



Pradnya

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**WRIT PETITION NO. 3616 OF 2018**

- 1. RAFIQUE RAHEMTULLAH KABANI,**  
An adult of Indian inhabitant  
Aged about 55 years, Occ: Retired  
Having address at, Flat No.801, 8<sup>th</sup>  
floor, Shivanjali Co-operative Hsg  
Society Ltd., 35, Dr. Ambedkar  
Road, Khar (W)  
Mumbai – 400 052

...PETITIONER

~ versus ~

- 1. THE ASSISTANT ENGINEER &  
DESIGNATED OFFICER,**  
H/west Ward, St. Martin Road,  
Bandra (West)  
Mumbai 400 050.
- 2. MUNICIPAL CORPORATION OF GREATER  
MUMBAI,**  
having office at Mahapalika  
Building, opp. CST, Mahapalika  
Marg, Mumbai – 400 001.
- 3. M/s. A. G. DEVELOPERS,**  
A partnership firm registered under  
the Provisions of the Partnership  
Act, 1932  
Having its office at Accost, 151, Pali-  
Road, Bandra (W),  
Mumbai – 400 050.

4. **M/s. RAO & ASSOCIATES,**  
A partnership firm registered under  
the Provisions of the Partnership  
Act, 1932  
Having its office at 18-C, Meadows-  
House, 3<sup>rd</sup> floor, Nagindas master  
Road, Fort, Mumbai – 400 001.
5. **SHIVAJANLI CO-OPERATIVE HSG SOC  
LTD LIMITED,**  
a Housing society Registered Under  
the Provisions of the Maharashtra  
Co-operative societies Act, 1960,  
having its address at 35, Dr.  
Ambedkar Road, Khar (W),  
Mumbai - 400052

...RESPONDENTS

**APPEARANCES**

**FOR THE PETITIONER IN  
WP/3616/2018**

**Mr Bhushan Joshi.**

**FOR RESPONDENT NO.5 IN  
WP/3616/2018**

**Mr Mandar Soman, a/w Mr  
Divakar Rai, Mr Nitin Rai,  
Mr Raj Tamhankar and Mr  
Aditya Rai, i/b Mr Saurabh  
Tamhankar.**

**FOR RESPONDENT NOS.1 AND  
2-BMC**

**Mr Rajshekhar Govilkar, Senior  
Advocate, a/w Ms Sujata  
Puri a/w Ms Shaba N. Khan,  
i/b Mr S. K. Sonawane.**

**CORAM : M. S. Sonak &  
Kamal Khata, JJ.**

**RESERVED ON : 30th August 2024  
PRONOUNCED ON : 11th September 2024**

**JUDGMENT (Per M S Sonak J):-**

1. Heard Mr Bhushan Joshi, learned counsel for the Petitioner, Mr Rajshekhar Govilkar learned Senior Advocate with Ms Sujata Puri and Ms Shaba Khan, instructed by Mr S. K. Sonawane, learned counsel for BMC (1st and 2nd Respondents) and Mr Mandar Soman with Mr Divakar Rai for the 5th Respondent. The 3rd and 4th Respondents, though duly served, were absent.

2. Rule. The Rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties.

3. The Petitioner challenges notice No.CE/4362/BSII/AH dated 12th June 2018 under Section 53 of the Maharashtra Regional and Town Planning Act, 1966 (“**MRTP Act**”) by the Brihanmumbai Municipal Corporation (“**BMC**”) for the removal of the structure viz. (i) work carried out beyond the approved plan, i.e. 4th floor to 8th floor, (ii) work carried out beyond the approved plan i.e. 2nd floor to 8th floor Phase 1.

4. The Petitioner, in the alternate, prays that the direction be issued to the BMC not to implement its above notices under Section 53 of the MRTP Act until the competent authority decides on the 5th Respondent’s application for regularisation in respect of the structures forming the subject matter of the impugned notices.

5. Mr Joshi submitted that the impugned notices, though served on the owner/developer and the 5th Respondent (Society), were not served upon each of the occupants of the premises, which are now ordered to be demolished and removed. He, therefore, submitted that this would amount to a breach of the principles of natural justice, and the impugned notices may be set aside on this ground.

