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3 Aces, Hyderabad v. Municipal Corporation Of Hyderabad .

Andhra Pradesh High Court (2 Sep, 1994)

CASE NO.
Writ Petn. No. 10019 of 1993

ADVOCATES

JUDGES

Syed Shah Mohammed Quadri

P.L.N Sarma

B.S Raikote, JJ.

Summary

1. The learned Judges directed the office to place the papers before The Hon'ble The Chief Justice for necessary orders for constituting a Full Bench and posting the writ petition.

2. Special Leave Petition preferred against the order of the High Court to the Supreme Court was also dismissed at the admission stage itself.

3. Thereupon the petitioner was constrained to file E.P. No. 23 of 1991 on the file of IInd Assistant Judge, City Civil Court, Hyderabad which was dismissed by the executing Court on 15-7-1993 erroneously.

4. It was further stated that the construction is in violation of bye-law 73 of bye-laws 1972 and Sections 378 and 447 of "The Act" was never raised by the respondent and the same cannot be raised by the respondent.

5. The petitioner was constrained to invoke the jurisdiction of this Court for the reliefs mentioned above.

6. Construction actually commenced in the year 1991 without issuing any notice of commencement of construction and the Corporation was compelled to issue a notice under Section 452 of "The Act" to the petitioner on 7-6-1991 as also on 17-8-1991.

7. Block 'B' was raised in contravention of the provisions as aforesaid and to the extent the construction of Block 'B' contravened the provisions of "The Act", bye-laws, rules and regulations was pulled down or demolished in accordance with the decree of civil Court itself and no exception can be taken to the same.

8. Learned Judge specifically reserved the right of the petitioner to approach the executing Court for appropriate reliefs if the respondent interferes with the construction in spite of the constuction carried on in accordance with the deemed sanctioned plan.

9. Having invoked the jurisdiction of the executing Court and having invited an order, sought to challenge the same by way of a revision petition in the High Court; the petitioner is not entitled to invoke the jurisdiction of this

10. The respondent, demolished the building to the extent of violations and deviations and the petitioner is not entitled to claim damages for its illegal activity.

11. The claim for damages by the petitioner does not arise.

12. 11. It is apparent from the pleadings that the petitioner in essentially basing the relief claimed in the writ petition on the decree granted by IInd Assistant Judges, City Civil Court, Hyderabad in O.S. No. 2804 of 1982 which has become final by virtue of dismissal of Special Leave Petition No. 5048 of'l991 by the Supreme Court on 8-4-1991.

13. It is necessary, for a correct understanding of the case to refer to the proceedings in the civil Court.

14. Under Section 437 of "The Act" the per-missison, as sought for by the petitioner for the construction of the building is deemed to have been granted.

15. Learned appellate Judge held that the mere fact that the approval is deemed to have been given does not mean that the petitioner can make the construction without conforming*} the rules and regulations and that the Corporation has every power and authority to stop the construction and require the petitioner to fulfil the requirements of the rules, bye-laws and regulations and can even pull down the construction if it

is in violation of the Act, Rules made .thereunder as well as bye-laws.

16. A learned single Judge of this Court dismissed the Second Appeal by his Judgment dated 27-8-1990 and the Special Leave Petition No. 5048 of 1991 preferred by the Corporation to the Supreme Court was also dismissed on 8-4-1991, the result being that the decree granted by the trial Court has become final and conclusive.

17. A 13 is deemed to have been sanctioned under the provisions of "The Act" which has becomes final and the construction raised by the petitioner in accordance with Ex, A. 13 plan cannot be interfered with unless the matter falls outside the subject-matter of the suit.

18. 3) Section 440 of "The Act" was held to be procedural by the civil Court in O.S. No. 2804 of 1982 and even if the said decision is not right in law, it is binding on inter parties as the same has become final and it is not open to the respondent now to contend that since no notice for erection or re-erection as provided under Section 440 of "The Act" was given that the work has not been commenced within the period of one year and it is in violation of the provisions of the Act.

19. What all the civil court decided in O.S. No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad is that the petitioner is entitled to proceed with the construction in accordance with Ex.

20. "The petitioner has not placed nay material before the Court to come to a conclusion that the construction is being carried on in the suit premises as per the deemed sanctioned plan.

21. The learned Judge held that in spite of construction being carried on in accordance with the deemed sanctioned plan, if there is any interference by the Corporation, the petitioner is at liberty to approach the executing Court for appropriate relief.

22. But the writ petitioner has not moved the High Court in revision under Section 115, C.P.C. against the order of the executing Court dismissing the execution petition.

23. Having regard to the findings recorded and observations made by the executing Court, which are binding on both the parties, it will not be open to this Court to go into the correctness or otherwise of the findings recorded by the executing Court.

24. From the decision, it is clear that a decision on pure question of law will not operate as res judicata if

the law has changed or altered by a competent Court or authority subsequent to the earlier decision.

25. We hold that even assuming that petitioner is right in its submission that its application ought to have been considered in terms of 1972 Building Bye-laws, it will not be entitled to commence construction in contravention of the Zoning Regulations introduced on 5-9-1981 and other restrictions which were brought into force by the Multistoreyed Building Regulations."

26. It is not correct to contend that Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 will not be applicable to such a case, having regard to the law declared by the Division Bench of this Court in the Judgment referred to supra .

27. 20. Sri K. G. Kannabhiraman, learned Senior Counsel for the petitioner then contended that the civil Court in the earlier proceedings held that Section 440 of "The Act" is only procedural and that it cannot destroy the substantive right acquired by his client under Section 437 of "The Act".

28. 21. For the reasons mentioend above, we are of the opinion that the findings recorded in O.S. No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad regarding applicability of Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 will not operate as res judicata and not binding on the respondent.

29. 22. Sri Kannabhiran, learned senior counsel then contended that the endeavour of the Court must be to see and implement the orders of the civil Court in O.S. No. 2804 of 1982 and failure to do so makes the rule of law a mere phrase only.

30. In the present case, on the facts and in the circumstances, we have already held that the decree of the civil Court which has become final will not give the petitioner to raise the construction contrary to the provisions of the Act.

31. When an illegality is brought to the notice of the Court, particularly relating to public interest, the Court should take notice' of it and apply to the case.

32. 26. For the reasons mentioned above, we are of the opinion that there is no substance in this contention and it is rejected.

33. We have already referred to the Judgment of the Supreme Court in Prathiba Co-operative Housing

Society's case (supra) wherein it was clearly mentioned by the Supreme Court that the rules, regulations and bye-laws are made taking in view the larger public interest of the society.

34. The learned Judges of the Supreme Court held that the word "may" occurring in the said section leaves discretion to the Magistrate either to order for demolition or not.

35. Having regard to the above observations of the Supreme Court, if in any given case, the Commissioner comes to the conclusion that the construction deserves to be demolished, that decision have been taken in public interest should not be interfered with normally by the Courts.

36. 37. One of the arguments advanced before us by Sri K.G. Kannabhiran, learned Senior Counsel appearing on behalf of the petitioner is that the demolition of the disputed structure commenced on a Sunday in the early hours after gathering men and material and supported by huge police force, making it impossible for the petitioner to move the Court of law and the method and manner of demolition adopted by the Corporation should be condemned.

37. The learned Judge made those observations.

38. "Obviously the issuance of notices by the respondent is not made with a deliberate and malicious intention of flouting the order of the Court but under the bona fide impression that law does not permit any such construction if it is in violation of the provisions of the H.M.C. Act.

39. 40. For all the reasons mentioned above, we do not find any substance in this writ petition and it is dismissed.

