

Dipak Kumar Mukherjee vs Kolkata Mun.Corp.& Ors on 8 October, 2012

Equivalent citations: AIR 2013 SUPREME COURT 927, 2013 (5) SCC 336, 2012 AIR SCW 5463, (2013) 2 MAD LW 130, (2012) 2 WLC(SC)CVL 753, (2012) 8 MAD LJ 107, (2012) 10 SCALE 29, (2012) 4 ICC 715, (2013) 1 CAL HN 21, AIR 2012 SC (CIVIL) 2786

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Bench: Sudhansu Jyoti Mukhopadhyaya, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7356 of 2012
(Arising out of SLP(C) No. 23780/2011)

Dipak Kumar Mukherjee

...Appellant

versus

Kolkata Municipal Corporation and others
...Respondents

J U D G M E N T

G. S. Singhvi, J.

1. Leave granted.

2. In last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions - (1) K. Ramadas Shenoy v. Chief Officers, Town Municipal Council (1974) 2 SCC 506; (2) Virender Gaur v. State of Haryana (1995) 2 SCC 577; (3) Pleasant Stay Hotel v. Palani Hills Conservation Council (1995) 6 SCC 127; (4) Cantonment Board, Jabalpur v. S.N. Awasthi 1995 Supp.(4) SCC 595; (5) Pratibha Coop. Housing Society Ltd. v. State of Maharashtra (1991) 3 SCC 341; (6) G.N. Khajuria

(Dr) v. Delhi Development Authority (1995) 5 SCC 762; (7) Manju Bhatia v. New Delhi Municipal Council (1997) 6 SCC 370; (8) M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999) 6 SCC 464; (9) Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733; (10) Shanti Sports Club v. Union of India (2009) 15 SCC 705 and (11) Priyanka Estates International Pvt. Ltd. v. State of Assam (2010) 2 SCC 27.

3. In *K. Ramadas Shenoy v. Chief Officers, Town Municipal Council* (supra), the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:

“An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction.”

4. In *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* (supra), this Court approved the order passed by the Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed:

“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. 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.”

5. In *Friends Colony Development Committee v. State of Orissa* (supra), this Court noted that large number of illegal and unauthorised constructions were being raised in the city of Cuttack and made the following significant observations:

“.....Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders.....

In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the

nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.” (emphasis supplied)

6. In *Shanti Sports Club v. Union of India* (supra), this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the appellant on the land acquired for planned development of Delhi to be illegal and observed:

“In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose

other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc. Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions.”

7. In *Priyanka Estates International Pvt. Ltd. v. State of Assam* (supra), this Court refused to order regularisation of the illegal construction raised by the appellant and observed:

“It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To

some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder.”

8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.

9. We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorized constructions by those who treat the law to be their sub-servient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short, ‘the Corporation’) have been extremely vigilant and taken steps for enforcing the provisions of the Kolkata Municipal Corporation Act, 1980 (for short, ‘the 1980 Act’) and the rules framed thereunder for demolition of illegal construction raised by respondent No.7. This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.

10. The appellant is an enlightened resident of Kolkata. He succeeded in convincing the learned Single Judge of the Calcutta High Court to order demolition of unauthorised construction of multi-storied building by respondent No.7 – M/s. Unique Construction on the plot owned by respondent No.8 – Sarjun Prasad Shaw but could not persuade the Division Bench to affirm the order of the learned Single Judge and this is the reason why he has approached this Court.

11. Mohammad Shahid, (the sole proprietor cum attorney of respondent No.7) entered into an agreement with respondent No.8 for development of plot bearing No.8/1F, Gopal Doctor Road, Kolkata. The building plan submitted by respondent No.7 for construction of two storied building was sanctioned by the Corporation on 11.4.1990 and five years time was given for completing the construction. When the site was inspected by the officers of the Corporation in October, 2009, they found that respondent No.8 had raised unauthorised construction by erecting RCC column upto 3rd floor along with staircase in deviation of the sanctioned plan. Thereupon, stop work notice was issued by the Executive Engineer (Civil), Building under Section 401 of the 1980 Act. However, instead of stopping the construction, respondent No.7 added one more floor. This brazen defiance of law by respondent No.7 led to the issuance of notices dated 15.10.2009 and 10.11.2009 under Sections 400(1) and 401(A) respectively. Simultaneously, a report was submitted by Deputy Chief

Engineer (Building) to the Director General (Building) – II, for demolition of the unauthorised construction on the ground that structural stability of the illegal construction was doubtful and existence of the same was dangerous to the lives of the people. The issue was then considered by the Mayor-in- Council on 14.1.2010 and it was decided to demolish the unauthorised construction. Accordingly, about 600 sq. ft. out of the total constructed area measuring 1500 sq. ft. was demolished on 4.2.2010.