6. Without prejudice, Mr Joshi submitted that the show cause notice dated 12th September 2017 referred only to the six specific but alleged illegalities listed in the Schedule to this notice. However, the impugned notice/speaking order dated 12th June 2018 *inter alia* refers to the structure/building from the 2nd to the 8th floor. He, therefore, submitted that the final order dated 12th June 2018 travels beyond the show cause notice dated 12th September 2017, and again, for this reason also, there is a breach of the principles of natural justice and fair play.

7. Finally, Mr Joshi submits that this Court, in its order dated 7th June 2017 disposing of Writ Petition No.56 of 2017 instituted by the 5th Respondent (Society), had only directed action against the V. C. Fitness Centre (as described in Exhibit "B" to this Petition) at the entrance of the building and some other structures specified in the said Writ Petition. Therefore, when the BMC officials inspected the building, they were required to focus only on the illegalities referred to in Exhibit "B" to the said Petition or other structures forming the subject

matter of Writ Petition No.56 of 2017. He submitted that action against the 2nd to 8th floor of the building was neither sought nor formed the subject matter of Writ Petition No.56 of 2017. Therefore, he submitted that the BMC's impugned action transgresses this Court's order dated 7th June 2017 in Writ Petition No.56 of 2017.

8. Mr Joshi submitted that the impugned notices/speaking order must be set aside for all the above reasons.

9. Mr Soman, learned counsel for the 5th Respondent (Society), also strongly supported Mr Joshi's contentions. He submitted that the Society's Writ Petition No.56 of 2017 had no concern with the 2nd to 8th floor. This Petition only concerned V. C. Fitness Centre and possibly the other structures referred to in the show cause notice dated 12th September 2017 issued by the BMC. He submitted, therefore, that the impugned notices/speaking order, to the extent they directed the removal/demolition of the 2nd to 8th floor, was improper and even illegal.

10. Mr Soman submitted that the BMC had committed contempt of this Court by not faithfully implementing this Court's order dated 7th June 2017 in Writ Petition No.56 of 2017 instituted by the 5th Respondent (Society) because no action was taken against the illegal and unauthorised construction carried out by one Gul Achhra at the entrance of the Society's building or the establishment of M/s. V. C.

Fitness Centre by him unauthorisedly. Instead, the BMC has initiated action against the constructions from the 2nd floor to the 8th floor. He pointed out that Contempt Petition Nos.68 and 69 of 2017 had already been instituted by the 5th Respondent (Society), which were connected with this Writ Petition.

**11.** Based on the above, Mr Soman submitted that Writ Petition No.3616 of 2018 may be allowed and that the BMC officials should be punished for not faithfully implementing this Court's order dated 7 June 2017 in Writ Petition No.56 of 2017.

**12.** Mr Govilkar, learned Senior Advocate for BMC, submitted at the outset that the building approvals were only for the ground + 1st floor of the Society's building. Still, with impunity and complete disregard for law and regulations, the builders and developers constructed the 2nd to 8th floors. They inducted the Society's members without any occupancy certificate, fire clearance or other mandatory compliances. Mr Govilkar submits that the Petitioner in Writ Petition No.3616 of 2018, who is the occupant of one of such premises on the patently illegally constructed floors and the Society, which comprises mainly of members who are illegally occupying the premises on the 2nd to 8th floor are only interested in stalling the removal/demolition of the patently illegally constructed 2nd to 8th floors.

13. Mr Govilkar submitted that, significantly, the 5th Respondent (Society) has not challenged the BMC's order dated 12 June 2018, and only the Petitioner, i.e., one of the illegal occupants of the premises on the illegally constructed 8<sup>th</sup> floor, has instituted Writ Petition No.3616 of 2018 in his individual capacity.

14. Mr Govilkar submitted that even the pleas for regularisation of the blatantly illegal and unauthorised constructions had been rejected by the BMC. He referred to the affidavit of Sharad Ughade filed on 19th July 2018 in the connected Contempt Petition No.68 of 2017 and submitted that during the course of inspections directed by this Court in Writ Petition No.56 of 2017, serious illegalities and large-scale deviations were noticed, and action was initiated.