JUDGMENT

P.L.N Sarma, J.: When this writ petition came up for hearing before a Division Bench of this Court consisting two of us (Syed Shah Mohammed Quadri and B.S Raikote, JJ.), they felt during the course of hearing that the scope of S. 437 of the Hyderabad Municipal Corporation Act, hereinafter referred to as The Act, and the effect of the decree dated 23-12-1987 in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad, which became final by the ultimate dismissal of Special Leave Petition No. 5048 of 1991 dated 8-4-1991 by the Supreme Court and the power of the Corporation under S. 452 of The Act as well as the procedure to be followed in resorting to demolition of a building

under The Act in the absence of the guidelines provided by The Act or under the Rules, require determination by a larger Bench having regard to the great and general importance of the issues involved. The learned Judges also felt that the stakes involved in the present case are heavy and that the interpretation put upon S. 452 of The Act by a Division Bench of this Court in Municipal Corporation of Hyderabad v. Shamsuddin Hasan Khudankmen, (1978) 1 Andh WR 91, insofar as the said decision held that in the case of construction of a building without permission, demolition is not the only course open to the Corporation requires reconsideration. Accordingly, the learned Judges directed the office to place the papers before The Hon'ble The Chief Justice for necessary orders for constituting a Full Bench and posting the writ petition.

2. This writ petition has been posted before us as per the orders of the Hon'ble The Chief Justice. That is how the matter has come up before us.

3. The petitioner, a partnership firm, represented by its partner, invoked the jurisdiction of this Court by way of this writ petition under Art. 226 of the Constitution of India. The petitioner sought a mandamus or any other writ or order or direction declaring the action of the respondent in demolishing the structures under construction is in violation or in the teeth of the decree passed in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad without any notice on Sunday, i.e, 18-7-1993 and therefore, illegal, bad and high-handed and opposed to all canons of justice.

4. In the original affidavit filed in support of the writ petition, the petitioner stated that it filed O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad seeking a declaration that the plan, marked as Ex. A.13 in the suit should be deemed to have been sanctioned and that it is entitled to construct as per the said plan and also sought a consequential permanent injunction restraining the respondent from taking any action for demolition of the structure. The said suit was decreed by the IInd Assistant Judge, City Civil Court, Hyderabad. The respondent unsuccessfully challenged the said decree in A.S No. 91 of 1988 on the file of the Addl. Chief Judge-cum-Principal Spl. Judge for SPE & ACB Cases as well as in the Second Appeal in the High Court. Special Leave Petition preferred against the order of the High Court to the Supreme Court was also dismissed at the admission stage itself. Even though the respondent lost the legal battle carried to the highest Court of the land, it issued a show cause notice as to why the building or such part of the building as it found to be unauthorised should not be removed or pulled down. Thereupon the petitioner was constrained to file E.P No. 23 of 1991 on the file of IInd

Assistant Judge; City Civil Court, Hyderabad which was dismissed by the executing Court on 15-7-1993 erroneously. Petitioner also reserved its right to challenge the said order of the executing Court. Alleging that the respondent on a public holiday, i.e, Sunday dated 18-7-1993 without even issuing final notice to the reply given by the petitioner, with the assistance of the police, in a high-handed manner started demolishing the entire building towards the southern side, constructed in accordance with Ex. A. 13 plan, this writ petition has been filed challenging the action. The petitioner stated that having obtained a decree from a competent Court of law, it is entitled to construct and retain the same which has been constructed as per Ex. A.13 plan and that the action of demolition by the respondent is contrary to the terms of the decree and bad. It is also stated that the construction carried on by the petitioner is neither a public obstacle nor health hazard and the respondent is not entitled to take the action without issuing the required notice under S. 636 of The Act. It is further stated in the affidavit that the property of the value of over eighty lakhs of rupees is damaged beyond repairs which was constructed in accordance with Ex. A.13 plan.

5. Petitioner filed a further affidavit giving details with regard to the filing of O.S No. 2804 of 1982. It is stated that in the suit filed by the petitioner two material issues were raised viz., whether the plan, Ex. A.13 submitted on 28-6-1980 must be deemed to have been sanctioned under S. 437 of The Act and that Ex. A.13 plan is in accordance with the provisions of The Act, bye-laws and zoning regulations as on the date of submission of the plan on 28-6-1980 and those two principal issues have been found in favour of the petitioner by the trial Court and that they have become final by virtue of dismissal of Special Leave Petition No. 5048 of 1991 by the Supreme Court of India. In spite of the same, the respondent trespassed into the premises and demolished the building on the rear side. Petitioner further submitted that the questions relating to the applicability of bye-laws and the provisions of the Act were tried and a decree was passed holding that the petitioner is entitled to carry on construction as per the plan, Ex. A.13 submitted on 28-6-1980 and a perpetual injunction was also granted against the respondent from taking any action of demolition and from interfering with the construction work being carried on and that the action of demolition by the respondent is opposed to public policy. Petitioner stated that the respondent is not entitled to rely or insist upon the compliance with the bye-laws 23 and 24 of 1972 bye-laws as they were struck down by the High Court of Andhra Pradesh in T.N Kambati v. State of Andhra Pradesh, AIR 1982 Andh Pra 431. Likewise, the question of permissibility F.S.I was also considered by the trial Judge in the suit and it was held in its favour which has become final. Similarly the question with regard to the car

parking space was also held in its favour by the civil Court. It was further stated that the construction is in violation of bye-law 73 of bye-laws 1972 and Sections 378 and 447 of The Act was never raised by the respondent and, therefore, the same cannot be raised by the respondent. It is also stated as a fact that there was no such violation. It is further stated that the action of the respondent is not only in violation and contrary to the decree of the civil Court which has become final, but also in violation of its right under Art. 19(1)(g) of the Constitution of India and also amounts to deprivation of property within the meaning of Art. 300A of the Constitution of India. The petitioner claimed that it is carrying on trade of selling the property and by the impugned illegal action of the respondent, it is deprived of its fundamental right to carry on the trade. Ultimately, it was stated by the petitioner that the remedy provided for the enforcement of the decree of the civil Court in O.S No. 2804 of 1982 is inadequate and not efficacious since it only provides for attachment of the property and for detention of the Judgment debtor in civil prison. Therefore, the petitioner was constrained to invoke the jurisdiction of this Court for the reliefs mentioned above. The petitioner further stated that the respondent arbitrarily demolished approximately 28,000 sq. ft. of constructed area and the damage sustained was tentatively estimated at Rs. 25,00,000/- and without prejudice to its right to proceed against the respondent for damages/compensation under civil law, prayed this Court for awarding the said amount of Rs. 25,00,000/- as damages/compensation.

6. Counter has been filed on behalf of the respondent contending that the construction was not commenced within one year as provided under Section 440 of The Act from the date of the alleged deemed permission for the construction of 1 + 23 floors and that the construction did not commence even within one year from the date of the decree in O.S No. 2804 of 1982 i.e, 28-12-1987. Construction actually commenced in the year 1991 without issuing any notice of commencement of construction and, therefore, the Corporation was compelled to issue a notice under Section 452 of The Act to the petitioner on 7-6-1991 as also on 17-8-1991. Petitioner commenced the construction in the year 1991 not only without issuing the requisite notice but also in violation of building bye-laws, zoning regulations and multistoreyed building regulations. It is also alleged in the counter that under the shelter of the order of ex parte injunction obtained by the petitioner in E.A No. 22 of 1991 in E.P No. 23 of 1991 dated 21-8-1991, the petitioner raised unauthorised construction in gross and capricious violation of the law with impunity for full two years. It is also stated that since the construction was commenced by the petitioner in the year 1991, zoning regulations and multi-storyed building regulations, which are in force as on the date of commencement of construction, will apply and if so applied, the construction is contrary to the zoning

regulations and multi-storyed building regulations.

