
(1996) 09 GUJ CK 0035
In the Gujarat High Court

Yogeshbhai D. Sheth

APPELLANT

Vs

Ahmedabad Municipal Corporation

RESPONDENT

Date of Decision : 13-09-1996

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 260, 260(1), 260(2), 263, 268
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 226
Gujarat Town Planning and Urban Development Act, 1976 — Section 26, 27, 28, 29, 49

Citation : (1996) 3 GLR 416

Hon'ble Judges : K.R. Vyas, J

Bench : Single Bench

Judgement

K.R. Vyas, J.—The appellants, in this group of three appeals, have challenged the orders dated 29th March 1996 below Exs. 5 and 6 in Civil Suit Nos. 4913 of 1995, 5105 of 1994 and 5106 of 1994 passed by the Auxiliary Chamber Judge, Court No. 18, City Civil Court, Ahmedabad, whereby the learned Judge has vacated the ad-interim injunctions granted earlier. Since the facts of these three appeals are common and the question of law involved therein is also common, they can conveniently be disposed of by this common order.

2. In view of the fact that number of other suits are pending in the City Civil Court at Ahmedabad in respect of the same subject-matter, at the request of the learned Advocates for the parties, it was decided to hear these matters finally and the learned Advocates were heard at length.

3. Civil Suit No. 4913 of 1995 has been filed by 13 shop-owners (hereinafter referred to as "the occupiers") of the building known as Urvashi Tower, constructed on final plot No. 368 of T.P. Scheme No. 3 of the Ahmedabad Municipal Corporation. The society had submitted the plan and the respondent granted permission according to the plan. However, the society carried out different construction and the hollow plinth which was to be kept for the purpose of parking has been converted into the commercial use by constructing the shops

and thus the parking space has been converted into commercial purpose. Admittedly, the construction has been carried out by the society without any permission and contrary to the permission granted by the respondent. It is the case of the occupiers that they are the bona fide purchasers for value without notice in respect of the shops purchased by them and the properties were assessed to tax by the Tax Department of the respondent-Corporation. The premises are also registered under the Bombay Shops and Establishment Act. In view of this, the occupiers reasonably and bona fide believed that the property was constructed in accordance with the Rules and the Bye-laws of the Corporation. As the respondent-Corporation had decided to remove the unauthorised construction, the occupiers have, therefore, filed the aforesaid Civil Suit No. 4913 of 1995 and have prayed for a declaration that the respondent-Corporation is not entitled to take any action u/s 260(1) and Section 260(2) of the Bombay Municipal Corporations Act without giving notice to them. They have also prayed for a permanent injunction restraining the respondents, their servants and agents from demolishing the construction of the premises or obstructing the occupiers in carrying on their business and occupation in the said property. They have also prayed for a permanent injunction restraining the respondents from taking any action u/s 260(1) or Section 260(2) of the B.P.M.C. Act without giving such notices to them. The occupiers took out Notice of Motion for temporary injunction restraining the respondents from demolishing the construction of the premises and obstructing the occupiers from carrying on their business and occupation in their properties.

4. Civil Suit No. 5105 of 1994 and Civil Suit No. 5106 of 1994 have been filed by the Jan Umang Co-operative Housing Society Limited (hereinafter referred to as "the society"). The society has constructed superstructure on final plot No. 368 after obtaining the approval of the plans from the respondent-Corporation. It is the case of the society that it has spent considerable sum in constructing the building and that the officers of the respondent-Corporation even visited the society from time to time to verify the progress of the construction work and even revised plans were submitted to the respondent which were also approved by the respondent. It is the case of the society that the respondent issued notice u/s 260(1) of the B.P.M.C. Act to the society. However, the society had already allotted the respective shops/flats to the respective owners.

5. As the society came to know that the respondent, its agents and servants were proposing to vacate forcibly the shops and flats on 15th June, 1989 at 10-00 a.m., the society was constrained to file Civil Suit No. 2805 of 1989. As the said suit was filed without addressing statutory notice upon the respondents, the society withdrew the same.

6. It appears that thereafter the society filed Civil Suit No. 4236 of 1989 on 21st August, 1989 after issuing a statutory notice dated 1-7-89. It further appears that the said Civil Suit No. 4236 of 1989 was instituted on two causes of action jointly and as an objection was raised by the respondent, the society withdrew

the said suit with permission of the Court to file a fresh suit on the same cause of action after serving statutory notice separately upon the respondent. However, the injunction granted in the earlier suit being Civil Suit No. 2805 of 1989 was ordered to be continued till 30th September 1994. In any case, when the present two suits were filed by the society on 4-10-1994, the learned Chamber Judge granted ad-interim injunction restraining the respondent, its agents and servants from demolishing or taking action whatsoever in pursuance of the notices dated 16-10-1987 u/s 260(1) of the B.P.M.C. Act in respect of the flats/shops constructed on final plot No. 368 of T.P. Scheme No. 3 and known as Urvashi Tower.

7. The respondent-defendant contended that the society submitted the plan for permission to construct the building wherein the society had shown the hollow plinth for the purpose of parking and which was to be kept open on all sides. Accordingly, the respondent-Corporation granted the permission. However, on or about 13-10-1987, it was found that the society had carried out the construction of the shops in the hollow plinth without the permission of the respondent-Corporation by covering it from all sides. In other words, the society had carried out the construction of shops contrary to the permission granted by the respondent-Corporation. In substance, it is the case of the respondent that the construction has been carried out for the purpose different than the one for which the permission was sought for and granted, i.e., other than the parking purpose. It was, therefore, contended that the notice dated 16-10-1987, with the sketch of the unauthorised construction attached thereto was issued u/s 260(1) of the B.P.M.C. Act and it was served on the society on 16-10-1987. The society was called upon to submit its explanation on 25-10-1987. It was also called upon to appear in person on 26-10-1987 at 3-30 p.m.

