
(2013) 02 AP CK 0017

In the Andhra Pradesh High Court

Case No : Writ Petition No. 12668 of 1996

V. Parvathalu

APPELLANT

Vs

The Municipal Council

RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

Andhra Pradesh Municipalities Act, 1965 — Section 204, 209, 211, 212, 213

Citation : (2013) 3 ALT 83

Hon'ble Judges : Nooty Ramamohana Rao, J

Bench : Single Bench

Advocate : M. Rama Rao, for the Appellant; Poliseti Radha Krishna, for the Respondent

Final Decision : Dismissed

Judgement

Nooty Ramamohana Rao, J.—This writ petition is instituted by a practitioner of law, challenging the legality and validity of the notice issued on 29.06.1996 by the respondent in terms of Section 228(3) of the Municipalities Act, 1965, directing demolition of a certain portions of the first and second floors of the building, constructed by the petitioner bearing H.No. 2-3-195, Kaman Road, Karimnagar. The case of the petitioner is that, he has constructed a building comprising of a single floor sometime during 1972-73 and it was assigned house No. 2-3-195, Kaman Road, Karimnagar. The petitioner has proposed to make an addition to the existing building by constructing first and second floors thereon and submitted an application in that regard on 06.09.1984 duly paying a sum of Rs. 1305/-. Finding no response, either sanctioning or refusing to sanction the building permission applied for, the petitioner has delivered a notice in the office of the Commissioner of the respondent on 08.11.1984 notifying that he is proceeding to execute the work of construction treating the building permission applied for by him as deemed to have been sanctioned. At that stage, on 14.12.1984 the respondent has served two notices, one under Sub-section (1) of Section 228 of the Andhra Pradesh Municipalities Act, (henceforth referred to as

"Act") and the second under Sub-section (2) of the same Section 228 of the Act. These notices are alleged to have been served on the petitioner on 02.01.1985. The petitioner drew a representation on 04.01.1985 pointing out that he has intimated the commencement of construction on 08.11.1984, as he did not receive any communication with reference to the building application submitted by him on 06.09.1984 and hence the building permission is deemed to have been granted to the petitioner. However, on 21.01.1985, the respondent passed orders in terms of Sub-section (3) of Section 228 of the Act directing the petitioner to remove the constructions made by him unauthorizedly, failing which action in accordance with Section 340 of the Act would be initiated in the matter. At that stage, the writ petitioner filed W.P. No. 44 of 1985 in this Court. While admitting the said writ petition, a status quo order was passed by this Court. Since the petitioner is said to have collected the necessary building material, he moved WPMP. No. 459 of 1985 in W.P. No. 44 of 1985 to permit him to carry on constructions of first and second floors over the existing ground floor in premises bearing H.No. 2-3-107, Kaman Road, Karimnagar, duly furnishing an undertaking that he would face any consequences in case the writ petition is dismissed. This miscellaneous petition No. 459 of 1985 is disposed of on 01.03.1985. It will be appropriate to notice the order passed in the said application which reads as follows:

I have heard the counsel for the petitioner and also the counsel for the Municipality. The Counsel for the petitioner is pressing for an interim order in this matter on the ground that his client has already collected and stored the building material and is not able to carry on the construction. So far as the stand of the respondent, that a rejection was communicated to the petitioner is concerned, I do not find any material on record to show that any such communication was sent in writing or even made orally. In view of this, the contention of the petitioner that the permission is deemed to have been granted is correct.

The main ground on which the plans are alleged to have been rejected and the writ petition is opposed is that the petitioner's intended construction is in violation of Rule 9 Sub Rule 2. In respect of the open space between the building and street line, according to the counsel for the Municipality, a distance of 1.5 metres from the street line upto the line of construction of any floor has to be maintained. There is no other objection either available in the record or pressed at the hearing.

The counsel for the petitioner is challenging the validity of the said rule. Hence he requests that the interlocutory petition may be disposed of and the question of validity of rule gone into the main writ petition.

At present, the petitioner cannot make any construction in violation of the objection based on the said rule viz., without leaving a distance of 1.5 metres from the street line and the proposed construction either on the first floor or in the second floor. The petitioner's counsel has given an undertaking that if the construction is found to be in violation of this condition he will himself demolish

or the municipality authorities are at liberty to demolish the building or prevent further construction.

In view of this there shall be a direction to the respondent that the petitioner should be allowed to construct in accordance with the pleas which he has already submitted only subject to one condition viz., any construction on first floor or second floor should be made only after leaving a distance of 1.5 metres between the street line and the proposed construction on the first floor or second floor by treating the line of construction vertically to the boundary of street line.

At the time of the admission of the writ petition, status quo as on 3-1-85 was passed. The petitioner's contention is that the construction already made as on 3-1-85 should be not demolished till the writ petition is disposed of and any construction that is being made should be in compliance with the condition imposed above. This is opposed by the counsel for the Municipality on the ground that this may lead to unnecessary controversy.

I do not think that there is any scope for such controversy as what was constructed by 3-1-85 may not be considerable and even according to the petitioner, that construction was very small one not capable of being called a building by itself. The construction already made shall not be demolished till the writ petition is disposed of.

