

MAHENDRA BABURAO MAHADIK AND ORS.

v.

SUBHASH KRISHNA KANITKAR AND ORS.

MARCH 16, 2005

[B.P. SINGH AND S.B. SINHA, JJ.]

*Town Planning :*

*Maharashtra Regional and Town Planning Act, 1966—Sections 44, 52, 53, 123E and 144—Unauthorised constructions within Municipal Area - Regularisation of—Portion of land in front of single storeyed building of a person taken by Municipal Council for widening road—Grant of repair permission of the existing building and not for new construction, however new construction carried out—Issuance of notice directing compliance with the directions—Non compliance of and also non-filing of application under section 53(3)—Municipal Council passing Resolution to regularise unauthorised constructions on payment of penalty charges and compounding of offences but concerned person not filing any application for seeking regularization—High Court directing demolition of unauthorized structures in writ petition—On appeal, held : Municipal Council does not possess the statutory power to regularize unauthorized construction and recover development charges, but is confined to compounding of offences—Demand of development charges without prejudice to their rights does not create any legal right—Also since no application filed for permission for retention of land, Council obliged not only to prosecute owner but also to carry demolition—Hence, High Court rightly exercised discretionary power directing demolition of structure—Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965—Section 189.*

**The Municipal Council took over portion of land in front of the single storeyed structure standing on the site of the appellant for the purpose of road widening. Appellants in lieu of lost land obtained repair/construction permission from the Municipal Council in respect of remaining land for ground as well as two upper floors though no upper floor were in existence. Appellants then started the construction of ground floor plus six floors. Thereafter, the Municipal Council issued notice to the appellants directing**

A them to comply with the directions contained therein or file an application in terms of section 53(3) of the Maharashtra Regional and Town Planning Act, 1966 but they took resort to neither. Meanwhile, the appellants sought permission for construction of new houses for ground plus four more floors against the lost land. Thereafter, the appellants adopted a resolution that the unauthorized construction without permission could be regularised on  
B payment of certain penalty charges and compounding of offences in terms of Section 43 of the MRTP Act. However, the appellants did not file any such application for regularization of the unauthorized constructions.

C First Respondent then filed a writ petition seeking issuance of direction to the Municipal Council to demolish the building consisting of ground and six upper floors constructed by the appellants. High Court held that the Resolution was wholly unsustainable in law and the structures be demolished. Hence the present appeals.

D Appellants and the respondent nos. 2 and 3 in Civil Appeal No. 2733 of 2001 *inter alia* contended that the Municipal Council had the requisite jurisdiction to pass the resolution whereby unauthorised construction could be regularized and as such the direction of High Court exercising its discretionary power to demolish the structure was not just; and that the Municipal Council had the requisite jurisdiction to regularize such  
E unauthorized constructions by compounding offences upon accepting compounding fees.

F First Respondent contended that the appellants filed wrong documents and statements before this Court to bolster their cases; and that no general order of regularization could be issued in terms of the purported resolution.

Dismissing the appeal, the Court

G HELD : 1. A discretionary power must be exercised having regard to the larger public interest. It cannot be said that the High Court should have taken a lenient view with regard to the demolition of unauthorised constructions. Therefore, the Municipal Council is directed to carry out the demolition order passed by the High Court, as expeditiously as possible.

[924-B, G; 925-H]

H *Corporation of Calcutta v. Mulchand Agarwalla*, [1955] 2 SCR 995, distinguished.

*Friends Colony Development Committee v. State of Orissa and Ors.*, [2004] 8 SCC 733; *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.*, [1999] 6 SCC 464 and *Consumer Action Group and Anr. v. State of T.N. and Ors.*, [2000] 7 SCC 425, referred to. A

2.1. The Municipal Council did not make any promise to give full cooperation and concession in lieu of compensation for taking the road for widening purposes. It promised that cooperation will be given in the matter of payment of compensation for affected land. Therefore, the appellants made incorrect statements and annexed a wrong document before this Court. Furthermore, the Municipal Council granted only repair permission to the appellants. If permission had been granted only for carrying out repairs of an existing building and if, in fact, there existed only ground floor, question of grant of any permission for new construction or for that matter permission for carrying out repairs in ground plus two storey could not have been issued. Furthermore, there is nothing on record to show that any application seeking permission was filed for construction of new houses for ground plus four more floors for carrying out the repairs and also that they had any F.S.I. If the Council in fact had granted any permission to make new constructions of ground and two storeyed building, there was no reason for not producing before the High Court or before this Court. Thus, there is no option but to hold that only repair permission had been granted to the appellants. B  
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[917-D-E; 918-C, G-H; 919-A] E