8. The society by its reply dated 20-10-1987 has admitted that it has carried out the construction of shops on the hollow plinth without the permission of the respondent and the society had commenced the use and occupation of the building without the permission of the respondent-Corporation required u/s 263 of the B.P.M.C. Act and, therefore, the respondent served the appellant with a notice u/s 268 of the B.P.M.C. Act. This notice has been challenged under Civil Suit No. 5105 of 1994. In short, it is the case of the respondent that the appellant has converted the parking space into commercial use/market and, therefore, the respondent-Corporation is constrained to resort to the drastic action of removing the construction of the shops.

9. As stated above, the learned Chamber Judge, after hearing the parties, vacated the ad-interim injunction against which the present appeals have been filed.

10. Before dealing with the various contentions raised by the learned Advocates of the parties, it is necessary to refer certain relevant facts which have also bearing on the decision of these appeals. On 8-5-1996, during the course of hearing of these appeals, as it was not possible for this Court to come to a

definite conclusion as to whether there is any area reserved for parking or not; whether the area where the vehicles are parked in front of the shops is the area occupied by the shop owners or not, and whether there is adequate space for parking, keeping in mind the requirement of the entire building, at the request of Mr. P.M. Raval, learned Advocate for the occupiers, Mr. P.K. Roowala, the Town Development Officer, who was present in the Court, was appointed as Court Commissioner with a direction to visit the site, hear the appellants and submit a report to this Court on 10th May 1996 dealing with the aforesaid questions though the respondent had not consented to the passing of the aforesaid order.

11. In compliance with the said direction, Mr. Roowala has submitted the report and stated that there is no specific area reserved for parking and the area of hollow plinth and part portion of consolidated open plots are used as a parking space by the flat owners (occupiers). It is further stated that the area just in front of the shops is having negative plinth and is only approachable by going down the steps. This area is separated from the remaining margin area, with steps and the area where vehicles are parked by the shop owners is margin space, area going in road line and the Municipal street land. For part of the area on which cars are presently parked, road is being expanded, the owners have given letter which is annexed to the report saying that they will hand over the area without claiming compensation but requesting for F.S.I. It is further reported that in Urvashi Complex at present there are fifty-eight (58) residential flats and thirty-eight (38) shops. The area of the hollow plinth and area of the consolidated open plot is being used as parking. On inquiry it was found by him that flat owners are having about 60 cars and about 100 scooters and the entire area is occupied by them. They do not allow to park any vehicle of the shop-keepers as well as their customers. Fifty per cent shops are having the business of motor spare parts and accessories and number of vehicles are parked in front of shops and on Municipal street land and causing traffic nuisance for the whole day. Keeping in mind the vehicles of the shop-keepers and the customers being parked in the area, the space for parking will be inadequate. He has also produced the photographs showing the exact position. The Court Commissioner concluded the report by stating that even under the revised plans submitted in the year 1987, the appellants have shown the proposed use of common amenities, doctor's rooms and eight shops. Instead they have constructed thirty-eight shops, which is not permissible even at the time of submission of the revised plan and at present also. He has stated that over and above shops in negative plinth is also not permissible as per the present policy.

12. On 10th May 1996, a grievance was made by the appellants that the report was prepared by the Commissioner without hearing them. It was the contention of the appellants that the appellants have to submit and/or to point out the material regarding their occupation of the place where the vehicles are being parked. It is also contended that they in fact made a representation to the Commissioner of the Municipal Corporation. However, no decision was taken thereon. In view of this, as it appeared to this Court that the grievance made by

the appellants is required to be sorted out by the Municipal Commissioner himself, this Court had given the following directions:

1. It would be open for appellants to submit a representation either jointly or individually to the Commissioner of Ahmedabad Municipal Corporation. The said representation shall be made within a period of one week from today.
2. As and when such representation is made, the Commissioner shall consider the same after hearing the appellants as well as interested parties and will pass appropriate reasoned order.
3. The Commissioner shall also consider the question regarding regularisation, if permissible, and will also consider the question of allotting alternative site on payment at the market rate for the purpose of parking of vehicles of the customers of the shop owners.
4. The Commissioner shall submit his report to this Court on 17th June, 1996.

This order was passed without prejudice to the rights and contentions of the parties.

13. The Municipal Commissioner, in compliance with the order passed by this Court, on 17th June 1996, submitted a report after considering the representation in writing and after affording personal hearing to the appellants, their Engineer and Advocate, submitted a report with reasons by holding that it is not possible for him to accede to any of the requests of the appellants.

14. Since the report of the Commissioner has gone against the appellants, the appellants of Appeal from Order No. 219 of 1996 filed two applications being Civil Application No. 5830 of 1996 for permitting them to amend the plaint of Civil Suit No. 4913 of 1995 and Civil Application No. 5829 of 1996 for permitting them to adduce additional evidence. I will deal with both these applications at the appropriate stage in the present order.

