

(2011) 12 MAD CK 0067

In the Madras High Court

Case No : Writ Petition No's. 10132 of 2003, 4674 of 2008 and M.P. No. 1 of 2008

Kences Foundations Pvt. Ltd.

APPELLANT

Vs

State of Tamil Nadu, Chennai Metropolitan Development Authority and The Branch Manager Vysya Bank Ltd.
M/s. Brindavan Apartment Owners Welfare Association Vs Chennai Metropolitan Development Authority and Kences Constructions Pvt. Ltd.

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Development Regulations for Chennai Metropolitan Area — Regulation 28, 28(14), 4(1)
Tamil Nadu Town and Country Planning Act, 1971 — Section 113, 47, 48(1), 49(1), 49(2)

Citation : (2012) 1 CTC 594 : (2012) 2 MLJ 180 : (2012) WritLR 1

Hon'ble Judges : Elipe Dharma Rao, J;D. Hariparanthaman, J

Bench : Division Bench

Advocate : V.T. Gopalan, for Mr. P.B. Ramanujam in W.P. No. 10132 of 2003, Mr. C.A. Diwakar in W.P. No. 4674 of 2008, in W.P. No. 4480 of 2010, in W.P. No. 4481 of 2010, for the Appellant; V.T. Gopalan Senior Counsel for Mr. P.B. Ramanujam for Respondent-3 in W.P. No. 4674 of 2008, for Respondent-4 in W.P. No. 4480 of 2010 and in W.P. No. 4481 of 2010, Mr. Malarvizhi Udayakumar Special Government Pleader for Respondent-1 in W.P. No. 10132 of 2003, in W.P. No. 4480 of 2010, in W.P. No. 4481 of 2010, Mr. I. Paranthaman for Respondent-2 in W.P. No. 10132 of 2003, for Respondent-1 in W.P. No. 4674 of 2008, for Respondent-2 in W.P. No. 4480 of 2010 and in W.P. No. 4481 of 2010, Mr. V. Bharathidasan for Respondent-2 in W.P. No. 4674 of 2008, for Respondent-3 in W.P. No. 4480 of 2010 and in W.P. No. 4481 of 2010, Ms. C. Sri Ranjani for Respondent-5 in W.P. No. 4480 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

D. Hariparanthaman, J.

W.P. Nos. 4674 of 2008, 4480 and 4481 of 2010

1. Brindavan Apartment Owners Welfare Association (shortly "the Association") is the petitioner in W.P. Nos. 4674 of 2008, 4480 and 4481 of 2010. The petitioner in W.P. No. 10132 of 2003 is Kences Constructions Pvt. Ltd., (shortly "the Builder").

2. The Builder submitted an application to the Chennai Metropolitan Development Authority (shortly "the CMDA") in the year 1996 seeking planning permission for construction of seven blocks of multi-storied buildings, out of which, six blocks are residential buildings and one block would be of a Hotel, at No. 135, Poonamallee High Road, Kilpauk, Chennai -600010, an arterial road in the Chennai Metropolitan City.

3. The CMDA granted planning permission for construction of six blocks consisting of ground and 9 floors for residential purposes and one block consisting of ground and 7 floors for Hotel purpose, in PP No. C/PP/MSB/25 A to K/96 (Planning Permit No. 19735) dated 20.06.1996 and communicated the same to the Builder vide their letter No. C3/29047/95 dated 20.06.1996. The planning permit dated 20.06.1996 was valid for three years, that is from 20.06.1996 to 19.06.1999.

4. Based on the aforesaid planning permit, the Builder constructed 202 apartments for residential purposes in six blocks.

5. Subsequently, based on the advertisement and the Planning Permission of the CMDA in PP No. C/PP/MSB/25 A to K/96 (Planning Permit No. 19735) dated 20.06.1996, several persons purchased the apartments. Out of 202 apartments owners, 201 are the Members of the Association, which is registered under the Tamil Nadu Societies Registration Act.

6. When the Builder completed the residential apartments and sold all the apartments, they did not construct Hotel building (in the 7th block) within the planning permit period i.e. before 19.06.1999.

7. In these circumstances, the Members of the Association, that is, the owners of the apartments, complained that the Builder failed to provide statutory requirements like providing of fire equipments, lightning conductors, bellow doors for the entrance leading to the lifts and proper earthing, which led to the filing of a suit in C.S. No. 930 of 2007 before this Court by them. However, we are not concerned with those issues in these writ petitions, since rest on different parameters and considerations.

8. While so, without any planning permit, the Builder proceeded with the construction work for building a Hospital in the vacant site earlier meant for the Hotel, during June 2007. The Builder sent a written communication to the Association on 18.04.2007 informing about the proposed construction of Multi Specialty Hospital. The Builder, in another letter dated 11.06.2007, informed the Association that as land owners, they entered into lease agreement with Apollo Hospitals for construction of a Multi Specialty Hospital.

9. The Association sent a letter dated 09.08.2007 to the CMDA informing them that the Members of the Association purchased the apartments believing that the Builder was planning to construct a Hotel on the plot, which he had reserved for the said purpose, but the Builder informed them that they were constructing a Multi Specialty Hospital on the vacant site. The Association pointed out that the excavation and pile work was going on at a brisk pace both during day and night. Since the construction was taking place without any planning permission, the Association requested the CMDA authorities to take action against the Builder forthwith to stop the construction work. The Association sent yet another letter dated 25.09.2007 to the CMDA authorities reminding about their earlier letter dated 09.08.2007 and requesting them to take steps to stop the illegal construction work being carried out by the Builder. But, the construction work was carried on by the Builder.

10. In these circumstances, the Association was forced to approach this Court by filing the writ petition in W.P. No. 4674 of 2008 seeking a writ of mandamus directing the CMDA authorities and the Chennai Corporation to demolish the illegal and unauthorized construction being put up by the Builder at No. 135/142, Poonamallee High Road, Kilpauk, Chennai-600010. The Association also sought for an order of injunction restraining the Builder from constructing the Hospital at the aforesaid site by filing M.P. No. 1 of 2008 in W.P. No. 4674 of 2008.

11. In the said writ petition, the Learned Counsel for the CMDA informed that in spite of the order rejecting the application of the Builder seeking planning permission, the Builder started construction work and therefore, the CMDA issued stop work notice on 18.01.2008. The Learned Counsel for CMDA also brought to the notice of this Court that temporary injunction against the Builder from proceeding with the construction work was granted by this Court on 03.12.2007 in W.P. No. 29133 of 2007 preferred by one of the apartment owners. The Learned Counsel for CMDA brought to the notice of this Court that there was also already an order of injunction issued against the Builder in W.P. No. 13066 of 2004 preferred by another apartment owner, not to proceed with the construction work. The Learned Counsel for CMDA further submitted that in violation of the orders of this Court as well as the stop work notice issued by the CMDA, the Builder was proceeding with the construction work. In these circumstances, the First Bench of this Court, on 27.02.2008, issued a contempt notice to the Builder in W.P. Nos. 4674 of 2008 and 29133 of 2007. In the said notice, the Managing Director of the Builder company was directed to appear in person. The said notice was issued after hearing the Learned Counsel for the CMDA.

12. The Managing Director of the Builder company appeared before this Court in person on 08.04.2008, pursuant to the order dated 27.02.2008 of this Court passed in W.P. Nos. 4674 of 2008 and 29133 of 2007 and filed an affidavit tendering unconditional apology and also informed that after knowledge of the order, he stopped the construction. On the same day, i.e., on 08.04.2008, the

CMDA was directed to file an affidavit as to whether the application for approval of the building plan submitted by the Builder has been approved or rejected or is pending consideration and to produce the order showing the grounds for rejection if any order of rejection was already made.