7. It was further stated in the counter that the decree in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad categorically stated that the petitioner is entitled to carry on construction as per the deemed sanctioned plan, marked as Ex. A.13 in the suit, subject to the construction conforming to the rules, regulations, bye-laws in force and that the respondent has the power to demolish or to take action by pulling down the construction which contravenes or does not conform to the requirements of bye-laws, rules and regulations governing it and that the petitioner was also warned and cautioned that the deemed sanction does not give liberty to the petitioner to make the construction contrary to law. The construction now raised is contrary to the bye-laws, rules, zoning regulations of 1981 and multi-stroyed building regulations of 1981. Block B was raised in contravention, of the provisions as aforesaid and, therefore, to the extent the construction of Block B contravened the provisions of The Act, bye-laws, rules and regulations was pulled down or demolished in accordance with the decree of civil Court itself and, therefore, no exception can be taken to the same.

8. It is further stated in the counter that the petitioner after receipt of the notice dated 7-6-1991 as also 19-8-1991 filed E.P No. 23 of 1991 in O.S No. 2804 of 1982 seeking execution of the decree under Order 21, Rule 32, C.P.C by way of arrest and detention of the Commissioner/Special Officer Judgment debtor in civil prison. Pending E.P, petitioner obtained interim injunction restraining the respondent from interfering with the construction. Executing Court by its order dated 15-7-1993 dismissed the E.P holding that the petitioner did not place any material before the Court to establish that the construction was within the limits prescribed by the deemed sanction. The learned Judge also found that the petitioner has not placed any material before the Court to indicate that the alleged deviation pointed out in the notice are not in violation of the deemed sanction plan and categorically stated that the petitioner shall not carry on any construction violating the building bye-laws and zoning regulations and that in the absence of any clinching piece of evidence to prove the contention of the petitioner, it must be presumed that deviations pointed out by the respondent are in violation of the building rules and The Act and that the construction made by the petitioner violating the deemed sanctioned plan and building regulations, the respondent will be entitled to initiate action following the due course of law. Learned Judge specifically reserved the right of the petitioner to approach the executing Court for appropriate reliefs if the respondent interferes with the construction in spite of the construction carried on in accordance with the deemed sanctioned plan.

The petitioner ought to have approached the executing Court only. Having invoked the jurisdiction of the executing Court and having invited an order, sought to challenge the same by way of a revision petition in the High Court; the petitioner is not entitled to invoke the jurisdiction of this Court under Art. 226 of the Constitution of India and on that ground, this writ petition is not maintainable. The order of the executing Court is binding on both the parties.

9. It was also stated in the counter that the construction is in violation of the bye-laws, zoning regulations and multi-storyed building regulations in respect of permissible floor areas, car parking space and the space to be left on all the sides, land use as well as height of the building and that the approach and access to the building is insufficient for free movement of vehicles coming to the complex and that the demolition of the building by the respondent is strictly confined to the deviations which are in contravention of the provisions of The Act, bye-laws, zoning regulations and multi-storyed building regulations. It is also alleged that when the Corporation wanted to issue public notice warning intending purchasers about the unauthorised construction, the petitioner obtained an order of status quo dated 18-2-1993 in E.A No. 8 of 1991 regarding publication in the newspapers under the caption Purchasers Beware and that the petitioner is not entitled to contend that the interest of third parties will be jeopardised if demolition of the building is carried on by the respondent. The claim of the petitioner for damages is denied and it is stated that the respondent is not responsible for payment of damages or compensation claimed by the petitioner as the construction made by the petitioner is not in accordance with the provisions of The Act and the bye-laws made thereunder and regulations. The respondent demolished the building to the extent of violations and deviations and, therefore, the petitioner is not entitled to claim damages for its illegal activity. It is also stated that the action of demolition was undertaken in public interest and in accordance with law. Therefore, the claim for damages by the petitioner does not arise. Therefore, it is prayed that the writ petition is liable to be dismissed.

10. A reply affidavit has been filed on behalf of the petitioner disputing the contention of the respondent that the construction was not started within one year as per Section 440 of The Act and that the construction was commenced only in the year 1991 without issuing any notice of commencement of construction. It was also denied in the reply that the petitioner proceeded with the construction under the shelter of interim injunction dated 21-8-1991 and completed Blocks B and C in total violation of the bye-laws. Reply affidavit is to the effect that in fact the construction was commenced prior to the filing of

suit O.S No. 2804 of 1982 and a notice under Section 685 of The Act was given prior to the filing of the suit and that the civil Court already decided that Section 440 of The Act is only procedural and will not affect the vested right of the petitioner to proceed with the construction even without issuing any notice and that no part of the construction taken up by the petitioner is unauthorised or against building bye-laws of 1972 or zoning regulations or the Act. It was specifically mentioned in para 15 of the reply affidavit that the respondent has demolished the construction in all illegal manner firstly by not issuing notice under Section 636 of The Act which is a madatory one, secondly the demolished structure raised is not in violation of Ex. A.13 plan and the decree of the civil Court or the Act or building and zoning regulations applicable thereto, and thirdly no notice or warrant was served by the Corporation on the petitioner before proceeding with the demolition. The action of demolition is in violation of principles of natural justice, fair play and rules of Audi Alteram Partem.

11. It is apparent from the pleadings that the petitioner in essentially basing the relief claimed in the writ petition on the decree granted by IInd Assistant Judges, City Civil Court, Hyderabad in O.S No. 2804 of 1982 which has become final by virtue of dismissal of Special Leave Petition No. 5048 of 1991 by the Supreme Court on 8-4-1991. Therefore, it is necessary, for a correct understanding of the case to refer to the proceedings in the civil Court. It is also necessary to refer to the facts which arise out of the record preceding the filing of the suit to appreciate as to why and in what circumstances the suit was filed and the cause of action for the suit.

12. The petitioner applied for permission to construct a multi-storyed building complex to the respondent on May 2, 1978 by giving notice under Section 428 of The Act. It is stated that the said notice was returned on 22-5-1978 and the same was not re-submitted by the petitioner to the Corporation. However, the petitioner served a fresh notice under Section 428 of The Act on the Corporation along with a plan seeking permission to erect 1 + 23 floors as the main building (A Block) and two wings consisting of 1 + 6 floors (Blocks B and C respectively). According to the petitioner, within 30 days alter the receipt of the notice dated 28-6-1980 issued by it, the Commissioner of the Corporation failed to intimate in writing to the petitioner his disapproval of the erection of the building as per the notice. Therefore, under Section 437 of The Act the permission, as sought for by the petitioner for the construction of the building is deemed to have been granted. The permises in which the proposed building was sought to be erected bears Municipal No. 4-1-970 and 4-1-969/7 situate at Abid Road, Hyderabad comprising of 9,009 sq.

metres. The site is situated in the heart of the city and on a prestigious road. According to the petitioner, it paid the required permit fee also and that the construction of the building was in accordance with 1972 by-laws of the Corporation. The plan is deemed to have been sanctioned by 28-7-1980. While that being so, on 15-10-1981, the petitioner received a letter from the Secretary, Housing, Municipal Administration and Urban Development Department stating that the petitioner should submit new plans for construction of a building consisting of ground and three floors, as muti-storyed buildings were baned in the area as on that date i.e, 15-10-1981. In fact the petitioner submitted revised plans on 11-9-1981 for the construction of 1 + 3 floors as per the zoning regulations of 1981 and multi-storyed building regulations of 1981 though under protest and without prejudice. Claiming that the permit for erecting multi-storeyed building is governed by the bye-laws prevalent as on the date of filing of the application i.e, 28-6-1980 and not by the subsequent bye-laws or regulations, the petitioner filed O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad for a declaration that the petitioner is entitled as per the deemed sanction under Section 437 of The Act to carry on the construction in accordance with the plans submitted on 28-6-1980 and also sought a consequential injunction restraining the Corporation, its agents, servants and staff members or persons acting on their behalf from taking any action of demolition or interfering with the construction work being carried on in the premises bearing No. 4-1-970 and 4-1-969/7 situate at Abid Road, Hyderabad. The same was decreed by the trial Court by its Judgment dated 28-12-1987. The learned trial Judge held that the petitioner submitted plans for the construction of the building on 28-6-1980 and since the Commissioner of the Municipal Corporation failed to intimate his disapproval within the statutory period of 30 days, the plan is deemed to have been sanctioned in the eye of law and that the petitioner is entitled to carry on construction of the building in accordance with the plan submitted by it on 28-6-1980. The learned Judge held that the petitioner is entitled to go on with the construction without violating the provisions of The Act and bye-laws made thereunder and the regulations which are in force as on the date of filing of the application or on the date of deemed sanction i.e, 28-7-1980. The learned Judge also held that the bye-laws, zoning regulations as well as multi-storeyed building regulations which came into force on 5-9-1981 have no retrospective effect and they will not govern the proposed construction by the petitioner. Respondent Corporation preferred A.S No. 91 of 1988 on the file of Addl. Chief Judge-cum-Principal Special Judge for SPE and ACB cases which was dismissed on 20-3-1990. Learned appellate Judge held that the mere fact that the approval is deemed to have been given does not mean that the petitioner can make the construction without conforming to the rules and

