

SUPREME COURT OF INDIA

Muni Suvrat-Swami Jain S.M.P. Sangh

Vs

Arun Nathuram Gaikwad and Others

Special Leave Petition (Civil) 9049 of 2006

(Dr. Ar. Lakshmanan and Tarun Chatterjee, JJ)

11.10.2006

JUDGMENT

DR. AR. LAKSHMANAN, J.

Leave granted.

This appeal is directed against the final judgment and order dated 23.02.2006 passed by the High Court of Judicature at Bombay in Writ Petition No. 2841 of 2005 whereby the High Court while allowing the writ petition directed the Municipal Corporation to demolish the entire illegal and unauthorized construction carried on by respondent Nos. 3-17 on entire CTS No. 206, 206(1 to 9), Kurla Part-IV, New Mill Road, Kurla (W), Mumbai.

The short facts leading to the filing of the above appeal as stated in the S.L.P. are as under:- Shri Fernandes and others (hereinafter referred to as Original owners) owned a plot of land bearing C.T.S. No.206 and 206/1 to 9 and CTS No.212 and 212/1 to 4, N.A. Survey No.764 & 768, of Village/Taluka, Kurla, Mumbai, Suburban District, consisting of two bungalows and one chawl of 8 tenements. It is to be noted that there is only one entrance to the property from A.H. Wadia Marg (New Mill Road) through a strip of land about 12 feet wide (hereinafter referred to as 'access road'). The tenants/occupants used the said access road to access their respective premises, including the writ petitioner before the High Court (Respondent No.1 herein), who was a tenant of chawl

no.523/7 of C.T.S no 1 to 9 in the aforesaid property.

Shri Fernandes entered into Development Agreement with Shri Ghag of Sadhana Builders in order to develop the property. A proposal for approval of proposed temple complex at CTS No.206, 206/1 to 9 was submitted before the BMC. The construction of temple was completed and the installation of idol ceremony (Prathishta) took place. It is to be noted that the respondent no.1 participated in the celebration and did not make any complaint regarding the construction of the temple.

The original owner sold the aforesaid property (hereinafter referred to as the 'trust property') to the appellant, a public trust, by a deed of conveyance, where Mr. Ghag was a confirmation party. When the property was conveyed to the appellant the aforesaid property consisted of four shops, eight residential premises, Jain temple, Upashraya, Pravachan hall and open space. It is to be noted that the easementary rights from A.H.Wadia Marg (New Mill Road) through the access road of about 12 feet wide were also conveyed to the appellants. One Mr. Ismail Yakob Payak, the developer of the plot adjacent to the Trust property i.e. plot of land bearing CTS No. 205, N.A.No.765, 766, 767 started construction on the said plot (hereinafter referred to as the 'developer').

The said developer constructed a building of ground plus 6 floors known as "Saiba Palace". After constructing the said building the developer dug the land beneath the access road and tried to install a gate at the entrance of the access road. The appellant Nos.1 to 11 filed a suit being suit No.1478 of 2005 in the City Civil Court at Bombay for declaration and injunction.

The developer in an attempt to pressurize the appellants into not prosecuting the said suit had setup respondent no.1 herein (a tenant of the Trust property) to initiate proceedings against the appellants. According to the appellants, the fact that the respondent no.1 was setup is clear from the following- a) though the construction of the temple was completed in the year 2001, the respondent no.1 who was a tenant of the premises did not complain about the unauthorized construction till the appellants herein filed a suit against the developer; b) that the respondent no.1 had participated in the celebration of idol installation; c) the advocates of the developer as well as the Respondent no.1 were same; d) that the respondent no.1 and the developer belong to the same Nationalist Congress Party.

Respondent No.1 through its advocate gave a representation to Municipal Commissioner about the unauthorized structure/temple. The respondent no.1 also wrote several letters of complaints to Hon'ble Ministers, Assistant Commissioner of Police, Deputy Chief Minister, Commissioner of Police, Inspector General of police, Editors of Newspaper etc.