15. Mr Govilkar submitted that notices were issued to all the affected parties, assuming that individual notices were required. He submitted that the detailed contentions raised by Advocate Jamshed Ansari, Advocate Gul Achhra and Mr Rakesh Saigal were considered. Even the documents produced were considered, and impugned notices/speaking orders were made.

16. Mr Govilkar submitted that there is no clarity about the Petitioner's or the Society's defence even today. He submitted that the Petitioner or the Society have produced no permissions or approvals for construction beyond the 1st floor.

He submitted that even regularisation pleas have already been rejected. He submitted that the developer applied for regularisation means and implied that the constructions beyond the 1st floor were illegal and unauthorised. He submitted that most of the members of the Society, including the Petitioner, occupied premises without any occupancy certificate or fire safety clearance. He, therefore, submitted that there is no merit in the Petition. Considering the petitioner's and the Society's conduct, no equitable relief should be granted to the Petitioner or the Society.

**17.** Mr Govilkar submitted that merely because the allegation in Writ Petition No.56 of 2017 instituted by the Society may have been restricted to some specific illegalities with which they were aggrieved, that does not preclude the BMC officials from noticing or taking cognisance of several other illegalities, which were glaring. Mr Govilkar, therefore, submitted that the contention about BMC violating the orders made by this Court in Writ Petition No.56 of 2017 are entirely misconceived.

**18.** Mr Govilkar submits that the Petitioner and the Society are trying to confuse the issues on the show cause notices when responses on their behalf have dealt with all matters, including, in particular, the gross illegalities involved in constructing the 2nd to the 8th floors without permission and approvals from any authorities. Accordingly, he submitted that

no violation of natural justice was involved and that this Petition should be dismissed with costs.

19. The rival contentions now fall for our determination.

20. The Petitioner is an occupant of Flat No.801 (8th floor), Shivanjali Co-operative Housing Society Limited building, 35 Dr Ambedkar Road, Khar (W), Mumbai—400 052 (the said premises and the said building, respectively).

21. In paragraphs 8 and 9 of the Petition, the Petitioner has pleaded that BMC issued Intimation of Disapproval (“IOD”) and commencement certificate on 22nd December 1992 and 22nd May 1993 for the construction of a building on plot of land surveyed under Nos.725, 726 and 727, CTS Nos.E/87, E/88, E/89, E/90 and E/91 owned by a Trust and to be developed by the 3rd and/or the 4th Respondent.

22. In paragraph 16 of the Petition, the Petitioner has pleaded to the information allegedly obtained by the Petitioner from the proceedings in Writ Petition No.3156 of 2006 instituted by the 5th Respondent (Society) complaining about some illegal constructions and unauthorised user of the basement in the said building. This information, pleaded by the Petitioner in a tabulated form, reads as follows: -

	<i>Approval</i>	<i>Commencement Certificate issued</i>	<i>Actual construction</i>
<i>Phase-1(A)</i>	<i>Basement + ground+1st floor</i>	<i>Up to 1<sup>st</sup> floor</i>	<i>Basement+Gr +1st floor</i>

<i>Phase-1(B)</i>	<i>Basement+Gr+3rd floor</i>	<i>Plinth level</i>	<i>Basement+Gr +8th floors</i>
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**23.** From the perusal of the documents enclosed along with the Petition and the returns filed by BMC in this petition and the connected Contempt Petition No.68 of 2017, it is evident that the said building had approval for basement + ground + 1st floor (Phase 1-A) and basement+ ground + 3rd floor (Phase 1-B). The commencement certificate issued based on the approvals, i.e. the IOD, was only for the construction up to the 1st floor. However, the said building comprises a basement + ground + 8 floors. Thus, the construction of the building beyond the 1st floor, i.e. the 2nd floor to the 8th floor, is patently illegal and unauthorised. This is in addition to illegal constructions in the basement and on the ground and 1st floors.

**24.** The Court requested Mr Soman, learned counsel for the 5th Respondent, to inform whether there were any permissions or approvals for undertaking constructions beyond the 1st floor in the Society's building. Despite records and pleadings showing that no permissions and even regularisation were applied for, Mr Soman refused to make any definite statement except to say that he would obtain instructions were the matter adjourned. If there were any permissions or approvals, it would be the first document the Petitioner or the Society would have produced on record. As contended by Mr Govilkar, learned Senior Advocate for BMC, there are no permissions and approvals for the structure

beyond the 1st floor and up to the 8th floor. Even the pleas for regularisation have been rejected, and there is no challenge to such rejections.