13. The CMDA filed a counter affidavit in W.P. No. 4674 of 2008 stating that the Builder constructed only six residential blocks based on the planning permit. But the seventh block with regard to the construction of a Hotel building was not proceeded with and the site was kept vacant. While so, the Builder submitted an application in the year 2007 for construction of basement, ground floor, service floor and 2 to 6 floors for Hospital purposes in the vacant site, wherein approval was granted during 1996 for construction of Hotel building. The application of the Builder was returned by CMDA on 02.11.2007 for various reasons. One of the reasons for returning the application was that the Hospital activity was not permissible in the mixed residential zone. Hence, the Builder submitted an application in the month of November 2007 for reclassification of zone. Based on the said application, the CMDA issued a public notice on 21.02.2008 calling for objections of general public giving 21 days time.

14. While so, on 10.04.2008 the Division Bench of this Court directed that the Builder shall not proceed with the further construction until further orders and it was also made clear that the pendency of the writ petitions shall not stand in the way of the competent authority to pass appropriate orders in accordance with law on the application if any preferred by the Builder for change of zone.

15. In these circumstances, the Builder approached the CMDA with an application dated 18.03.2009 for renewal of planning permission obtained in the order dated 20.06.1996 of the CMDA, as the planning permit expired on 19.06.1999. However, the CMDA rejected the said application as they could not renew the planning permit if the application was received after the expiry of the planning permit period as per Section 50 of the Tamil Nadu Town and Country Planning Act, 1971 (shortly "the Act").

16. Thereafter, the Builder approached the Government vide letter dated 28.04.2009 to pardon/condone the delay in submitting the papers for renewal of planning permission and sought for approval by revalidating the earlier planning permission. Accordingly, as a special case, the Government issued an order in G.O.Ms. No. 83, Housing and Urban Development Department, dated 02.06.2009 invoking its power u/s 113 of the Act by granting exemption to the provision of Section 50 of the Act. In the said G.O. the Government condoned the delay in making the application for renewal of planning permit. The said G.O. was challenged by the Association in W.P. No. 4480 of 2010.

17. The CMDA passed the consequential order dated 29.06.2009, as the impediment for considering the renewal application u/s 50 of the Act was removed by the impugned G.O.Ms. No. 83 referred to above granting revalidation of planning permit up to 16.06.2012.

18. The Association challenged the order dated 29.06.2009 of the CMDA renewing the planning permit up to 16.06.2012 in W.P. No. 4481 of 2010.

19. The Government is the first respondent, CMDA is the second respondent, Chennai Corporation is the third respondent and the Builder is the fourth respondent in W.P. Nos. 4480 and 4481 of 2010.

20. While admitting the writ petitions on 05.03.2010 in W.P. Nos. 4480 and 4481 of 2010, this Court granted interim injunction in M.P. No. 1 of 2010 in W.P. No. 4480 of 2010 restraining the Government and CMDA from permitting the change in usage of the building from a hotel to a hospital, pending disposal of the said writ petition and granted interim stay in M.P. No. 1 of 2010 in W.P. No. 4481 of 2010 staying the operation of the order dated 29.06.2009 of the CMDA revalidating the plan pending disposal of the said writ petition. Both the interim orders were made absolute on 14.07.2010.

21. The Government filed a common counter affidavit in W.P. Nos. 4480 and 4481 of 2010. It is stated therein that the powers vested with the Government u/s 113 of the Act was invoked, as a special case, and Section 50 of the Act was exempted, thereby the delay in making the application for renewal of planning permit was condoned.

22. The CMDA filed a common counter affidavit in W.P. Nos. 4480 and 4481 of 2010 stating that the application of the Builder seeking renewal of planning permit was rejected, since the same was made after the expiry of the planning permit period, in view of Section 50 of the Act. Later, the Government issued the order in G.O.Ms. No. 83 condoning the delay in making the application for renewal of planning permit as a special case, by granting exemption to the provision of Section 50 of the Act, u/s 113 of the Act. Accordingly, the planning permit was renewed up to 16.06.2012 by the CMDA by order dated 29.06.2009. It is stated that the change of usage of one block from Hotel to Hospital was returned on 10.05.2010 itself.

23. The Builder filed a counter affidavit in W.P. No. 4674 of 2008 and also a common counter affidavit in W.P. Nos. 4480 and 4481 of 2010. The crux of the averments made in the counter affidavits referred to above, filed by the Builder, are as follows:

(a) It is true that originally what was proposed was a hotel project, but however, subsequently, the Builder decided to construct a Specialty Hospital. At the relevant point of time, since a Hospital was not permitted in a mixed residential zone, the Builder was advised to apply for reclassification of the land and accordingly, the Builder made an application and the same was under due process. Further, the Association was fully aware of the fact that the Builder proposed to construct a Hospital.

(b) The reclassification application of the Builder was returned and the Builder was informed that after the second master plan came into force, reclassification

was not required, since construction of Hospital is permitted even in a mixed residential zone. A communication to the said effect returning the papers for reclassification from CMDA was received on 14.11.2008.

(c) It is stated that the Builder applied for renewal of the original plan, which got lapsed. Ultimately, the Housing and Urban Development Department, Government of Tamil Nadu accepted the request of the Builder and renewed the original planning permit and the same was published in the Government Gazette on 17.06.2009. The CMDA, on 29.06.2009 informed the Builder that the original plan was renewed upto 16.06.2012.

(d) It is stated that drawings were enclosed along with the application for approval of revised plan submitted to CMDA and the Builder was directed to deposit a sum of Rs. 65,000/- to process the revised building plan. Accordingly, the said amount was deposited with the CMDA and the CMDA acknowledged the receipt of the same on 15.09.2009.

(e) Since there was a change in the proposal and the Hotel project was replaced by a Specialty Hospital, the Builder wrote to the CMDA on 21.10.2009 informing them that the change of use from Hotel to Hospital would not affect the setback measurements and only internal changes in the plan to suit the Hospital would be effected.

(f) It is also averred that at the time of renewal of original plan, the Builder incurred heavy expenditure in the form of fees for processing, permit etc. It is stated that there has been no illegal construction whatsoever and only for technical reasons, the original plan lapsed, for which, thereafter the Builder had taken due steps to renew the same and subsequently it was also renewed and the CMDA stated that reclassification was not required for constructing a Hospital after the issuance of second master plan.

(g) It is stated that the building plan submitted on 21.10.2009 for construction of a Hospital is to be formally approved to enable the Builder to commence construction of the Specialty Hospital. Further, the Builder is entitled to put up construction as per the original plan which has now been renewed up to 2012, though it is one for Hotel, as there are no changes affecting the surroundings of the proposed building, like setback spaces and there would be only internal structural changes to suit the Hospital to be constructed.

(h) Further, the foundation work for the Hospital project was under construction and basement floor was about to complete when the Association filed the writ petition in W.P. No. 4674 of 2008 and obtained interim injunction. The work was stopped and no further construction work was undertaken thereafter.

(i) It is averred that the relief claimed in the writ petitions in W.P. Nos. 4480 and 4481 of 2010 are of purely civil in nature, which need to be adjudicated only in civil suits and already, the Association filed a suit in C.S. No. 930 of 2007 before this Court for certain relief and the writ petition, under such circumstances, is not

an appropriate remedy. Further, if the Builder is driven today to apply afresh for the commercial block alone, irreparable hardship and prejudice would be caused to the Builder and the residents also would be made to suffer because of change in FSI set backs and other parameters. Thus, it is stated that the writ petitions are absolutely frivolous besides not being bona fide and deserve to be dismissed.

24. We have heard the submissions made on either side.

25. The Learned Counsel for the Association vehemently contended that the Builder deliberately proceeded with the construction, without any planning permit and the planning permit for construction of Hotel expired in 1999 itself. Besides, the construction put up by the Builder was for a Hospital, for which, they did not have any planning permit, at any point of time. In spite of bringing to the notice, about the unauthorized construction being carried on by the Builder as early as on 09.08.2007, the CMDA gave stop work notice only after five months in January 2008. Even after the issuance of the stop work notice, the Builder proceeded with their construction without any regard to the rule of law. In fact, the injunction order of this Court also did not deter him from committing illegality. The Builder stopped his illegal construction activities, only after they were pulled up by way of contempt proceedings.