2.2. Once a notice under section 52 of the Maharashtra Regional and Town Planning Act, 1966 is served, the persons aggrieved must apply for permission for retention on the land of the building or works under section 44 of the Act within one month. Only when a permission is granted, the notice would stand withdrawn. The question of grant of any permission would arise only if an application is made therefor. As the appellants had not filed such application, the Municipal Council was under statutory obligation not only to prosecute the owner but also to carry out the demolition in terms of the notice. But the Council did not discharge its statutory obligation and on the other hand, adopted the resolution whereby the unauthorized construction could be regularised on payment of certain charges. Appellants did not file any application for regularization of the unauthorized constructions within a reasonable time. Thus, they were not entitled to obtain any order of regularization from the Municipal Council, pursuant to the resolution. In any view, as the State did not approve the F  
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**A** Resolution, there is no question of giving effect thereto by the Municipal Council in favour of the appellants. Furthermore, even during pendency of the writ petition, appellants did not file any such application nor contended that they were entitled to take recourse to the benefits contained in the resolution. [919-C; 920-A-C, D-E]

**B** 2.3. The Municipal Council is a 'local authority' as well as planning authority within the meaning of the provisions of sections 2(15) and 2(19) of the MRTP Act. The Municipal Council being a creature of statute was bound to carry out its functions within the four-corners thereof. Being a statutory authority, it was required to follow the Rules scrupulously. The jurisdiction of a local authority is confined only to deal with application for grant of permission for construction as contained in section 44 of the Act whether at the initial stage or when a notice is served under section 53(2). The power to grant such permission could be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of section 44 of the Act, the Municipal Council did not have any jurisdiction to direct regularisation of such unauthorized constructions by reason of the said resolution or otherwise. Its power is confined to compounding the offences in certain cases. [920-F-G; 922-F-G]

**C** 2.4. Even the development charges could not be recovered from the person in respect of unauthorized constructions in terms of section 124E(2) of the MRTP Act. Certain demands were made upon the appellants to deposit the development charges by the Municipal Council but the same were made without prejudice to their rights and as such did not create any legal right in favour of the appellants. Therefore, payment of development charges by itself did not lead to exoneration from the consequence of commission of an offence or regularization of unauthorized constructions. [920-H; 922-D-E]

**D** *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors*, [2004] 2 SCC 663, relied on.

**E** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2733 of 2001.

From the Judgment and Order dated 31.7.2000 of the Bombay High Court in W.P. No. 4675 of 1999.

**F** Shekhar Naghde, Dr. N.M. Ghatate, V.A. Mohta, Himanshu Gupta, T.

Raja, Shivaji M. Jadhav, M.D. Adkar, Nilananta Nayar, Vijay Kumar, Vishwajit Singh and Mukesh K. Giri for the appearing parties. A

The Judgment of the Court was delivered by

**S.B. SINHA, J.** These two appeals arising from a common judgment and order dated 31st July, 2000 passed by a Division Bench of the High Court of Judicature at Bombay in writ petition No. 4675 of 1999 were taken up for hearing together and are being disposed of by this common judgment. B

**FACTS :**

The factual matrix is being noticed from Civil Appeal No. 2733 of 2001. C

The First Respondent herein, an advocate, is said to be associated with various social activities and had been acting as Chief Trustee of Ganpati Devasthan, Bhiwandi. He filed a writ petition in the nature of a Public Interest Litigation *inter alia* for issuance of an appropriate direction upon The Bhiwandi Nizampura Municipal Council (hereinafter referred to 'Municipal Council') to demolish a building consisting of ground and six upper floors constructed by the Appellants herein on the land bearing City Survey No. 3331 and House Property No. 358 and 358/1 of Kaskar Alley, Bhiwandi, District Thane. A further prayer was made that the Municipal Council be directed to furnish certified copies of extracts of assessment register/book and permission dated 5th May, 1995 granted to the Appellants herein in relation to the aforementioned property. D E

**WRIT PROCEEDINGS :**

In his writ petition, the first Respondent complained of illegal constructions made in the town of Bhiwandi on private as well as Government lands but despite the same neither any action was taken thereupon nor any certified copy of the assessment register/ book was supplied. F