**25.** There are neither any pleadings/documents nor was even any attempt made by Mr Joshi and Mr Soman, learned counsel for the Petitioner and the 5th Respondent (Society), to establish that there was any legality to the constructions beyond the 1st floor that is, the constructions from the 2nd floor to the 8th floor. The Petitioner had several opportunities, including opportunities before this Court to show some semblance of legality for the constructions beyond the 1st floor, that is, the 2nd floor to the 8th floor in the said building, but at no stage where such opportunities availed of either before the BMC or this Court.

**26.** This is obviously because there are no permissions for such constructions beyond the 1st floor, which were constructed with impunity and complete disregard for the law and regulations on the subject. Even the occupation of premises in the entire building, not to mention the premises from the 2nd floor to the 8th floor, was patently illegal and unauthorised. This is because there was no occupancy certificate or fire safety clearance regarding such occupation.

**27.** The Petitioner has pleaded in paragraph 15 of the Petition that the 5th Respondent (Society) has instituted Suit No.5509 of 2006 under the Maharashtra Ownership Flats

(Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("**MOFA Act**") against the 3rd Respondent seeking certain reliefs, including a direction to the 3rd Respondent to (i) regularise such floors of the building which the 3rd Respondent has constructed by utilising excess Floor Space Index ("**FSI**"); and (ii) a direction to the 3rd Respondent to convey the land in favour of the Society.

**28.** From the above, it is apparent that not only were the constructions above the 1st floor and up to the 8th floor made without any permissions or approvals from any authorities, but further, such constructions were made by utilising FSI, which was not even available to the plot, on which the construction was made. There is not even a statement in the Petition that the construction was otherwise within the permissible parameters provided under building rules, regulations, Development Control Regulations ("**DCR**"), etc.

**29.** Accordingly, such construction was not even regularisable. This is apart from the fact that constructions brazenly made with impunity, disregarding all rules and regulations, should not be regularized. Regularisation is only an exception that can be resorted to in exceptional circumstances. There is no right to construct brazenly and illegally and then urge regularisation as if regularisation were a matter of right. The Hon'ble Supreme Court has rejected such contention in several matters and, more recently, by the

Division Benches of this Court in Suo Motu Writ Petition No.2 of 2023 and Writ Petition No.5816 of 2023 has also rejected such contention relying on the decisions of the Hon'ble Supreme Court.

**30.** In paragraph 17 of the Petition, the Petitioner has pleaded about some illegal and unauthorised constructions carried out by the 3rd Respondent along with one Mr Sharif Khan in the basement of the said building and in the shops at the entrance of the said building, thereby completely blocking the entrance to the building. It is pleaded that the Society instituted Writ Petition No.1645 of 2013 in this Court, urging the BMC to take action against such illegal constructions.

**31.** In paragraph 18, it is pleaded that Writ Petition No.1645 of 2013 was disposed of by this Court on June 5, 2017, with a direction to the Assistant Commissioner, H/West ward, to visit the premises that were the subject matter of the Petition after notice to the Petitioner (Society) and to take action against the illegal structures that were the subject matter of the said Petition.

**32.** Similarly, in paragraph 19 of the Petition, it is pleaded that one Mr Gul Achhra constructed illegal and unauthorised structures at the entrance of the Society building. Because, despite several complaints, the BMC was not initiating any action, the Society instituted Writ Petition No.56 of 2017,

urging action against the said illegal construction. This was the structure/establishment styled as M/s. V. C. Fitness.

**33.** In paragraph 19 of the Petition, it is pleaded that Writ Petition No. 56 of 2017 was disposed of by this Court by an order dated 7th June 2017. The Assistant Commissioner, H/West ward, was directed to visit the premises, which were the subject matter of the said Petition, after notice to the Society and Mr Gul Achhra. The Assistant Commissioner of BMC was further directed to take action against the illegality associated with the structures that were the subject matter of the Petition.