(a) The Learned Counsel for the Association heavily relied on the order dated 27.02.2008 passed by this Court initiating contempt proceedings for proceeding with unauthorized construction despite an order of injunction. The Builder admitted that they sent proposals in November 2007 for reclassification of the site from mixed residential zone to commercial zone for the purpose of construction of a Hospital. Even before submitting such proposal, the Builder proceeded with their construction. Mere reclassification itself would not suffice for proceeding with construction, as the Builder did not have valid planning permit for construction of Hospital.

(b) The Builder filed an application for renewal of planning permit only on 18.03.2009. Even if the renewal of planning permit could be validly issued by the CMDA, they could, at the most, build a Hotel and not a Hospital. But the construction which they had put up is a Hospital and therefore, in any event, the same should be demolished and the violator should not be shown any mercy. Further, it is not a case wherein the Builder made certain deviations while constructing a building pursuant to a planning permit, but it is a case of construction of a building without any planning permit leaving to winds the law of the land in this regard.

(c) The Learned Counsel for the Association relied on the following judgments, wherein the Honorable Supreme Court and this Court have come down heavily on violators of building laws and ordered for demolition of the unauthorized constructions.

(i) Judgment of the Honorable Supreme Court in Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others,

(ii) Division Bench judgment of this Court in Palani Hills Conservation Council vs. The State of Tamil Nadu and Others 1995 (2) WRIT L.R. 737

(iii) Judgment of the Honorable Supreme Court in Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others,

(iv) First Bench judgment of this Court in The Chairman, Madras Metropolitan Development Authority Vs. S. Radhakrishnan and Others,

(d) The Learned Counsel for the Association submitted that the G.O.Ms. No. 83 does not contain any reason for granting exemption of Section 50 of the Act, except stating that "it is treated as a special case". No reason was given as to why the matter was treated as a "special one". Even the counter affidavit filed by the Government does not give any reason as to why they granted exemption to Section 50 to the builder, by invoking its power u/s 113 of the Act. Though the Government has power u/s 113 of the Act to grant exemption, it should be for some valid reasons and the same should not be to aid a violator. The facts of the case make it clear that the Builder is a gross violator and therefore, the Government ought not to have invoked its power u/s 113 of the Act. Even in the application dated 28.04.2009 made to the Government, the only reason given by the Builder is that they did not apply for renewal due to market conditions and scarcity of funds, for which, no supporting materials were placed. Neither the market conditions nor the alleged scarcity of funds could be a valid reason for not making an application for renewal of the planning permit u/s 50 of the Act. For making an application for renewal of the planning permit, the plea of scarcity of funds has no relevance. The Government mechanically passed the order in G.O.Ms. No. 83, without applying its mind, particularly by not taking note of the fact that the Builder is a gross violator.

(e) The Learned Counsel for the Association heavily relied on the judgment of the Honorable Supreme Court in The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, wherein, the Honorable Supreme Court has held that the Government should give reason while passing orders, granting exemption u/s 113 of the Act.

(f) It was submitted that while Section 113 of the Act and the judgment of the Honorable Supreme Court in The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, require the Government to put such condition as they deem fit, while granting exemption u/s 113 of the Act, no condition was put on the Builder in the impugned G.O.Ms. No. 83 granting exemption to Section 50 of the Act.

(g) If the impugned G.O.Ms. No. 83 is set aside for the aforesaid reasons, the consequential order dated 29.06.2009 passed by the CMDA would automatically be set aside. Thus, the Learned Counsel for the Association prays for allowing of all the writ petitions.

26. On the other hand, the learned Special Government Pleader has sought to

sustain the impugned order, based on the counter affidavit filed before this Court.

27. The Learned Counsel for the CMDA submitted that the CMDA passed the consequential order dated 29.06.2009 based on the exemption granted by the Government in G.O.Ms. No. 83. Therefore, the CMDA could not be faulted, as they have to follow the Government Orders.

28. The learned senior counsel for the Builder submitted that ultimately the Government accepted the request of the Builder and invoked its power u/s 113 of the Act and granted exemption to Section 50 of the Act and the delay in making application for renewal of planning permit was condoned. Hence the alleged violation against the Builder is only technical in nature. The Builder has already incurred heavy expenditure for renewal of original plan and further, deposited the process fee on 15.09.2009, for revised plan for construction of Hospital. The change of usage from Hotel to Hospital would not affect the set back measurements and only internal changes in the plan to suit the Hospital would be effected. The Builder stopped the construction immediately, based on the injunction order granted by this Court and no further construction was made thereafter. It was further submitted that as per the second master plan published by the CMDA, there is no prohibition for construction of Hospital even in the mixed residential zone. If the site is abutting and gaining access from the road on 18 mt width, then it would be deemed as commercial zone. The same was intimated to the Builder by the CMDA in their letter dated 14.11.2008 and the same was brought to the notice of this Court.

The learned senior counsel for the Builder submitted, based on the counter affidavit that the writ petitions under Article 226 of the Constitution of India are not maintainable, as similar reliefs were claimed in C.S. No. 930 of 2007 and the issues involved therein are of Civil in nature, for which, the remedy is not available under Article 226 of the Constitution of India.

29. Considering the submissions made on either side and on a thorough perusal of the entire materials placed on record, the following points would arise for consideration in these matters.

(1) Whether the writ petitions in W.P. Nos. 4480 and 4481 of 2010 are maintainable under Article 226 of the Constitution of India?

(2) Whether G.O.Ms. No. 83, Housing and Urban Development Department, dated 02.06.2009 and the consequential order dated 29.06.2009 of the CMDA renewing the planning permit are valid ?

(3) Whether the prayer of the Association for demolition of the construction put up by the Builder has to be granted ?

POINT NO. 1:

30. The pendency of the suit in C.S. No. 930/2007 was cited as a bar for invoking Article 226 of the Constitution of India questioning the G.O.Ms. No. 83

and the order of the CMDA passed thereon. The suit filed by the Association in C.S. No. 930 of 2007 is for seeking certain directions in the form of injunction against the Builder based on the purchase of apartments made by the Members of the Association. It has nothing to do with the writ petitions that are under our consideration. Further, in W.P. No. 4480 of 2010, the Association sought to question the exercise of power by the Government u/s 113 of the Act and the consequential order dated 29.06.2009 passed by the CMDA was questioned in W.P. No. 4481 of 2010. The grant of exemption by the Government with regard to the construction of multi storied building was questioned often and this Court has entertained many writ petitions. In fact, the orders of the Government granting exemption were the subject matter of consideration in the judgments cited by the Learned Counsel for the Association. Hence, we are of the view that the submissions made by the learned senior counsel for the Builder has no substance on the maintainability of the writ petitions and hence, we hold that the writ petitions in W.P. Nos. 4480 and 4481 of 2010 are maintainable. Point No. 1 is answered accordingly.

POINT NOS. 2 & 3:

31. The Tamil Nadu Town and Country Planning Act, 1971 was enacted to regulate the development of buildings, so as to secure to the inhabitants sanitary conditions, amenity and convenience. The scheme of the Tamil Nadu Town and Country Planning Act, 1971 is to have a planned development. Chapter VI of the Act deals with Control of Development and Use of Land and Sections 47 to 58 are in Chapter VI of the Act. Section 47 of the Act mandates that "no person shall carry out any development otherwise than in conformity with development plan". Section 48 of the Act restricts that "no person shall erect any building or make any excavation or other operations in the land without written permission of the appropriate planning authority and in accordance with the conditions specified therein". Section 49(1) of the Act prescribes that "any person, who intends to carry out any development on any land or building shall make an application, in the form prescribed, to the appropriate planning authority". Section 49(2) of the Act mandates that "the planning authority shall have regard to the purpose for which the planning permission is required, the suitability of the place for such purpose and for future development and maintenance of the planning area, while deciding as to whether to grant or refuse permission". Section 50 of the Act provides that "the permission for development granted u/s 49 of the Act shall remain in force for three years from the date of such permission". The proviso to Section 50 of the Act makes it clear that the planning authority may extend the period not exceeding three years, if application is made before the expiry of the planning period. Section 54 of the Act provides for revocation and modification of planning permission to development. Section 56 of the Act empowers the planning authority to issue notice to the person, who constructed building, without permission or in contravention of the permission or after the permission was revoked, requiring to remove the unauthorized constructions. Section 57 of the Act gives power to the planning authority to stop unauthorized development/

construction.