The appellant filed an interim application Notice of Motion No.1201 of 2005 in Suit No. 1478 of 2005 for grant of ad interim relief. After hearing the parties City Civil Court passed the following order:-

"The Defendants have constructed part of their compound wall. The plaintiff's agree that the defendants shall extend that constructing leaving 6ft. from the ota on the rear of the four shops in

the Plaintiff's property.

The defendants shall construct their compound wall as shown in blue extending it from the wall already constructed leaving 6ft. space from the ota on the rear of the shops of the plaintiffs as shown in blue in the sketch plan Ex-A to the plaint. The plaintiffs shall be entitled to have access through the defendant's property for only pedestrian traffic (including Palkhis) pending the suit. N/M is disposed off accordingly. NOC W/s if filed."

The aforesaid order was modified and it was added that

"By consent order dated 3.5.2005 is without prejudice to the rights and contentions of both parties."

During the pendency of the said suit, the developer started constructing a compound wall on the southern side of the tenement, whereby the developer encroached upon a part of the land bearing CTS No.212 and reduced the width of the access road from 12 feet to 6 feet. He also wrongfully constructed a gate at the entrance of the Servient Tenement, touching the land bearing CTS No.212/1 to 4 and thereby attempted to disturb the free use of the right of way acquired by the trust.

The appellant complained to the authorities about the illegal construction and unauthorized conduct of the respondents.

In reply, the Municipal Corporation informed the petitioner that as per order of Asst. Joint Municipal Commissioner dated 6.8.2005, the occupation certificate to the building constructed by the developer and named Saiba Palace shall be issued after the proceedings in court are finally disposed off and the provisions of access to the subject temple will also be taken into account.

Respondent no.1 filed a writ petition before the High Court at Bombay alleging that appellants were in the process of constructing a temple in the extremely crowded area without obtaining permission from Municipal Corporation and that on account of this construction the atmosphere in the locality has been disturbed and disputes have arisen. In view of this he sought the following reliefs:

i) Direct municipal authorities to demolish the entire unauthorized and illegal construction on CTS no. 206, 206 (1 to 9) called on by the petitioners herein;

ii) Pending disposal of the writ, injunct the petitioners from carrying on any further construction;

iii) Appointment of court commissioner to visit the property and give its report. It is the case of the appellant that the construction of temple was not in progress at that time. Temple was already constructed in the year 2001.

It is also the case of the appellant that respondent no.1 being a tenant of Chawl 523/7 on the trust property claimed that he recently came to know about the illegal and unauthorized construction in the Trust property, despite his further claim in the writ petition that the property was under his supervision continuously for 12 years and Mr. Ghag had also executed Power of Attorney on 18.11.1998 in his favour. Bombay Municipal Corporation (in short BMC) issued notice to stop the work under section 354A of BMC Act for construction of four RCC columns on the rear side of the temple.

Appellant submitted an application before BMC for regularization of the temple building.

One of the trustees and the appellant herein Shri Arvind Kothari filed counter affidavit to the petition and stated in detail about the proxy- litigation initiated by the builder and also the malafides against the respondent no.1. It was also pointed out that there had been no infringement of bye-laws relating to FSI. That lacs of devotees visit the temple. The respondent no.1 filed a rejoinder before the High Court in which most of the averments have remained uncontroverted due to either bald denial or no denial. It would be pertinent to mention that nexus between the developer and the respondent no.1 largely remained uncontroverted. The BMC also filed a counter affidavit, wherein it was categorically stated that after service of a stop-work notice under section 354-A of the MMC Act, no work was carried out. The High Court passed an order directing the Municipal Authorities to demolish entire illegal and unauthorized construction carried on by respondent no.3 to 17 on entire CTS No. 206, 206(1 to 9) Kurla part IV, new mill road Kurla (W) Mumbai-400070 despite noting that the issue of regularization was a matter between the respondent and the BMC. The High Court stayed the operation of the order by 4 weeks, which was extended for another 4 weeks by order dated 5.4.2006. Hence the present appeal by way of SLP has been filed.

We heard Mr. F.S. Nariman, learned senior counsel appearing for the appellants and Mr. Mukul Rohatgi and Mr. Ranjit Kumar, learned senior counsel for the respondent No. 1, Mr. Pallav Shishodia, learned counsel for respondent Nos. 2 and 3 and Mr. U. U. Lalit, learned senior counsel for the Interveners.