15. Before dealing with the case on merits, it is required to be borne in mind that when the demolition of the unauthorised construction is under challenge, it is obvious that the plaintiff is always keen to obtain an order of injunction from the Court by raising all sorts of contentions and to make them disputed questions of facts in the name of triable issues by contending that evidence is required to be led at the trial and thereby to prolong the litigation and protect the property indefinitely. The Court, under the circumstances is required to be cautious and should weigh the personal interest of the plaintiff on one hand and the public safety and the inconvenience caused to the general public by reason of the unauthorised construction on the other. The Court should never encourage the alleged illegalities committed by the interested party against the interest of the public when it is found that he is trying to use the Court as a lever for carrying on his activities on such unauthorised construction of the building. Keeping this in mind, the only question which is required to be considered by this Court is whether the appellants have made out a prima facie case which can be decided

only by leading evidence. I may make it clear that by raising this question, I am not overlooking the requirement of balance of convenience and irreparable loss that may be caused to the appellants, if the injunction is refused.

16. The appellants have averred in the plaint by making a grievance that no notice u/s 260(1) and Section 260(2) of the B.P.M.C. Act has been served and, therefore, the proposed action of the respondent-Corporation in demolishing the shops in question is violative of the principles of natural justice inasmuch as no hearing is afforded to them before resorting to the drastic action of demolishing the shops in question. Now, it is not in dispute that notice u/s 260(1) was issued on 16-10-1987 and it was served upon the society whereby the society was called upon to submit its explanation on 26-10-1987. The society was also called upon to appear for personal hearing 26-10-1987 and to show cause why the action should not be taken. It is also not in dispute that the society has admitted that unauthorised construction has been carried out and the shops have been constructed in the hollow plinth without the permission of the respondent-Corporation. It is also not in dispute that the society had submitted revised plan wherein they had shown the proposed use of the common amenities, doctor's room and eight shops. However, instead of constructing as per the revised plan, the society has constructed 38 shops contrary to the revised plan. Thus, admittedly the construction has been carried out by the society without any permission and contrary to the permission granted by the respondent-Corporation. It is also an admitted fact that when the respondent-Corporation took the final decision to remove the construction of the shops which have been made by covering the hollow plinth meant for parking space, nobody, including the appellants, was in occupation of the said shops. In view of these admitted facts, the question that arises for consideration is whether the occupiers who came in occupation of the shops are entitled to a fresh process of hearing? Now, this question has been concluded by the decision of this Court in Jaykumar G. Vyas Shop No. 2 Vs. Vijay Housing Development Corporation , wherein it has been held as under:

The transferee who takes the property with the knowledge of a demolition order validly made, would not be entitled to any fresh process of hearing and the proceedings concluded against the transferor would remain binding on him. An order of demolition made under the statute and served on the owner would ordinarily be disclosed to the transferee and the transferee cannot acquire a better right than the transferor. The building liable to be demolished under a demolition order made under a statute would not become not liable to be demolished by virtue of its transfer....

Similar view was taken by learned brother B.C. Patel, J. while deciding a group of matters being Special Civil Application No. 14106 of 1993 and other cognate matters on 18-10-1993 and it has been observed therein:

So far as the contention that on account of recovery of Municipal taxes, respondent is estopped from demolishing the construction, in the case of

Jaykumar G. Vyas Shop No. 2 Vs. Vijay Housing Development Corporation this Court has considered this aspect in detail in paragraphs 21, 22 and 23. In view of the settled position of law, I do not find it necessary to give elaborate reasons on this count except to reiterate that mere recovery of taxes in respect of unauthorised constructions would neither create any estoppel nor would it amount to waiver and an action can be taken under the provisions of the Act for removing the unauthorised construction even in respect of properties for which taxes are recovered.

As regards the contention that leaving several other illegal constructions this construction is selected by the respondent on a pick and choose basis, the petitioners have not placed any material supporting this contention and, therefore, it is not required to be dealt with this allegation, being a mere vague allegation.

In view of this judgment, it is clear that the occupiers are not required to be afforded fresh hearing, as they have occupied the shops after the order of demolition was made. Since this was the main contention in the suit filed by the occupiers, the learned Chamber Judge rightly held that there is no prima facie case in their favour.

17. Realising the difficulty in their way, it appears the occupiers have taken a somersault by coming forward with a case that as they were not aware of the issuance of the notice u/s 260(1) and Section 260(2) of the B.P.M.C. Act to the society and the society was never made available to them with the revised plan even though demanded, they were kept in total dark. It is the contention of Mr. P.M. Raval, learned Advocate for the appellants that the occupiers were not aware about the various facts regarding approved plan, revised plan, policy and the Rules of the Corporation. It is the submission of Mr. Raval that during the pendency of these appeals, the appellants were advised to make inquiries about the approved plan, revised plan etc. and they have come to know about the various facts which would necessitate incorporation in the plaint. Mr. Raval, therefore, filed an application being Civil Application No. 5830 of 1996 for permitting the occupiers to amend the plaint in Civil Suit No. 4913 of 1995. Now, this application was filed on 16-7-1996. Simultaneously, on the same day, another application being Civil Application No. 5829 of 1996 was filed by the occupiers for permitting them to produce additional evidence referred to in the said application. As contended by Mr. P.M. Raval, the original plan was sanctioned by the Municipal Corporation. Thereafter the revised plan was submitted by the society. The notes were prepared from the inspection file of the Ahmedabad Municipal Corporation after the revised plan was rejected, the approval was granted by the Municipal Commissioner to the proposal of the department for regularisation. This would prima facie suggest that no illegality has been committed by the society in deviating from the revised plan as the deviation is permissible and, in any case, the Corporation itself had permitted the other buildings having negative plinth on C.G. Road during the same period when the