32. Chapter XI of the Act is also relevant for this case, which deals with penalties. This Chapter empowers the planning authority to restore the property to its original state where it is dealt with in contravention of Sections 47 and 48 of the Act. Section 85 occurring therein is relevant for the purpose of this case and the same is extracted hereunder:

85. Restoration of property to original state where it is dealt with in contravention of section 47 or 48. -(1) Where any person

(a) subject to the proviso to section 47, uses or causes to be used any land or carry out any development in that area otherwise than in conformity with such development plan;

(b) has erected any building or made or extended any excavation or carried out any mining or other operations or made any material change in the use of land or constructed, formed or laid out any work in contravention of section 48 or of any condition specified in any permission referred to in that section;

(c) the appropriate planning authority may, by order, require such person to restore the land or building to its original condition, or to bring the land or building in conformity with any condition specified in such permission within such period as may be specified in the order.

(2) If such person fails to comply with such order within the period specified in the order

(a) the appropriate planning authority may itself take such measures as appears to it to be necessary to give effect to the order and recover the cost thereof from such person as an arrear of land revenue; and

(b) such person shall, without prejudice to the provisions of clause (a), be punishable

(i) with fine which shall not be less than twenty-five rupees and not more than five hundred rupees; and

(ii) in the case of continuing failure, with fine which shall not be less than five rupees and not more than one hundred rupees for every day during which such failure continues.

That is, Section 85 of the Act empowers the planning authority to issue direction to the person to restore land or building to its original condition. If the said person fails to comply with the order within the period specified in the order, the planning authority may itself take appropriate measures as it appears to be necessary to give effect to the order and recover the cost thereon from the person concerned as an arrears of land revenue.

33. Thus, the Scheme of the Act makes it very clear that if any person puts up construction without planning permit, the CMDA has to restore the property to its

original position by invoking its power u/s 85 of the Act. That is, the CMDA has power to demolish the unauthorized construction put up by any person without planning permit, at the cost of the violator.

34. In the light of the aforesaid provisions of law, we like to examine these cases.

35. The Builder obtained planning permit dated 20.06.1996 from CMDA for construction of 6 blocks of residential buildings and one block of Hotel. The planning permit is valid for three years and the same expired on 19.06.1999. The Builder constructed only 202 apartments in 6 blocks and did not construct the Hotel building.

36. As per para 4 of the counter affidavit filed by the CMDA in W.P. No. 4674 of 2008, the Builder submitted an application in the year 2007 for construction of basement, ground floor and service floor and 2 to 6 floors for hospital purposes in the vacant site that was meant for construction of Hotel building as per the expired planning permit. As per para 5 of the counter affidavit filed by the CMDA in W.P. No. 4674 of 2008, the aforesaid application was returned on 02.11.2007. The reasons for returning the application as stated in para 5 of the counter affidavit are as follows:

5. This respondent respectfully submits that the aforesaid application was returned on 02.11.2007 for various reasons. They are:

(i) The sub division becomes unauthorized one, since the site under reference forms part of an earlier approved site for residential and commercial purpose. The Multistoried Buildings in the residuary plot do not get access from 18 meter wide road due to this unauthorized sub division.

(ii) There is an objection regarding ownership and interim injunction for the proposed construction in the site under reference.

(iii) Patta attested by Revenue Officials is not furnished.

(iv) The site under reference is zoned for Mixed Residential use zone wherein the proposed hospital activity is not permissible.

(v) The proposal violates Floor Space IndEx.

(vi) Traffic Police returned the proposal calling for revised plan with additional details.

(vii) The Director of Fire and Rescue Services did not recommend No Objection Certificate for the proposal in their Letter Rc. No. 15744/E1/2007 dated 24.9.2007.

37. In these circumstances, the Builder submitted an application in the month of November 2007 for reclassification of zone as commercial zone, as per para 6 of the counter affidavit filed by the CMDA in W.P. No. 4674 of 2008.

38. The aforesaid facts make it clear that the Builder decided to construct a

Hospital and not a Hotel. But the Builder, neither had planning permit for construction of a Hotel nor for construction of a Hospital, in 2007. However, in 2007, he proceeded with the construction at the vacant site, without planning permit.

39. In the letter dated 11.06.2007, the Builder admitted that the construction work was being taken up for building a Hospital and that necessary approvals were obtained from the Government authorities like CMDA, Chennai Corporation, Health Department etc. The relevant passage from the said letter dated 11.06.2007 of the Builder is extracted hereunder:

The main issue raised by you is with regard to the construction work being taken up by us for building a Hospital. We as builders and M/S Apollo Hospitals are very well aware that we need to certainly adhere to all the rules, norms and terms laid down by the respective Government authorities concerned. All necessary approvals are being obtained from the Government authorities like CMDA, Corporation and Health department etc., who will take care of general public's interest. There need not be any unnecessary apprehensions and fears in the minds of Kences Brindavan residents, as if the points raised by you are not taken care of. While we are bound to act as per law, our plans are made in such a way to adhere all norms including provision for required car parking etc. there is absolutely no need for you to get alarmed and get into unnecessary worries.

But the aforesaid contents of the letter of the Builder are totally false, since they did not have any approval for construction of Hospital.

40. In the said circumstances, the Association approached the CMDA to ascertain as to whether any planning permission was obtained by the Builder and the Association sent a letter dated 22.06.2007 to CMDA in this regard. The CMDA, in their letter dated 27.06.2007, replied as follows:

With reference to the above, it is informed that no planning permission is issued for hospital building in the site referred to by you.

41. As the Builder proceeded with the unauthorized construction, the Association wrote a letter dated 09.08.2007 to CMDA requesting them to take action forthwith to stop the construction work. The said letter dated 09.08.2007 of the Association is extracted hereunder:

We represent the residents of Kences Brindavan Apartments located at No. 135/142, New No. 175, Poonamallee High Road, Kilpauk, Chennai - 600010.

Each of our resident have purchased the said apartments from the Builder M/s. Kences Constructions Pvt. Ltd., (Formerly known as Kences Foundation) which has its Registered Office at Kences Towers, 1, Ramakrishna Street, North Usman Road, T. Nagar, Chennai - 600017. At the time of purchase of the Apartments, our residents were made to believe that the builder was planning to construct a Hotel on the plot which he had reserved for the said purpose. The plan was sanctioned by CMDA for both the residential complex and hotel project (vide Plan

No. C/PP/MSD/25A/K/96 dt.19.7.96). However, the hotel project was never implemented. We have now been informed by the builder that instead of the hotel project, they are constructing a specialty hospital on the said plot and construction work has commenced. A copy of the letter received from the builder in this regard is enclosed. The excavation and pile work is going on at a brisk pace both during day and night. One of the residents has been informed under the RTI Act by your office that no planning permission has been issued for construction of a hospital building at the said site. A copy of the said letter is also enclosed herewith for your ready reference.

We therefore request you to take action forthwith to stop the construction work.

42. The Association sent a reminder letter dated 25.09.2007 to the CMDA seeking them to take action to stop the construction work of the Builder.

43. Left with no option, the Association filed the writ petition in W.P. No. 4674 of 2008 seeking for direction to demolish the unauthorized construction put up by the Builder.

44. In the meantime, individual apartment owners filed writ petitions in W.P. Nos. 13066 of 2004 and 29133 of 2007 before this Court claiming identical relief, before the Association approached this Court and those apartment owners obtained interim orders against the Builder from proceeding with the unauthorized construction.