regulations and that, therefore, the Corporation has every power and authority to stop the construction and require the petitioner to fulfil the requirements of the rules, bye-laws and regulations and can even pull down the construction if it is in violation of the Act, Rules made thereunder as well as bye-laws. In other words, the learned Judge clearly held that the construction work as per the notice of the petitioner dated 28-6-1980 can go on, but not in cotravention of any of the provisions of The Act or bye-laws made thereunder. Respondent-Corporation preferred S.A No. 398 of 1990 to the High Court of Andhra Pradesh questioning the Judgment of the appellate Court which also met with the same fate. A learned single Judge of this Court dismissed the Second Appeal by his Judgment dated 27-8-1990 and the Special Leave Petition No. 5048 of 1991 preferred by the Corporation to the Supreme Court was also dismissed on 8-4-1991, the result being that the decree granted by the trial Court has become final and conclusive. The petitioner is entitled to carry on the construction as per the plan submitted on 28-6-1980.

13. On the basis of the above pleadings, Sri G. Kannabhiraman, learned Senior Counsel raised the following contentions.

(1) That the civil Court in O.S No. 2804 of 1982 held that the plan, Ex. A.13 is deemed to have been sanctioned under the provisions of The Act which has becomes final and, therefore, the construction raised by the petitioner in accordance with Ex. A.13 plan cannot be interfered with unless the matter falls outside the subject-matter of the suit. This will be so even assuming that in law the decision of the civil Court is not correct.

2) Notices issued on 7-6-1991 and 17-8-1991 specifically mentioned the deviations and violations including the violation of bye-laws 23 and 24 of 1972 bye-laws which are struck down by the High Court. Any action of demolition by the respondent must confine to the reasons and violations mentioned in the notices and cannot be supported by supplementing the reasons given in the counter-affidavit or otherwise.

3) Section 440 of The Act was held to be procedural by the civil Court in O.S No. 2804 of 1982 and even if the said decision is not right in law, it is binding on inter parties as the same has become final and it is not open to the respondent now to contend that since no notice for erection or re-erection as provided under Section 440 of The Act was given that the work has not been commenced within the period of one year and, therefore, it is in violation of the provisions of the Act.

4) The power of demolition reserved to the respondent under Section 452 of The Act is not a mandatory

one. It cannot be resorted to unless there is overwhelming public interest involved.

5) In respect of high rise buildings when third party interests are involved, the same should be taken note of and their interest should not be affected and in such cases power of demolition should not be resorted to.

Points 1 and 3:

14. From the facts mentioned above, it appears that the cause of action for filing the suit was the letter of the Secretary, Housing, Municipal Administration, Urban Development Department requiring the petitioner to submit new plans for construction of the building consisting of ground and three floors on the ground that the plan, Ex. A.13 submitted for the purpose of construction of multi-storeyed buildings in Abid Road, Hyderabad was prohibited by virtue of zoning Regulations, 1981 and multi-storeyed building regulations, 1981. Though the petitioner submitted revised plans, it is stated that the said submission was without prejudice to its right and contentions. In the suit a finding was recorded by the learned trial Judge, which was also referred to and confirmed by the appellate Judge, that the application seeking permission for the construction of buildings as per Ex. A.13 plan made by the petitioner on 28-6-1980 will be governed only by the bye-laws and regulations in force as on 28-6-1980 only. It was held that the zoning regulations of 1981 and multi-storeyed building regulations, 1981 which came into force on 5-9-1981 are not retrospective and they will not govern the application dated 28-6-1980. In fact, the learned appellate Judge in para 48 of his Judgment stated as follows:

The zonal regulations imposing a ban on the construction of high rise buildings has come into force on 5-9-1981 and these proposals are dated 28-6-1980 and so the Regulations that have come into force subsequent to these proposals do not have any application to the instant case.

The appellate Judge with regard to the application of the provisions of Section 440(1)(b) of The Act stated that Section 440(1)(b) requiring notice of the intention to commence erection is only a procedural requirement. The substantive right under Section 437 of The Act will not be destroyed or affected by procedural lapse in not giving notice of erection. It was also stated by the learned Judge that according to the plaintiff the required parking space has been provided. If sufficient parking space is not provided and if any of the rules or bye-laws are not conformed to, it is open to the Municipality to require it to conform to those rules, bye-laws and the Corporation has such a power. Ultimately, the appellate Judge held that the

deemed sanction does not entitle the plaintiff to make construction violating rules and bye-laws in force at the time of the application i.e, 28-6-1980 and the Corporation has the power to stop any construction which is in violation of Rules and bye-laws and require it to conform to the rules and bye-laws and that the plaintiff which has obtained deemed sanction does not have the liberty or licence to make the construction contrary to the rules and bye-laws and if it violates those rules and bye-laws, it will do so on its own risk and on pain of demolition. In the Second Appeal also, a learned single Judge of this Court reiterated the same.

15. Now it is the contention of Sri K.G Kannabhiran, learned Senior counsel appearing for the petitioner that the Judgment of the civil Court gives the writ petitioner a right to construct the buildings in accordance with Ex. A.13 plan and so long as the construction does not violate any of the bye-laws of 1972 or the Zoning regulations or any other law in force as on 28-6-1980, the same cannot be interfered with. The demolition of the alleged deviations by the Corporation is wholly unsustainable and that the construction was made strictly in accordance with Ex. A.13 plan. In other words, the learned counsel contended that the Judgment of the civil Court operates as res judicata and it is not open to the respondent-Corporation to contend contrary to the Judgment even assuing that the finding or decision of the civil Court is erroneous in law.

16. A xerox copy of the decree in O.S No. 2804 of 1982 dated 28-12-1987 together with the plan, Ex. A.13 has been filed by the petitioner at page 80 of the material papers of Book No. 1. The said plan is only a site plan and not a building plan. Site plan cannot be equated to a building plan contemplated under Section 444 of The Act. Unless a building plan was filed in accordance with Section 444 of The Act and approved, it cannot be said that the building plan is approved to enable the person to proceed with the construction. This important factor which was lost site of during the civil proceedings should also be kept in mind in proceedings with the case.