12. In the meanwhile, the appellant filed WP No. 23741/2009 in the High Court for issue of a direction to the Corporation to demolish the illegal construction by respondent No.7. The same was disposed of by the learned Single Judge on 3.3.2010 with the direction that the objection raised by the appellant against the unauthorised construction be decided by the competent authority after hearing the affected parties. Simultaneously, it was ordained that no illegal construction be carried out in the premises in question.

13. Notwithstanding the decision of the Mayor-in-Council and the order of the High Court, respondent No.7 continued with the construction of building, albeit in violation of the sanctioned plan. Therefore, the appellant filed fresh writ petition which came to be registered as WP No.13815/2010 for demolition of the unauthorised construction and for issue of a direction to the Corporation not to issue completion certificate in favour of respondent Nos.7 and 8. The second writ petition was disposed of by the learned Single Judge vide order dated 28.7.2010, the relevant portions of which are extracted below:

“It appears from the submissions that the construction has been raised up to ground plus fourth floor which is beyond the sanctioned plan. It is evident from the photo copies of the records that it was resolved on 14th January, 2010 in the M.I.C. meeting of the Corporation that as the person responsible continued with the unauthorised construction which might lead to an accident, appropriate action towards demolition of the unauthorised construction should be taken forthwith under section 400(8) of the Kolkata Municipal Corporation Act with the help of the local administration.

Since admittedly, unauthorized construction has been raised, that is, construction has been carried out beyond the sanctioned plan, I direct the Director General (Buildings-II) Kolkata Municipal Corporation and the Executive Engineer (Civil), Building Department, Borough-IX, the respondent nos. 3 and 4 respectively, to demolish the unauthorized structure, as resolved, within eight weeks from the date of communication of this order. During such demolition, if need be the respondent nos. 3 and 4 are at liberty to seek assistance of the Officer-in- Charge, Watgunge Police Station, Kolkata, the respondent no.6 shall render all assistance in implementing the order of this Court.”

14. Immediately thereafter, Mohammad Shahid submitted an application dated 13.8.2010 for regularisation of unauthorised portion of the building under Section 400(1) of the 1980 Act. That application reads as under:

Date: 13.08.2010 "To:

The Executive Engineer (Civil) Building Department Br.-IX, The Kolkata Municipal Corporation, 11, Belvedere Road, Kolkata-700027.

Sub: Regularisation of additional floor over Sanctioned Building.

Re: Pre: No. 8/ 1 F, Gopal Doctor Road,
Ward No.76, Br. -IX.

Dear Sir,

I Md. Shahid, attorney of the above mentioned premises, am submitting herewith one copy of ammonia print of five storied building plan. The said building was sanctioned of two storied, and additional three more storied has been constructed for accommodation of existing tenants and our family members.

Now I do request and pray to your goodself to regularize the unauthorized portion of the said building under section 400(1). For that I am ready to pay the penalty and charges for the same.

Hope your honour would extend your co-operation in this respect and oblige me.

Thanking you.

Yours faithfully, Sd/-

Md. Shahid."

15. Simultaneously, respondent No.7 challenged the order of the learned Single Judge by filing an appeal. During the pendency of the appeal, Mohammad Shahid filed an additional affidavit dated 16.9.2010, paragraphs 5 to 10 whereof are reproduced below:

"5. I state that a plan dated 11.04.2009 vide building permit no.2009090004 was sanctioned for premises no. 8/1F, Gopal Doctor Road, Kidderpore, Kolkata-700023, by the Kolkata Municipal Corporation, for erection of a two storied building, covering a sanctioned area measuring about 145.82 square meter. The proposed F.A.R for the said plan was 0.99 over land measuring about 145.927 square meter. But the building has been constructed upto five storied. Presently, the total constructed cover area for the five storied building is measuring about 559.57 square meter and the present F.A.R is 3.83.