45. When the writ petition in W.P. No. 4674 of 2008 came up before the First Bench of this Court on 27.02.2008, this Court passed the following order, after hearing the Learned Counsel for CMDA and initiated suo motu contempt proceeding against the builder.

Learned Counsel appearing for C.M.D.A stated that the application for planning permission made by the third respondent in W.P. No. 4674 of 2008 Kences Constructions Pvt. Ltd., who is the fourth respondent in W.P. No. 29133 of 2007, was rejected by the C.M.D.A vide its order dated 01.11.2007. He stated that in spite of rejection order, Kences Constructions Pvt. Ltd. has started construction and therefore, stop work notice has been issued on 18.01.2008. He brought to our notice that temporary injunction has been issued against the promoters of Kences Constructions Pvt. Ltd., from proceeding with the construction work, on 03.12.2007 in W.P. No. 29133 of 2007. He also brought to our notice an earlier order of injunction issued against the promoters in W.P. No. 13066 of 2004 not to proceed with the construction work. He submitted that in violation of the orders passed by the Court as well as stop work notice issued by the Corporation, the 4th respondent is proceeding with the constructions in a defiant manner. Photographs are produced on record to show that the construction activity is in progress even now.

2. Prima facie we are satisfied that the third respondent in W.P. No. 4674 of 2008 is guilty of committing contempt of Court. Issue notice to Mr. K. Narasa Reddy,

Managing Director of the third respondent company, to show cause as to why he should not be proceeded against under the Contempt of Courts Act, made returnable by 28.03.2008. He is directed to appear before this Court in person on the returnable date.

3. Learned Counsel appearing for the third respondent in W.P. No. 4674 of 2008 upon taking instructions from the Manager of the third respondent/ Company, Mr. Devaraj states that the construction activity has been stopped about 15 days back and also undertakes not to proceed with the further construction.

4. Post on 28.03.2008 along with W.P. No. 13066 of 2004.

46. From the aforesaid narration of facts, it is made clear that though the Association informed the CMDA as early as on 09.08.2007, the CMDA issued stop work notice only on 18.01.2008 i.e., after five months. Even after the issuance of stop work notice, the Builder proceeded with the construction as per the statement made by the Learned Counsel for CMDA before this Court, as noted in the order dated 27.02.2008, referred to above. The First Bench of this Court has taken suo-motu contempt proceedings in the aforesaid order dated 27.02.2008 and directed the Managing Director of the Builder company to appear before this Court on 28.03.2008. Accordingly, the Managing Director of the Builder company appeared in person and filed an affidavit tendering unconditional apology. It is stated in para 6 of the affidavit tendering unconditional apology that the Builder stopped further construction on 27.02.2008, as soon as this Court issued the contempt notice on 27.02.2008 to stop further construction. Thus, the Builder proceeded with the unauthorized construction sufficiently for a long time from June 2007 to 27.02.2008.

47. Per contra, the Builder has filed a counter affidavit in W.P. No. 4674 of 2008 wherein it has been stated in para 7 that there has been no illegal construction whatsoever and only for technical reasons, the original plan lapsed, for which, thereafter, they had taken due steps to renew the same. In this regard, the relevant passage in para 7 of the counter affidavit is extracted hereunder:

7... There has been no illegal construction whatsoever and only for technical reasons, the original plan lapsed, for which, thereafter we had taken due steps to renew the same....

The relevant passage in para 9 of the counter affidavit filed by the Builder in W.P. No. 4674 of 2008 is also extracted hereunder:

9... The allegation that there is no sanction plan is false, in view of the aforementioned averments set out in detail hereinabove. The other allegation that we are constructing the hospital with total disregard to the objections of the residents and without sanction required under law are also denied, being false....

48. In our view, the aforesaid averments of the Builder are totally false, as the Builder admitted in the letter dated 11.06.2007 and the same was extracted above.

49. While tendering unconditional apology by way of filing an affidavit, when contempt proceedings were initiated against the Builder, the Builder, in para 5 of the said affidavit, has stated as follows:

5. I further state that we have a sanctioned plan for construction of a hotel and since we are now proposing a hospital in the site for the world renowned group of Apollo Hospitals, we have applied for necessary change of plan from the CMDA. As the hospital construction, as on date, requires the land to be a commercial area, the CMDA returned our request for plan for hospital and we have thereafter applied for reclassification of the land use from mixed residential to commercial and the same is pending with the authorities. In any event the plan is identical in so far as the basement construction is concerned for both the hotel and hospital and it cannot be said that the construction we put up is unlawful as the plan for hotel has been already sanctioned to us by the CMDA though now technically, that too on a wrong interpretation of provisions of the Town and Country Planning Act, it is being alleged that the planning permit granted to us for a hotel has also lapsed.

50. The aforesaid averments of the Builder are not acceptable to us. We are not able to understand as to how the Builder could state that there is no illegal construction. Likewise, the statement of the Builder that the allegation of the Association that there was no sanctioned plan for proceeding with the construction was false, is also not acceptable to us, since there is no truth attached to it.

51. The Builder applied for renewal of planning permit that expired in 1999, only on 18.03.2009. The CMDA refused to renew the planning permit on the ground that as per Section 50 of the Act, the application for renewal should have been made before the expiry of the planning permit period. That is, even before the Builder applied for renewal of planning permit, they proceeded with the construction in June 2007 itself. The unauthorized construction made from June 2007 was for a Hospital, for which, no planning permit was issued at any point of time. As per the counter affidavit filed by the CMDA, the Builder applied for planning permit in the year 2007 for construction of a Hospital and they did not seek for renewal of the planning permit that expired in 1999. Therefore, the aforesaid averments of the Builder that there was only a technical violation as the plan only lapsed when they made construction, has no substance, since the expired plan was for a Hotel, but the construction they undertook now was for a Hospital.

52. In any event, we are of the view that the Builder is not correct in stating that the construction put up after the expiry of the permit period would not be called as illegal construction, particularly when the planning permit expired in 1999 itself, while the unauthorized construction was in 2007. Furthermore, as stated above, in the year 2007, the Builder did not seek for renewal of planning permit and on the other hand, they applied for planning permit for construction of Hospital, but the same was not granted by CMDA.

53. As rightly contended by the Learned Counsel for the Association, even in the case of deviations to the planning permit, the Courts have ordered for demolition of the building pertaining to the deviations and therefore, the unauthorized construction put up by the Builder, without any planning permit at all, could not be allowed to stand.

54. Having put up construction for a Hospital without any sanctioned plan, the Builder has now sought to justify the illegality stating that after the publication of second master plan by the CMDA in the year 2008, there is no bar to put up construction for a Hospital at the vacant site, as the site is deemed to be a commercial site, as per the second master plan.

55. We are not in agreement with the submissions made by the learned senior counsel for the Builder in this regard. On the one hand, the Builder has sought for renewal of the planning permit for construction of Hotel and on the other hand, they came with a plea that the change of use from Hotel to Hospital would require only internal changes in the plan to suit the Hospital. The entire action of the Builder lacks bonafide and the Builder has no regard for rule of law.

56. The CMDA refused to renew the planning permit dated 20.06.1996 that expired on 19.06.1999, when the Builder approached the CMDA in March 2009 for renewal, as the application was not made before the date of expiry of the planning permit. Thereafter, the Builder approached the Government with their application dated 28.04.2009 seeking to revalidate the earlier planning permission. In this regard, it is useful to extract the contents of the letter dated 28.04.2009 of the Builder addressed to the Government, which reads as under:

This has reference to the Planning permission obtained from CMDA vide PP No. C/PP/MSB/25A to K/96 dated 20.06.1996 wherein we have got approval for constructing 1 Block for Commercial (Hotel) and 6 Blocks of residential apartments at our above site. We have completed construction of residential apartments and we could not construct the Commercial (Hotel) Block at that time because of the market conditions and scarcity of funds.