present Urvashi Tower was being constructed. It is further contended by Mr. P.M. Raval that there are as many as 31 buildings of commercial complex situated on C.G. Road built on or around the same period during which the Urvashi Complex was constructed and in which there are no parking areas and the parking areas meant for such buildings have been converted into complexes, the negative plinth into basement shops and such properties are put to use other than the user of doctor's room, nursing home and bank. Reliance is placed on the notes prepared by the Town Planning Officer for regularisation of the irregularities in the construction of Urvashi Tower after the filing of these appeals. It is the case of the occupiers that the decision of regularisation has already been taken by the Municipal authorities and it is a relevant piece of evidence for the purpose of complete adjudication of the dispute between the parties. In substance, it is the submission of Mr. Raval, learned Advocate for the occupiers and Mr. G.R. Pathak, learned Advocate for the society that it is the policy of the Ahmedabad Municipal Corporation prevailing at or around the period during which the present complex was being constructed to permit such construction on C.G. Road and, therefore, the deviation from the original approved plan having been resorted to by the society, on the principle of legitimate expectations, the Corporation was required to regularise the same according to the decision on the file. Therefore, according to the learned Advocates for the appellants, this evidence is necessary to establish the consistent policy followed by the Municipal Corporation in the matter of construction of shops in the negative and hollow plinth and conversion of parking area into basement shops and user of the commercial complexes other than in accordance with the approved plan.

18. Considering the averments made in both these applications and the submissions advanced by the learned Advocates appearing for the occupiers as well as the society, it clearly transpires that an attempt is being made to make the dispute as a disputed question of fact to be decided by a Civil Court on the basis of the evidence that may be led before it and to see that till the decision thereon, the occupiers can merrily continue their business at the cost of public nuisance, safety and inconvenience. Normally, the Court should not and would not object to the grant of amendment to the plaint and production of additional evidence as it is the right of the party to pray for the same. However, while granting such prayers the Court has to consider the question as to the bona fides of the party making it and the other attendant circumstances. As stated above, in the suit, the occupiers have come forward with a case that they have not been served with the notice u/s 260(1) and Section 260(2) and till the said issue is concluded, in view of the decision of this Court in Jayeshkumar G. Vyas (supra), the present attempt is made to produce additional evidence and to amend the plaint with a contention that they were not aware about the revised plan submitted by the society and were also not aware about the notes prepared from the inspection file of the Corporation after the revised plan was rejected and the approval granted by the Commissioner to the proposal of the Town Planning Officer for regularisation. It is difficult to believe that the society had not given

access to the revised plan to the occupiers. The fact that the society is simultaneously fighting for the common cause of its members would suggest that the interest of the society as well as the occupiers is common and they are fighting for the common cause. It is to be noted that the occupiers have not made any attempt to have inspection of the plan from the Corporation office before they purchased the properties. Instances have been given in the application for additional evidence showing that the Corporation had given permissions to the other buildings having negative plinth, having no parking areas and the complexes converting the parking space and negative plinth into basement shops, during the same period when the present complex was being constructed and when the present suits were filed. However, no such grievance was made when Ex. 5 was heard. It was only at the appellate stage that the occupiers have come forward with these two applications with the sole object to prolong the litigation. It is well settled that a decision given at an earlier stage of the suit is binding to the parties at later stages of the same suit and, therefore, when an application for injunction is decided, the same cannot be made redundant by granting the applications as prayed for in the present appeals to suit the purpose of the appellants. Even though, in view of the judgment of this Court in J.G. Vyas's case (supra), the occupiers were not required to be heard and that was the main contention of the occupiers when the appeals were filed, this Court permitted the occupiers and the parties interested to submit a representation to the Municipal Commissioner and the Municipal Commissioner was directed to afford a personal hearing to the occupiers, their Engineer and Advocate and to consider their representation and submit his report before this Court. The occupiers, in fact, submitted the representation. The Commissioner, after considering the representation and hearing the parties, has submitted a detailed report to this Court and as the said report went against the appellants, these applications have been filed. Needless to say that all the contentions as raised in the applications for additional evidence and amendment of plaint and as contended by the learned Advocates before this Court, have been raised in the representation made to the Commissioner which has been duly considered by the Commissioner in his detailed report. Mr. P.M. Raval submitted that no reliance can be placed on the report of the Commissioner as the representation was made without prejudice to the rights and contentions of the parties. I think Mr. Raval is not right in his submission. As can be seen from the order dated May 10, 1996 passed by this Court, the said order was passed without prejudice to the rights and contentions of the parties meaning thereby the report submitted by the Commissioner is not without prejudice to the rights and contentions of the parties. Thus, when the appellants, who were not entitled to be heard under law, were, in fact, heard pursuant to the indulgence shown by this Court, it does not lie in the mouth of the appellants now to contend that the said report cannot be relied upon which has been submitted after considering the representation of the appellants and after hearing the appellants by the Commissioner. In S.C.A. No. 14106 of 1993 and other cognate matters (supra), it is observed:

...In the instant case, the petitioners came in occupation after the decision u/s 260(2) of the Act was served. Moreover, petitioners have entered into agreement with S.M.K. Corporation with full knowledge that the building is incomplete, plans are not sanctioned and S.M.K. Corporation had undertaken to get necessary plans sanctioned. Prior to that, decision for removal was taken and served on S.M.K. Corporation. Hence, the allegation in the petition such as "unilateral decisions to demolish without giving proper notice", "choosing constructions arbitrarily and unilaterally", "pick and choose method for demolition of construction" etc. are irrelevant