When the matter came up for admission on 04.07.2006, this Court observed as under:-

"Issue notice limited to the question as to whether in the city of Bombay governed by the provisions of Section 351 of the Mumbai Municipal Corporation Act, 1888 where it has been left to the Commissioner's discretion to demolish or not to demolish, the High Court could direct a mandamus for demolition.

Mr. Lakshmi Raman Singh, advocate, takes notice for respondent no.1. Issue notice limited to above question to all other respondents returnable within four weeks. Dasti, in addition is permitted. Learned counsel for the petitioner is also permitted to serve notice privately by registered A.D.Post. Two weeks time is granted to file counter affidavit. Rejoinder, if any be filed within two weeks thereafter. List the matter for final hearing, by consent of parties, on 10th August, 2006.

In the meanwhile, there shall be interim stay of demolition. It is also made clear that the petitioner shall not make any further construction until further orders."

The following submissions were made by Mr. Nariman, learned senior counsel appearing for the appellants:

1) The High Court proceeded on the erroneous footing that "The petition is filed pointing out that respondent no.3 to 17 are in the process of constructing a temple in an extremely crowded area." It was submitted that the temple was constructed in the year 2001 and the temple was not in the process of construction.

2) The High Court while replying to the submission of the appellant that application for regularization was pending on the one hand held "that is a matter between the Respondent and the Municipal Corporation" and in the same paragraph also held "it is very clear that the construction is illegal, without any authority of law and without any permission of the Municipal Corporation." Thus it was submitted that the High Court assumed the powers granted to the Municipal Commissioner, under the Bombay Municipal Corporation Act, 1988 (herein after referred to as "the Act") to decide whether the structure is legal/illegal without affording an opportunity of hearing to the appellants. It is submitted that issuance of a notice under Section 351 of the BMC Act and giving opportunity of hearing to the owner of the building are conditions precedent for issuing an order for demolition of the building and unless, upon hearing, the Municipal Commissioner holds that the construction on the disputed property is unauthorized and illegal, question of its demolition does not arise.

3) The High Court failed to appreciate that the provisions of Section 351(2) of the Mumbai Municipal Corporation Act, 1888 (M.M.C Act) confer very wide discretionary powers upon the Municipal Corporation to remove, alter or pull down or not the building constructed without complying with the provisions of Section 342 or 347 of the said Act. It was submitted that the Court cannot substitute such discretion of the Commissioner nor can the writ Court direct the Commissioner to exercise the discretion in a particular manner.

4) The High Court erred in passing a drastic direction for demolition of a structure/temple without affording an opportunity of hearing to the appellant especially when the Municipal Commissioner has the power to regularize a building constructed and the application for regularization was pending before the Municipal Commissioner. It was submitted that there was enough material to show that the structure of the temple can be regularized. The total area of the plot on which the temple is situated is 1290.30 sq.mtrs. the area of the existing structures including the temple is 574.91sq.mtrs and hence within the F.S.I limit of 1, which is 44.55% of the permissible F.S.I. This Court in the decision of Corporation of Calcutta Vs. Mulchand Aggarwal has held that if the structure is not otherwise violative of the Building Bye-laws, it need not be demolished. However, the said application has now been dismissed by the Municipal Commissioner by order dated 9.3.2006 in view of the impugned order. An appeal against the same is pending before the authorities.

5) The High Court erroneously held in para-4 of the impugned order "ultimately a stop work notice was issued. In the utter disregard of such notice, the construction work had proceeded." It was submitted that the Corporation itself had filed the affidavit stating "respondent Corporation had visited the site and issued notice under section 354 of MMC Act at present there is no further construction work found in progress."

6) The High Court erred in issuing a direction for demolition under its writ jurisdiction where mandamus could only be issued directing the administrative authorities to act in accordance with law.

7) The High Court erred in granting prayer of the appellant which seeks direction to demolish entire illegal and unauthorized structure standing on CTS No.206, 206 (1 to 9) in as much as there are many structures on the said plot which were constructed prior to the year 1962 and were considered to be heritage.