**34.** The Petitioner then pleaded that while no action was taken against the structures that were the subject matter of Writ Petition No.1645 of 2013 and Writ Petition No.56 of 2017, the BMC officials who visited the site turned their attention to the alleged illegalities involved in the construction of the 2nd to the 8th floor.

**35.** Mr Joshi and Mr Soman earnestly contended that the BMC officials had committed contempt of Court, not simply by failing to initiate action against the unauthorised constructions put up by Mr Sharif Khan and Mr Gul Achhra, which were the subject matters of Writ Petition No.1645 of 2013 and Writ Petition No.56 of 2017, but by taking cognisance of illegal construction from the 2nd to the 8th floor of the said building, including the premises on the 8th

floor which the Petitioner is presently occupying without any occupancy certificate.

**36.** The Petitioner has pleaded that the Society has therefore filed Contempt Petition No.68 of 2017 alleging breach of the order dated 7th June 2017 in Writ Petition No.56 of 2017 and Contempt Petition No.69 of 2017 alleging contempt of the order dated 5th June 2017 in Writ Petition No.1645 of 2013. These Contempt Petitions are tagged along with the present Petition.

**37.** The contention that the BMC officials were precluded from noticing or taking cognisance of the patently illegal and unauthorised constructions from the 2nd floor to the 8th floor of the said building because of the orders made by this Court in Writ Petition No.56 of 2017 and Writ Petition No.1645 of 2013 is patently misconceived and cannot be accepted. The BMC officials are duty-bound to take cognisance of illegal and unauthorised constructions. It is unfortunate that they seldom take such cognisance and not that they have, in the present matter, taken cognisance even though the orders of this Court in the two Writ Petitions may not have referred to the illegal and unauthorised constructions of the 2nd to the 8th floor.

**38.** Even de hors the orders made by this Court or even suo motu, the BMC officials were entitled to and expected to act against brazenly illegal and unauthorised constructions. Therefore, if during the inspection, as directed by this Court,

the BMC officials noticed that the constructions beyond the 1st floor, i.e. 2nd floor to the 8th floor, were without any permissions/approvals, there was no jurisdictional error or any error at all in initiating proceedings against such gross illegalities. The challenge on these grounds needs to be rejected and is hereby rejected.

**39.** In the context of the directions issued by us in our orders dated 5th June 2017 in Writ Petition No.1645 of 2013 and order dated 7th June 2017 in Writ Petition No.56 of 2017, the BMC officials did inspect the site and based upon such inspections issued notices regarding the illegalities and unauthorised constructions which were the subject matter of those two Petitions instituted by the Society. In those two Petitions, Respondent No.5 (Society) only referred to the illegal constructions that were at that time bothering Respondent No.5 (Society).

**40.** However, quite conveniently, the 5th Respondent (Society), of which the Petitioner is a member, conveniently suppressed all issues relating to the gross illegality involved in constructions beyond the 1st floor, i.e., the 2nd floor to the 8th floor of the said building. The 5th Respondent (Society) cannot claim any ignorance of such gross illegality, notably when it had filed Suit No.5509 of 2006 seeking a direction to the 3rd Respondent (Developer) to regularise such floors of the building using excess FSI.

41. The contention about the failure of natural justice is equally misconceived. The Petitioner and the 5th Respondent (Society) are bent upon confusing issues and trying to make out a case of some technical breach of the principles of natural justice. For this, the Petitioner selectively refers to the notice dated 12th September 2017 and submits that since this particular notice does not refer to the illegal constructions from the 2nd floor to the 8th floor, the final notice/speaking order dated 12th June 2018 could not have referred to and directed the removal/demolition of the illegal construction from the 2nd to the 8th floor of the said building.

42. The Petitioner, however, has failed to refer to several documents, including but not limited to the notice dated 28th April 2004 under Section 53 of the MRTP Act clearly stating that the construction of the 2nd to the 8th floor in the said building is without any permissions and, in any event, not in accordance with the permission granted on 20th December 1993. Accordingly, an opportunity was given to show cause, failing which such floors were directed to be demolished.

43. It is at this stage that Respondent No.5 (Society), of which the Petitioner is a member, instituted Suit No.5509 of 2006 alleging that the 3rd Respondent (Developer) was responsible for the illegal and unauthorised constructions and, therefore, the 3rd Respondent must be directed to get these gross illegalities “regularised” by either utilising FSI available or by purchasing and loading additional FSI on the plot.