Mr. P.M. Raval submitted that in past such illegalities, of course, were committed. No action was taken and on the contrary the same have been regularised by the Corporation. Therefore, he submitted that the appellants are required to be protected. In the past, the Ahmedabad Municipal Corporation may have approved such relaxation plans but looking to the difficulties and problems of such type of relaxation, the aggravating traffic problems and other related problems including drainage, rain water disposal etc., if the Corporation has not preferred to permit such relaxation since almost last three years, the appellants, as a matter of right, cannot claim such relaxations in absence of any provisions with respect to such relaxations in the Act, the Rules or the Bye-laws. At this stage, it is worthwhile to refer to the following observations made by a Division Bench of this Court (Coram: B.N. Kirpal C.J. as he then was and H.L. Gokhale, J.) in Letters Patent Appeal No. 331 of 1995 decided on July 11, 1995 which, in my opinion, will give complete answer to the submission made on behalf of the appellants that the authorities have not taken similar action against the other wrong-doers and has regularised other illegal constructions in the past:

Before parting, it would be useful to refer to the following passage from the judgment of the Supreme Court in the case of Chandigarh Administration v. Jagjit Singh JT 1996(1) SC 445, at page 449:

"...Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be, that has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/ unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the Court should direct the

appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law...."

What is observed aforesaid with regard to the exercise of the judicial restraint by the High Court under Article 226 would also apply when a Civil Court is called upon to exercise its discretion under Order 39 Rules 1 and 2 and the same principles would be applicable.

Even the comparison of the buildings situated on C.G. Road with the building in question, i.e., Urvashi Tower is not proper. The road on which building in question is situated is not as developed as C.G. Road. It is to be noted that mostly the occupiers in the building in question are dealing in the business of repairs and fixing of accessories of motor cars. The entire complex is a residential building and, therefore, commercial activities are not only illegal but will have extremely adverse impact on the public utilities around the building. Not only the residents of the building are harassed because of the nuisance of repairs and fixing of accessories of motor cars, but the roads on the side of the building and in front of the building are completely choked up because of this activity. It has become impossible to go to the side street which has been virtually taken over by accessories shops for the purpose of their business. The entire activity takes place in the margin of this building as well as on the public street on the side and in front of the building with the result that thousands of vehicle owners and pedestrians are harassed because of the pursuit of certain vested interests who want to subserve their personal interest at the cost of the public good. Therefore, there is no question of comparison with C.G. Road. In this case the illegalities have not only created adverse impact on the inhouse residents of the building but have adversely affected and blocked public street traffic. Therefore, if the decision is taken to demolish the unauthorised structure with a view to remove public nuisance and inconvenience, it would be hardly a ground for the Court to protect the interest of such wrong-doers.

19. Mr. P.M. Raval and Mr. Pathak, learned Advocates for the appellants, have heavily relied on the notes prepared by the Town Planning Officer on the inspection file of the Ahmedabad Municipal Corporation after the revised plan was rejected and contended that the approval was, in fact, granted to the proposal of the department for regularisation. It is true that a proposal was made by the Town Planning Officer to the Commissioner wherein it was pointed out that the society has submitted a revised plan for regularisation of their shops; the double height of hollow plinth is not misused; that the pergola is constructed for the Architectural appearance only and such type of pergola are permitted in

Narayannidhi Complex by the Corporation; that the Corporation should take deposit of Rs. 1,93,000/- from the occupiers for change of use of nursing home and approve the plan and the negative plinth should be condoned as per the previous policy and approved in some cases of C.G. Road. It appears from the endorsement made by the Commissioner that "the matter was discussed" but certainly no decision was taken. It further appears that a clarification was sought from the Town Planning Officer about the endorsement to which the Town Planning Officer has endorsed that the recommendation may be considered as approved. The learned Advocates for the appellants, therefore, contended that whether the approval was granted or not by the Commissioner and under what circumstances the Town Planning Officer made the aforesaid endorsement is a question to be decided in the trial as the concerned Town Planning Officer is required to be cross-examined in the case. There is no merit in this contention for the simple reason that there is nothing on record to suggest that the Commissioner in the instant case in fact approved the proposal of the Town Planning Officer. On the contrary, for any reason, the endorsement made by the Town Planning Officer remained on paper only and has not been acted upon. On the contrary, on perusal of the file, it transpires that the Commissioner has decided to call for the explanation of the Town Development Officer regarding the said endorsement. Even if the said recommendation was made by the Town Development Officer to the Commissioner, the same will not be of any help to the appellants, when no order in pursuance to the said recommendation has been passed by the Commissioner and, secondly, it is an admitted fact that no construction is made even as per the revised plan.

20. Mr. P.M. Raval, learned Advocate for the occupiers, after inviting my attention to the relevant Building Bye-laws, T.P. Scheme Regulations in force and the provisions of the Development Plan of the Ahmedabad Municipal Corporation, has submitted that by constructing the shops in the parking space no illegality is committed as the additional storey having not been constructed, the F.S.I, in the instant case has remained the same. He also submitted that in any case and especially when the deviation from the construction according to the plan is permissible under the relevant Bye-laws, the illegality, if any, is required to be dealt with leniently considering the case on the ground of balance of convenience as the occupiers have already settled in their business in the respective shops. Reliance is also placed on the decision of the Supreme Court in *Rajatha Enterprises Vs. S.K. Sharma and Others*, . In the said case the Supreme Court, considering the facts of that case, has observed as under in paragraph 20:

20. We have perused the records and considered the arguments on both sides. We are not satisfied that, on the facts and in the circumstances of this case, the learned Judges of the Division Bench of the High Court were justified in permitting and much less directing the demolition of the 6th floor. On the facts found, there is neither justice nor equity in authorising the demolition. The total site area being 15,517 sq. ft. as found by the High Court, and the permissible FAR in relation to the site area being 38,792 sq. ft. as against the determined

area of 45,974 odd sq. ft. the excess FAR is only 7,182 sq. ft. When an area of 4,500 sq. ft. occupied by the school is excluded from the excess area of 7,182 sq. ft. by reason of the school having vested in the Government upon the completion of the building, the actual excess area in the possession and enjoyment of the appellant is only 2,682 sq. ft. The permissible limit of compounding being 5 per cent of the permissible FAR, which works out to 1,940 sq ft. the actual area of deviation outside the permissible compounding limit seems to be not larger than 742 sq. ft. In the circumstances, in the light of what the Commissioner says about the practice of the Corporation in regard to the commencement certificate and in the absence of any evidence of public safety being in any manner endangered or the public or a section of the public being in any manner inconvenienced by reason of the construction of the building, whatever may be the personal grievance of the 1st respondent, the High Court was not justified, at the instance of the 1st respondent claiming himself to be a champion of the public cause, in ordering the demolition of any part of the building, particularly when there is no evidence whatsoever of dishonesty or fraud or negligence on the part of the builder. See the principle stated by Sabyasachi Mukharji, J. in *Ramsharan Autyanuprasi and another Vs. Union of India and others*, , and by Khalid, J. in *Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others*, . Accordingly, we set aside the impugned order of the High Court insofar as it permits or directs the demolition of the 6th floor and affirm the rest of the order. The appeal is allowed in the above terms. We make no order as to costs.

In my view, the facts of the present case are totally different. In the instant case, the society submitted the revised plan on 2-11-1987 not as per the requirements of the Town Planning Schemes Regulations, the Development Control Regulations, the Building Bye-laws, the Act as well as the present policy. The proposed construction, as shown in the revised plan, is not made and instead 38 shops are constructed which were occupied without permission. As the revised plan was not approved, notices u/s 260(1), Section 260(2) and also u/s 268 of the Act were issued. Earlier the building was approved as a residential building and was thereafter converted partly into commercial and partly into residential building. The area of common amenities requires as per the Town Planning Scheme Regulation No. XI (A) (vii) for the common use of the occupiers is put to commercial use. The pergola covering the open space increases the built up area and the F.S.I, which is not permitted. The present built up area on ground floor inclusive of the unauthorised shops, exceeds 23% of the total plot area. Accordingly, the F.S.I, of only 1 would be permissible. The present F.S.I, exceeds 1 and is nearly 1.5 and therefore, the construction does not conform to the F.S.I. Regulations. Considering the design of podium and Tower, the total area of Tower exceeds 50% of the area at Podium level, which is not permissible, particularly since the building unit is not capable of sub-division (T.P.S. Regulation No. VII). The construction of the stair leading to upper level shops is in the marginal space which is not permissible [T.P.S. Regulation Nos. III (6) (iv) and VI (2)]. The lower

level shops have no plinth and the upper level shops have no means of access except the illegal not permissible stair in the front margin. There is no provision of having the negative plinth in the Regulations and hence it cannot be permitted [Building Bye-law No. 111 (10) (a) and T.P.S. Regulation No. X (i)]. As can be seen from the report of the Commissioner, there is a parking space provided in Urvashi Complex area but it is insufficient for the residents of the society. The Secretary and the President of the Society have also objected for using this space by the shop-keepers. Open space in front of the shops used for automobile accessory fittings is the margin space and the area going in road line. It is not permitted for the use of parking space as per the present Regulations. Some portion of this space is also lowered down to have access of shops at negative plinth. The irregularities of construction and use are not minor and it is not at the discretion of the Municipal Commissioner to ignore these irregularities as per the provisions of the Bye-laws, the Town Planning Scheme Regulations and the Development Control Regulations. The Commissioner, who personally visited the site has further observed that the commercial exploitation is not only illegal but is having an extremely adverse impact on the public utilities around the building. Not only are the residents of the building harassed because of the nuisance of repairs and fixing up of accessories but the roads on the side of the building and in front of the building are completely choked up because of this activity. Actually, it is impossible to go through the side street which has been virtually taken over by accessories shops for the purpose of their business and this entire activity takes place in the margin of this building as well as on the public street on the side and in front of the building. According to the Commissioner, the development of the road is presently at the initial stage and it is possible to initiate preventive steps before the problem on this road also assumes menacing proportions. In this particular case, the illegalities have not only created adverse impact on the inhouse residents of the building but have adversely affected and blocked public street traffic. In this case, the problem of the illegalities in the building and of exceeding F.S.I, is further compounded by the fact that the commercial activities are patently a public nuisance. Considering the difficulties and problems of the residents and the aggravating traffic problems and other related problems, including drainage, rain water disposal etc. the Commissioner preferred not to grant any relaxation regularising the illegal construction. The appellants have not been able to controvert any of the aforesaid findings recorded by the Commissioner and show that there is no nuisance or inconvenience to the general public. In view of this, when there is patent violation of the Building Bye-laws, I do not find any merit in the submission of the learned Advocates for the appellants.

21. The Supreme Court in *M/s. Rajatha Enterprises (supra)* set aside the direction for demolition of the upper floor given by the High Court by considering the fact that there was no evidence of public safety being in any manner endangered or the public or a section of the public being in any manner inconvenienced by reason of the construction of the building, that is not the case

before this Court.

22. The Supreme Court in *Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others*, has observed that tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers and residents.