17. Even so, it is necessary to understand what exactly the civil Court decided. What all the civil court decided in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad is that the petitioner is entitled to proceed with the construction in accordance with Ex. A.13 plan and that construction should be according to the provisions of the Act, bye-laws and regulations. So long as it is according to law, it shall not be interfered with by the Corporation. If the construction is in violation of bye-laws, regulations or the provisions of The Act, it is open to the Municipal Corporation to demolish that

portion of the building constructed in violation of law. The corporation now says that it is in violation of law and bye-laws, Rules and Regulations. The petitioner says it is not. Is it open to this Court to go into these disputed questions of fact? We are of the opinion that this is a matter which will have to be decided in execution proceedings which relate to execution, discharge and satisfaction of the decree in O.S No. 2804 of 1982. In fact, the petitioner filed E.P No. 23 of 1991 on the file of IInd Assistant Judge, City Civil Court, Hyderabad for execution of the decree by way of arrest and detention of Commissioner Special Officer Judgment debtor in civil prison etc. All these questions were put in issue. Executing Court dismissed the execution petition. The very same points which are raised here were also raised and debated before the executing Court. The learned Judge stated that if the construction is made in accordance with Ex. A.13 plan, then it will not fall within the four corners of execution of the decree as the cause of action is altogether a different one. It would be convenient to extract the decision of the executing Court which is as follows:

The petitioner has not placed nay material before the Court to come to a conclusion that the construction is being carried on in the suit premises as per the deemed sanctioned plan. On the other hand, the petitioner tried to orally convince the Court that the construction is not in deviation against the building bye-laws and zoning regulations. Further, the counsel contended that the notices do not speak about Ex. A.13, the deemed sanctioned plan. It is not out of place to mention that in the absence of the petitioner placing any material evidence before the Court, it is not possible to come to a conclusion that the construction is within the limits prescribed by the deemed sanctioned plan.

(Emphasis supplied)

It was further held as under:

In the absence of any clinching piece of evidence to prove the contention of the petitioner, it must be presumed that the deviations pointed out by the respondent are to building bye-laws and provisions of the H.M.C Act.

The learned Judge with regard to sub-section (2) of Section 440 of The Act stated as follows:

One aspect which does not seem to have been brought to the notice of the Court is that since the application for permission to M.C.H was made on 28-6-1980, if the construction was not started within the prescribed period from the date of deemed sanction, the sanction will automatically lapse.

Ultimately, the learned Judge held that in spite of construction being carried on in accordance with the deemed sanctioned plan, if there is any interference by the Corporation, the petitioner is at liberty to approach the executing Court for appropriate relief. After the dismissal of E.P the petitioner filed E.A No. 34 of 1993 in E.P No. 23 of 1991 seeking suspension of the order of the executing Court dismissing E.P and also to grant stay of demolition of the premises to enable the petitioner to prefer revision to the High Court. It is stated that the executing Court granted some time to enable the petitioner to approach the High Court. But the writ petitioner has not moved the High Court in revision under Section 115, C.P.C against the order of the executing Court dismissing the execution petition. Now it is to be seen what is the effect of the order of executing Court which was passed in E.P No. 23 of 1991 filed by the writ petitioner after the receipt of the notices dated 7-6-1991 and 17-8-1991. Question is, having regard to the dismissal of E.P by the execuitng Court, whether it is open to the petitioner to move this Court under Art. 226 of the Constitution of India questioning the demolition on the ground that the decree in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad gives it a right to proceed with the construction in accordance with Ex. A.13 plan. We are clearly of the opinion that the petitioner is not entitled to invoke the jurisdiction of this Court under Art. 226 of the Constitution of India. The petitioner ought to have challenged the order of the executing Court dismissing execution petition. Having regard to the findings recorded and observations made by the executing Court, which are binding on both the parties, it will not be open to this Court to go into the correctness or otherwise of the findings recorded by the executing Court. Any decision rendered on merits in this writ petition will amount to attacking the order of the executing Court collaterally which is not permissible under law. The jurisdiction under Art. 226 of the Constitution of India being discretionary in view of the above circumstances, we are not inclined to grant any relief in the writ petition.

18. One other aspect which has to be considered in this connection is whether the finding in the civil proceedings that the zoning regulations of 1981 and multi-storeyed building regulations, 1981 are not retrospective and they will not be applicable to the application of the petitioner filed on 28-6-1980 operates as res judicata or not and in any event binding on the parties. In this connection, it would be necessary to understand the scope and ambit of Section 11 of the Code of Civil Procedure. It is well settled that a decision rendered on questions of fact between the parties in a former suit will operate as res judicata and binds the parties or persons claiming under it in a subsequently instituted proceeding. Similar is the position insofar as findings recorded in the former suit in respect of mixed questions of law and fact. It is

also well settled that pure questions of law relating to the jurisdiction of the Court/Tribunal will not operate as res judicata, and cannot be deemed to have been finally determined. This is because of the fact that if erroneous interpretation of statute, the Court which has no jurisdiction holds that it has jurisdiction, that decision will not operate as res judicata between the parties, even if the cause of action in the subsequently instituted proceeding is the same. What is the position with regard to a decision rendered on a pure question of law? On the said question, it has been held in Mathura Prasad v. Dossibai, AIR 1971 SC 2355 that if the cause of action is the same both in the former and subsequent proceedings, then the decision on an issue of law will be res judicata between the same parties. If the cause of action is not the same in both the proceedings, it will not operate as res judicata. It is also held therein that when the law has since the earlier decision been altered by a competent authority, that will not operate as res judicata. The relevant portion of the Judgment is as follows:

A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

(Emphasis supplied)

The learned Judges further held as under:

Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

(Emphasis supplied)

Therefore, from this decision, it is clear that a decision on pure question of law will not operate as res judicata if the law has changed or altered by a competent Court or authority subsequent to the earlier decision. In fact, the learned Judges in para 7 of their Judgment reiterate the decision in the following manner.

Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties.

This is based on the premise that the rule of procedure indicated in Section 11, C.P.C cannot supersede or override the law. This view has been followed and reiterated in the decisions reported in Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193 and in Isabella Johnson (Smt) v. M.A Susai (Dead) By Lrs.. AIR 1991 SC 993. In the present case, the cause of action for the suit was the letter dated 15-10-1981 issued by the Secretary, Housing, Municipal Administration and Uban Development Department requiring the petitioner to submit new plans for construction of the building consisting of ground and 3 floors only as multi-storyed buildings are banned in the area. The cause of action for the present later writ petition is the act of demolition by the Corporation of the alleged deviations. Therefore, we are of the view that the decision of the civil Court rendered between the parties that the Zoning regulations of 1981 and the multi-storeyed building regulations, 1981 did not apply to the petitioner's application dated 28-6-1980 will not bar the respondent from contending that the above mentioned regulations do apply to the application of the petitioner dated 28-6-1980. Further a Division Bench of this Court in a Judgment reported in Aditya Constructions v. Secretary, Housing, Municipal Administration and Urban Development Department (1992) 3 Andh LT 597 held that the Bhagyanagar Urban Development Authority Multi-storeyed Building Regulations, 1981 which came into force with effect from 5-9-1981 will govern the applications made prior thereto. The Division Bench as a matter of law held as under:

Assuming again that the petitioner was deemed to have permission in terms of Section 437 of the Act and it should have commenced construction 30 days after receipt of valid application by the 2nd respondent on 17-8-1981 and within one year thereafter he could have done so only subject to the Zoning Regulations, 1981 and the Multi-storeyed Building Regulations, 1981 which had come into force in the meantime. It could have commenced construction at the earliest only on 16-9-1981 and that too, subject to the provisions of the above Regulations. Those Regulations contain restrictions regarding construction of multistoreyed buildings with more than 1 + 3 floors in the Zone in question. It is difficult to accept the submission that the petitioner is entitled to avoid and escape the provisions of the relevant Rules and Regulations which were in force as on the earliest date on which it could have commenced construction on the basis of the permission which was deemed to have been granted in accordance with the provisions of Section 437 of the Hyderabad Municipal Corporation Act. Clause 17(viii) of the Building Bye-laws, 1981

which were in force with effect from 5-9-1981 contained an absolute prohibition that no proposed construction shall contravene the Zoning Regulations. Petitioner could not therefore, have commenced construction on 16-9-1981 or within one year thereafter in violation of the above provision. It is also necessary to refer to the Building Bye-laws of 1972. Clause 70 of those Bye-laws also contained a similar provision as follows:

70. Violation of Zoning Regulations:

No proposed construction shall contravene any of the Zoning Regulation of the sanctioned development plan.