With the above direction, the miscellaneous petition is disposed of. Expedite the hearing of the writ petition.

(Emphasis is brought out)

2. Thereafter, the petitioner carried on construction of the first and second floors in the post 01.03.1985 period. Ultimately, W.P. No. 44 of 1985 came to be decided on 15.10.1988 in the following terms:-

The petitioner V. Parvathalu has proceeded with the construction of the building contrary to the Building Rules. But now the fact remains that the construction has been completed by virtue of the interim order passed by this court. In these circumstances the only course that would be left open is to legalise the illegal construction now made pursuant to the interim direction granted by the court. It is not stated in the counter-affidavit that the said construction impedes the traffic flow or in any other way causes obstruction though the construction is illegal. Under those circumstances, Commissioner, the respondent herein, is directed to levy the compound fee as per the Building Rules and legalise the illegal construction already made by the petitioner. The writ petition is accordingly ordered. No costs. Advocate's fee Rs. 350/-.

(Emphasis is generated)

3. The petitioner has not called in question this order. But, however, the respondent herein carried the matter in appeal by instituting W.A. No. 927 of 1989, that came to be disposed of by a Division Bench by the order dated

24.04.1996. The relevant portion of the order passed by the Division Bench in W.A. No. 927 of 1989 reads as under:

The learned counsel for the petitioner-respondent, it is to be noticed that the learned single Judge before passing the above said interim order heard both the parties, and on the basis of the said order, the petitioner-respondent constructed the first and the 2nd floors, and finally, while disposing of the main writ petition, the learned single Judge directed that if there is any violation, the same should be condoned and legalized by levying compound fee. However, according to the Municipality, the said interim order was violated.

In view of the above, we make it clear that it is open to the Municipal authorities to inspect the building of the petitioner-respondent, and if it is found that the petitioner had not violated the condition made in the above interim order, the Municipal authorities shall be restrained from taking any action against the petitioner and in case if it is found that the petitioner-respondent has violated the said order, it is open to the Municipal authorities to take action against the petitioner in accordance with law.

The writ petition was filed seeking relief to the extent of construction of first floor and second floor, and the construction already made on the ground floor is not subject matter of dispute before us; therefore, we do not want to go into that aspect.

The learned counsel for the appellant-Municipality submitted that the petitioner's house is situated on Kaman Road, Karimnagar, which falls under the proposed road widening programme and if the Government decides to widen the road, the petitioner's house will have to be demolished and in that (the) case the petitioner should not claim any damages. We are afraid, we cannot give any such direction as every citizen living in India has a right to claim his own rights as guaranteed under the Constitution.

The writ appeal is accordingly disposed of. No costs.

(Emphasis is mine)

4. Thereafter, the present impugned order came to be passed on 29.06.1996 directing the petitioner to remove the offending portion of the building constructed in the first and second floors on the premise that the said constructions are violating the building rules 9(2)(i)(a), (9)(2)(ii), 9(4) and 9(7). This order is stated to have been passed in accordance with Section 228 of the Act. This gave rise to the present writ petition.

5. With the leave of the Court, the Municipal Commissioner filed a counter affidavit in the matter. It is stated in paragraph 3 of the said counter affidavit that the petitioner without serving a notice as contemplated under the Act before commencement of the work, completed the construction. It is also specifically alleged in the said paragraph as under:

...This Hon''ble Court in WPMP No. 459/85 directed to construct the building leaving a distance of 1.5 meters between the street line and the proposed construction on the 1st and 2nd floors. The petitioner herein contrary to the said order constructed the building. The petitioner has not left the 1.5 meters as directed by this Hon''ble Court.

(Underlining is mine)

6. In paragraph 4, it is also alleged that the construction made by the petitioner is effected by the 80" wide road, as per the revised master plan as the petitioner has not left the set backs as contemplated in the Building Rules and Zoning Regulations and the same cannot be regularized. In paragraph 5, it is alleged that the petitioner has not paid the requisite fees and further when the officials of the respondent Municipality wanted to take measurements for assessing the constructed plinth area, the petitioner has not allowed the officials to measure the plinth area.

7. A reply affidavit is filed by the petitioner. He has stoutly denied the allegation that he has not delivered the intimation of commencement of construction. The petitioner has pointed out that he has filed a photo copy of the notice delivered by him on 08.11.1984 in the office of the respondent, clearly intimating his intention to commence the proposed constructions. In paragraph 3 of this reply affidavit, the petitioner stated as under:

It is also not correct that I have constructed the building not leaving a distance of 1.5 meters between the street and the construction already made first and second floor more than 1.5 Mts away from the street as on 1984 and also it is not correct that I have constructed the building contrary to the Hon''ble High Court orders.