23. In an identical case, in the case of *Shalin Hotel*, in Letters Patent Appeal No. 331 of 1995 (supra), the facts were that the building, as constructed and as in use, was not in accordance with the building plans, which were passed in so far as the cellar or the basement is concerned. The basement was meant to provide for underground parking but this was not done. On the facts and circumstances of that case, the Division Bench, observed that:

We would also expect the Municipal Corporation to take similar action against all those buildings, which have been constructed and or are being used not in accordance with the building plans or the building bye-laws. The message must go out loud and clear, viz., that laws, which include the bye-laws, are meant to be obeyed and not flouted and that monetary or any extraneous influence should not deter a Municipal authority from discharging its public duties and functions. The action which has been taken in the instant case by the respondents is in accordance with law and needs to be commended.

In view of this, I see no merit in the submission that even for the sake of balance of convenience the shops in question deserve any protection till the decision of the suits.

24. Thus, considering the facts on record, I am of the opinion that in view of the illegality in the construction of the shops inasmuch as the space meant for the parking has been converted into shops, which is admitted by the society for which no evidence is required to be led and the sole aim of the appellants is to prolong the litigation to suit their own purpose against the public interest, causing inconvenience to the general public, creating traffic problems and nuisance to the residents of the area and therefore, injunction as prayed for cannot be granted as there is no merit in the case.

25. The learned Advocates appearing for the appellants have submitted that (i) the power u/s 260 of the Act can only be exercised by the Commissioner and the same cannot be delegated to any other officer, (ii) the satisfaction about the illegal or unauthorised construction should be that of the Commissioner himself and not any other officer of the Commissioner, and (iii) the time of three days to remove the illegal construction stated in the notice is unreasonable.

26. So far as delegation of the power to issue notice u/s 260 is concerned, a reference to Section 69 of the said Act is required to be made. Section 69 deals with the exercise of certain powers of the Commissioner by the Municipal

officers. It, inter alia, provides that subject to the provisions of Sub-sections (2) and (3) any of the powers, duties or functions, including powers, duties or functions of a judicial or a quasi-judicial nature, conferred or imposed upon or vested in the Commissioner, may be exercised, performed or discharged, by any Municipal officer whom the Commissioner generally or specially empowers by order in writing in this behalf. Now, Sub-section (2) provides that the Commissioner shall not, except with the prior approval of the Standing Committee, make an order under Sub-section (1) affecting his powers, duties or functions under the various sections, sub-sections and clauses, enumerated in Sub-section (2). Section 260 under which the notice has been issued is not included in Sub-section (2) of Section 69. Therefore, u/s 69 the Commissioner is authorised to delegate his powers, functions and duties exercisable by him u/s 260 to any Municipal officer by order in writing. My attention has been invited to the order of delegation of power to the Town Development Officer for the purpose of issuing notice u/s 260. Therefore, the contention that the notice is illegal on the ground that it has been issued by the Town Planning Officer and consequently, therefore, the satisfaction arrived at by him is not the satisfaction of the Commissioner, is not sustainable.

27. In so far as the contention that the time limit of three days given to the appellants to remove the construction being unreasonable is concerned, the reliance placed in the decision of Andhra Pradesh High Court in G. Kamalakumari Vs. Municipal Corporation of Hyderabad, wherein a demolition notice of 3 days" time was given which, according to the Andhra Pradesh High Court, was unreasonable, is not helpful to the cause of the appellants since it is only one paragraph order and no facts are stated in the said decision. Secondly, no prejudice is caused to the appellants inasmuch as even though the notice is of 19-12-1987, no action in pursuance thereof has been taken thereafter and, thirdly, it is not in dispute that the construction is illegal.

28. Mr. P.M. Raval, learned Advocate for the appellants, then invited my attention to the rejection of the revised plan issued u/s 29(1), 49 and Chapter XII of the B.P.M.C. Act and Rule 4 of the Rules, and submitted that in view of Section 6 of the Gujarat Town Planning and Urban Development Act, 1976, the Standing Committee alone is entitled to exercise powers and as there is nothing on record to suggest that the power was delegated u/s 68 of the B.P.M.C. Act and, even if it is so, the Commissioner cannot further delegate his powers. Reliance is placed on the decision of this Court in Devjibhai B. Chudasama and Others Vs. State of Gujarat and Others, . The Division Bench of this Court, after considering the various provisions of the said Act has observed:

Sections 6(2) and (3) are clear to the effect that all the powers that can be exercised by the Municipality as the Area Development Authority can be exercised by the Planning Committee appointed by the Municipality. Reading Section 6(2) and Section 7 it is clear that the statute itself authorises and requires the local authority to set up the Planning Committee for the purpose of

performing the functions assigned to an Area Development Authority. Section 6 of the Gujarat Town Planning and Urban Development Act clearly states that the Planning Committee appointed shall have all the powers, responsibilities and status as are given to a Standing Committee, if any, appointed under the Act under which the local authority is constituted. In respect of the Municipality we do not have the provision of appointment of a Standing Committee in the Gujarat Municipalities Act, but Section 53 of the Act visualises the establishment of an Executive Committee consisting of such number of Councillors mentioned therein. The limitations for that Executive Committee is only that prescribed by the Rules framed under Clause (a) of Section 271 and by the provisions of Sections 49, 54 and 55. This Executive Committee is akin to the Standing Committee that will be constituted in the local bodies such as Corporation. Reading the provisions of the Gujarat Municipalities Act, it is clear that the Executive Committee appointed will have full powers in respect of discharging its functions assigned to the said Executive Committee....