Now, we have decided to start the construction of 1 Block Commercial and hence we have requested CMDA to kindly Re-Validate the approval already given by them as the original approval expired. However CMDA could not consider our request as the time for applying renewal has lapsed and because of that our renewal proposal was rejected.

We request you to intervene in this matter and pardon the delay in submitting the papers for renewal and consider our request favorably by granting an early approval by means of revalidating the earlier PPA got by us.

57. Based on the aforesaid application, the Government issued the order in G.O.Ms. No. 83, Housing and Urban Development Department, dated 02.06.2009 invoking section 113 of the Act and pardoned / condoned the delay in submitting the papers for renewal of planning permit. However, the G.O.Ms. No. 83 does not

contain any reason for exercising its power u/s 113 of the Act. Except stating that "as a special case, exemption is granted", no reason has been assigned for treating the matter as a "special case".

58. When the Association questioned the order of the Government in W.P. No. 4480 of 2010, the Government filed counter affidavit, wherein also no reason was given for exercise of its power to grant exemption u/s 113 of the Act. The Builder also did not produce any material in support of making an application after 10 years, for renewal. Further, though it was stated in the said application that there was scarcity of funds, no material was produced along with the application in support of the same. Likewise, when the Builder stated that market condition was not good for construction of Hotel, they did not produce any supporting materials. In any event, the Government did not give any reason for passing G.O.Ms. No. 83 by invoking its power u/s 113 of the Act to grant exemption to Section 50 of the Act for making an application even after the expiry of planning permission. Section 113 of the Act also mandates that the Government should stipulate some conditions for granting exemption, but no condition is imposed in G.O.Ms. No. 83.

59. At this juncture, it is relevant to take note of the fact that Section 50 of the Act provides for making renewal application before the expiry of planning permit period. The planning permit was valid for three years from 20.06.1996 to 19.06.1999. Therefore, the Builder should have applied for renewal before 19.06.1999. Even if the Builder applied before 19.06.1999, the renewal could be granted for three years. If the Builder failed to complete the project, the Builder could only make a fresh application for planning permission and he could not seek for further renewal. Taking note of this legal position, the Builder made a fresh application in 2007 for construction of Hospital. But the CMDA returned the same stating that the Builder could not make any application for construction of Hospital in a mixed residential zone. In these circumstances, they came with the application in March 2009 before the CMDA seeking renewal of planning permit, knowing very well that the application itself could not be entertained in view of Section 50 of the Act. When the CMDA refused to entertain the application stating that the application was not filed before the expiry of the planning permit, the Builder approached the Government and the Government, without taking into account the aforesaid facts, mechanically invoked its power u/s 113 of the Act and granted exemption to Section 50 of the Act. The Government failed to take into account that the Builder filed a fresh application u/s 50 of the Act, in the year 2007 and therefore, no question of seeking renewal, that too, after ten years would arise. For the purpose of this case, it is relevant to extract Section 50 as well as Section 113 of the Act, which reads as under:

50. Duration of permission - Every permission for development granted u/s 49 shall remain in force for a period of three years from the date of such permission:

Provided that the appropriate planning authority may, on application made in this behalf before the expiry of the aforesaid period, extend such period for such time

as it may think proper; but such extended period shall in no case exceed three years:

Provided further that any expiry of permission shall not bar any subsequent application for fresh permission under this Act.

Section 113. Exemptions - Notwithstanding anything contained in this Act, the Government may, subject to such conditions as they deem fit, by notification, exempt any land or building or class of lands or buildings from all or any of the provisions of this Act or rules or regulations made hereunder.

60. As rightly contended by the Learned Counsel for the Association, the Government is bound to give reasons for exercise of its power u/s 113 as per the decision of the Honorable Supreme Court in *The Consumer Action Group and Another Vs. State of Tamil Nadu and Others*, . In that case, the Consumer Action Group filed writ petition under Article 32 of the Constitution of India directly before the Supreme Court challenging the vires of Section 113 of the Act. While upholding Section 113 of the Act, the Supreme Court quashed the Government Orders passed based on Section 113 as there was no application of mind by the Government and there was no reason given for granting exemption u/s 113 of the Act. Further, the Supreme Court has also held that while exercising the power u/s 113 of the Town and Country Planning Act, the Government shall impose some condition to keep in check the person in whose favour the power was exercised. In this regard, it is relevant to extract paras 28 and 30 of the said judgment, which reads as follows:

28. In this background we scrutinized each of these 62 GOs. We find that the grant of exemptions to the persons concerned has been in a set manner, almost identically except one or two. When we are saying mechanically, it is because except for typing different plot numbers and the Rules which have been exempted, all other words are identical. Except for this little difference the rest of the words in these orders are the same, which is reproduced below:

In exercise of powers conferred by Section 113 of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act 35 of 1972) the Government of Tamil Nadu hereby exempts the construction made at... from the provisions of Rule... of the Development Control Rules relating to... (front setback, FSI etc.) requirements respectively to the extent of violations as per plan refused by the Member-Secretary, Madras Metropolitan Development.

Each of these orders reveals non-application of mind by giving a total go-by to the Rules relating to the restrictions and control in construction of a building, to the floor space index, the front setback, side setback, parking requirements including provision of standby generator, transformer room, meter room and floor space requirements, construction abutting road width, corridor width, permissible floor area, limits of nursing homes, height of the rear construction even from the provisions of prohibition on the construction of multistoried buildings etc. Not only this, while granting exemptions the Government has not

recorded any reasons as to why such power is being exercised and further such power was exercised not only to regularize some irregularities but were passed to overreach even the order of refusal passed by the Member-Secretary, Madras Metropolitan Development Authority. In other words, power of exemptions was granted which set aside the orders earlier passed by the statutory authorities in terms of the Act and the Rules. The submission on behalf of the State for salvaging the validity of Section 113 being ultra vires was, the Government does not possess unanalyzed or unbridled power as it is controlled by the policy of the Act. The question is, whether the impugned orders could be said to have been passed for the furtherance of such policy or for achieving the purpose for which it was enacted. So even as per submission it can only be exercised in the aid of such policy and not contrary to it. We find, in the present case, the Government while exercising its powers of exemption has given a go-by to all the norms as laid down under the Act and the Rules and has truly exercised its powers arbitrarily without following any principle which could be said to be in furtherance of the objective of the Act, nor could Learned Counsel for the State point out any.

30. When such a wide power is vested in the Government it has to be exercised with greater circumspection. Greater is the power, greater should be the caution. No power is absolute, it is hedged by the checks in the statute itself. Existence of power does not mean to give one on his mere asking. The entrustment of such power is neither to act in benevolence nor in the extra-statutory field. Entrustment of such a power is only for the public good and for the public cause. While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both, viz. the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health etc. the exercise of power could not be for the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within, reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting. Such an application of mind has not been made in any of these impugned orders. Another significant fact which makes these impugned orders illegal is that Section 113 empowers it to exempt but it obligates it to grant subject to such

condition as it deems fit. In other words, if any power is exercised then the Government must put such condition so as to keep in check such person. We find that in none of these sixty-two orders any condition is put by the Government. If not this then what else would be the exercise of arbitrary power?

But in the case on hand, no condition was imposed by the Government while granting exemption to Section 50 of the Act, by exercising power u/s 113 of the Act.

61. In view of the categorical pronouncement of the Supreme Court, we are of the view that the impugned order in G.O.Ms. No. 83 of the Government and the consequential order dated 29.06.2009 of the CMDA are liable to be quashed.

62. We have already held that the Builder proceeded with the construction of Hospital unauthorized and not for Hotel as per the expired planning permit, for which, they sought renewal in 2009. Since the order dated 29.06.2009 of the CMDA renewing the planning permit that expired on 19.06.1999 is set aside, the subsequent application made on 21.10.2009 by the Builder for change of use from Hotel to Hospital has no substance. The Builder could not act at their own whims and fancies.