8. In paragraph 4 of this reply affidavit, it is brought out that the respondent has earlier objected when the petitioner undertook constructions of the ground floor and rejected the permission and thereafter he has preferred an appeal and the said appeal was allowed by the Municipal Counsel at its meeting held on 21.10.1972. The petitioner has therefore described the averment of the respondent that he has not left 1.5 meters distance from the road as a totally incorrect statement. Further the petitioner has disputed the statement in the counter that he has not permitted measurements to be taken, by describing the said allegation as devoid of truth, but, in paragraph 7, this is what the petitioner has stated:

...In the year 2002, the Municipality for assessing the property tax has measured the entire building area and fixed the property tax....

9. The petitioner has also enclosed the assessment order of property tax on 18.01.2007 clearly indicating the details of the constructions made by the petitioner.

10. The petitioner has also filed an additional affidavit in the matter clearly

pointing out that, against the rejection of the building permission for ground floor constructions, when he preferred an appeal to the Municipal Council, his appeal has been considered as Item No. 309 at the Council meeting held on 21.10.1972 at 03.30 p.m. and enclosed a copy of the proceedings in that regard. It will be relevant to quote its contents herein below:

Item No. 309: File No. 1489/G1/72. The building application of Sri V. Parvathalu for addition in the existing House No. 2-3-107 at Kaman Road was rejected by the Commissioner Vide proceedings No. 1469/G1/72. dated 13-9-72. As the proposed construction is violating rule 9(2) a of building rules and further he was informed to seek exemption from the operation of rule 9(2) a of building rules from the Director of Town Planning.

Read appeal petition of Sri V. Parvathalu preferred against the orders of the Commissioner. The appeal is in time and enclosed original orders as required under rules.

The appeal petition is placed before the council for consideration.

RESOLUTION: Appeal is allowed and permission is granted since the proposed construction is within the existing compound wall.

Sd/- Chairman.

(Emphasis is supplied)

11. At that stage, this Court passed a detailed order on 02.02.2007 directing the Commissioner of Municipal Corporation, Karimnagar and its Municipal Engineer, in case of necessity, with the assistance of any qualified engineer of the Roads and Buildings Department, Government of Andhra Pradesh, to inspect the premises of the writ petitioner and file a complete report as to the nature of the constructions standing as of now. Accordingly, by securing the assistance of the Deputy Executive Engineer, Roads and Buildings Department, Government of Andhra Pradesh, an inspection was carried out on 19.02.2007. Paragraph 5 of the report submitted is to the following effect:

5. It is respectfully submitted that the report of nature of construction, street line and building line since 1984 as follows:

a. The petitioner constructed RCC building with Ground, First and Second Floors which is effected by southern side 80 feet Master Plan Road to the extent of 8".6" on left side and 7".6" on right side of the building.

b. According to sanctioned Master Plan the site in question is earmarked for "Residential use" but the Ground Floor is converted as shops and given for rents for commercial purpose.

c. No permission was accorded for first and second floor by the Respondent.

d. The balconies are further projected upto 0.90 meters towards southern side road and 1.22 meters on the Eastern side road and bathroom is constructed in

balconies.

e. That the total width of the road at the site in question is only 67"-6".

f. The width of road before the shops of Sri V. Parvathalu is 31".6" upto the existing road divider.

g. The petitioner building is ahead of 4"-3" from the building line of western side neighbour."

h. During the year 1984, the road was existing 80 feet but was not formed. At present same position of building and road is existing since 1984 except a road divider with a width of 1 feet was constructed in the year 1995.

12. The petitioner has filed his detailed objections in response thereto. They will be adverted to a little later on. The petitioner has enclosed the master plan for Karimnagar sanctioned by Raj Pramukh on 24.09.1954, in which Kaman Road is shown only of 50" width. He has also enclosed copy of the letter sent up by the Executive Engineer, PWD (Roads and Buildings), Karimnagar to the Chairman, Municipal Council, Karimnagar on 24.06.1986, indicating that the Kaman Road is proposed to be widened from 7 meters to 16.50 meters. He has also enclosed the gazette notification dated 08.09.1983 relating to the sanction accorded to the General Town Planning Scheme of Karimangar Municipality by the State Government.

13. Heard Sri M. Rama Rao, learned senior counsel for the petitioner and Sri Polisetty Radhakrishna, learned counsel for the respondent.

14. Sri Rama Rao would submit that, at no point of time Kaman Road in Karimnagar is 80" wide and unnecessarily the petitioner is subjected to inconvenience and harassment. Further, the petitioner has only constructed first and second floors on the existing building in the ground floor and hence the question of not providing set-backs for the first and second floors would not arise. Above all, the petitioner after having submitted his application seeking building permission, has waited for more period than is really necessary and he commenced the constructions only after delivering a notice of commencement of constructions. If the proposed construction is impermissible nothing prevented the respondent from rejecting it. Unjustly, the respondent is troubling the writ petitioner. Realizing the same, this Court on the previous occasion allowed the writ petitioner to proceed further in the matter and make constructions. Therefore, the constructions made by the petitioner are strictly in accordance with the deemed sanction of the building plan. Hence, the question of demolition of such structures simply would not simply arise. When constructions are made in the first and second floor of the building, no inconvenience can ever be said to have been caused to anyone, much less the respondent. Above all, Sub-Rule 2(a) of Rule 9 of the Building Rules permits balconies to be constructed and hence the question of their demolition would not arise, Sri Rama Rao would wind up his submissions by urging that the equities are loaded heavily in favour of the writ

petitioner and the constructions made by him cannot be ordered to be dismantled. At best, if a compounding fee is to be levied, the writ petitioner is always willing to get the same complied with.