In the writ petition, it was contended that on the aforementioned plot there existed a single storied structure but the Appellants managed to obtain a repair permission dated 5th May, 1995' for carrying out repairs on the ground floor and two upper floors, but construction of ground plus six floors was started on the basis thereof. G

The First Respondent herein sought for copies of extracts of the H

- A assessment register for the purpose of establishing the nature of the original structure standing on the said property but the same was denied to him on the premise that the property in question did not stand in his name. It was furthermore contended that the officials of the Municipal Council colluded with the Appellants herein. It was urged that such constructions had come up solely owing to negligence and default on their part. It was further contended that no F.S.I. was available on the plot for constructing such a huge building and, thus, the same being unauthorized was liable to be demolished.

- B Before the High Court the Appellants did not file any return. The Municipal Council, however, contended that in relation to the said property a civil suit had been pending in the Court of Civil Judge, Junior Division, Bhiwandi wherein the Appellants had obtained an order of status quo. It was further disclosed that a First Information Report in relation to the aforementioned unauthorized construction was lodged on 4th June, 1999 under Section 43 read with Section 52 of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act) and Sections 119 and 217 read with Section D 34 of the Indian Penal Code wherein the Appellants as also the officers of the Municipal Council including the then Chief Surveyor and Chief Engineer were named as accused therein.

- E Before the High Court, reliance was also placed upon a purported resolution of the Municipal Council dated 12th October, 1998 in terms whereof all unauthorized constructions within the municipal area were sought to be regularized upon imposition of penalty and compounding of offences in terms of Section 43 of the MRTP Act.

- F The State of Maharashtra in its affidavit contended that it was not inclined to approve the aforementioned resolution passed by the Municipal Council.

#### JUDGMENT OF THE HIGH COURT :

In the impugned judgment, the High Court held :

- G (i) The First Respondent was entitled to inspection of documents as also grant of certified copies on payment of requisite charges;
- (ii) Recovery of taxes in respect of unauthorized construction does not amount to regularisation thereof;
- H (iii) The Resolution dated 12th October, 1998 passed by the Municipal

Council on a wholesale basis is wholly unsustainable in law. A

(iv) Offences relating to unauthorized or illegal constructions cannot be compounded and, thus, structures have to be demolished.

(v) Regularization of such unauthorized structures would defeat the very purpose of introducing the rules of planned development of the city and, thus, cases of such unauthorized constructions must be dealt with sternly. B

It was directed :

“(i) The Respondent nos. 1 and 2 are directed to issue certified copies of the documents within four weeks as per the applications filed by the Petitioners subject to payment of charges. C

(ii) Civil Judge (J.D.) Bhiwandi is directed to decide the application for interim relief by Respondent nos. 4 to 6 in Reg. Civil Suit No. 321 of 1999 within a period of eight weeks. The parties shall appear before the Civil Court on 4th September, 2000 and thereafter the Civil Court shall hear the matter on day to day basis without granting any adjournments to either side. D

(iii) Appeal filed against the order of the Trial Court, if admitted and ad-interim or interim relief is granted, shall be disposed of within a period of six weeks without insisting for formal paper book. E

(iv) In case the Civil Court vacates the interim order the Municipal Council shall demolish the building constructed by Respondent nos. 4 to 6 within a period of four weeks from the date of vacation of interim relief. F

(v) The Commissioner of Police, Thane is directed to provide adequate police protection to the municipal staff in carrying out demolition of the building. G

(vi) The resolution dated 12th October, 1998 is quashed and set aside. Respondent nos. 1 and 2 are directed to take immediate steps to demolish the unauthorized structures in Bhiwandi in accordance with law.” H

**A** SUBMISSIONS :

Mr. Shekhar Naphde, learned senior counsel appearing on behalf of the Appellants principally raised the following two contentions in support of these appeals :

**B** (1) Having regard to the statutory scheme contained in Sections 52 and 53 of the MRTP Act read with Section 189 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (the Municipal Act), the Municipal Council had the requisite jurisdiction to pass the resolution dated 12th October, 1998 and in that view of the matter the direction of the High Court to demolish the structure is manifestly unjust, as pursuant to or  
**C** in furtherance of such scheme of regularization, the Appellant could have filed an application praying for regularization of the constructions raised by them.

**D** (2) In any event, the High Court should not have exercised its discretionary power in directing demolition of the structure. Strong reliance, in this behalf, has been placed on *Corporation of Calcutta v. Mulchand Agarwalla*, [1955] 2 SCR 995.