63. We have categorically held that the construction was an unauthorized and illegal one in all respects. At this juncture, it is relevant to point out that the Supreme Court and this Court have ordered demolition of unauthorized constructions and those judgments are dealt with hereunder:

64. When there was a sanctioned plan to build only ground and first floor for a Hotel at Kodaikanal, five more floors were constructed unauthorized and the unauthorized construction of five floors were directed to be demolished by the Division Bench of this Court in Palani Hills Conservation Council vs. The State of Tamil Nadu and Others 1995 (2) WRIT L.R. 737. Paragraphs 67 and 68 of the said judgment are extracted hereunder:

67. In the result, all the three writ petitions are allowed in the following terms:

(1) A writ of Mandamus shall issue directing respondents 1 and 2 in W.P. No. 13231 of 1992 to demolish the building constructed by the Hotel to the extent to which it is contrary to the plan sanctioned by the second respondent on 01.11.1991. Respondents 1 and 2 shall see to it that there are only two floors viz., ground floor and first floor above natural ground level of the site as per the original plan submitted by the hotel for sanction in April, 1991. The remaining part of the building shall be demolished.

(2) It is necessary for the Hotel to obtain environmental clearance from the Central Ministry.

(3) Till the demolition as aforesaid and till obtaining clearance of the Central Ministry, there shall be no supply of electricity or water to the Hotel and no occupancy shall be permitted in the building.

(4) The second respondent-Township Committee is hereby directed to investigate all the cases of constructions in Kodaikanal erected in contravention of the Rules and take appropriate action in accordance with law against the violators within a period of three months from this date.

(5) G.O.Ms. No. 126, Municipal Administration and Water Supply, dated 13.05.1994 is quashed.

(6) G.O.Ms. No. 317, Municipal Administration and Water Supply, dated 6th December, 1994 is quashed.

(7) The petitioner is entitled to its costs in W.P. No. 13231 of 1992 against respondents 3 and 4. Counsel's fee Rs. 5,000/- .

(8) The petitioner is entitled to costs in W.P.13104 of 1994 and 20375 of 1994 against the first respondent therein. Counsel's fee Rs. 2,500/- in each of the said writ petitions.

(9) W.M.P. Nos. 6955 and 6956 of 1995 are dismissed. There will be no order as to costs.

68. Before parting with the case, we would like to remind the Government of the wise words of the great Saint Tiruvalluvar, in the verse:

ehblhWk; eho Kiw bra;ah kd;dtd; ehblhWk; ehL bfLk;

"Behold the king who doth not oversee his administration everyday and remove the irregularities therein; his sovereignty will wear away by day." -Translation by Sri V.V.S. Aiyar.)

In this case the Government has exempted the law-breaker from the operation of the law which would tantamount to cutting a man to the size of a cot. Of the disastrous consequences we need not say, the great Saint has said it two thousand years ago.

The said judgment also supports our view in quashing the Government order in G.O.Ms. No. 83 since the Division Bench of this Court has also quashed the Government Orders granting exemption to the Builder therein by invoking Section 113 of the Act.

65. Likewise, the Supreme Court in its judgment in Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others, has held that the tendency of raising unlawful constructions is increasing in the entire country and such activities are required to be dealt with by firm hands. In the said case, in Bombay, 36 floors were raised, out of which, 8 floors were unauthorized. The Supreme Court upheld the demolition ordered by the Bombay High Court. While upholding the order of the Bombay High Court, the Supreme Court held that this case should be a pointer to all the Builders, who are making unauthorized constructions. In this regard, paras 6 and 7 of the said judgment are extracted hereunder:

6. It is an admitted position that six floors have been completely demolished and a part of seventh floor has also been demolished. It was pointed out by Mr. K.K. Singhvi, Learned Counsel for the Corporation that the tendency of raising unlawful constructions by the builders in violation of the rules and regulations of the Corporation was rampant in the city of Bombay and the Municipal Corporation with its limited sources was finding it difficult to curb such activities. We are also of the view that the tendency of raising unlawful constructions and unauthorized 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 multistoried buildings. The violation of FSI 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 FSI 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 November 13, 1990.

7. In the result we find no force in the petition and the same is dismissed with no order as to costs. Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorized constructions never pays and is against the interest of the society at large. The rules, regulations and by-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits.

66. In the judgment of the Supreme Court in Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others, the Supreme Court ordered demolition of Nursery School that was built up unauthorized, on the plot allotted for a Park, at the instance of the residents. Para 8 of the said judgment is extracted hereunder:

8. We, therefore, hold that the land which was allotted to Respondent 2 was part of a park. We further hold that it was not open to the DDA to carve out any space meant for park for a nursery school. We are of the considered view that the allotment in favour of Respondent 2 was misuse of power, for reasons which need not be adverted. It is, therefore, a fit case, according to us, where the allotment in favour of Respondent 2 should be cancelled and we order accordingly. The fact that Respondent 2 has put up some structure stated to be permanent by his counsel is not relevant, as the same has been done on a plot of land allotted to it in contravention of law. As to the submission that dislocation from the present site would cause difficulty to the tiny tots, we would observe that the same has been advanced only to get sympathy from the court inasmuch as children, for whom the nursery school is meant, would travel to any other

nearby place where such a school would be set up either by Respondent 2 or by any other body.

67. The First Bench of this Court in its judgment in *The Chairman, Madras Metropolitan Development Authority Vs. S. Radhakrishnan and Others*, has ordered demolition of construction put up in the ground floor and also in the fourth floor, as those constructions were made in violation of the sanctioned plan. The sanctioned plan provides for Car parking in the ground floor and the built up area in the first, second and third floors. But the Car parking area was converted as office rooms and the fourth floor was constructed by the Builder therein, in violation of the sanctioned plan. The CMDA issued notice for demolition and the same was challenged by the Builder. A learned single Judge of this Court allowed the said writ petition. The First Bench of this Court reversed the judgment of the learned single Judge and upheld the action of the CMDA. Para 9 of the said judgment is relevant for this case and the same is extracted hereunder:

9. A harmonious reading of the provisions in Sections 47, 48, 56 and 85 of the Act clearly reveals the intention of the legislature not to permit unauthorized and illegal development in contravention of the planning permission issued by the appropriate planning authority. The appropriate planning authority de hors the powers u/s 56 of the Act has also got powers to order demolition of unauthorized development u/s 85(1)(c) of the Act. Further, in matters of this nature, the offence committed is to be treated as continuing one till the offending structure is either demolished or altered. Therefore, we are of the view that the planning authority is perfectly within its right to issue a notice to proceed against unauthorized development even after expiry of three years and take appropriate steps for demolition of the development by the developer without obtaining permission from the appropriate planning authority.

The First Bench of this Court in para 10 of the above judgment has opined that unlawful construction shall be dealt with firm hands, in the following words:

10. Off late, the tendency of raising unlawful construction and unauthorized encroachment is increasing in almost all metropolitan cities 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 storied buildings....

Hence, the impugned G.O.Ms. No. 83 and the consequential order dated 29.06.2009 of the CMDA are liable to be quashed and the prayer of the Association for demolition of the construction put up by the Builder has to be granted. Points 2 and 3 are answered accordingly.

68. Resultantly,

(i) the writ petition in W.P. No. 4674 of 2008 is entitled to be allowed with a direction to the CMDA to demolish the unauthorized construction put up by the Builder at No. 135/142, Poonamallee High Road, Chennai - 600010, within a

period of two weeks from the date of receipt of a copy of this order, at the cost and expenditure of the builder.

(ii) The writ petitions in W.P. Nos. 4480 and 4481 of 2010 are also entitled to be allowed and the order in G.O.Ms. No. 83, Housing and Urban Development Department, dated 02.06.2009 of the Government and the consequential order dated 29.06.2009 of the CMDA are quashed.

W.P.NO.10132 OF 2003

69. The petitioner is the Builder. The Government, CMDA and Vysya Bank Ltd., are the respondents 1, 2 and 3 respectively.