15. Per contra, Sri Polisetty Radhakrishna, learned counsel for the respondent would urge that the petitioner has constructed the building without leaving any set-backs. While he was required to maintain the set-backs compulsorily, the petitioner has constructed the building in contravention of the set-backs. Further the petitioner has also not demonstrated anywhere as to how the building constructed by him is either in accordance with law or in accordance with the terms of the orders passed by this Court on the previous occasion or that it is in conformity with the building plan submitted by him seeking permission. Once the building has been constructed by the petitioner contrary to the requirements of law, no exception need be drawn to the impugned order passed in the writ petition. Sri Radhakrishna would further submit that the report submitted after undertaking inspection of the premises of the petitioner would clearly demonstrate that, it has been constructed in contravention of the requirements of law.

16. Chapter IV of the A.P. Municipalities Act 1965 dealt with the building regulations and has set out the general powers in that regard. Section 204 of the Act sets out that, no piece of land shall be used as a site for construction and no building shall be constructed or reconstructed otherwise than in accordance with the provisions of this part and of any rules or bye-laws made under the Act, relating to the use of building sites or the construction or reconstruction of buildings. Section 209 of the Act required every person who intends to construct or reconstruct a building other than a hut, to submit an application in writing for the approval of the site together with the site plan of the land and an application in writing for permission to execute the work together with ground-plan, elevations and sections of the building, and the specification of the work. Such an applicant is also required to submit a copy of the title deed of the land duly attested by a Gazetted Officer of the Government. Section 211 of the Act prohibits construction or reconstruction of a building unless and until the Commissioner has granted permission for execution of the work. Section 212 required the Commissioner, by order in writing either to approve the site or refuse the building permission on one or more of the grounds mentioned in Section 215 of the Act, within sixty days after the receipt of the application made u/s 209 of the Act. Section 213 similarly obligates the Commissioner, within sixty days after the receipt of the application submitted u/s 209 of the Act, seeking permission to execute any work, either to grant such permission or refuse to grant such permission on one or any of the grounds mentioned u/s 215 of the Act. The proviso to Section 213 makes it clear that the period of sixty days shall not begin to run until the site has been approved u/s 212. Section 214 of the Act acquires relevance in the present context and it reads as under:

214. Effect of delay in grant or refusal of approval or permission:-

If within the period prescribed by Section 212 or Section 213, as the case may be, the Commissioner has neither given nor refused its approval of a building site, or its permission to execute any work, as the case may be, such approval or permission shall be deemed to have been given; and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or any rules or bye-laws made under this Act.

17. Section 214 therefore makes it clear that the approval or permission sought for shall be deemed to have been accorded, if no order either granting or refusing the approval has been communicated by the Commissioner within the time limits specified under Sections 212 and 213 of the Act. However, the applicant who shall be deemed to have been accorded the permission shall execute the work without contravening any of the provisions of the Act or any rules or bye-laws made under the Act. In other words, the work that is to be executed by virtue of the fictional permission, shall nonetheless comply with all the requirements contained in the provisions of the Act and the rules or bye-laws made thereunder. No building, hence, can be executed contrary to the requirements of the building bye-laws or rules made in that regard. Section 217 empowers the Commissioner, if he finds the work executed is otherwise than in accordance with the plans or specifications which have been approved or any such work is found to contravene any of the provisions of the Act or bye-laws or rules made thereunder, by notice, require the owner of the building within a period stated therein to make such alterations as may be specified in the said notice with the object of bringing the work into conformity with the said plans or provisions of law. Subsection (2) thereof sets out that, if the owner of the building does not show cause as aforesaid, he shall be bound to make the alterations specified in such notice. Sub-section (3) thereof requires the Commissioner, in case a cause as is shown by the owner, either to cancel the notice issued under Sub-section (1) or confirm the same subject to such modifications as are deemed fit. Section 228 deals with demolition or alteration of building work which was commenced unlawfully, commenced or carried on, or completed, otherwise than in accordance with the plans, or in breach of the provisions of the Act or any rule or bye-law made thereunder. It is worthy to note that the impugned order has been passed in terms of and in accordance with Section 228.

18. The impugned order specifically pointed out that the constructions made in the first and second floor by the petitioner is against the building rules. In fact, Building Rules 9(2), 9(4) and 9(7) are allegedly breached by the petitioner. Section 2301 declared that the rules embodied in Schedule III of the Act shall be read as part of Chapter IV of the Act. Schedule III prescribed the building rules. Rule 9(2) thereof specifically sets out that, in case of public or private street, not being a conservancy lane, no building shall be built within 1.5 meters of the boundary of such a street and also in the space between the building line and the street alignment. Further Rule 9(2)(ii) stipulates that, where a site abuts one, two or more streets, the front set back shall be provided on all such sides facing

the streets. Rule 9(4) further stipulates that, between the rear boundary of every building site and the building itself, there shall be an open space exclusively belonging to such building and extending laterally throughout the width of the site to a depth of not less than 3 meters. Rule 9(7) specifies that, buildings wholly or partly intended for human habitation or to be used as offices, schools, factories, workplaces and the like where human beings work for considerable part of the day, except the buildings to be solely used as shops, godowns or warehouses, shall not cover more than two thirds of the area of the site and the remaining one-third area of the site shall be kept as vacant space open to sky. It is now alleged that these rules have been breached by the writ petitioner.