44. Possibly, this is why the present Petitioner has instituted this Petition instead of the 5th Respondent (Society). Besides, even the notice dated 12 September 2017 directs the developer/owner and the owner/occupiers to demolish/restore the unauthorised constructions in the existing building beyond the plans approved by the BMC on 20 December 1993. This direction includes the construction of the 2nd floor to the 8th floor, which is admittedly beyond the plans approved by the BMC on 20 December 1993.

45. The replies filed by the advocates for the Society show that the 5th Respondent (Society) had no complaints about the failure of natural justice. The replies deal with all aspects of the matter, including the unauthorised constructions from the 2nd floor to the 8th floor. The BMC considered the replies/causes shown in substantial detail. The impugned order dated 12th June 2018 refers to the various notices issued and the replies filed and deals with every aspect of the illegal constructions that plague this building. Finally, the impugned speaking order dated 12th June 2018 directs the demolition of all the unauthorised constructions, i.e. constructions not reflected in the approved plans and not restored to the status of the approved plans despite several opportunities. The impugned speaking order/notice states that all this must be completed within seven days, failing which the BMC would demolish the illegal and unauthorised constructions at the risk, cost and consequences of the developer/owner/society/occupants.

46. Apart from the affidavit in the connected Contempt Petition No.68 of 2017, Mr Muley Mahendra Ganesh, Assistant Engineer of BMC, has filed an affidavit in Notice of Motion No.70 of 2007 in this Writ Petition No.3156 of 2006. Paragraph 4(a) of this affidavit is relevant, and the same reads as follows: -

*“4. Without prejudice to the aforesaid contentions, the briefly nattered facts of the case are as follows :*

*a. As I say the plans in respect of shivanjali Bldg. situated at 70-B, Dr Ambedkar Road, Khar (west) were approved for basement + Ground floor + 3 upper floors on 20.12.1993 and cc. is granted upto 1<sup>st</sup> floor for phase 1(A) and plinth C.C for phase I (B) on 30.04.194. I say that as the developer who is Respondent No.3 herein had carried out the work beyond approved plan and without C.C. the notice u/s 354A of The M.M.C Act was issued to Architect/Developer on 17.08.1994. I say that on site it is seen that the work is carried out upto 8<sup>th</sup> floor. I say that the work carried out beyond approval is 4<sup>th</sup> floor to 8<sup>th</sup> floor and were carried out beyond C.C is 2<sup>nd</sup> to 8<sup>th</sup> floor for phase (B). I say that these respondents have initiated action u/s 53(1) of M.R & T. P Act on 2.4.2004 against the developer.”*

47. Thus, this was not a case of any failure of natural justice. The petitioner and the 5<sup>th</sup> respondent society of which the petitioner is a component were given adequate notice of the case they had to meet. They were given ample opportunities, which they availed of. They had no answers to the patent illegalities involved in the unauthorised construction of the 2<sup>nd</sup> to the 8<sup>th</sup> floors. They had no answers to justify their occupation without any occupancy certificate or fire safety clearance. They only intended to create confusion and then allege some hypertechnical breach of

natural justice. There are no pleadings on prejudice. Even some semblance of defence is not disclosed. Based on all this, the impugned action warrants no interference.

48. In *State of Uttar Pradesh vs. Sudhir Kumar Singh and others*<sup>1</sup> the Hon'ble Supreme Court explained that the principle of law is that some real prejudice must have been caused to the party complaining failure of natural justice. The Court has shifted from its earlier concept that even a small violation of natural justice shall result in the order being rendered a nullity. A clear distinction has been laid down between the cases where there was no hearing at all and cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula. Finally, the Hon'ble Supreme Court, has summarised the law on when breach of principles of natural justice would be actionable.

(i) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(ii) Where procedural and/or substantive provisions of law embody the principles of natural

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1 (2021) 19 SCC 706

justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(iii) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(iv) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(v) The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.

49. Applying the above principles to the gross facts and circumstances of the present case, the challenge based on

alleged failure of natural justice is required to be rejected and is hereby rejected.