8) The High Court failed to appreciate the following evidence which clearly showed that the writ petition was filed by a person who was set up by the developer: (a) though the construction of the temple was completed in the year 2001, the writ petitioner who was a tenant of the premises did not complain about the unauthorized construction till the petitioners herein filed a suit against the developer; (b) that the writ petitioner participated in the celebration of idol installation; (c) the advocates of the developer as well as the writ petitioner are same; (d) that the writ petitioner and the developer belong to the same Nationalist Congress Party. Admittedly, the petitioner was a friend of the developer for 18 years and the complaint against the present petitioner was made only after civil case was filed against the builder.

9) The High Court erred in relying on stop work notice to order demolition of the entire structure as the aforesaid stop work notice was issued only for stopping the construction of four pillars on the rear side of the temple.

Mr. Nariman also invited our attention to certain averments made in paras 5 and 7 of the writ petition filed by the first respondent herein being Writ Petition No. 2841 of 2005. Our attention was drawn to para 7 of the affidavit wherein the respondent as the writ petitioner stated that respondent No.2 informed respondent No.1 by letter dated 05.10.2005 that they were taking legal action against Jain Temple/Dervasar as per Section 354A of the Bombay Municipal Corporation Act. Learned senior counsel also drew our attention to the counter affidavit filed by respondent No.14 to the writ petition and, in particular, paragraph 17. The relevant portion reads thus:

"The construction of temple had commenced in or around the year 1999 and the "Pratishtha" (installation of idol ceremony) took place in the year 2001. The petitioner infact joined the Trust in the celebration relating to Pratistha Mahotsav. The petitioner never made any complaint during the period of construction or even when the said Pratistha Mahotsav took place or around the year 2001. Pertinently the petitioner started writing letters to authorities only after the disputes and

differences between the Trust and the said Payak started on account of unauthorized construction and attempted encroachment on the part of the said Payak."

Our attention was also drawn to the prayer made in the writ petition No. 2841 of 2005 which reads as follows:-

"a) The High Court may be pleased to issued writ of Mandamus; any other writ, order or direction in the nature of mandamus directing the respondent No. 1 & 2 to demolish the entire unauthorized and illegal construction carried on by the respondent Nos. 3 to 17 on entire CTS No. 206, 206(1 to 9), Kurla Part IV, New Mill Road, Kurla (West), Mumbai 400070.

b) Pending hearing and final disposal of the petition; the respondent nos.3 to 17 may be restrained by an order of injunction of this court from carrying on any further construction on CTS No.206, 206 (1 to 9), Kurla Part IV, New Mill Road, Kurla (West), Mumbai 400070."

Mr. Nariman, in support of his contention, that the High Court cannot assume the power granted to the Municipal Commissioner under the Bombay Municipal Corporation Act, 1988 (in short "the Act") to declare whether the structure is legal or illegal, submitted that issuance of a notice under Section 351 of the Act and giving opportunity to the owner of the building are conditions precedent for issuing the order for demolition of the building and unless upon hearing the Municipal Commissioner holds that the construction on the disputed property is unauthorized and illegal, question of its demolition does not arise. He would further submit that provisions of Section 351(2) of the Act confer very wide discretionary powers on the Municipal Commissioner to remove alter or pull down or not the building constructed without complying with the provisions of Section 342 or 347 of the said Act. Therefore, he submitted that the High Court cannot substitute such discretion of the Commissioner nor can the High Court direct the Commissioner to exercise the discretion in a particular manner. In support of the above contention, learned senior counsel first invited our attention to Section 351 of the Act which reads thus:

"351. Proceedings to be taken in respect of buildings or work commenced contrary to section 347 - (1) If the erection of any building or the execution of any such work as is described in section 342, is commenced contrary to the provisions of section 342 or 347, the Commissioner, unless he deems it necessary to take proceedings in respect of such building or work under section 354, shall

(a) by written notice, require the person who is erecting such building or executing such work, or has erected such building or executed such work, or who is the owner for the time being of such building or work, within seven days from the date of service of such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Commissioner, to show sufficient cause why such building or work shall not be removed, altered or pulled down; or

(b) shall require the said person on such day and at such time and place as shall be specified in such

notice to attend personally, or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

Explanation - "To show sufficient cause" in this sub-section shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of section 337 or 342 and section 347 of the Act.