19. It will be most appropriate at this stage to notice the contents of the inspection report submitted together with a plan annexed thereto. The plan is reflected herein below for an easy grasp of the state of things existing.

The building is abutting roads on south and on east side. It is reflected that the south-west corner of the petitioner's building is in fact protruding by 4".3", in comparison to his western neighbours building. Further the balconies which the petitioner has constructed, which are clearly marked in the above plan, show that they are protruding both on to the south road as well as the eastern side road. Thus, far from leaving the 1.5 meters open space, the petitioner has made constructions which are protruding onto the street line on the south and eastern sides. On the opposite side of the eastern road, parallel to the petitioner's building, there were existing some shops. The distance between those buildings and the road divider was exactly 40 feet, whereas, from the road divider, the distance between south-west corner of the petitioner's building was noted as 32"6", while, the distance between the road divider and his western neighbours property is recorded as 36"9". The distance between the south-east portion of the petitioner's building and the road divider is noted as 31"6". Thus, the petitioner's building is clearly ahead by 4"3" from the building line compared to his western side neighbour and the balconies constructed by him in the first and second floors have clearly protruded on to the southern and eastern side roads. Nowhere, the 1.5 Mts. distance/open space has been reflected. Further, the other half of the road from the road divider is 40" wide. Whereas the half abutting the building is varying in width from 36"9" to 31"6". It can therefore be assumed that the road is required to be of 80" wide. The objections filed by the petitioner do not deal with these projections, but on the other hand his objection is about the respondent not filing the master plan. It is appropriate to notice the objection raised by the petitioner in the following words.

3. ... But the respondent has not filed any master plan to show that when the said master plan was kept in force and implemented. As per my knowledge goes, the said master plan was implemented only after 1998. Even today, the buildings were not removed till today in compliance of the master plan. If the master plan is implemented, I am the first person to surrender the land as per the procedure for taking the land for road widening i.e. by way of acquisition of land and

structures....

The substance behind the objection of the petitioner appears to be that the master plan road is not existing and even if it is existing, it is implemented after his building is constructed. He also placed reliance upon the contents of the letter dated 24.06.1980 addressed by the Executive Engineer to the Chairman of the Municipal Council, Karimnagar, indicating the width of the Kaman Road to be 55 feet only. However, from the very beginning the respondent is insisting upon the petitioner to maintain the open space/distance of 1.5 Mts. from the boundary of the street as required by Rule 9(2). It has nothing to do with the width of the road, whether it is off 55" or 80". Nowhere, did the petitioner dispute that the balconies constructed by him are not protruding on to the street line, both on the south and eastern side roads.

20. It is most important to note that the order passed by this Court in WPMP. No. 459 of 1985 in W.P. No. 44 of 1985 dated 01.03.1985 made it very clear that the constructions on the first and second floors should be made only after leaving a distance of 1.5 meters between the street line and the proposed construction on the first floor or the second floor, by treating the line of construction vertically to the boundary of street line. It would also be appropriate to notice that the learned counsel for the petitioner in W.P. No. 44 of 1985 has given an undertaking to this Court that, if the construction is found to have been made in violation of the condition of maintaining 1.5 meters distance from the street line, the petitioner himself will demolish or the Municipal Authorities are at liberty to demolish the building. From the latest inspection report, it is now abundantly clear that the petitioner has carried out constructions completely contrary to the order passed by this Court on 01.03.1985 in WPMP. No. 459 of 1985 by not maintaining 1.5 mts. distance and he is also now trying to resile from the undertaking furnished by him to this Court at that point of time.

21. In fact, the petitioner made an attempt to challenge the validity of Sub-rule (2) of Rule 9 of the Building Rules. That is the reason why the order dated 01.03.1985 passed in WPMP. No. 459 of 1985 recorded the same in the following words:

Learned counsel for the petitioner is challenging the validity of the said rules.

22. Strangely, the petitioner has not pursued the said line of action when WP. No. 44 of 1985 was taken up for final consideration. He has obviously abandoned such a course of action. That is the reason why the learned single Judge who decided W.P. No. 44 of 1985, in his Judgment dated 25.10.1988 recorded the finding as under:

The petitioner V. Parvathalu has proceeded with the construction of the building contrary to the Building Rules.