**50.** Mr Joshi's and Mr Soman's final contention that the illegal constructions from the 2nd floor to the 8th floor are regularise is also misconceived. The 5th Respondent (Society) has already filed a Suit against the builder/developer as noted above, seeking a direction to the builder/developer to get the illegal and unauthorised constructions regularised, if necessary, by purchasing additional FSI. This is an admission that the 2nd to the 8th floors exceed the constructions permitted by the approved plans and the permissible FSI. The Petitioner, based upon the ad-interim order obtained in this Petition on 25th June 2018, has virtually succeeded in stalling the demolition of the patently illegal and unauthorised construction put up by the builder/developer and enjoyed by the Petitioner and other members of the 5th Respondent (Society).

**51.** Mr Govilkar referred to the affidavit of Sharad Ughade, Assistant Commissioner, H/West ward of BMC, in Contempt Petition No.68 of 2017 filed on 19th July 2018. This affidavit states that the affiant and his team visited the premises on 9th June 2017 to comply with the directions of this Court in its order dated 5th June 2017 in Writ Petition No.1645 of 2013. During this site visit, the affiant and other team members also inspected the structures, which were the subject matter of Writ Petition No.56 of 2017. To ascertain the legality of the

structures, the affiant directed the Building Proposal Department to come with entire files containing the approved plan and sanctions, if any, in respect of the said building (See paragraphs 9, 10 and 11 of the affidavit).

52. Paragraph 12 of this affidavit states that the concerned department vide letter dated 30th June 2017 furnished details regarding the said building. This communication stated that the last amended plans approved by the BMC on 20th December 1993 were for a building comprising basement + ground + 1st + 2nd + 3rd (part) floors. Further, the plans were approved with FSI restricted to 0.75 as the CTS boundary, and the possession boundary was not tallying. Therefore, the commencement certificate permitted construction in two phases, 1A and 1B, on 30th April 1994. These commencement certificates authorised the basement, ground and 1<sup>st</sup>-floor construction only. Thus, there was no commencement certificate to construct beyond the 1st floor (See paragraph 12 of the affidavit).

53. In paragraph 13, the affidavit states that the developer/builder, in breach of the approved plans, carried out constructions beyond the 1st floor, i.e., from the 2nd floor to the 8th floor. Therefore, a notice under Section 354A of the Mumbai Municipal Corporation Act (“**MMC Act**”) was issued on 17th August 1994. A notice under Section 53(1) of the MRTP Act was also issued on 28th April 2004. A police complaint was also lodged on 7th July 2004 since the

builder/developer failed to comply with the requisitions and demolish the unauthorised constructions beyond the 1st floor.

54. In paragraph 13, there is a categorical statement that the Developer (Respondent No.3) applied for regularisation, but BMC did not accept this request. The developer was informed about this via a letter dated 18 October 2004. The developer/builder was again told to demolish the work beyond the approved plans, and the C.C. The affidavit refers to the notices issued and how the site inspection revealed non-compliance with the requisitions to demolish the constructions from the 2nd floor to the 8th floor, which were patently illegal and unauthorised.

55. Paragraph 15 of this affidavit refers to the notices issued and how almost 20 representatives of the shops and flats were present for the meeting to discuss this issue of illegal construction. The affidavit also refers to replies/representations of Advocate Mr Gul K. Achhra and Mr Jamshed Ansari inter alia on behalf of the Society and certain shop owners. This paragraph also refers to a reply of one Mr Rakesh Saigal regarding some shops. Finally, the affidavit states that after considering such replies, responses, and documents, the decision was reached about the patent illegalities.

56. For all the above reasons, the plea that the constructions from the 2nd floor to the 8th floor should be regularised or at

least pending the consideration of the application for regularisation, no demolition should be effected, is entirely misconceived in the gross facts and circumstances of the present case. The application for regularisation is already rejected, and the vague plea that any regularisation application made by the 5th Respondent (Society) is pending is, with respect, a little mischievous if not misconceived. The BMC has categorically stated that no such plea is pending or could be pending, given the earlier rejection by the BMC.

