the above the following points are proved:

(a) The construction was made in violation of the MCH sanctioned plan after the cut-off date for regularisation of the unauthorised constructions issued by Government i.e., 30-9-1997.

(b) The construction was deliberately made in violating the status quo orders issued by the Hon''ble High Court based on petition filed by neighbours and also violating the interim injunction orders by restoring to unauthorised constructions under the guise of Hon''ble Court orders.

(c) You have applied to the Government for relaxation of Z.Rs. for set backs etc., for 300.00 sq.yds. of site but without waiting for its outcome, you have applied for regularisation under G.O.Ms. No.289, M.A. dated 25-5-1998 by splitting up the property into two parts and showing each part as less than 200.00 sq. mtrs, fraudulently.

(d) There are complaints from the neighbours that their ventilation and privacy are severely affected due to the construction of the building without providing the required setbacks. The construction of apartments was made against public interest and without providing sufficient open spaces Tot-lot, and without minimum plot area required for such constructions.

In view of the above, the permission issued vide permit No.175/17180 dated 26-6-1998 in file N0.289/65/TP/R8/HO/98 is hereby cancelled.

Yours faithfully, Sd/- For Commissioner, MCH

Copy to the Assistant City Planner, Circle No.3.

M.C.H. for taking necessary action.

14. The contention of the owners of the building is that the allegation of the material misrepresentation and fraud played, referred to in the show-cause notice, are vague and without any details and therefore, the consequential order passed is in violation of the principles of natural justice, and the impugned orders, cancelling the regularisation orders, were passed on the grounds other than the grounds referred to in the show-cause notice. As already referred to the show-cause notice, it is clear from the same, that there is a reference that the owners represented that they owned less than 200 sq. mtrs. each to come within the purview of G.O. Ms. No.289 (wrongly referred as 249), dated 25-5-1998.

Though actually they have constructed a single building in a plot of land of 250 sq. mtrs, as apartments, consisting of six flats, in the explanation filed by the owners of the building, they have stated that there was an oral partition of the site of 300 sq. yards into 150 square yards each. But, according to them for convenience they have made a single application for construction of a single building. Further, they have stated that as per G.O. Ms. No.289, dated 25-5-1998, the date of construction was extended from time to time under various GOs., apart from the extension made under the said G.O., up to 30-6-1998. Therefore, there is no suppression of facts or fraud played by the owners of the site. In the order passed by the Commissioner, cancelling the regularisation orders, it was stated that the constructions were made in violation of the sanctioned plan after the cut-off date and got regularisation by suppression of facts. According to the Commissioner, the cut-off date for completion of unauthorised or deviated constructions is 30th September, 1997, which would come under the purview of the Government Orders for regularisation. Another ground is that though the construction was made in a site of 300 sq. yards with reference to which relaxation was also sought for from the Government, but contrary to that applications were made showing less than 200 sq. mtrs, each to get the benefit of G.O. Ms. No.289. The order also shows two other grounds that the constructions made by the owners were objected to by the neighbours affecting their privacy as well as other amenities. Another ground is that the constructions were made deliberately in violation of the status quo orders issued by this Court. Though the last two grounds were incorporated in the impugned order of cancellation of the Regularisation Orders, which were not referred to in the show-cause notice, with reference to the others, the Petitioner is conscious and even in the explanation submitted by him, a reference was made that the GOs., were issued extending the date from time to time for regularisation of the unauthorised or deviated constructions. But a perusal of the said G.O.Ms.No.289, dated 25-5-1998 shows that the Government has issued orders for regularisation of unauthorised constructions made before 30th September, 1997 in the plots/sites up to 200 sq. mtrs. The said order also shows that the time for such regularisation was given up to 30th April, 1998 and it was further extended up to 31st July, 1998. Under the said G.O., what was extended is only the period for regularisation and not with reference to the date of construction. The date of construction, as fixed is only 30th September, 1997. Therefore, the deviated or unauthorised constructions made after September 30, 1997 are not entitled for the benefit of regularisation under the said G.O. Therefore, there is no violation of the principles of natural justice by not referring to the above stated facts specifically in the show-cause notice, especially when the Petitioner is aware of those facts, and in fact, they were stated in the explanation submitted to the show-cause notice.