The petitioner has not challenged this finding recorded in W.P. No. 44 of 1985. He was happy and content inasmuch as, the learned single Judge directed the

respondents to legalize the illegal construction already made by the petitioner by levying a compounding fee. The question of payment of compounding fee by the petitioner would not have arisen at all if the petitioner has not made any constructions contrary to the building plan or contrary to the building rules. It is in fact the respondent which has challenged the directions issued by the learned single Judge to legalize the illegal constructions of the petitioner, when it carried the matter by way of an appeal in W.A. No. 927 of 1989. In fact, the learned Judges of the Division Bench which decided W.A. No. 927 of 1989 did not straightaway approve the legalization of the illegal constructions made by the petitioner. Hence, they left it open to the municipal authorities to inspect the building of the petitioner-respondent and in case, if it is found that the petitioner-respondent has violated the orders passed by this Court, to take action against the petitioner in accordance with the law. It is, therefore, abundantly clear that the Division Bench has not authorized or approved legalization of the illegal structure raised by the petitioner. The impugned order is, therefore in accordance with law.

23. As was already noticed from the inspection report, which was called for by this Court, in view of the consistent plea of the petitioner that he has not made any constructions contrary to the orders passed by this Court, far from, leaving 1.5 meters distance from the street margin, the constructions of the petitioner are in fact protruding upon the street line on both the south and eastern roads abutting the building of the petitioner.

24. In this context, Sri Rama Rao has made an attempt to demonstrate that, as per the proviso to Rule 9(2) of the Building Rules, any sunshade, balcony, a canopy or other similar projections of a building not exceeding one meter in width can be allowed above a height of three meters measured from ground level where no pillar, wall or other structure is erected in the open space for support, and hence the constructions made by the petitioner need not be pulled down.

25. I am afraid, this contention is without any substance or merit. Firstly, this Court granted permission to the petitioner to make constructions by its order dated 01.03.1985 passed in WPMP. No. 459 of 1985 by clearly leaving an open space of 1.5 meters distance. When once the petitioner obtained an order from this Court, subject to the said condition imposed by this Court, he cannot later on turn around and plead to the contra. The petitioner is therefore bound to maintain a set-back space of 1.5 meters (which is equivalent to 5 feet distance). Once he has not done it, the action of the petitioner in making constructions amounts to contravening the order passed by this Court. Further, the petitioner has held out an assurance to this Court through his learned counsel that, in case he carries out constructions contrary thereof, he himself pulls down the offending structures or will allow the respondent to pull them down. The present pleading therefore runs contrary to that undertaking.

26. Above all, it is true that the projections not exceeding one meter in width are allowed by the proviso to Rule 9(2), inasmuch as, the sunshades or the balconies

would still be lying within the compound of the building itself. When once a building is constructed leaving a set-back of 1.5 meters, a sunshade or a balcony or a canopy or any other similar structure which may project up to one meter would still be lying within the open space of 1.5 meters left as a set-back space. They will not over flow the building line and project themselves on to the street line/margin. In the instant case, the inspection report has clearly noted as to how the balconies constructed by the petitioner have overshoot the building line and consequently protruding on to the street line, both on the south and eastern roads. Further, the east side balcony constructed by the petitioner is of 1.22 meters wide. Therefore, even the allowable width of one meter has also not been adhered to by the petitioner. Hence, the contention advanced by Sri Rama Rao cannot be accepted.

27. Above all, the building constructed by the petitioner was itself projecting forward by 4'3" from the building line of his western neighbour, thus, it is clear that the petitioner has made constructions without providing for any open space as a set-back area.

28. It is apt to notice that the petitioner when applied for a building permission for his ground floor, his application has been rejected by the Municipal Commissioner vide his proceedings dated 13.09.1972, as he has not left the 1.5 meters open space. Then the petitioner carried the matter in appeal to the Municipal Council. The Municipal Council at its meeting held on 21.10.1972 allowed his appeal assuming that the proposed construction of the petitioner is within the existing compound wall. Therefore, it is for the petitioner to satisfy that he has constructed his building leaving aside 1.5 meters of open space on both southern and eastern sides, since the building is abutting roads on those both sides. He failed to discharge this burden. Therefore, the contention of Sri P. Radhakrishna that the writ petitioner has constructed his building without providing for the set-backs is a well taken objection.

29. The petitioner has shown scant regard to the requirements of law. Though, the building permission applied for by him has not been rejected within the sixty days time frame limit by the Commissioner, but still, the petitioner is supposed to carry on the constructions strictly in accordance with the building rules. He cannot breach them. No constructions can be made in transgression of open space limits. The law has devised the concept of a fictional sanction to achieve two purposes. One is to prevent enormous time from being consumed by the competent authority to sanction the permission applied for. A clear time frame of sixty days is provided for the competent authority to apply his mind and in case the building permission is otherwise liable to be rejected to do so within the said period of time. Hence the first object is to keep a check on the authority competent to sanction building permission. The second is that the applicant need not stand at the mercy of the competent authority to secure sanction of the permission applied for. Therefore, a fiction is created in favour of the applicant to assume that the permission sought for by him is otherwise liable to be accorded

and hence he can treat as if the permission has been accorded to him. But the basic philosophy incorporated specifically u/s 214 is that no building shall be constructed in contravention of any of the provisions of the Act or rules or bye-laws made thereunder and they will have to be complied with by the applicant. If the building constructed by an applicant by virtue of a deemed sanction, has been found specifically to have been so constructed in transgression of any of the provisions of the Act or any rules or bye-laws made thereunder, such building is liable to be proceeded against in terms of Section 228 of the Act. As is now made out, the building constructed by the petitioner is not in accordance with the building rules which are made part of the Act by virtue of Section 230, which was in force till 16.08.2008. Hence, no exception can be drawn to the impugned order.