**E** Dr. N.M. Ghatate, learned senior counsel appearing on behalf of the Appellants in Civil Appeal No. 2734 of 2001 and Respondent Nos. 2 & 3 in Civil Appeal No. 2733 of 2001 supported the contention of Mr. Naphde and furthermore urged that although a notice had been served upon the Appellants, no demolition could be carried out in view of the order of status quo passed by the Civil Court.

**F** According to Dr. Ghatate, the Municipal Council has the requisite jurisdiction to regularize such unauthorized constructions by compounding offences upon accepting compounding fees prescribed therefor.

**G** Mr. V.A. Mohta, learned senior counsel appearing on behalf of the First Respondent, on the other hand, would submit that the Appellants are guilty of commission of fraud and even in this Court got up documents have been filed and wrong statements have been made to bolster their cases. According to learned counsel, Section 143 of the MRTP Act refers only to offences and in that view of the matter, by reason thereof, except as expressly provided for in the MRTP Act or the Municipal Act, no general order of regularization could be issued in terms of the purported resolution dated 12th  
**H** October, 1998 or otherwise. Provisions of Sections 52 and 53 of the MRTP

Act, Mr. Mohta would contend, would apply only during development and not thereafter. A

STATUTORY PROVISIONS :

The relevant provisions of the MRTP Act are as under :

“2(15) *“local authority” means -* B

(a) the Bombay Municipal Corporation constituted under the Bombay Municipal Corporation Act or the Nagpur Municipal Corporation constituted under the City of Nagpur Municipal Corporation Act, 1948, or any Municipal Corporation constituted under the Bombay Provincial Municipal Corporation Act, 1949. C

(b) a Council and a Nagar Panchayat constituted under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965

2(19) *“Planning Authority” means a local authority; and includes -* D

(a) a Special Planning Authority constituted or appointed or deemed to have been appointed under section 40;

(b) in respect of the slum rehabilitation area declared under section 3C of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, the Slum Rehabilitation Authority appointed under section 3A of the said Act; E

44. Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed : F

Provided that, save as otherwise provided in any law, or any rules, regulations or by-laws made under any law for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under G

H

A the Maharashtra Housing and Area Development Act, 1976.

52. (1) *Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development, or institutes, or changes the use of any land -*

B (a) without permission required under this Act; or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;

C (c) after the permission for development has been duly revoked; or

(d) in contravention of any permission which has been duly modified.

D shall, on conviction, be punished with imprisonment for a term which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees for every day during which the offence continues after conviction for the first commission of the offence.

E (2) Any person who continues to use or allows the use of any land or building in contravention of the provisions of a Development plan without being allowed to do so under section 45 or 47, or where the continuance of such use has been allowed under that section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall, on conviction be punished with fine which may extend to five thousand rupees; and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.

G 53(1) Where any development of land has been carried out as indicated in sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve on the owner a notice requiring him, within such period being not less than one month, as may be specified therein after the service of the notice, to take such steps as may be specified in the notice.

(a) in cases specified in clause (1) or (c) of sub-section (1) of section 52, to restore the land to its condition existing before the said development took place, A

(b) in cases specified in clause (b) or (d) of sub-section (1) of section 52, to secure compliance with the conditions or with the permission as modified : B

Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.

(2) *In particular, such notice may, for purposes of sub-section (1), require -* C

(a) the demolition or alteration of any building or works;

(b) the carrying out on land of any building or other operations; or

(c) the discontinuance of any use of land. D

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, and pending the final determination of withdrawal of the application the mere notice itself shall not affect the retention of buildings or works or the continuance of such use. E

(5) If the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand; or if such permission is granted for the retention only, of some buildings, or works, or for the continuance of use of only a part of the land, the notice shall stand withdrawn as respects such buildings or works or such part of the land, as the case may be, and thereupon, the owner shall be required to take steps specified in the notice under sub-section (1) as respects such other buildings, works or part of the land. F  
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124E (2) The Authority shall, on such application being made or if no such application is made, by a person instituting or changing any use of any land or building, then after serving a notice in writing on the person liable to such payment and after calling for a report in this H

A behalf from the concerned officer of the Authority, after taking into consideration the report aforesaid, determining whether or not and if so, what development charge is leviable in respect of that development or, institution of use or change of use and after giving the person concerned an opportunity to be heard, shall then assess the amount of development charge payable by such person and give to such person

B a notice in writing of such assessment.