6. I say that according to Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules 1990, "if during the erection or execution of work any external deviation beyond the sanctioned covered space is intended to be made and which does not violate the provisions of the Act or the said Rules, the person erecting such construction, prior to carrying out such erection or execution of works, submit, in accordance with the provisions of the said rules, a revised plan incorporating the deviation intended to be carried out, for obtaining necessary sanction thereof."

7. I further say that Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules, 1990, empowers the Municipal authorities to allow a person to construct beyond the sanctioned covered area, which means construction exceeding the Floor Area Ratio can be allowed to be carried on.

8. I say that there is no express provision in the Kolkata Municipal Corporation Act 1980 and also in Kolkata Municipal Corporation Building Rules, 1990, stopping a person from constructing beyond the Floor Area Ratio. I further say that though none of the provisions of the Kolkata Municipal Corporation Act, 1980 and Kolkata Municipal Corporation Building Rules, 1990, empowers the Kolkata Municipal Corporation to regularize the construction made in excess of the sanctioned plan, but the Kolkata Municipal Corporation gets the said power of regularization by virtue of the Full Bench Judgment of this Hon'ble Court delivered in the case of Ramesh Prasad Agarwal (Supra) reported in All India Reporter 1972 Calcutta 459. In the said case this Hon'ble Court was pleased to decide that 'even in respect of matters which involve violation of an unrelaxable building rules the Commissioner has discretion not to order demolition if the violation is not of a serious nature.'

9. I say that I, on 13th August, 2010, have already applied before the Kolkata Municipal Corporation for regularization of the construction erected beyond the sanctioned plan and have submitted a revised plan for sanction before the concerned authority. Copy of the letter dated 13th August, 2010 and the revised plan is collectively annexed hereto and marked with the letter "R-1".

10. I say that the construction erected by me in the present case is not of a serious nature and there is no immediate threat that the building may fall down and the said fact shall be proved from the structural stability certificate issued by Sri Prabir Kumar Mitra, Civil Engineer, after due inspection of the premises in question.

A copy of the structural stability certificate is annexed hereto and marked with the letter "R-2".

16. The appellant filed detailed counter affidavit dated 17.1.2011 reiterating his plea that the construction made by respondent No.7 was illegal. Thereafter, respondent No.8 filed affidavit dated 22.2.2010 and questioned the locus standi of the appellant to file the writ petition. Shri Tapas Chandra and Smt. Asha Devi Shaw, to whom the unauthorised portions of the building are said to have been sold, got themselves impleaded as parties to the appeal filed by respondent No.7. On

1.3.2011, the Division Bench of the High Court suo-motu directed issue of notice under Order 1 Rule 8 of the Code of Civil Procedure and publication thereof in two daily newspapers, one in Bengali and another in English so as to enable other purchasers of the unauthorised portions of the building to present their cause before the Court. The relevant portion of that order reads as under:

“01.03.2011 Mr. Bhaskar Ghosh, learned Advocate, has filed a report of the Officer-in-Charge of the Watgunge Police Station.

Let 1st and 2nd pages of the said report be endorsed by the learned Advocate, Mr. Ghosh Let the said report be kept on record.

From the said report it appears that in an unauthorized construction without sanction plan above 2nd floor, in terms of the complaint filed by the Kolkata Municipal Corporation, Case No. 320 dated 14.10.2010 under Section 401(A) KMC Act was started and Developer/appellant and the respondent/Owner are accused in the said proceeding.

It is submitted by the learned Advocate, Mr. Chatterjee, appearing for the Developer and Mr. Bhattacharya, learned Advocate appearing for the owner that their clients already have been granted bail in that criminal proceeding and trial is continuing.

It is further submitted by the learned Advocate appearing for the Developer/appellant and the learned Advocate appearing for the respondent/Owner that the concerned premises, as has been constructed, though on breach of the sanction plan of the Kolkata Municipal Corporation but many persons have been provided with occupation in different flats by selling the concerned flats of said property or providing their occupation on considering their earlier tenancy right.

Let affidavits be filed by them disclosing the total number of flats of the concerned premises, the names of the occupants therein, if any, detailing the particulars, namely their right and the instruments executed by the appellant and/or the respondent/Owner concerned, so that the Court may pass appropriate order as to whether those persons should be heard to not before passing any decision in this appeal.

Let such affidavits be filed within 10 days from date.

The matter is posted for hearing on 15th March, 2011 at 10.30 A.M. as fixed matter.