30. It is now appropriate to reflect on the Judgments relied upon by the learned counsel for the petitioner, in support of his plea that Rule 9(4) of the Building Rules is not applicable to any constructions made in the first and second floors of the building by the petitioner. Sri Rama Rao placed reliance upon the Judgment rendered by the Court in *Telu Nagaratnam Vs. The Municipal Council, Kakinada* 1979 (1) APLJ 141. It is appropriate to notice paragraph 7 of the Judgment which is as follows:

(7). IT can at once be seen from the above sub-rule that the open space required to be left under sub-rule (4) shall be measured at the level of the proposed construction, reconstruction, addition or alteration on any floor other than the ground floor, a line being taken along with the floor vertically above the boundary line on the ground. So if three metres of open space is left between the rear boundary of the building site and the building itself as required under Rule 9 (4) the same three metres of open space has to be left at every floor level. But in this case there is no dispute that the three metres of open space as required under sub-rule (4) is not there in the ground floor. For the construction of the ground floor permission was granted by the defendant in the year 1966. Now the plaintiff has only applied for construction of the first floor on the existing ground floor. She has not made any projections in the first floor beyond the ground floor. The extent of open space between the building site and the building at the ground level was also left at the level of the first floor: Can the defendant even then insist on leaving 3 metres of space at the level of the first floor? A careful and close reading of rules 9(4) and (8) together drives to the inescapable conclusion that a person constructing a building has to maintain the same open space at any upper floor level as that left between the boundary line of the site and the building, a line being taken vertically above the boundary line on the ground along with the floor. So read, the refusal of permission to the plaintiff for the construction of the first floor on the existing building appears to be highly arbitrary and illegal.

That is a case where exemption has been granted to the plaintiff from three meters distance of open space on the rear side for constructing the ground floor of the building. Subsequently, when he applied for construction of first floor

thereon, permission is declined. Once exemption is granted from the operation of Rule 9(4) for construction of the ground floor of the building, no such objection can be raised with regard to subsequent constructions carried on in the next floor of the same building, particularly, when no projections are made in the first floor beyond the ground floor. The petitioner in the present case has not been granted any such exemption by the respondents. Therefore, the above judgment is of little assistance to the cause of the petitioner.

31. Learned counsel for the petitioner placed reliance upon Judgment rendered by Justice B. Gangadhara Rao in W.P. No. 3496 of 1974 between T. Vijayalakshmi Vs. Commissioner and Special Officer, Municipal Corporation of Hyderabad and also the Judgment rendered in Godavari Bai Rathi and Another Vs. The Municipal Corporation of Hyderabad and Another, . The following passage from the Judgment rendered in Godavari Bai's case would set out the correct principles.

10. So far as bye-laws 23 and 24 are concerned, they relate to open air spaces to be provided for the rooms in the building. These bye-laws are intended to regulate and provide proper ventilation for the rooms. I do not see why the application of these bye-laws should be restricted to the rooms in the ground floor. There can be no practical difficulty in applying the bye-laws 23 and 24 to the rooms in the first floor and above. In the Judgment in Vijayalakshmi vs. Commr. And Special Officer, Municipal Corporation of Hyderabad (W.P. No. 3496 of 1974) decided by my learned brother Gangadhara Rao, J. the question of applicability of bye-laws 23 and 24 to the first floor was not raised or decided. But the Special Officer, Municipal Corporation of Hyderabad on a wrong understanding of the said judgment, issued proceedings No. 534/TP/77 dated 23-7-1977 that mere need be no compliance with bye-laws 23, 26, 27 and 28 to the extent of construction of the first floor. On account of these proceedings of the Special Officer, it was held by Chinnappa Reddy, J. in Smt. Godavari Bai Radii Vs. Municipal Corporation of Hyderabad, (W.P. No. 186 of 1977) that bye-law No. 24 also applies to spaces referred to in Building bye-laws No. 23 and therefore, compliance with Building bye-law No. 24 could not also be insisted upon when the construction is on the first floor. But for the erroneous proceedings referred to above of the Special Officer, the learned Judge would not have intended to lay down that bye-laws relating to ventilation should not apply to the rooms in the first floor. The proceedings issued by the Special Officer that bye-laws 23, 26, 27 and 28 need not be complied with, with regard to construction of the first floor and above appears to be clearly erroneous. Such a direction is really beyond his powers.

11. The petitioners have to comply with the bye-laws 23 and 24 in respect of the rooms to be built on the second floor. But they need not set apart 5 feet open space in the second floor, as they had already left the required open space at the ground floor level in conformity with bye-laws 26, 26 and 28. But in constructing the second floor, the petitioners have to comply with the provisions of bye-laws 25 and 29 and cannot raise any construction in contravention of the said bye-

laws.