143. (1) The Regional Board or Planning Authority or Development Authority concerned or any person authorized in this behalf by general or special order may either before or after the situation of the proceedings compound any offence made punishable by or under this

C Act or rules made thereunder.

(2) When an offence has been compounded, the offender, if in custody, shall be discharged : and no further proceedings shall be taken against him in respect of the offence compounded.”

D Sub-sections (2), (8) and (9) of Section 189 of the Municipal Act are as under :

“(2) Before beginning to construct any building, the person intending so to construct shall give to the Chief Officer notice thereof in writing and shall furnish to him at the same time, if required by a bye-law

E or by a special order to do so, a plan showing the levels, at which the foundation and lowest floor of such building are proposed to be laid, by reference to some level known to the Chief Officer, and all information required by the bye-laws, or demanded by the Chief Officer regarding the limits, design, ventilation and materials of the proposed building and the intended situation and construction of the drains, privies water-closets, house-gullies and cess pools, if any, to be used in connection therewith, and the location of the building with reference to any existing or projected streets, the means of access to such building and the purpose for which the building will be used :

F

G Provided that, if the bye-laws of the Council so require, such notice shall be in such form as the Council may from time to time prescribe and such plans shall be signed by a person possessing the qualifications laid down in the bye-laws or licensed under the bye-laws so to sign such plans.

H (8) *If any person begins any construction of a building of which*

*notice is required to be given under sub-section (2) -*

(i) without the permission of the Chief Officer under sub-section (4) or of the Council under sub-section (5), save as otherwise provided under sub-section (6); or

(ii) having received permission under clause (a) of sub-section (4), contrary to the plans and information furnished under sub-sections (2) and (3); or

(iii) having received permission under clause (b) of sub-section (4) contrary to the conditions imposed under that clause or contrary to the plans and information submitted under sub-sections (2) and (3) in so far as such plans and information are not modified by such conditions; or

(iv) contrary to the provisions of sub-section (6), when construction is begun under that sub-section, the Chief Officer may, by a written notice, require such person to stop such construction and to alter or demolish any construction already made as specified in the notice. If, within fifteen days, from the service of such notice for demolishing any such construction, the work of demolishing is not commenced, the Chief Officer may cause such work to be done and the expenses incurred therefor shall be recoverable from the person concerned in the same manner as an amount due on account of a property tax.

(9) Any person who fails to comply with the notice issued by the Chief Officer under sub-section (8), shall, on conviction, be punished with fine which may extend to five thousand rupees."

#### ANALYSIS OF THE STATUTORY PROVISIONS :

In terms of Section 44 of the MRTP Act, a person intending to raise any construction is required to make an application in respect thereof to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed. Filing of such application and obtaining such permission concededly are imperative in character. Such permission, if granted, remains in force for a period of one year unless extended by the Planning Authority.

Section 52 contains penal provisions. Section 53 authorizes the local authority to direct removal of unauthorized development. Sub-section (1) of

A Section 53 authorizes the local authority to issue a notice where a development of land has taken place in violation of the conditions indicated in Sub-section (1) of Section 52.

In terms of Sub-section (7) of Section 53, a person prosecuted under Clause (1) of Sub-Section (6) of Section 53 will be inflicted with the punishment specified therein.

**DETERMINATION :**

The First Respondent herein in the writ petition categorically stated that the original structure standing on the site in question was not of permanent nature and was a single storeyed one. Only the open land in front of the said structure on its southern side had been taken over by the Municipal Council for the purpose of road widening, whereafter the Appellants made an application to the Municipal Council for grant of repair permission which was granted for carrying out the repairs of ground as also two upper floors, despite the fact that no upper floor was ever in existence. Although in terms of such permission, only repairs of the existing structure could have been carried out and that too within a period of one year from 5th May, 1995, the Appellants herein started altogether new construction in the year 1998. They had erected R.C.C. framework of a building consisting of ground plus six upper floors but have not yet finished the work. The said averments of the Respondents in the Writ Petition were not denied or disputed. In fact, as noticed hereinbefore, the Appellants herein did not file any return before the High Court.

Before this Court the Appellants have produced a letter of the Municipal Council dated 4th December, 1986 addressed to the Appellant herein wherein it is contended :

“Sub : Road Widening.

Sir,

This is to inform you that your land on the southern side from C.T.S. 3331 is given to the Municipal Council after demolishing the compound wall for Road widening and the work of drainage is in progress.