Since it is the submission of the appellant that there are many occupants above the 2nd floor of the concerned premises upto 5th floor which have been constructed without any sanction plan, for effective adjudication, let notice under Order 1 Rule 8 of the Code of Civil Procedure be published by the appellant within a week in the two daily Newspapers having State-wide publication; one in Bengali and another in English and will submit a Supplementary Affidavit disclosing his action to that effect.”

17. On 15.3.2011, the High Court, after taking note of the fact that none of the occupants had come forward to espouse their cause, directed that a fresh notice be published under Order 1 Rule 8 C.P.C. The second opportunity given by the High Court was also not availed by the occupants of the illegally constructed portion of the building. The appeal filed by respondent No.7 was finally disposed of by the Division Bench of the High Court on 2.5.2011 and the competent authority of the Corporation was directed to take appropriate decision in accordance with law after complying with the principles of natural justice. This is evinced from the following extracts of the impugned order:

“Having heard the learned Counsel appearing for the parties and considering the facts and circumstances of the case, We are of the view that the competent authority of the Kolkata Municipal Corporation should take appropriate decision under the provisions of the Kolkata Municipal Corporation Act and Building Rules framed thereunder while dealing with the allegations of unauthorized construction in respect of any building. In the present case, specific allegation has been made to the effect, that two floors of the building in question were constructed even in absence of sanctioned building plan.

In the aforesaid circumstances, the competent authority of the Kolkata Municipal Corporation must take appropriate decision in respect of the building in question upon complying with the provisions of the Kolkata Municipal Corporation Act and the Building Rules framed thereunder.

The Court cannot usurp the authority of the Kolkata Municipal Corporation in this regard. The validity and/or legality of the decision of the Kolkata Municipal Corporation authorities regarding demolition and/or retention of any unauthorized structure can be challenged before this Court but this Court under normal circumstances should not dictate the Kolkata Municipal Corporation authorities to take any specific decision regarding demolition or retention of any structure without allowing the competent authority to take appropriate decision in this regard.

The Kolkata Municipal Corporation authorities should take appropriate decision in respect of the fate of an illegal structure at the first instance and the Court will thereafter adjudicate the correctness of such decision. The Court under normal circumstances should not either direct retention of any illegal structure or demolition of the same before allowing the competent authority of the concerned Kolkata Municipal Corporation to take appropriate decision in accordance with law.

For the aforementioned reasons, we direct the competent authority of Kolkata Municipal Corporation to consider the nature and magnitude of the unauthorised construction at the premises in question and take specific decision regarding retention or demolition of the same or any part thereof.

Needless to mention that the competent authority of the Kolkata Municipal Corporation will take appropriate decision strictly in accordance with law and upon

observing the principles of natural justice without any further delay but positively within a period of two months from date.”

18. Shri Bhaskar P. Gupta, learned senior counsel appearing for the appellant argued that the direction given by the Division Bench is legally unsustainable because while deciding the appeal preferred by respondent No.7, the Division Bench of the High Court overlooked the fact that the Mayor-in-Council had, after giving notice and opportunity of hearing to the representative of respondent No.7, already passed order on 14.1.2010 for demolition of the unauthorised construction. Learned senior counsel emphasised that respondent No.7 had defied the ‘stop work notice’, decision taken by Mayor-in-Council and continued with the construction of building even after demolition of unauthorised portion thereof and argued that the Division Bench of the High Court committed serious error by ordaining compliance of the rule of audi alteram partem ignoring that respondent No.7 had never contested the factum of unauthorised construction. Shri Bhaskar P. Gupta relied upon the judgments of this Court in Friends Colony Development Committee v. State of Orissa (supra) and Priyanka Estates International (P) Ltd. v. State of Assam (supra) and argued that the Division Bench of the High Court committed serious error by interfering with the direction given by the learned Single Judge for demolition of the construction which was raised by respondent No.7 in violation of the sanctioned plan and by showing total contempt for the notices issued by the Corporation under Sections 400 and 401 of the 1980 Act.

19. Shri Kalyan Bandopadhyay, learned counsel for the Corporation extensively referred to the pleadings of the parties to show that the representative of respondent No.7 had admitted construction of building in violation of the sanctioned plan and argued that such construction cannot be regularised under Rule 25 (2) of the Kolkata Municipal Corporation Building Rules, 1990 (for short, ‘the Rules’).