Then the learned counsel for the petitioner has also placed reliance upon Judgment rendered by a Division Bench of this Court in *Kukatpally Municipality vs. P. Satyanarayana* 1990 (2) ALT 202 D.B. In paragraph 10, it is held as under:

10. There is another relevant aspect regarding which the Municipal Council did not address itself while disposing of the appeal. Even if the construction had taken unauthorizedly without valid sanction, it does not necessarily merit demolition of the building. We have already referred to the decided cases on the subject. The considerations of equity and public interest should be kept in view in exercising the discretion whether to order demolition or not. This discretion confided to a statutory authority, should be exercised judiciously and reasonably. At this juncture, it is pertinent to take note of in relation to the public road. The Advocate-Commissioner has reported that the distance between the building and the middle of the road is 53 feet on the eastern and western directions and about 50 feet from the balcony (where elevation was being undertaken). Therefore, he pointed out that "most of the buildings on either side of the road are in one line including the building which is sought to be demolished". It is evident from his report that almost all the buildings in the street in question do not comply with the requirement with regard to distance from the public road and the set off to be maintained according to the Zonal Development Regulations. It is also relevant to take note of the fact that the petitioner has given an undertaking that as and when the Zonal Development Regulations are enforced by ensuring that the building on either side of the road maintains a set back of 75 feet from the centre of the road, he would demolish the construction at his cost without claiming any compensation. He also expressed his willingness to pay the compounding fee, if any, levied by the Municipality.

In the instant case, it has become evident that the writ petitioner's building is protruding by about 4'3" from the building line and the offending constructions have overshoot the boundary of the road itself. Further, the petitioner was required to maintain the distance of 1.5 meters by this Court, which he has not maintained. Hence, it will be difficult to describe the impugned order as one passed without proper application of mind by the respondent.

32. Learned counsel for the petitioner then pressed into service the Judgment of the Supreme Court in *Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot*, wherein, it is held as

we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

It would also be apt to notice that their Lordships have proceeded thereafter to observe as

So far as income tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment u/s 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

33. In the instant case, no proceedings which have attained finality are attempted to be revived by the respondent. On the other hand, pursuant to the Judgment rendered by the Division Bench of this Court, the impugned order came to be passed. Hence, the Judgment of the Supreme Court referred to supra cannot be of much help to the petitioner.

34. Learned counsel for the petitioner has also placed reliance upon the Judgment rendered by a learned single Judge of this Court in *Sirpur Paper Mills Ltd. Vs. Income Tax Officer, "A" Ward and Another*, wherein, it is held as under:

The admission of a fundamental fact or primary fact cannot be withdrawn and a fresh litigation cannot be started with a view to obtain another assessment upon different assumption of facts. THE income tax department cannot be permitted to begin fresh litigations because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstances. If this is permitted, litigation would have no end, "except when legal ingenuity is exhausted". To do so, is "...to divide one argument into two and to multiply the litigation"....

It is apt to remember that the respondent-Corporation has not revised the basic premises upon which the action has been initiated against the petitioner herein. It has all through been maintaining that the petitioner has made constructions without complying with the requirements of Section 214 of the Act read with Rules 9(2), 9(4) and 9(7) of the Building Rules. Hence, the above Judgment is of not much help to the petitioner's cause. Learned counsel for the petitioner Sri M. Rama Rao has also placed reliance upon the judgment rendered by the Division Bench in *T.N. Kambati and Others Vs. State of Andhra Pradesh and Another*, wherein Bye-law Nos. 23 and 24 of Hyderabad Municipal Corporation (Buildings) Bye-laws (1972) are tested for their validity and the Bench found them as meaningless and arbitrary and hence declared them as void. Bye-law No. 23 dealt with the open space requirements of every room intended for human habitation while Bye-law No. 24 dealt with the open air space whereas Bye-law No. 26 dealt with open space around the buildings, and in respect thereof, it is observed by the Division Bench in paragraph 9 as under:

... It was sought to be argued that the Bye-laws 26 and 28 refer only to single or double floor buildings and they have no application to flat-type constructions of more than three floors apart from the ground floor, and that Bye-laws 23 and 24 are exclusively meant for such buildings. We do not see any justification for this assumption firstly because, Bye-law 26 deals with front open space and refers to

every building and Bye-laws 27 and 28 which refer to open space and side open space, refer to every residential building. No distinction is made in these bye-laws with reference to the height of the building and the open spaces in the front or rear or sides do not vary with the height....

35. Therefore, it is difficult to hold that the Bye-laws in the instant case should not have applicability at all. Even otherwise, the petitioner has not challenged the validity of the Bye-laws even now. He intended to do that on the previous occasion, but discarded such a course of action ultimately. For the aforesaid reasons, this writ petition fails and it is accordingly dismissed, but however, without costs.

1 Section 230 has since been omitted by the Amending Act 37 of 2008 which was brought into force on 16.08.2008.