15. One of the arguments advanced by the learned Counsel for the owners of the building is that there was an oral partition, which was made earlier and the same was reduced into writing as a Memorandum of Partition on 23-8-1997 and the

said partition is valid. But, however, the said contention of the Petitioner is opposed by the learned Counsel for the contesting Respondents by referring to the provisions of the Stamp Act, as per which an instrument of partition referred to u/s 2(15) of the Indian Stamp Act, where a State Amendment was incorporated by Act 17 of 1986 by adding the word a memorandum recording past partition. Therefore, according to the learned Counsel for the Respondents, a Memorandum recording past partition is also to be treated as instrument of partition, liable for both the stamp duty as well as for registration, as the document in question referred to by the owners of the property requires stamp duty payable in terms of Article 45 of the First Schedule and further the said document also requires registration. In the absence of such compliance the alleged memorandum of past partition could not be recognised. Further, there was no such reference even when they have applied for obtaining sanction of the plan submitted to the Municipal Corporation originally as well as in the representation made to the Government for obtaining relaxation of the relevant rules. In the absence of such material to prove that there was a partition, the Commissioner was justified in holding that the owners of the building have misrepresented. Further it is not permissible in the site in question to construct six flats or apartments. In the light of the above undisputed factual aspects, there is no merit in the contention advanced by the learned Counsel for the owners of the building. Alternatively, even assuming that they were specifically asked as to the date of completion of the building as well as to the exact extent of site, there won't be any improvement as indisputably the extent of the site is 300 sq. yards and the construction of the building was only after 30th September, 1997, as the original plan itself was sanctioned only on 29th September, 1997. In light of that, there is no scope to take a different view than what was taken by the Commissioner. In fact, in the show-cause notice, the Commissioner also referred to Section 450, which gives power to the Commissioner to cancel the permission on the ground of misrepresentation of material facts or fraud played by the applicant. Therefore, there is no merit in the contention that there was violation of the principles of natural justice.

16. Coming to the claim of the Respondents, who are the neighbours and are seeking direction to the Corporation for demolition or removal of the deviated or unauthorised constructions, the learned Counsel relied upon various decisions, in support of his contention that unauthorised and deviated constructions are liable to be demolished. Though the term used under the provisions of the Municipal Corporation Act was "may", the said word "may" used in Sections 452 and 636 was considered by a learned Single Judge of this Court in the case of *S. Narsimha Reddy v. Corporation of Hyderabad* (supra). In that case, the Petitioner submitted an application for the construction of a building in the site owned by him. Though he sought for construction of both rooms and store room in addition to the main building as well as certain projection on the eastern side, they were not permitted as per the plan, but however, the Petitioner constructed all those structures unauthorisedly. The Corporation issued notice proposing to demolish

the unauthorised and deviated constructions. Questioning the said action, the Petitioner filed the writ petition contending that the term used under the provisions is "may", which gives discretion to the Commissioner and it is not necessary to demolish in each and every construction made in deviation of the approved plan. Rejecting the said contention, this Court held:

"Applying the above to the facts of this case, I hold that Section 636(2) as well as Section 452(2) of the Act, confer by the use of the word "may" instead of "shall", discretion on the Commissioner in ordering or not ordering demolition. Under these provisions the Commissioner of Municipal Corporation is not bound to order demolition of any and every unauthorised construction howsoever trivial the deviation may be or however in offensive it may be to the interests of the neighbourhood. A building may be unauthorisedly constructed by not intimating in advance to the Municipal authorities about the intention. Such a construction is clearly, authorised. But does it call for demolition? If permission had been asked for in those cases the municipality might have no power to refuse. Such unauthorised constructions merely involve a technical offence and may not call for orders of demolition. But there may be cases where the municipal authorities are totally without any power to sanction a layout of a building plan or grant permission to build a house even when applied for in time, because the granting of such sanction or permission is contrary to the building rules and the rules made on grounds of hygiene and sanitation. In matters of demolition of those buildings the Municipality under the Act has no discretion. Such an unauthorisedly constructed building must be demolished by the municipal authorities as a rule, because by granting ex post facto condonation to such infractions of law, the municipal authority would be doing something which it could not have done at all under the statute. These are the cases which involve the health and well-being not merely of the neighbours but also of the neighbourhood and it is for that reason the Municipality was denied all powers to sanction layouts of grant permission even when they were approached by the individuals in time. Such cases are those where the municipal authorities must demolish. Yet there may be cases where the unauthorised constructions are so trivial and minimal that the municipal authorities acting under the doctrine de minimis, may rightly refuse demolition. There may also be old cases of unauthorised constructions uncomplained of for over a very long time and may therefore, be taken to be causing no injury to the neighbourhood. There may be cases where these unauthorised constructions are located in the outskirts of the city, causing no injury. As there cannot be any substantial infraction of the rights of the neighbours in such cases, the extreme step of demolition may not be taken in those cases.