In lieu of compensation for the said land the Municipal Council shall give full cooperation and concessions.”

Such a statement has also been made in the synopsis and list of dates at page B of Civil Appeal No. 2733 of 2001. A

However, while filing the additional documents, a copy of the said letter dated 4th December, 1986 had been annexed which reads as under :

“By this letter it is to inform you that on the part of your land bearing City Survey No. 3331 towards South a portion of land is taken for road widening purpose. In the said land surrendered by you the Municipal Council has broken the compound and undertaken the work of laying drainage, and developed a road. B

Kindly note that necessary cooperation will be given in the matter of compensation (price) for affected land from Municipal Council.” C

The Municipal Council, therefore, in terms of its aforementioned letter dated 4th December, 1986 did not make any promise to give full cooperation and concession in lieu of compensation. What was promised was that cooperation will be given in the matter of payment of compensation for affected land. D

It is, therefore, apparent that the Appellants have made incorrect statements and annexed a wrong document before this Court.

The Municipal Council, moreover, granted only repair permission to the Appellants, as would appear from its letter dated 5th May, 1995 wherein it is stated : E

“Sub : Repairs/Constructions permission in respect of remaining land upon demolition carried out for road widening. F

Ref : Reply letter No. TP/2021 dt. 4.12.86.

Sir,

For the purpose of road widening you out of your own initiative demolished your premises and handed over the land affected thereby to the Municipal Council. Repair permission for the old house, leaving the portion of land falling under road widening, is hereby granted as under : - G

Location : Mauje Bhiwandi, City Survey No. 3331

Scope of Construction : In lieu of the land lost in road widening, on H

A remaining land the construction of ground + 2 story could be made, leaving the distance of 5 feet from Municipal drainage.

Measurement : East 68', West 38', North 71'.

B For constructions made over and above the aforesaid measurement, appropriate legal action will be taken against you entirely at your risks as to costs and consequences thereof. Similarly in the event of any objections on ownership, possession, easement etc. being taken, resulting in civil as well as criminal proceedings, the Municipal Council shall not be responsible for the same."

C Thus, if permission had been granted only for carrying out repairs of an existing building and if, in fact, there existed only ground floor, question of grant of any permission for new construction or for that matter permission for carrying out repairs in ground plus two storey could not have been issued. It, furthermore, appears that the Municipal Council on or about 6.6.1998 issued a notice asking the Appellants herein to comply with the directions contained therein failing which it was threatened that necessary action would be taken in terms of the provisions of the MRTP Act and the Municipal Act and the unauthorized construction/ development would be demolished.

E In the Schedule appended to the said notice, the structure in question was described as :

"Under *repair permission* No. TP/87 dated 5.5.95, unauthorized construction is in progress at land bearing City Survey No. 3331 at Bhiwandi Mauje - Ground + six floors.

Measurement : East 68 ft. West 38 ft. North 71 ft."

F It appears that the Appellants had prayed for assessment of house tax by a letter dated 25.06.1998. In the said letter, permission was sought for construction of new houses for ground plus four more floors purported to be by way of compensation for the land lost by them by way of equalization thereof for road widening. There is nothing on record to show that Mr. R.R. Patil had made any such application for carrying out the repairs. There is also nothing on record to show that the said Shri R.R. Patil had any F.S.I..

H If the Municipal Council in fact had granted any permission to make new constructions of ground and two storeyed building, there was no reason as to why the same had not been produced before the High Court or before

us.

We have, therefore, no option but to hold that only repair permission had been granted to the Appellants.

The Appellants herein in terms of the said notice dated 6.6.1998 had the option of complying with the directions contained therein or file an appropriate application in terms of Sub-section (3) of Section 53 of the MRTP Act but they took recourse to neither.

If within a period of one month from 6.6.1998 no such application was filed, the Municipal Council was under a statutory obligation to carry out demolition of the structure in question. It did not discharge its statutory obligation. On the other hand, it adopted the following resolution on 22.10.1998 :

“Sub : Common disposal of cases of unauthorized/ without permission constructions by imposing penalty under the provisions of Municipal Council Rules.