20. Learned counsel for respondent No.7 fairly conceded that the construction raised by his client is contrary to the sanctioned plan but argued that the Corporation is duty bound to pass appropriate order on the application filed for regularisation of such construction. Learned counsel submitted that even though Rule 25(2) of the Rules may not be strictly applicable to the case of his client, the Corporation possesses inherent power to regularise the illegal construction and there is no justification to demolish the unauthorised portion of the building without deciding the application submitted on 13.8.2010.

21. We have considered the respective arguments and carefully perused the record. Since, respondent No.7 has not disputed that the building was constructed in violation of the sanctioned plan and the Mayor-in-Council passed order dated 14.1.2010 for demolition of the disputed construction, the direction given by the Division Bench of the High Court to the competent authority of the Corporation to pass appropriate order after giving opportunity of hearing to respondent No.7 cannot be sustained. It appears that attention of the Division Bench was not drawn to the notices issued by the competent authority of the Corporation under Sections 400, 401 and 401A of the 1980 Act and order dated 14.1.2010 passed by the Mayor- in-Council, else it would not have decided the appeal by assuming that the competent authority had not passed an order for demolition of the illegal construction. The factum of illegal construction having been raised by respondent No.7 is also

evinced from the counter affidavits filed on behalf of respondent Nos.1 to 5 and respondent No.7 respectively. In paragraphs 4

(a) to (c), (e) to (h), (j) and (k), Shri Amitava Roy Chaudhary, Executive Engineer (Civil), Building Department, Kolkata Municipal Corporation has explained the Corporation's stand in the following words:

“ 4. I crave leave of this Hon'ble Court to set out the following facts in connection with the present S.L.P. :-

a) A Building plan being Building Sanction Plan No. 200909004 was sanctioned on 11.04.2009 by the concerned authority of the Corporation in favour of one Md. Sahid for construction of two storied residential building in respect of the premises No.8/1F, Gopal Doctor Road, Kolkata-700023 (hereinafter referred to as the said premises) and the same to be completed within five years from the date of sanction i.e. 10.04.2014 as per the said sanction.

b) On or about October, 2009 the concerned officers of the Corporation inspected the said premises after receiving a complaint over telephone about the unauthorized construction being made in the said premises. Upon the said complaint the concerned officials inspected the said premises and found that R.C.C. columns were erected upto 3rd floor level with projections of some columns above 3rd floor level and casting of R.C.C. slab were made upto 3rd floor level along with staircase in deviation from the said sanction plan for which a notice under section 401 of the K.M.C. Act, 1980 was served on 08.10.2009 to Md. Shahid, the person responsible, to stop forthwith further progress of construction work and the same was received by the person responsible. Moreover, an intimation was sent to the Officer-in-charge, Watgunge Police Station, Kolkata, requesting him for follow up action in the prevention of unauthorized construction at the said premises which was in deviation and beyond sanction plan.

A true copy of Notice u/s. 401 of the K.M.C. Act and a copy of the intimation given to Officer in-charge Watgunge Police Station, Kolkata, are annexed as Annexures P-1 & P-2 at pages 23-27 of the SLP Paper Book.

c) It appeared from the records of the K.M.C. that inspite of service of notice u/s. 401 of the K.M.C. Act, 1980 to stop construction forthwith, the person responsible continued with the construction works defying the said stop-work notice for which first time Municipal guard watch was posted from 12.10.2009 in respect of the said premises and an intimation of the said posting of guard watch was given to the person responsible for prevention of the continuance of unauthorized construction thereon.

e) On or about November, 2009 the concerned officers of the Building Department of the Corporation further inspected the said premises and found that the construction works were going

on up to 4th floor level in spite of posting of guard watch. Accordingly, considering the gravity of the situation and safety of the adjoining structure as well as the safety of the public in general the concerned authority suggested that action under section 401-A of the K.M.C. Act, 1980 may be taken against the said person responsible and a proposal was made by the concerned officials of the Corporation, besides to it the same was sent to Watgunge Police Station for taking action against the person responsible or any other person who has conspired to make the said unauthorized construction. A true copy of the said proposal dated 10.11.2009 is annexed as Annexure P-4 at pg. 30 of the S.L.P. Paper Book.