Building By-laws in a Municipality belong to that category of inflexible and inexorable laws of house-building the observance of which cannot be waived normally either in prospect or retrospect of by the municipal authorities. The prohibitions contained in those building bye-laws are prohibition against a builder and for the benefit of the neighbourhood. They cannot therefore, be lifted

by the Municipal Corporation. If Courts hold that even in such cases the municipal authorities cannot demolish, it would amount to authorising the municipal authorities to sanction departures of law which have injurious effects on the health and well-being of all those that are living in the neighbourhood. In other words, such a course of action would involve sanctioning inflicting of injury on third parties which could never have been contemplated by the statute.

.....

.....

.....But, we must note that there can be no property outside the legal and social framework. Any acquisition of property that a particular legal order does not sanction should receive neither legal recognition nor legal protection. It is this type of "property" which can truly be called "theft". Petitioner's unauthorised constructions in my opinion, belong to that category. No one in the name of "property" should be allowed to endanger the rights of others. Such "property" should not receive the same protection as legitimate property.....

In the case of K. Srinivasan v. Executive Officer, Cantonment Board, Sec "bad (supra) a Division Bench of this Court had an occasion to consider the issue as to the unauthorised and illegal constructions. This Court found that the builder had deviated the approved plan and constructed multi-storied building, contravening the Rules and Regulations and the Cantonment Authority deliberately failed to take any action in spite of being informed about the violations. Therefore, this Court while allowing the writ petition directed the Executive Officer, Cantonment Board, to take steps to notify the 2nd Respondent builder to demolish or remove such of the flats or portions or projections constructed unauthorisedly and contrary to the plan sanctioned by the Cantonment Board-1st Respondent, after informing the flat owners within a reasonable time.

In the case of Dr. C. Kulsum Reddy v. State of A.P. (supra) a Division Bench of this Court had an occasion to consider the Government Order issued in G.O. Ms. No.419, dated 30th July, 1998 under which the Corporation was given powers to regularise unauthorised constructions. The Division Bench held that the said Government Order is ultra vires of the provisions of the Hyderabad Municipal Corporations Act, 1955 and the Rules made thereunder and therefore, quashed the said G.O., as having been issued without the powers.

In the case of Pratibha Co-operative Housing Society Ltd v. State of Maharashtra (supra), the Apex Court had an occasion to consider the issue as to the demolition of unauthorised and deviated constructions. In the said case, the Housing Society made constructions in violation of floor space index to the extent of 24000 sq. ft. As the Corporation found the said deviations, it had issued notice for demolition of the unauthorised and deviated constructions. While upholding the order of the Corporation, proposing to demolish the deviated and unauthorised constructions, the Apex Court observed that:

"We are also of the view that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. The violation of F.S.I, in the present case was not a minor one but was to an extent of more than 24,000 sq. ft. Such unlawful construction was made by the Housing Society in clear and flagrant violation and disregard of F.S.I, and the order for demolition of eight floors had attained finality right up to this Court. The order for demolition of eight floors has been substantially carried out and we find no justification to interfere in the order passed by the High Court as well as in the order passed by the Municipal Commissioner dated 13th November, 1990."

The learned Counsel also relied upon a decision of the Apex Court in the case of Delhi Development Authority v. Skipper Construction Co. (P) Ltd. (supra) in support of his contention that the owners of the building have effected the constructions in violation of the orders, as they have effected the constructions after obtaining an order of status quo. In the said case it was held that the principle that a contemnor ought not be permitted to enjoy or keep the fruits of his contempt is well settled.