#### RESOLUTION

In Bhiwandi city, it is observed that there are unauthorized/ without permission constructions made in large scale. Proceedings against the unauthorized constructions are already afoot. However, inspite of the actions pursuant to the decisions of the courts of law and due to inadequate strength of municipal staff, there is no reduction noticed in unauthorized constructions. Similarly, it is observed that the people are residing in/ using the unauthorized construction. Hence, only because the constructions are unauthorized, from the point of view of humanity it is deemed impracticable / improper to demolish the said constructions. Hence, the unauthorized constructions which are not opposed to the Development Planning Scheme and are within the FSI, the cases of such constructions can be commonly disposed off by imposing penalty under the provisions of section 143 of Maharashtra Regional and Town Planning Act, 1966. For dealing of such cases the powers of Planning Authority are given to the Chief Officer, Bhiwandi Nizampur Municipal Council, who may take further appropriate action in that regard under the guidance of respected Dy. Director, Town Planning, Kokan Division, Kokan Bhawan.

A Resolution approved unanimously.”

The Appellants did not file any application for regularization of the unauthorized constructions raised by them in terms of the aforementioned resolution dated 22.10.1998 within a reasonable time. They, thus, were not entitled to obtain any order of regularization from the Municipal Council, pursuant to the said purported resolution.

In any view of the matter, the State of Maharashtra having not approved the said Resolution, the question of giving effect thereto by the Municipal Council in favour of the Appellants, as was submitted by Mr. Naphde does not arise.

The writ petition was filed by the First Respondent herein on 29.6.1999 and even during pendency thereof, no such application was filed by the Appellants nor any contention was raised to the effect that they were entitled to take recourse to the benefits contained in the said resolution.

Once such a notice under Section 52 is served, the persons aggrieved within the period specified therein, which in the instant case is one month, must apply for permission for retention on the land of the building or works under Section 44 of the MRTP Act. Only when a permission is granted, the notice would stand withdrawn. The question of grant of any permission would arise only if an application is made therefor. As the Appellants herein had not filed such application, the Municipal Council was obliged not only to prosecute the owner but also to carry out the demolition in terms of the aforementioned notice dated 6.6.1998.

The Municipal Council is a ‘local authority’ as well as planning authority within the meaning of the provisions of Sections 2(15) and 2(19) of the MRTP Act.

The Municipal Council being a creature of statute was bound to carry out its functions within the four-corners thereof. Being a statutory authority, it was required to follow the rules scrupulously. Concededly, the Municipal Council is not possessed of any statutory power to regularize unauthorized constructions. Its power is confined to compounding the offences in certain cases. Moreover, even development charges could not be recovered from the Appellant in respect of unauthorized constructions in terms of Section 124E(2) of the MRTP Act.

It appears that the Municipal Council itself in terms of a letter dated 20.11.1998 sought for guidance of the Dy. Director Town Planning stating:

“Sub : Common disposal of cases of unauthorized/ without permission constructions made within Municipal Council limits by imposing penalty under the provisions of Section 143 of Maharashtra Regional and Town Planning Act, 1966.

Ref : Council’s Resolution No. 134 dt. 12.10.98.

Sir,

With reference to above, it is seen that in Bhiwandi city there are large number of unauthorized/ without permission constructions made. Proceedings against the said unauthorized constructions are a foot already. However, inspite of the action taken pursuant to the decisions of the courts of law and due to inadequate strength of Municipal staff, there is no reduction noticed in the unauthorized constructions. Similarly, it is observed that the people are residing in/ using the unauthorized constructions. Hence, only because the constructions are unauthorized, the demolition of the same is not deemed proper/ possible. Hence, in this regard the Municipal Council has passed a unanimous Resolution dated 12.10.90 in General meeting, being Resolution No. 134. Such cases can be disposed off commonly under the provisions of section 143 of Maharashtra Regional and Town Planning Act, 1966, considering Development Planning Proposal, FSI etc. Powers for dealing such cases on behalf of the Planning Authority is delegated to the Chief Officer. Copy of the Resolution is annexed hereto for perusal. Hence, it is requested that necessary legal and technical guidance in that regard be kindly given.”

A reference to the Government also appears to have been made by the Director, Town Planning by a letter dated 29th July, 2000 addressed to the Head Secretary of the Government of Maharashtra in the following terms :

“Sub : Recovery of development fees on unauthorized constructions.

Ref : (1) Letter dt. 27.7.99 of Chief Officer, Bhiwandi Nizampur Municipal Council

(2) Letter No. TPS—1299-1105/CD-12, dt. 29-3-2000 of City/ Development Department, Govt. of Maharashtra.