70. The Builder was granted planning permission by the CMDA in PP No. C/PP/MSB/25 A to K/96 (Planning Permit No. 19735) dated 20.06.1996 for construction of basement + ground + 7 floors (1 Block) for hotel and ground + 9 floors (6 Blocks) for residential buildings at R.S. No. 454/1, 3 to 6, and 455/16, Block No. 27, Door No. 135, Poonamallee High Road, Chennai, with certain conditions.

71. We are concerned with the conditions relating to furnishing of Bank Guarantee for a sum of Rs. 42,37,200/- .

72. The Builder furnished the Bank Guarantee for the aforesaid sum with the third respondent Bank. The Bank, being a Guarantor, executed a deed of guarantee on 02.08.1995 and the same was to remain in force for an initial period of five years. The Guarantor undertook to renew the same as and when a request was received from the CMDA for any further period not exceeding in all 10 years. The Builder came forward to furnish the Bank Guarantee for a sum of Rs. 42,37,000/- in lieu of security deposit and the CMDA accepted the Bank Guarantee in lieu of cash payment.

73. The Builder constructed residential buildings on six blocks. According to the Builder, there was a deviation in the sanctioned plan and the same was worked out to 380 Sq. Mts. The Builder applied for regularization of the aforesaid deviation and paid necessary fee of Rs. 6,55,000/- (Rupees Six Lakhs Fifty Five Thousand Only) for the same. According to the Builder, since they paid fee for regularization of the deviations and the deviations, being minor and negligible deviation the CMDA could not invoke its power to encash the Bank Guarantee.

74. In these circumstances, to prevent the CMDA from encashing the Bank Guarantee as per the deed of Bank Guarantee, the Builder filed the writ petition in W.P. No. 10132 of 2003 seeking for mandamus forbearing the CMDA from encashing the Bank Guarantee issued by the Bank relating to the construction of multi storied buildings at No. 135, Poonamallee High Road, Chennai-600010 pending disposal of the Builder's application seeking regularization under the regularization scheme.

75. While admitting the writ petition, this Court granted interim order.

76. The contention of the learned senior counsel for the Builder is that since the Builder paid regularization fee, the CMDA is not bound to pay the cash deposit as per the conditions stipulated in the planning permit.

77. On the other hand, the Learned Counsel for the CMDA relied on the Development Regulations for Chennai Metropolitan Area that provides for forfeiture of the security deposit, when there is deviation to the sanctioned plan.

78. Regulation 28 of the Development Regulations for Chennai Metropolitan Area is the Special Rules for multi-storied buildings. Regulation 28(14) of the Development Regulations for Chennai Metropolitan Area deals with security deposit and the same is extracted hereunder:

28.(14) Security deposits - The applicant shall deposit a sum at the rate of Rs. 100 per square meters of floor area as a refundable non-interest earning security and earnest deposit. The deposit shall be refunded on completion of development as per the approved plan as certified by Chennai Metropolitan Development Authority; if not, it would be forfeited.

79. Regulation 4(1)(c) of the Development Regulations for Chennai Metropolitan Area provides that the Builder should give an undertaking in Form "C" for payment of security deposit etc., and the same is extracted hereunder:

4.(1)(c) Form-C

An undertaking in Form "C" in the case of developments such as special buildings, group developments, multi storied buildings and other developments as may be decided by the authority, obtained from the owner, builder, promoter and power of attorney holder that they are jointly and severally responsible to carry out developments in accordance with permission granted and for payment of development charges, security deposit amount and all other charges as applicable and levied by Chennai Metropolitan Development Authority and also liable for penal actions for developments made in contravention of these regulations and the conditions prescribed in the planning permit.

80. Regulation 28(14) of the Development Regulations for Chennai Metropolitan Area contemplates the cash deposit. However, in view of the order of this Court, the Builder was permitted to furnish Bank Guarantee. Para 2 of the letter dated 20.06.1996 of the CMDA states that the Builder accepted the conditions stipulated by CMDA in their letter dated 28.06.1995 and furnished Bank Guarantee for a sum of Rs. 42,37,200/- towards security deposit for building, which is valid up to 01.08.2000. Para 2 of the said letter dated 20.06.1996 of the CMDA is extracted hereunder:

2. The applicant has remitted the following charges:

Development charge

Rs. 1,65,000/-

Scrutiny charge

Rs. 44,000/-

Regularization charges

Rs. 2,12,000/-

in Challan No. 70136 Dated 19-9-95 accepting the conditions stipulated by MMDA vide in the reference 3rd and furnished Bank Guarantee for a sum of Rs. 4237200/- (Rupees Forty two lakhs thirty seven thousand and two hundred only) towards Security Deposit for building which is valid up to 1-8-2000.

That is, the furnishing of Bank Guarantee by the Builder is accepting the conditions stipulated by CMDA, which are in terms of the aforesaid Development Regulations.

81. As per Regulation 28(14), the deposit shall be refunded on completion of development as per the approved plan as certified by CMDA. As on today, there is no completion certificate issued by the CMDA. The planning permit period expired on 19.06.1999. Section 50 of the Act contemplates that the planning permit could be renewed for three years, if the renewal application is made before the expiry of the permit period. That is, in total, the Builder should complete his construction before six years. Section 50 of the Act provides for making fresh application, if the building is not completed within the aforesaid period.

82. In this case, the completion as per the planning permit did not take place. The CMDA also did not give any certificate. As per the planning permit dated 20.06.1996, the Bank Guarantee was valid up to 01.08.2000. As per the Deed of Bank Guarantee dated 02.08.1995, initially the guarantee was valid up to five years and later, it could be extended for another five years. Since the Bank Guarantee was valid only up to 01.08.2000, the CMDA sent a letter dated 17.07.2000 to the Bank seeking extension of validity period of the Bank Guarantee for a further period of three years from 02.08.2000 to 01.08.2003. Accordingly, the Bank extended the validity period of the Bank Guarantee from 02.08.2000 to 01.08.2003 and communicated the same to the CMDA vide their letter dated 01.08.2000. In these circumstances, in order to prevent the CMDA from realizing the amount based on the deed of guarantee, the Builder has approached this Court by filing the writ petition in W.P. No. 10132 of 2003 and obtained interim order. In view of the interim order, the CMDA was not able encash the Bank Guarantee.

83. At this juncture, it is relevant to note that as per Clause 4 of the deed of Bank Guarantee, the Guarantor undertook to pay the CMDA the guaranteed amount in full, within 3 days after receipt of a letter from the CMDA stating that the construction put up by the Builder was not in accordance with the plan sanctioned by the CMDA. Clause 4 of the deed of Bank Guarantee is extracted hereunder:

4.The guarantor hereby undertakes to pay without question to the MMDA the guaranteed amount in full within three days after receipt of a letter from MMDA, stating that the construction put up by the applicant which is the subject matter of this guarantee is not in accordance with the plan sanctioned by MMDA and the guaranteed amount has thus become payable.

84. In view of Clause 4 of the Bank Guarantee and the Regulations referred to above, we are of the view that the CMDA is entitled to encash the Bank Guarantee furnished by the Builder. Accordingly, the CMDA is directed to encash the Bank Guarantee furnished by the Builder. We make it clear that the payment of Rs. 6,55,000/- towards regularization fee paid by the Builder has nothing to do with the encashment of Bank Guarantee. Therefore, we do not find any merit in the writ petition in W.P. No. 10132 of 2003 and the same is liable to be dismissed.

85. In the result,

(i) W.P. No. 4674 of 2008 is allowed with a direction to the CMDA to demolish the unauthorized construction put up by the Builder at No. 135/142, Poonamallee High Road, Chennai - 600010, within a period of two weeks from the date of receipt of a copy of this order, at the cost and expenditure of the Builder.

(ii) W.P. Nos. 4480 and 4481 of 2010 are allowed and the order in G.O.Ms. No. 83, Housing and Urban Development Department, dated 02.06.2009 of the Government and the consequential order dated 29.06.2009 of the CMDA are quashed.

(iii) W.P. No. 10132 of 2003 is dismissed.

However, there will be no order as to costs. Consequently, connected miscellaneous petition is closed.