"In the case of Bimala Devi v. Allahabad Development Authority (supra), a Division Bench of the Allahabad High Court had an occasion to consider the violation of the building rules under the U.P. Urban Planning and Development Act. In that case the builder, who had constructed the building contravening the Rules, sought for compounding the said offence on the ground that opposite to their property, another property owner had his illegal constructions compounded. The Court while negating the contentions of the Petitioners observed that what the Petitioners contend is that the wrong must follow a wrong and two wrongs must be treated equally. The law gives no sanction to repeat the wrong. The petitioner seeks a prerogative writ to protect his wrong. This is not a ground for issue of a writ to perpetuate a wrong. This has been explained by the Supreme Court in the matter of Chandigarh Administration and another Vs. Jagjit Singh and another, , Nor can the Petitioners be under any legitimate expectation to receive encouragement in continuing a wrong or follow an illegality of another and claim equality on admitted illegalities".

In the case of Tajuddin v. District Collector, Kannur (supra), a Single Judge of the Kerala High Court had an occasion to consider a similar situation under the provisions of the Kerala Municipalities Act and Kerala Building Rules. In that case, the Petitioner was aggrieved by the order of exemption granted by the District Collector in exercise of the powers conferred on him, by the Government of Kerala. The Court, while setting aside the said exemption order, observed that - it is evident that the 1st Respondent has not stated any reason while issuing Ex.P-3 order. District Collector has not given due regard to right of privacy, right of light and air, right of easement of the neighbour and the right of the public in

general and the problems of traffic, flood and rain.

In the case of *Aditya Construction v. Secretary, HMA and UD Dept. (supra)*, a Division Bench of this Court had an occasion to consider the issue as to the construction of a multi-storied building, contravening and deviating the sanctioned plan and the building bye-laws. When the builder sought for a direction to the Government for granting exemption, this Court held that, "On scrutiny of the relevant Rules, we find that there is no power at present under any of the above statutory provisions for the Government to grant any such exemption. This was brought to the notice of the State Government as the files moved up. It is unfortunate that in spite of the persistent reminders with reference to the relevant statutory provisions that the Government had no power to grant exemption and that the cases which were before the Government did not deserve any such exemption, the Government thought it fit to exercise a non-existing power to grant exemption. Petitioner may be right in its submission that it could or should also have been granted similar exemption. Unless we are certain that the Government has got power to grant exemption by virtue of any of the statutory provisions, it is not possible for us to issue the direction, which the Petitioner seeks. It is not as if this Court shall countenance the illegality committed by the Government in granting exemptions and direct the Government that it shall proceed and continue to pass such illegal orders in other cases as well. The jurisdiction under Article 226 of the Constitution of India is equitable and discretionary. That jurisdiction cannot be exercised for the purpose of compounding any illegality or for directing that such illegality shall be committed in other like cases also, because it was once committed.

In the case of *P. Saina v. Konderi (supra)*, it was held that a clear violation of the Building Rules entitles the adjoining owners of the building to institute a suit even though such violation has not resulted in any invasion of the plaintiffs' right to light, air or privacy causing material injury to him. This is so because a citizen has a right to institute a suit with a view to ensure effective implementation of the Municipal Regulations, such as the Building Rules in the present case, even in the absence of a specific personal injury to the person suing.

In the case of *K.R, Shenoy v. Udipi Municipality (supra)*, the Apex Court had an occasion to consider as to the violation of the Municipal Rules. While setting aside the illegal action, the Apex Court observed:

"..... The Municipality acts for the public benefit in enforcing the Scheme. Whether the Municipality acts in excess of the powers conferred by the Act or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess. The right to build on his own land is a right incidental to the ownership of that land. Within the municipality the exercise of that right has been regulated in the interest of the community residing within the limits of the Municipal Committee. If under pretence of any authority, which the law does give to the Municipality it goes beyond the line of its authority, and infringes or violates the rights of

others, it becomes like all other individuals amenable to the jurisdiction of the Courts. If sanction is given to build by contravening a bye-law the jurisdiction of the Courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye-laws made by that authority is illegal and inoperative."

In the case of *M.I. Builders Pvt. Ltd. v. Radhey Sham Sahu* (supra), the Apex Court had an occasion to consider as to the permissions granted by the Lucknow Nagar Mahapalika for the construction of a shopping complex in a park to a private builder. The Apex Court, while upholding the orders of the High Court setting aside the permissions granted to a private builder for the construction of the shopping complex, observed:

"Number of cases coming to this Court pointing to unauthorised constructions taking place at many places in the country by builders in connivance with the Corporation/ Municipal Officials. In the series of cases, this Court has directed demolition of unauthorised constructions. This does not appear to have any salutary effect in cases of unauthorised construction of coming to this Court. While directing demolition of unauthorised construction, Court should also direct inquiry as to how the unauthorised construction came about and to bring the offenders to book. It is not enough to direct demolition of unauthorised construction, where there is clear defiance of law."