A Sir,

B With reference to above referred letter of Bhiwandi Nizampur Municipal Council, guidance is sought for recovery of development fees on unauthorized construction. Considering the provisions of Section 124-E(2) of Maharashtra Regional and Town Planning Act, 1966, proceedings of recovery of development fees on unauthorized constructions by Municipal Councils is not proper. Instead of that, the Municipal Councils should take actions under the provisions of Sections 52,53 and 54 of the aforesaid Act with respect to unauthorized constructions. And only the constructions which can be regularized in accordance with rules, actions for such constructions should only be taken to regularize and recovery of development fees in such cases would be proper. Accordingly, the Municipal Councils may be advised.”

C It may be true that certain demands were made upon the Appellants herein to deposit the development charges by the Municipal Council but the same were made without prejudice to their rights, as would appear from the notice dated 3.11.1998. Demand of the development charges without prejudice to the rights of the Municipal Council did not, thus, create any legal right in favour of the Appellants. [See *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors*, [2004] 2 SCC 663].

E Payment of development charges by itself, therefore, did not lead to exoneration from the consequence of commission of an offence or regularization of unauthorized constructions.

F The jurisdiction of a local authority is confined only to deal with application for grant of permission for construction as contained in Section 44 of the MRTP Act whether at the initial stage or when a notice is served under Sub-section (2) of Section 53 of the MRTP Act. The power to grant such permission could be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of Section 44 of the MRTP Act, the Municipal Council did not have any jurisdiction to direct regularization of such unauthorized constructions by reason of the said resolution or otherwise. The power of the Municipal Council, it is trite, being confined to the provisions of the said Acts, no action could be taken by them contrary thereto or inconsistent therewith.

H In *Friends Colony Development Committee v. State of Orissa and Ors.*, [2004] 8 SCC 733, this Court opined :

“25. Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are *bona fide* or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.”

In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.*, [1999] 6 SCC 464, this Court observed :

“73. The High Court has directed dismantling of the whole object and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be

A exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahalaplika to construct and maintain parking lots.”

B A discretionary power must be exercised having regard to the larger public interest.

In *Consumer Action Group and Anr. v. State of T.N. and Ors.*, [2000] 7 SCC 425, this Court held :

C “While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both, viz. the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health etc. the exercise of power could not be for the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within, reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting...”

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G

Mr. Naphde, therefore, is not correct in contending that the High Court should have taken a lenient view.

H In *Mulchand Agarwalla (supra)*, whereupon strong reliance has been placed by Mr. Naphde, this Court upon taking into consideration the provisions

of the Calcutta Municipal Act and in view of the terminologies contained in Section 449 thereof noticed that that the Magistrate had a discretionary jurisdiction to pass an order of demolition and held :

“...The conduct of the respondent in adopting a hide-and-peek attitude in completing the constructions in deliberate defiance of the law calls for severe action. It would be most unfortunate, and the interests of the public will greatly suffer, if the notion were to be encouraged that a person might with impunity break the building rules and put up a construction and get away with it on payment of fine. All this would be good justification for making an order for demolition.....”

However, keeping in view the provisions of Sub-section (2) of Section 363 of the Act which directs that no application for demolition shall be instituted after a lapse of five years from the date of the work, although were found to be inapplicable, but in the fact situation obtaining therein, it was opined :

“But then, it is now nearly five years since the building was completed, and though section 363(2) which directs that no application for demolition shall be instituted after a lapse of five years from the date of the work does not, in terms, apply as the proceedings have been started in time, we do not feel that after the lapse of all this time, an order for demolition is called for in the interests of the public. We also take into account the fact that the orders in question would not have come before us in the normal course by way of appeal, were it not that the appellant desired that the decision of this Court should be obtained on certain questions of importance, and that purpose has been achieved. On a consideration of all the circumstances we do not think that this is a fit case in which we should pass an order for demolition.”

The said decision, therefore, does not support the contention of the Appellants.

#### CONCLUSION :

For the reasons aforementioned, these appeals, being devoid of any merit, are dismissed. The Municipal Council is hereby directed to carry out the order of the High Court, as expeditiously as possible and not later than four weeks from date. Having regard to the fact that the Appellants have

**A** sought to mislead this Court, we think it appropriate to impose costs upon them. The Appellants are hereby directed to deposit a sum of Rs. 50,000 (Rupees Fifty Thousand) with National Legal Services Authority within four weeks from date and deposit the receipt thereof in the Registry of this Court.

**B** N.J. Appeal dismissed.