(2) If such person shall fail to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person. In case of removal or pulling down of the building or the work by the Commissioner, the debris of such building or work together with one building material, if any, at the sight of the construction, belonging to such person, shall be seized and disposed off in the prescribed manner and after deducting from the receipts of such sale or disposal, the expenditure incurred for removal and sale of such debris and material, the surplus of the receipt shall be returned by the Commissioner, to the person concerned.

(3) No Court, shall stay the proceeding of any public notice including notice for eviction, demolition or removal from any land or property belonging to the State Government or the Corporation or any other local authority or any land which is required for any public project or civil amenities, without first giving the Commissioner a reasonable opportunity of representing in the matter."

In support of the above legal submission, learned senior counsel first relied on the judgment of the Bharucha, J. dated 10.08.1983 in Writ Petition No. 1286 of 1990 of the Bombay High Court wherein the learned Judge held:

"Section 351 obliges the Municipal Commissioner, if the construction of any building or the execution of any work is commenced contrary to the provisions of the Act, to give notice requiring the person constructing or doing the work to show cause why it should not be pulled down. The word used in this context of "shall". If sufficient cause is not shown, the Commissioner "may" remove, alter or pull down the building or work. It is left to the Commissioner's discretion whether or not to demolish the unauthorized construction if sufficient cause is not shown. The court cannot impede the exercise of that discretion by the issuance of a mandatory order".

The above judgment was followed in Abdul Rehman Siddique and Others vs. Ahmed Mia Gulam Mohuddin Ahmedji and another, 1996 (2) MLJ 1042 at 1047 wherein a learned Single Judge of the Bombay High Court held thus:

"9. Such discretion of the Commissioner or such authority cannot be substituted by the court nor can court direct the commissioner or such authority to exercise discretion in a particular manner. If the discretion by the commissioner or such authority appears to have not been exercised in accordance with law then court can only call upon the Commissioner or such authority to consider the matter

afresh in accordance with law.

10. I am fortified in my view by the judgment of this court in Writ Petition No. 1286 of 1980, Bilkishbai Moizbhai Vasi and others, petitioners v. Municipal Corporation for Greater Bombay and 3 others, respondents decided on 10.08.1983. In the said judgment Hon'ble Justice S.P.Barucha (as he then was) has considered the provisions of section 351 of the BMC Act vis-a-via the obligation of the commissioner or the authority delegated such power to demolish the unauthorized construction. Barucha, J. held thus:-

"Section 351 obliges the Municipal Commissioner, if the construction of any building or the execution of any work is commenced contrary to the provisions of the Act, to give notice requiring the person constructing or doing the work to show cause why it should not be pulled down. The word used in this context of "shall". If sufficient cause is not shown, the Commissioner "may" remove, alter or pull down the building or work. It is left to the Commissioner's discretion whether or not to demolish the unauthorized construction if sufficient cause is not shown. The court cannot impede the exercise of that discretion by the issuance of a mandatory order".

10-A. Apparently, therefore, the direction given and the order passed by the City Civil Court and impugned in the present appeal making the notice of motion absolute in terms of prayers (b) and (d) impedes the exercise of discretion of the commissioner or the authority delegated such power. The mandate issued to defendant no.1 in issuing notice in respect of the structures to defendant Nos. 2 to 31 is clearly impediment in the exercise of the discretionary power of the commissioner or for that matter the authority delegated such power. Such mandatory order and that too pending trial of the suit where it is yet to be tried whether the alleged construction is unauthorized or not cannot be said to be justified."