17. On the other hand, the learned Counsel for the Respondents relied upon the following decisions:-

In the case of *Kamalamma v. Subba Rao* 1973 (2) ALT 8, a Division Bench of this Court was hearing an appeal, arising out of a suit filed by a neighbour with reference to the constructions made violating the building regulations. This Court held that Chapter-XII of the Act, nowhere gives an indication that the adjacent owners of a building has an implied right of action against his neighbour, who has constructed a building in contravention of the provisions of the Act and the Rules made thereunder. It is for the adjacent owner, if he feels that there is any damage or injury to his amenities either in the matter of free flow of air and light or sanitation for the reason that the plans of the proposed building of the neighbour are not in accordance with the Municipal Laws to move the Court and obtain a Writ of mandamus against the Corporation to observe the municipal laws in the matter of sanctioning the building plans for construction.

In the case of *Smt. B. Geethanjali Vs. The Government of Andhra Pradesh and Others*, , a learned Single Judge of this Court held that when the Government exercising the powers under Regulation No. 12 of the Zoning Regulations grants - exemption or relaxation as to the compliance of the Rules, the aggrieved adjacent owner of a plot in constructing a building, cannot maintain a writ petition, he has to pursue her remedy in a Civil Court if his easementary right is being infringed by the construction on the adjacent site.

In the case of *Godavaribai Rathi v. Municipal Corporation of Hyderabad* 1979(1)

ALT 147, it was held that if the setbacks are observed at the level of the ground floor, there is no need to further observe such setbacks at the stage of first floor and above.

18. If we examine the facts of the present case in the light of the above referred decisions the contention of the owners of the building that no public right has been affected and at the most what is affected is only the private right of the neighbours and therefore, the present proceedings are not maintainable by the neighbouring owners, is devoid of merit. As already referred, it was held that even if the private rights are affected, the neighbouring owners of the disputed property can maintain writ petitions seeking mandamus against the municipal authorities to see that the disputed structure should be in conformity with the building bye-laws of the local authority. Similarly, even the contention of the learned Standing Counsel that no writ of mandamus could be issued, directing the Corporation to demolish structures that were built in contravention of the sanctioned plan as well as the Rules and the building bye-laws, is devoid of merit, in the light of the decisions of our own High Court referred to earlier, where a mandamus was issued against the Cantonment Board to take appropriate steps for the removal of the deviated and unauthorised constructions. From the facts of the present case, it is very clear that the Petitioners, who are the owners of the disputed building have constructed the building in violation of the sanctioned plan as well building bye-laws of the Corporation and in fact even when the Corporation tried to take action either to stall the unauthorised constructions or to demolish the same, they have filed a civil suit and obtained orders and continued the constructions. The material on record clearly shows that the owners of the building have deliberately continued and completed the constructions in violation of the sanctioned plan and the building bye-laws and therefore, there cannot be equities in favour of such individuals.

19. Under the above circumstances, the first two writ petitions, filed questioning the cancellation orders in Permit Nos. 172/17/ 80 and 172/17/89, dated 26-6-1998, are dismissed.

20. Coming to the other two writ petitions filed by the neighbours seeking quashing of the G.O. Ms. No.289, dated 25-5-1998, as already a Division Bench of this Court quashed G.O. Ms. No. 419, dated 30th July, 1998, which was on the similar lines as that of G.O, Ms. No.289, for the same reasons for which G.O. Ms. No.419 was quashed holding that the Government has no power to issue such orders for regularisation of unauthorised and deviated constructions, the Government Order in G.O.Ms. No.289, dated 25-5-1998 is also quashed. Further, the Petitioners in these two writ petitions sought for a direction to the Corporation to demolish the deviated constructions. Therefore, the Corporation is directed to issue notices to the owners of the building for removal of the deviated and unauthorised constructions, within a period of three months from the date of such notice and if the owners of the building fail to comply the said notice the

Corporation is directed to carry out the said action, at the cost of the owners of the building, within a further period of three months thereafter.

21. In the result, W.P. Nos.35228 of 1998 and 35235 of 1998 are dismissed; and W.P. No. 18593 of 1998 and 20579 of 1998 are allowed to the extent indicated.