Assuming that the petitioner is right in its submission, that its application should have been dealt with only under the Bye-laws of 1972, Clause 70 of the 1972 bye-laws disabled it from undertaking any construction contrary to the Zoning Regulations. Zoning Regulations mentioned in the above provision shall necessarily mean the Zoning Regulations which were in force at the relevant time. Admittedly, on 16-9-1981 and thereafter, the Zoning Regulations, 1981 had come into force. So also had the provisions in the Multistoreyed Building Regulations, 1981, Appendix A of which, contains restrictions on buildings in specified Zones become operative. We, therefore, hold that even assuming that petitioner is right in its submission that its application ought to have been considered in terms of 1972 Building Bye-laws, it will not be entitled to commence construction in contravention of the Zoning Regulations introduced on 5-9-1981 and other restrictions which were brought into force by the Multistoreyed Building Regulations.

19. In the present case also, the petitioner submitted plans seeking sanction on 28-6-1980. It must start construction within a period of one year from the date of deemed sanction i.e 27-7-1980. There is absolutely no evidence on record to establish that the petitioner started construction as required under the provisions of the Act within a period of one year from the date of deemed sanction. In fact there is no evidence whatsoever adduced in that regard even in the suit, muchless in these proceedings. Therefore, it is not correct to contend that Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 will not be applicable to such a case, having regard to the law declared by the Division Bench of this Court in the Judgment referred to supra (1992 (3) Andh LT 597). We are of the opinion that the decision in the civil proceedings, that Zoning Regulations, 1981 are not applicable to the construction raised by the petitioner, will not operate as res judicata in these proceedings. We are in entire agreement with the decision of the Division Bench (supra) regarding the applicability of the Zoning Regulations, 1981 and Multistoreyed

Building Regulations, 1981. It is also clear from the material placed before us and also the decision in the civil proceedings that the petitioner nowhere stated, muchless established, that it started construction pursuant to the deemed sanction within a period of one year. The Division Bench in the above case (1992 (3) Andh LT 597) (supra) held that if the construction is not commenced within a period of one year from the date of deemed sanction, the deemed sanction itself lapses. The petitioner, in order to avail of the deemed permission has to establish the fact that it commenced the construction within one year of service of notice and if it had not commenced the construction within one year, the petitioner cannot take advantage of the deeming provision. Further as the learned Judges of the Division Bench observed in the above case that the petitioner, even if it has deemed permission, could not have commenced construction of the building in contravention of the maximum height of buildings as provided under Sections 446 and 447 of The Acl having regard to the fact that Section 437 of The Act itself imposes a restriction that it shall not construct the building so as to contravene any of the provisions of this Act or any other bye-law made thereunder. Therefore, the proposal to construct 1 + 23 floors and Blocks B and C of 1 + 6 floors will be contrary to the provisions of the Act. As already stated, the Multistoreyed Building Regulations also do not permit the construction of the building with more than 1 + 3 floors in the zone in question.

20. Sri K.G Kannabhiraman, learned Senior Counsel for the petitioner then contended that the civil Court in the earlier proceedings held that Section 440 of The Act is only procedural and that it cannot destroy the substantive right acquired by his client under Section 437 of The Act. In our view this submission has no legs to stand. Apart from the Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 which are applicable to the construction in question restricting the floors to 1 + 3, Section 437 of The Act itself clearly mentions that the deemed sanction is subject to the provisions of the Act and the Bye-laws etc. This is a restriction attached to deemed sanction itself. Having taken a deemed sanction under a provision, it is not open to the petitioner to say that the restriction imposed to the deemed sanction is not applicable. In other words, claiming a deemed sanction under certain stated terms, the petitioner cannot turn round and contended that the terms to which it is subjected to need not be adhered to. We are of the opinion, that whatever may be the of instruction put upon by the civil court on Section 440(1)(b) of The Act, the deemed sanction itself is subject to the limitation, one such being sub-section (2) of Section 440 of The Act that the construction must commence within the period of one year otherwise it lapses. The petitioner neither in the original affidavit nor in the affidavit filed subsequently made any averment as to when the construction commenced. In other words, it did not state in the affidavits that the construction

commenced within the period of one year from the date of deemed sanction or the notice issued for construction. The respondent in its counter clearly alleged that the construction commenced in the year 1991 without issuing any notice of commencement of construction and reiterated the same many a time in the counter and stated at page 28 of Book No. III of material paper filed in the case that the petitioner constructed the building in gross and capricious violation of law with impunity for full two years under the shelter of the order of ex parte injunction passed in E.A No. 22 of 1991 dated 21-8-1991. In the reply affidavit, except denying the allegations made in the counter, the petitioner nowhere stated that the construction of the building commenced within one year from the date of deemed sanction. In fact, the only statement made by the petitioner is that the construction was commenced perior to filing of O.S No. 2804 of 1982. The date of commencement etc., have not been indicated whatsoever. The said fact was neither pleaded in the plaint nor put in issue in the civil Court and naturally there was no finding thereon. It is significant to notice that it is for the petitioner to establish that it has a valid sanction for proceeding with the construction. To show that there is valid sanction, it is incumbent on the petitioner to plead and prove that the construction commenced within one year of deemed sanction. There is no allegation whatsoever in that regard in the main affidavits. Only in the reply affidavit it was alleged that the Construction commenced prior to the filing of the suit. The allegation in the reply affidavit cannot be taken as a pleading and even if that is taken, there is no proof whatsoever of the said fact.

21. For the reasons mentionend above, we are of the opinion that the findings recorded in O.S No. 2804 of 1982 on the file of IInd Assistant Judge, City Civil Court, Hyderabad regarding applicability of Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 will not operate as res judicata and, therefore, not binding on the respondent. The deemed sanction itself is subject to the provisions of the Act and subject to commencement of construction within a period of one year, and there being no material to substantiate the said fact of such commencement, the petitioner cannot avail of the deemed sanction. We are also of the opinion that even the deemed sanction will be subject to other provisions of The Act i.e, Sections 446 and 447 of The Act and the Multistoreyed Building Regulations, 1981 which restrict the height of the multistoreyed buildings. Having regard to the findings of the executing Court in E.P No. 23 of 1991 dated 15-7-1993, we are not inclined to grant any relief in this writ petition.

22. Sri Kannabhiran, learned senior counsel then contended that the endeavour of the Court must be to see and implement the orders of the civil Court in O.S No. 2804 of 1982 and failure to do so makes the

rule of law a mere phrase only. In support of his contention, the learned counsel relied upon Judgment reported in Gulshan Kallu v. Zilla Parishad, Etawah, AIR 1981 SC 1668. We have already dealt with the binding nature of the decree in extenso. There is no quarrel with the proposition contended for. However, in the present case, on the facts and in the circumstances, we have already held that the decree of the civil Court which has become final will not give the petitioner to raise the construction contrary to the provisions of the Act. Bye-laws and also Zoning Regulations, 1981 as well as Bhagyanagar Multistoreyed Building Regulations, 1981.

23. Point No. 2: The contention of the learned senior counsel appearing on behalf of the petitioner is that in the notice dated 7-6-1991 issued under Section 452 of The Act by the respondent, certain violations are alleged i.e, bye-laws of 1972, floor area, land use, short-fall of parking space and also violation of Section 447 of The Act in respect of height of the building. The same was reiterated in the notice dated 17-8-1991. These two notices, pursuant to which the demolition has taken place, should be supported only by the reasons contained in those notices. The notices cannot be sustained or supported by the reasons given either in the counter-.affidavit or otherwised. The respondent being a statutory authority and the notice having been issued under a statute, they must stand or fall on the reasons given in those notices and cannot be supported by any other reason that is given either by way of affidavit counter-affidavit or otherwise subsequently. In support of the said contention, the learned counsel relied upon the decisions reported in Commissioner of Police v. Gordhandas AIR 1952 SC 16; Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851; and Union of India v. Mario Cabrale Sa AIR 1982 SC 691. The leading decision on this aspect is Gordhandas case (AIR 1952 SC 16) (supra). The Supreme Court in that Judgment has held that Public Orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intend to do.