In *Syed Muzaffar Ali and Others vs. Municipal Corporation of Delhi*, , This Court in paras 4 & 5 held as under:

"However, it is to be pointed out that the mere departure from the authorised plan or putting up a construction without sanction does not ipso fact and without more necessarily and inevitably justify demolition of the structure. There are cases and cases of such unauthorized constructions. Some are amenable to compounding and some may not be. There may be cases of grave and serious breaches of the licensing provisions or building regulations that may call for the extreme step of demolition. These are matters for the authorities to consider at the appropriate time having regard to nature of the transgressions. It is open to the petitioners to move the authorities for such relief as may be available to them at law. The petitioners may, if so advised, file a plan indicating the nature and extent of the unauthorized constructions carried out and seek regularization, if such regularization is permissible. The dismissal of the petitions will not stand in the way of the authorities examining and granting such relief as the petitioners may be entitled to under law. The petitioners may move the authorities in this behalf within one week for such compounding or regularization and also for stay of demolition pending consideration of their prayer. During the period of one week from today, however, no demolition shall be made."

In U.P. State Road Transport Corporation and Another vs. Mohd. Ismail and Others, , this Court in paras 11 & 12 at page 244 observed as under:-

11. The view taken by the High Court appears to be fallacious. The discretion conferred by Regulation 17(3) confers no vested right on the retrenched workmen to get an alternative job in the Corporation. Like all other statutory discretion in the administrative law, Regulation 17(3) creates no legal right in favour of a person in respect of whom the discretion is required to be exercised -- other than a right to have his case honestly considered, for an alternative job by the Corporation.

12. The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. The Court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The Court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The Court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The Court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the Court.

Mr. Mukul Rohatgi made elaborate submissions which were later supported by Mr. Ranjit Kumar, senior counsel. He invited our attention to the counter affidavit on behalf of respondent No.1. Mr. Rohatgi submitted that Section 354A is categorical in spelling out the powers of Commissioner in respect of works unlawfully carried on and in the instant case there is an unlawful and deliberate mis-representation on the part of the appellants and, therefore, the civil appeal is ought to be dismissed on this very ground. He further submitted that the appellant continued the construction during the pendency of the petition in the High Court and is continuing to construct despite the orders of this Court and has covered the site with a cover to prevent access.

Mr. Rohatgi submitted that despite the several complaints made by the first respondent - Municipal Corporation of Greater Bombay did nothing to demolish the illegal structure and that the Municipal Commissioner did not exercise the power vested in him under the Act to demolish the illegal structure. It is further submitted that the Municipal Commissioner was under a duty and obligation to order or direct illegal structure to be removed as the same was per se illegal and that the Commissioner ought to have ordered demolition as Municipal Corporation had issued a notice under Section 354A of the Act and in spite of the same, the respondent had continued with the illegal construction. Learned senior counsel further submitted that owing to the inaction on the part of the Municipal Corporation in demolishing the illegal structure, the respondent had no other option but to move the Bombay High Court by filing the writ petition No. 2841 of 2005. He also drew our attention to the order passed by the High Court which clearly stated that the order of the High Court dated 21.12.2005 will not prevent the Corporation from taking any action in accordance with the law if the construction is found to be unauthorized. After the order of the High Court, the counsel for the first respondent sent several letters calling upon the BMC to take action against the unauthorized construction and despite these letters the BMC failed to take any action in the matter

and ultimately the High Court vide impugned order directed the Municipal Corporation to demolish the said illegal structure. It was submitted that the writ petition was filed for inaction of the Municipal Corporation and the writ petition was directed to ensure that the authority performed the duty cast upon it under the Statute and that the High Court on considering that the Commissioner had not taken any action in respect of the said illegal structure directed the demolition of the same. Thus, it was submitted that the order passed by the High Court was a corrective order aimed at enforcing the law and if the Commissioner declined to use his powers or enforce the law, the High Court was fully competent to enforce the same and that the writ of the High Court runs superior to the statutory powers of the Corporation. Concluding his argument, learned senior counsel submitted that considering the material on record and provisions of the BMC Act, this Court would hold that the High Court was right in ordering the Municipal Commissioner to demolish the structure and that when the executive failed to perform their duties or erred in performing their duties, the High Court acting under the extraordinary powers vested under Articles 226 and 227 of the Constitution of India has the necessary power to direct the executive to enforce the law as laid down in the statutes and power to order demolition of illegal structures as the Commissioner has failed to do so.