In the submission of Mr. Raval, there is nothing on record to suggest that the Standing Committee, in the instant case, had delegated its powers u/s 68 of the B.P.M.C. Act and, therefore, the exercise of the powers u/s 260 by the Commissioner is also illegal and without authority of law. The submission of Mr. Raval initially appears to be attractive. However, on the close scrutiny and detailed examination of the various provisions of law, it loses its value. As stated above, Section 6 of the Gujarat Town Planning and Development Act, 1976 ("Town Planning Act" for short) deals power to designate a local authority as Area Development Authority. It provides that the State Government may, instead of constituting an Area Development Authority for a development area, designate any local authority functioning in a development area or part thereof, as the Area Development Authority for that development area. Section 7 of the said Act deals with the powers and functions of Area Development Authority and it includes:

- (i) to undertake the preparation of development plans under the provisions of the said Act for the development area;
- (ii) to undertake the preparation of town planning schemes under the provisions of the said Act, if so directed by the State Government;
- (iii) to carry out surveys in the development area for the preparation of development plans of town planning schemes;
- (iv) to control the development activities in accordance with the development plan in the development area;
- (v) to enter into contracts, agreements or arrangements with any person or organisation as the area Development Authority may deem necessary for performing its function;
- (vi) to acquire, hold, manage and dispose of property, moveable or immovable, as it may deem necessary;

(vii) to execute works in connection with supply of water, disposal of sewerage and provision of other services and amenities, and

(viii) to exercise such other powers and perform such other functions as are supplemental, incidental or consequential to any of the foregoing powers and functions or as may be directed by the State Government.

On the bare reading of Section 7 of the Gujarat Town Planning Act, it is clear that the Area Development Authority is not entrusted with the powers u/s 260 of the B.P.M.C. Act. The functions u/s 7 inter alia, are for preparation of development plans under the provisions of the said Act for the development area. Thus, even if the powers u/s 7 of the Town Planning Act are assigned to the Standing Committee, the same are quite different and distinct from the powers u/s 260 of the B.P.M.C. Act. At this stage, it is necessary to refer to Section 27 of the Town Planning Act which provides that any person, not being the Central Government or a State Government, intending to carry out any development in any building or in or over any land within the limits of a development area on or after the date referred to in Section 26, shall, except where such development is for any of the purposes specified in the proviso to that section, make an application in writing to the appropriate authority for permission for such development in such form and containing such particulars and accompanied by such documents as may be prescribed. Section 29 of the Town Planning Act deals with grant or refusal of permission on receipt of an application u/s 27 or Section 28. Section 49 deals with restrictions on use and development of land after declaration of a scheme. Reading the said provisions, it is clear that an application for revised plan in the instant case was submitted in writing to the appropriate authority and the Town Development Officer of the Ahmedabad Municipal Corporation has rejected the revised plan u/s 29(1) of the B.P.M.C. Act. Since there is no provisions under the Town Planning Act for demolition of the unauthorised construction, the powers are required to be exercised u/s 260 of the B.P.M.C. Act and that exactly happened in the present case to which the appellants are not entitled to make any grievance.

29. In view of the aforesaid discussion, the appellants have failed to make out any case to be decided by this Court or by the trial Court, especially in view of the admitted position that the construction was not according to the original plan nor is it even according to the revised plan (even that was also not approved) and the appellants have not been able to make out a case to justify that the said illegality can be compounded. There is also no case made out that the discretion exercised by the trial Court is erroneous. The fact that the society was heard before the order of proposed demolition, there is no violation of the principles of natural justice. The occupiers even though had no legal right to be heard, this Court in the midst of the hearing of these appeals, directed the occupiers to make a representation to the Commissioner and the Commissioner was directed to give them personal hearing and consider the representation of the appellants. The Commissioner has duly considered the representation and submitted his

detailed report to this Court and the appellants have not been able to controvert a single aspect thereof. As already stated, the interim order passed by this Court is without prejudice to the rights and contentions of the parties and not the report submitted by the Commissioner and, therefore, the report is binding to them. No legal right is established by either of the appellants and it is an afterthought to contend that the deviation is permissible which, in my opinion, is uncalled for and an argument of convenience only. Assuming that the deviation is permissible, it does not mean that the same is a matter of right. In any case, in view of the fact that the illegality is admitted, it would contradict the case of the appellants that the deviation is permissible. Last but not the least, even the present construction is not as per the revised plan. Thus, considering the matter from all angles, including public interest which is also against the appellants, I am of the opinion, that there is no prima facie case in favour of the appellants. The appellants have not only not been able to show that the balance of convenience is in their favour but the Commissioner has been able to establish that if the injunction as prayed for is granted, there will be lot of inconvenience to the public at large, nuisance and harassment to the residents of the locality and the problem of traffic congestion if he is not allowed to proceed further with the implementation of the decision which is in the interest of the general public for all times to come.

30. In the result, there being no substance in these appeals, they are dismissed with no order as to costs.

31. Before parting, it may be stated that applications being Civil Application Nos. 7174 of 1996 and 7275 of 1996 have been filed by the society on behalf of its resident members who are having their residential premises and have opposed the appeals by, inter alia, contending that they are managing the affairs of the society and the society has no right to file an appeal. Without entering into that controversy or expressing any opinion thereon, I may observe that it will be open for them to file necessary application before the trial Court for appropriate relief and, therefore, that application is disposed of with no orders as to costs.

32. Civil Application Nos. 5830 of 1996 and 5829 of 1996 filed by the appellants for amendment of the plaint and production of additional evidence are also rejected with no order as to costs. In view of the above, Civil Application Nos. 7274 of 1996, 7275 of 1996, 4434 of 1996, 4194 of 1996 and 4939 of 1996 do not survive and they are disposed of accordingly with no order as to costs.

At the request of the learned Advocates for the appellants, the respondents are directed to maintain status quo for a period of eight weeks from to-day to enable the appellants to move the Supreme Court.