In Chief Election Commissioner's case (AIR 1978 SC 851) (supra) the learned Judges of the Supreme Court held that (at p. 858 of AIR):

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

24. It is submitted that the notices dated 7-6-1991 and 17-8-1991 issued by the respondent, a statutory authority, must be sustained or supported on its own terms and not by the allegations made in the counter-affidavit now filed in the writ petition. There cannot be any quarrel with this proposition. But there is a distinction between a statutory order issued by a statutory authority and an administrative order issued. The same principle will not apply to administrative order. Whatever it may be, the impugned notices clearly mentioned that the required parking spaces have not been provided for and that the building was also contrary to Section 447 of The Act. Section 447 of The Act refers to Section 446 as well and together these two sections restricted the height of the building. In the impunged notices, it was clearly mentioned in that the height of the building is contrary to Section 447 of The Act. Apart from Section 447 of The Act, it is also now brought to the notice of the Court, that having regard to the law enunciated by the Division Bench of this Court in Aditya Constructions case (1992 (3) Andh LT 597) (supra), the Zoning Regulations of 1981 and Multistoreyed Building Regulations of 1981 are applicable to the construction and since the construction is contrary to those regulations, the authorities have taken action in accordance with the provisions of the Act. The notices issued referred to Section 447 which is turn refers to Section 446 of The Act and the other violations. It is also stated, to support the action of demolition, that the building itself is contrary to the Zoning Regulations of 1981 and Multistoreyed Building Regulations of 1981. It is now well settled by the Judgment of the Supreme Court reported in Pratibha Co-operative Housing Society Ltd. v. State of Maharashtra, AIR 1991 SC 1453 that (at p. 1456 of AIR)

The rules, regulations and bye-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits.

Where public interest is involved and it is found that there is violation of the provisions of the Act, Rules, Regulations and Bye-laws made by the Coporations or developmental authorities, it is permissible for the Court to take notice of the same and give effect to them. When an illegality is brought to the notice of the Court, particularly relating to public interest, the Court should take notice of it and apply to the case. (Vide Mahmoud and Ispahuani (1921) 2 KB 716. Since the applicability of Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981 is a pure question of law, we are of the opinion that it can be raised in resisting the writ petition by the respondent and the Court should take note of the same having regard to the public interest involved. It is well settled that a pure question of law which goes to the root of

the matter can be raised at any stage. (Vide Tarinikaman v. Perfulla Kumar, AIR 1979 SC 1165. This is apart from the fact that the impunged notices themselves clearly mentioned the violation of Section 437 of The Act, floor space and parking space. While dealing with points 1 and 3, we have already referred to the appellate Court's Judgment in A.S No. 91 of 1988. The learned Judge in para 65 stated that even if sufficient parking space is not provided and if any of the rules or bye-laws are not conformed to, it is always open to the Corporation to require the petitioner to conform to those bye-laws and rules. We have already held that it is not possible for us to go into the disputed questions of fact with regard to parking space, floor area, F.S.I etc.

25. It is then contended that the impugned notices also relied upon the Bye-laws 23 and 24 of Bye-laws 1972, which were struck down by this Court in a Judgment reported in Kambati's case AIR 1982 Andh Pra 431 (supra) and, therefore, the notices are unsustainable. It is unfortunate that the Corporation also relied upon the said bye-laws for issuing the notices, in spite of the fact that they were struck down by this Court. But this argument will not further the case of the petitioner as the impugned notices can be and are sustained on the basis of other violations mentioned in the notices as also the fact that the constructions are admittedly in violation of the Zoning Regulations, 1981 and Bhagyanagar Multistoreyed Building Regulations, 1981.

26. For the reasons mentioned above, we are of the opinion that there is no substance in this contention and it is accordingly rejected.

27. Point No. 4: This point relates to the power to demolition under S. 452 of The Act. The contention of the petitioner is that the demolition contemplated under Sec. 452 of The Act is not a mandatory one. The power of demolition should not be resorted to unless overwhelming public interest is involved. We have already referred to the Judgment of the Supreme Court in Prathiba Co-operative Housing Society's case (AIR 1991 SC 1453) (supra) wherein it was clearly mentioned by the Supreme Court that the rules, regulations and bye-laws are made taking in view the larger public interest of the society. To appreciate this contention, it is necessary to refer to the observations of the learned Judges of the Supreme Court in the Judgment referred to supra (AIR 1991 SC 1453) which are as follows: (at p. 1456 of AIR).

We are also of the view that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers

and residents of muttistoryed buildings.

(Emphasis supplied)

The learned Judges further made the following pertinent obsrevations (AIR 1991 SC 1453 at p 1456):

Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large.

28. As aforesaid, the provisions of the Act, Bye-laws and the Regulations made under the Act are issued/framed by the competent authority to be observed and not to be breached. Their object is, systematic, orderly and methodical development of the cities which is in the interest of the society at large and there is no gainsaying the fact that the public interest should prevail.

29. Now, the other point which remains to be dealt with is whether the case of Shamsuddin Hasan Khudankmen (1978 (2) Andh WR 91) (supra) which construed the word may occurring in Section 452 of The Act is rightly decided or not. The learned Judges in the said Judgment held that the word may occurring in Section 452 of The Act is not mandatory, in the sense that the Commissioner is not bound to direct demolition of the building under the said section in every case of violation. In coming to the said conclusion, the learned Judges relied upon and followed the two-Judge Bench Judgment of the Supreme Court reported in Calcutta Corporation v. Mulchand, AIR 1956 SC 110.

30. The learned Judges of the Supreme Court were considering the word may occurring in Section 363 of the Calcutta Municipal Act. Under the said section, it is open to the Calcutta Corporation to move the Magistrate for an order of demolition of the unauthorised construction. In the said case two rooms etc., were constructed on the fifth floor by the respondent therein without obtaining permission from the Calcutta Corporation.

31. It is not necessary to refer to all the facts and circumstances arising in the said case for appreciating the point in issue. The learned Judges of the Supreme Court held that the word may occurring in the said section leaves discretion to the Magistrate either to order for demolition or not. However, the learned Judges themselves clearly stated as follows:

That the building rules are enacted generally for the benefit of the public, and where those rules have been violated and proceedings are taken for an order for demolition of the building under Section 363

what has to be decided is whether the breaches are of a formal or trivial character, in which case the imposition of a fine might meet the requirements of the case, or whether they are serious and likely to affect advesely the interests of the public, in which case it would be proper to pass an order for demolition.

The learned Judges further observed as follows:

The conduct of the respondent in adopting a hide-and-seek 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.

(Emphasis supplied)

We have already referred to the latest Judgment of the two-Judge Bench of the Supreme Court in State of Maharashtra's case (AIR 1991 SC 1453) (supra) and extracted the relevant passages which clearly lay down that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. In view of the above Judgments, we are also of the opinion that though the word used in Section 452 of The Act is may and it is not mandatory, the same must be understood in the light of the above, observations extracted from the Judgments of the Supreme Court. Having regard to the above observations of the Supreme Court, if in any given case, the Commissioner comes to the conclusion that the construction deserves to be demolished, that decision have been taken in public interest should not be interfered with normally by the Courts.

32. Having regard to the above, we are, of the opinion that it cannot be said, as a matter of law, that the power reserved under Section 452 of The Act is not mandatory.