57. Even otherwise, the law concerning the regularisation of illegal constructions is fairly well settled. The benefit of regularisation is never to be extended to the parties who violate the building or environmental regulations brazenly and with impunity. The Hon'ble Supreme Court has repeatedly warned against such regularisations and even directed action against officials who regularised such constructions without adequate cause. The Court has held that such indiscriminate regularisation discriminates against the law-abiding citizens who refuse to pay bribes and follow the due, though long, process of securing permission from all prescribed authorities before putting up any construction.

58. In *Esha Ekta Apartments Cooperative Housing Society Limited and ors. vs. Municipal Corporation of Mumbai and ors.*<sup>2</sup>, the Hon'ble Supreme Court observed that in the last five decades, the provisions contained in various municipal laws

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<sup>2</sup> (2013) 5 SCC 357

for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small. Those entrusted with the task of ensuring the implementation of the master plan, etc., have miserably failed to perform their duties. *It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise.*

59. In *Royal Paradise Hotel (P) Ltd. vs. State of Haryana*<sup>3</sup>, the Hon'ble Supreme Court rejected the plea for regularisation of construction made in violation of the provisions of the planning and municipal legislation by observing that no authority administering municipal laws and other laws like the Act involved in the matter, can encourage such violations. *Even otherwise, compounding is not to be done when violations are deliberate, designed, reckless, or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the law requirements can alone qualify for regularisation, which is not the rule but a rare exception.*

60. In *Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation and ors.*<sup>4</sup>, the Hon'ble Supreme Court has held that what needs to be emphasised is that illegal and

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3 (2006) 7 SCC 597

4 (2013) 5 SCC 336

unauthorised constructions of buildings and other structures 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 the master plan/development plan/zonal plan. The reports of the demolition of hutments and jhuggi shops belonging to the poor and disadvantaged section of society frequently appear in the print media. Still, one seldom gets to read about the demolition of illegally/unauthorisedly constructed multi-storeyed structures 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 the poor and all compromises are made by the State machinery when it is required to deal with those who have money and power or unholy nexus with the power corridors.*

61. In *Shanti Sports Club vs. Union of India*<sup>5</sup>, the Hon'ble Supreme Court has, after adverting to its several earlier judgments on the subject, taken cognisance 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

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5 (2009) 15 SCC 705

he has spent a substantial amount on the construction of the buildings. *The Hon'ble Supreme Court remarked that, unfortunately, despite repeated judgments of the Supreme Court and High Courts, illegal constructions continue to mushroom, and thereafter, pleas are made for regularisation on the grounds of compassion and hardship. Therefore, the Hon'ble Supreme Court has observed that it is high time that the executive and political apparatus of the State take a serious view of the menace of illegal and unauthorised constructions.*

**62.** In *Friends Colony Development Committee vs. State of Orrisa*<sup>6</sup>, the Hon'ble Supreme Court has held that structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, the 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 and do achieve the larger purpose of public health, safety or general welfare. So are front setback provisions, average alignments, and structural alterations. Any violation of zoning and regulation laws takes a toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience, and hardship posed to the occupants of the building.

**63.** The Hon'ble Supreme Court further observed *that municipal laws permit deviations from sanctioned constructions*

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6 (2004) 8 SCC 733

*being regularised by compounding, but that is by exception. Unfortunately, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, the exception has become the Rule. Only such deviations deserve to be condoned as are bonafide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Therefore, compounding of deviations ought to be kept at a bare minimum.*

**64.** Very recently, in *Kaalkaa Real Estates Private Limited & Anr. vs. Municipal Corporation of Greater Mumbai & Ors.*<sup>7</sup>, decided by the Division Bench of our Court on 20.09.2022, it was held that no indulgence must be shown to unlawful constructions that are brazenly put up. *Only such deviations deserve to be condoned as are bonafide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered.*

**65.** For all the above reasons, we dismiss this Writ Petition with costs of Rs.50,000/- payable by the Petitioner to the BMC. These costs are awarded because the Petitioner secured an interim order by misleading the Court and making selected disclosures.

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<sup>7</sup> Writ Petition (L) No.22398 of 2022

66. The rule in this Petition is discharged with costs of Rs.50,000/-. The interim order is vacated.

67. The BMC must proceed to execute the impugned notice dated 12 June 2018 within three months of this order and file a compliance report by 6th January 2025.

(Kamal Khata, J)

(M. S. Sonak, J)