Mr. Rohatgi also invited our attention to the notice issued by the Municipal Corporation of the appellants under Section 68 of the MMC Act directing the appellant to stop the execution of the work forthwith and failing to produce permission, the Commissioner shall under Section 354A and in exercise of powers and functions conferred upon him as aforesaid without any further notice cause the said building or work to be removed or pull down at the risk and cost. This notice was issued on 08.06.2005. Our attention was also drawn to the proceedings issued by the Deputy Chief Engineer dated 04.03.2006 regarding regularization of temple on a plot bearing No. CTS No. 206, 206/1-9 of Village Kurla. The appellant was informed that the plan submitted by them are not in consonance with the development, control and regulation, 1991 and they have not submitted the NOC from the Commissioner of Police being a place of public worship, their proposal of regularization of temple was refused. Similar to this effect is the two letters issued by Brihanmumbai Mahanagarपालिका dated 13.10.2005 and 12.07.2006 refusing the proposal of the appellant relating to the construction of temple on the plot in question.

In support of his contention, learned senior counsel relied on para 15 of the decision of this court in State (Delhi Admn.) vs. I.K. Nangia and Another, The above decision was cited for the proposition that the word may normally imply what is optional but for the reason stated it should in the context in which it appears here should mean must and that there is an element of compulsion and that its power coupled with a duty. It deals with the performance of public duty and that it comes within the dictum of Lord Cairns in Julius vs. Lord Bishop of Oxford (1874-80) 5 AC 214. The dictum reads thus:-

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

In Maxwell on Interpretation of Statutes, 11th Edn. at page 231, the principle is stated thus:

"Statutes which authorize persons to do acts for the benefit of others or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may" or "shall, if they think fit", or, "shall have power", or that "it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have 'to say the least' a compulsory force, and so would seem to be modified by judicial exposition."

Learned senior counsel next cited M.C. Mehta vs. Union of India & Ors, 2006 (2) Scale 364.

"Now, we revert to the task of implementation. Despite its difficulty, this Court cannot remain a mute spectator when the violations also affect the environment and healthy living of law-abiders. The enormity of the problem which, to a great extent, is the doing of the authorities themselves, does not mean that a beginning should not be made to set things right. If the entire misuser cannot be stopped at one point of time because of its extensive nature, then it has to be stopped in a phased manner, beginning with major violators. There has to be a will to do it. We have hereinbefore noted in brief, the orders made in the last so many years but it seems, the same has had no effect on the authorities. The things cannot be permitted to go on in this manner forever. On one hand, various laws are enacted, master plans are prepared by expert planners, provision is made in the plans also to tackle the problem of existing unauthorised constructions and misusers and, on the other hand, such illegal activities go on unabated openly under the gaze of everyone, without having any respect and regard for law and other citizens. We have noticed above the complaints of some of the residents in respect of such illegalities. For last number of years even the High Court has been expressing similar anguish in the orders made in large number of cases. We may briefly notice some of those orders

"Rule of law is the essence of Democracy. It has to be preserved. Laws have to be enforced. In the case in hand, the implementation and enforcement of law to stop blatant misuse cannot be delayed further so as to await the so called proposed survey by MCD. The suggestions would only result in further postponement of action against illegalities. It may be noted that the MCD has filed zonewise/wardwise abstract of violations in terms of commercialisation as in November, 2005. According to MCD, the major violation has been determined in respect of those roads where commercialisation of the buildings is more than 50%. According to it, the major violations in 12 zones are spread on 229 roads. Roads on which there are major violations are, thus, known. In respect of these, there is no need for any survey or individual notice. Beginning must be made to stop misuser on main roads of width of 80 ft. or more. The names of these roads can be published in newspapers and adequate publicity given, granting violators some time to bring the user of the property in conformity with the permissible user, namely, for residential use if the plans have been sanctioned for construction of a residential house. In case owner/user fails to do so, how, in which manner and from which date, MCD will commence sealing operation shall be placed on record in the form of an affidavit of its Commissioner to be filed within two weeks. On consideration of this affidavit, we will issue further directions including constitution of a Monitoring Committee, if necessary. The issue of accountability of officers and also the exact manner of applicability of Polluter Pay Principle to owners and officers would be further taken up after misuser is stopped at least on main roads. Civil Appeal Nos. 608/2003 above referred relates to Ring Road, Lajpat Nagar-

II. The other cases relate to areas like Green Park Extn., Green Park Main, Greater Kailash, New Friends Colony, Defence Colony, West Patel Nagar, etc. These areas are illustrative. The activities include Big Furnishing Stores, Galleries, Sale of Diamond and Gold Jewellery, sale of Car Parts etc."