(f) After considering the said statement and the demolition sketch the Deputy Chief Engineer (Building) submitted a report to the Director General (Building)-II, K.M.C. In the said report the Deputy Chief Engineer (Building) mentioned that since the nature of the unauthorized construction works are massive and there was defiant attitude of the person responsible and since the premises is situated in congested area, the construction had been done in a haphazard manner without following the norms and practice of Civil Engineering. It was felt that the structural stability of the impugned construction is doubtful which would create several hazards like traffic congestion, fire hazards, environmental hazards etc. Accordingly, it was recommended that action under section 400(8) of the K.M.C. Act, 1980 may be taken against the said unauthorized construction in the said premises to cause such building or work to be demolished forthwith, and the same was placed before the Member, Mayor-in-Council for approval.

(g) The Member, Mayor-in-Council approved the said recommendation. On 14.01.2010, upon such approval the Mayor-in- Council resolved that unauthorized construction/ structures at the said premises be demolished forthwith under section 400 (8) of the K.M.C. Act, 1980 with the help of the local administration. A true copy of the said proposal of the said premises and the resolution of the Mayor-in-Council dated 14.10.2010 is annexed as Annexure P-5 (Colly) at pages 31-32 of the S.L.P. Paper Book.

(h) In accordance with the said resolution of the Mayor-in- Council the demolition squad of the Corporation went to the said premises on 04.02.2010 and was able to demolish a portion of the unauthorized construction about 600 sq. ft. approx. out of approx. 1500 sq. ft. of the said unauthorized construction in the said premises. The demolition squad also submitted a report of the said structure in the said premises. In the said report the reason for not being able to demolish the entire un- authorized structure was also stated. A true copy of the demolition report and the demolition sketch is annexed as Annexure P-6 at page 33 of the S.L.P. Paper Book.

j) Pursuant to the directions of the Calcutta High Court, the concerned Executive Engineer gave a hearing on 08.04.2010 to the petitioner and the respondent, M/s. Unique Constructions represented by its Proprietor - Md. Shahid, the person responsible for making unauthorized constructions and on 16.04.2010 the concerned Executive Engineer passed an order and communicated the same to the respective parties. A true copy of the said Order dated 16.04.2010 is annexed as Annexure P-8 (at pages 36-37) of the S.L.P. Paper Book.

k) Thereafter, on the basis of the said order of the Executive Engineer, on 20.07.2010 the concerned Assistant Engineer along with the Sub-Assistant Engineer inspected the said premises and found that the demolished portion of the said building has been repaired by the said person responsible and also found that the said building is full of occupancy.”

22. In paragraphs 4, 5 and 6 of his affidavit, Mohammad Shahid has averred as under:

“4. That since the Premises No. 8/1F, Gopal Doctor Road, Police Station Watgunge, Kolkata having an area of about 2 Cottahs 11 Chittacks 33 Square feet was covered with temporary structures and some of which were tiles and asbestos etc. The said structures were occupied by various tenants and partly by the landlord. Therefore the owner/landlord decided to enter into an agreement with the answering respondent for undertaking necessary construction works since the property became uninhabitable. Thus necessary agreements were executed by and between the answering respondent and owner/landlord for the construction work in the premises in question.

Accordingly, thereafter a Plan dated 11.04.2009 vide Building Permit No. 2009090004 was sanctioned for premises No. 8/1F, Gopal Doctor Road, Kidderpore, Kolkata- 700 023, by the Kolkata Municipal Corporation for erection of a two storied building, covering a sanctioned area measuring about 145.82 Square Meter. The proposed F.A.R. for the said plan was 0.99 over land measuring about 145.927 Square Meter. But the building has been constructed upto five storied. Presently the total constructed cover area for the five storied building is measuring about 55.57 square meter and the present F.A.R. is 3.83.

5. That subsequent thereto as per the requirement of the owner and tenants in the said premises construction upto the floor more than sanctioned was constructed. Upon construction the answering respondent filed an application with the Kolkata Municipal Corporation under Rule 25(2)(b) of the Building Rules on 13.08.2010 for regularization of the construction erected beyond sanctioned plan and a revised plan was submitted for sanction before the competent authority.