Point No. 5:

33. This point cannot be accepted as a matter of law neither it can be applied as a hard and fast rule. Whether to exercise the power of demolition or not is in the discretion of the Corporation and that discretion will have to be exercised with reference to the facts of each case and in accordance with law. In any event, the petitioner cannot raise this contention. When the respondent filed a memo into executing Court for issuing necessary publication in all dailies to warn the public, including purchasers and builders,

to be cautious and if any investment of their monies in the disputed structure will only be at their own risk and peril, the petitioner itself filed E.A No. 8 of 1993 and obtained an order preventing the respondent from issuing such publication. Having regard to the above facts and the orders passed in E.A No. 8 of 1993, the contention of the petitioner has no substance.

34. Lastly, the petitioner claimed damages in a sum of Rs. 25,00,000/- for the alleged illegal action of the respondent in demolishing the portion of the disputed structure. In the original affidavit, the petitioner only mentioned that the respondent damaged the property worth eight lakh rupees beyond repair. In the additional affidavit, the petitioner stated that on a tentative conservative estimate, the damage sustained by it comes to about Rupees 25,00,000/- and sought the award of damages/compensation of the said amount without prejudice to its right to proceed against the respondent for damages/compensation under civil law. It also filed a certificate issued by one Dr. C.V Reddy, Registered valuer who estimated the value of the damages at Rs. 14,68,000/-.

35. In the counter, the respondent stated that it is not responsible for damages as the Corporation only demolished the deviations and illegal constructions, which action is in terms of the civil court's decree in O.S No. 2804 of 1982 as the demolished construction is against the bye-laws etc. The relief prayed for, for damages is not sustainable having regard to our findings recorded on points 1 and 3. Further, it is not possible for this Court, exercising jurisdiction under Art. 226 of the Constitution of India, to go into the estimation of the damages claimed by the petitioner and denied by the other side. It can only be decided after taking evidence and after full-fledged trial and enquiry in an appropriately constituted civil suit.

36. Having regard to the rampant, illegal and unauthorised constructions raised in the country as observed in State of Maharashtra's case (AIR 1991 SC 1453) (supra) before parting with this case, we would like to formulate the following guidelines to be followed by the respondent in respect of illegal constructions. The guidelines should not be treated as exhaustive but only illustrative and the discretion to be exercised by the Corporation in any given case should not be arbitrary or capricious.

1) In cases where applications having been duly filed in accordance with law, after fulfilling all requirements, seeking permission to construct buildings and permission was also granted by the Corporation, the power of demolition should be exercised by the Corporation only if the deviations made during the construction are not in public interest or cause public nuisance or hazardous or dangerous to public safety including the residents therein. If the deviations or violations are minor, minimal or trivial

which do not affect public at large, the Corporation will not resort to demolition.

2) whatever is stated in guideline number (1) will also equally apply to the permissions deemed to have been granted under Section 437 of The Act.

3) If no application has been filed seeking permission and the construction is made without any permission whatsoever, it is open to the Corporation to demolish and pull down or remove the said unauthorised structure in its discretion. Otherwise, having regard to the facts and circumstances of the case, it will be putting a premium on the unauthorised construction.

When the Corporation comes to the conclusion, keeping the above guidelines in view, that the construction in question is required to be demolished or pull down, it should follow the procedure indicated below:

(i) The demolition should not be resorted to during festival days declared by the State Government as public holidays excluding Sundays. If the festival day declared by the Government as a public holiday falls on a Sunday, on that Sunday also, the Corporation should not resort to demolition.

(ii) In any case, there should not be any demolition after sun set and before sun rise.

(iii) The Corporation should give notice of demolition as required by the statute fixing the date of demolition. Even on the said date, before actually resorting to the demolition, the Corporation should give reasonable time, depending upon the premises sought to be demolished, for the inmates to withdraw from the premises: If within the time given the inmates do not withdraw, the Corporation may proceed with actual demolition.

These guidelines are laid down in view of the fact that the Corporation is a public authority and its action must be tested on the touchstone of fairness and reasonableness.

37. One of the arguments advanced before us by Sri K.G Kannabhiran, learned Senior Counsel appearing on behalf of the petitioner is that the demolition of the disputed structure commenced on a Sunday in the early hours after gathering men and material and supported by huge police force, making it impossible for the petitioner to move the Court of law and, therefore, the method and manner of demolition adopted by the Corporation should be condemned. In support of this argument, learned counsel for the petitioner referred to the observations contained in Amrutha Estates Private Ltd. v. State of Andhra Pradesh (1990)

1 Andh Pra WR 158. In the said case, the learned Judge observed that

What is more revolting to judicial conscience is the indecent haste with which the demolition work was commenced at 9 a.m on 7-9-1988 by scores of municipal employees backed by police force, even before the expiry of the 24 hours time limit. The purpose is transparent-to-pre-empt the petitioner from obtaining stay order from a competent Court of law. It is hard, to come across parallel instances of such menacing display of executive power.

These observations are made by the learned single Judge having regard to the facts and circumstances of the said case. Learned Judge referred to the notice issued by the respondent dated 6-9-1988 which was served on the petitioner therein at 3.30 p.m on the same day calling upon the petitioner therein to demolish the entire structure within 24 hours and even before the expiry of 24 hours limit given in the notice, the demolition work was started by the Corporation. Therefore, the learned Judge made those observations. In this case, first notice was issued on 7-6-1991 for which an explanation was submitted by the petitioner on 15-6-1991. Again another notice was issued by the respondent on 17-8-1991 clearly stating that the explanation submitted by the petitioner was not satisfactory. It further called upon the petitioner to show cause within one week as to why the deviations and violations in the construction pointed out by it should not be removed or pullled down. Immediately thereafter the petitioner filed E.P No. 23 of 1991 for interdicting the action of the respondent. The petitioner also obtained interim injunction restraining the respondent from interfering with the construction or demolishing the structure in E.A No. 22 of 1991 on 21-8-1991. Ultimately E.P was dismissed by an order dated 15-7-1993. The petitioner sought interim stay of demolition on the ground that it proposed to file a revision challenging the order of the executing Court dismissing E.P Only after the period was over, the respondent has taken up the demolition work.

38. Having regard to the facts and the proceedings taken, it is not possible for this court to say that the petitioner was not given sufficient opportunity and that the demolition work was taken up all of a sudden by the respondent. From 7-6-1991 till after the dismissal of E.P, no demolition work was taken up. No exception can be taken to action of the respondent in this regard. This also answers the contention raised on behalf of the petitioner that no final notice was issued before the demolition work was taken by the respondent.

39. Lastly, it was contended on behalf of the petitioner that the entire action of demolition suffers from

legal mala fides. The Corporation having suffered a Judgment in the civil Court and lost the legal battle resorted to this high handed-illegal action of demolition. What the Corporation could not achieve through the legal battle, it achieved through its high-handed action and the said action is not bona fide and is vitiated by legal mala fides. In support of his contention, the learned counsel for the petitioner relied upon a decision reported in S. Partap Singh v. State Of Punjab., AIR 1964 SC 72. It is not necessary for us to deal with this contention in detail having regard to the findings arrived at by us in the foregoing paragraphs viz., that the civil Court's decree will not bar the demolition of the building if the construction is in deviation of the provisions of the Act, Bye-laws, Zoning Regulations, 1981 and Multistoreyed Building Regulations, 1981. In this connection, it is necessary to refer to the observations of the executing Court contained in para 35 of the order while dismissing E.P No. 23 of 1991 dated 15-7-1993.

Obviously the issuance of notices by the respondent is not made with a deliberate and malicious intention of flouting the order of the Court but under the bona fide impression that law does not permit any such construction if it is in violation of the provisions of the H.M.C Act. The object of this provision is to protect the interests of the society against individual rights.

We do not find any substance in this contention.

40. For all the reasons mentioned above, we do not find any substance in this writ petition and it is accordingly dismissed. No order as to costs.

Petition dismissed.