6. That according to Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building rules 1990 it is provided that if during the erection or execution of work any external deviation beyond the sanctioned covered space is intended to be made and which does not violate the provisions of the Act or the said Rules, the person erecting such construction, prior to carrying out such erection or execution of works, submit, in accordance with provisions of the said rules, a revised plan incorporating the deviation intended to be carried out, for obtaining necessary sanction thereof. Further the Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules, 1990, empowers the Municipal authorities to allow a person to construct the sanctioned covered area, which means construction exceeding the floor area ratio can be allowed to be carried on.”

23. In view of the pleadings filed before the High Court and the affidavits filed before this Court, there is no escape from the conclusion that respondent No.7 had raised construction in violation of the plan sanctioned under Section 396 of the 1980 Act and continued with that activity despite the order of the Mayor-in-Council. In the prevailing scenario, the representative of respondent No.7 might have thought that he will be able to pull strings in the power corridors and get an order for regularisation of the illegal construction but he did not know that there are many mortals in the system who are prepared to take the bull by horn and crush it with iron hand.

24. Rule 25 of the Rules, on which reliance was placed by respondent No.7 for seeking regularisation of the illegal construction, reads as under:

“25. Deviation during execution of works.—(1) No deviation from the sanctioned plan shall be made during erection or execution of any work.

(2) Notwithstanding anything contained in sub-rule (1), if during erection or execution of work any internal alterations or external additions which do not violate the provisions of the Act or these rules is made, the Municipal Commissioner may without prejudice to any action that may be taken against the person at whose instance such alteration or additions have been made, allow the person referred to in sub-rule (1) of rule 4 to submit, in accordance with the provisions of these rules, a revised plan showing the deviation and may sanction such plan.

(3) Any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the provisions of the Act and these rules and shall be dealt with accordingly.”

25. A reading of the plain language of Rule 25(1) makes it clear that a person, who erects any structure or executes any work is not entitled to deviate from the sanctioned plan. Rule 25(2) which contains a non-obstante clause and provides for sanction of revised plan to be submitted by the person engaged in erection of building or execution of work lays down that if during erection or execution of work, any internal alterations or external additions which do not violate the provisions of the Act or the Rules is made, the Municipal Commissioner can, at an application made in that behalf sanction the revised plan showing the deviation. Rule 25(3) is declaratory in nature. It lays down that any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the Act and the Rules shall be dealt with accordingly.

26. In our view, respondent No.7 cannot take benefit of Rule 25 because the disputed construction was in clear violation of the sanctioned plan and the notices issued by the competent authority of the Corporation and also because the application was made after completion of the construction.

27. Before parting with the case, we consider it necessary to observe that respondent No.7 is guilty not only of violating the sanctioned plan and the relevant provisions of the 1980 Act and the Rules framed thereunder but also of cheating those who purchased portions of unauthorized construction

under a bona fide belief that respondent No.7 had constructed the building as per the sanctioned plan. With the demolition of unauthorized construction some of such persons will become shelterless. It is, therefore, necessary that respondent No.7 is directed to compensate them by refunding the cost of the flat, etc., with interest. Respondent No.7 must also pay for raising construction in violation of the sanctioned plan. It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorized construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the concerned public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer.

28. In the result, the appeal is allowed and the impugned judgment is set aside. With a view to ensure that the illegal construction raised by respondent No.7 is pulled down without delay, we issue the following directions:

1. Within three months from today, respondent No.7 shall pay the price of the flats etc. to the purchasers with interest @ 18% per annum from the date of payment.
2. The occupiers of illegal/unauthorized construction shall vacate such portions of the building within next one month.
3. Within next one month, the Corporation shall demolish unauthorized construction after taking adequate precautionary measures.
4. Respondent No.7 shall pay cost of Rs.25,00,000/- for brazen violation of the sanctioned plan and continuance of illegal construction despite 'stop work notice'. The amount of cost shall be deposited with the Kolkata State Legal Service Authority within three months and the same be utilized for providing legal aid in deserving cases.

29. Reports showing compliance of the aforesaid directions be filed by the Corporation and respondent No.7 in the Registry of the Kolkata High Court within six months. Thereafter, the matter be placed before the learned Single Judge who had passed order dated 28.7.2010. If the learned Single Judge finds that any of the aforesaid directions has not been implemented then he shall initiate proceedings against the defaulting officers and/or respondent No.7 under the Contempt of Courts Act, 1971 and pass appropriate order.

.....J. [G.S. SINGHVI]J.
[SUDHANSU JYOTI MUKHOPADHAYA] New Delhi, October 8, 2012.