Learned senior counsel next cited M.I.Builders Pvt. Ltd. vs. Radhe Shyam Sahu and Others, 7 para 73 which reads thus:

"The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

Mr. Pallav Sisodia, learned counsel for the Corporation invited our attention to the counter affidavit filed in the writ petition and submitted that the appellant has raised several disputed questions of fact which cannot and ought not to be gone into by this Court and on that ground alone, the SLP deserves to be dismissed. Without prejudice to the aforesaid contention, he submitted that the owners through their architect submitted their proposal for the approval of the proposed temple complex along with notice under Section 44/99 of MTP Act and notice under Section 337 of the MMC Act. Respondent Nos. 2 and 3 vide application dated 08.04.1999 and in reply to the same the A.E. vide his letter had said that the said proposal will be processed further in compliance with certain documents mentioned in the said letter. It is submitted that one of the conditions required documents to be submitted regarding access roads of adequate width to the property. It is further submitted that the Trust has now made an application vide letter dated 09.12.2005 through a new architect to the Executive Engineer (BP) ES for regularizing the construction of the temple along with several documents such as copy of Deed of Trust, copy of the order and consent terms filed in suit No. 1478 of 2005. It is further submitted that the said application made to EE (PP) is pending and the same shall be considered as per the provisions of DC Regulation and other provisions of law. In the meanwhile on receipt of complaint respondent Nos. 2 and 3 visited the premises at Jain temple and detected that construction was in progress at site without permission from the respondents and hence stop work notice under Section 354A of the MMC Act dated 08.06.2005 was issued to the Trustees. By the said notice, the addressee was called upon to stop the erection of the building/execution of the said work that is construction of RCC columns on rear side without permission from the respondents. The party was also called upon to produce permission/approval, if any by the competent authority in respect of the said work within 24 hours from the receipt of the said notice. Thereafter on 05.12.2005 the site was again inspected by the officers of the respondents

when it was noticed that a temple was constructed with marble located in front of the existing plot and a shed on the rear side admeasuring 14.5 metre X 3.10 metre was also constructed as composite structure by using MSI Section with angle section and AC sheet roofing within the premises of the shed one cabin admeasuring 6.5 metre X 2.85 metre having the off 2.0 metre is seen and that there is no activity at present conducted in the cabin. Besides the aforesaid structure there are 4 numbers of RCC columns existing on the site within the temple premises.

It was further submitted that on receipt of complaint, the respondents had visited the site and issued notice under Section 354A of the MMC Act and at present there is no further construction work. It was further submitted that the said structure being a shrine and as there being no further work carried out at site and there being pending proposal in respect of the said structure no further action was initiated by the authorities pending the said proposal. It is also submitted that the application submitted by the applicant, namely, respondent No.4 shall be considered by the authorities strictly on merits and in accordance with the provisions of law. Learned counsel for the Municipal Corporation cited G.J. Kanga, Adm. Of Municipal Corpn., Greater Bombay and Another vs. S.S. Basha, 1992 (2) MLJ 1573 para 35 which reads thus:

"35. Whether an order of demolition under section 351 is an administrative order or a quasi-judicial order? It cannot be disputed that demolition results in serious civil consequences. It leads to loss and destruction of property entailing loss of money. It renders the occupiers homeless. It would, therefore, be futile to term the order an administrative order and the process leading to the order a quasi-judicial function. If I were to say, "you be hanged", can it be said that this is an administrative order and the trial leading to the order is a judicial or quasi-judicial process. Just as there is discretion in the matter of passing judicial orders similarly there is discretion in the matter of passing orders under section 351. A decision under section 351 requires a decision whether the offending structure is authorized or unauthorized. Whether the whole of it or only a part of it is unauthorized, if unauthorized why it is unauthorized, whether it can be tolerated or whether it can be regularized. In my view, there lies a large area of discretion in the matter of passing orders under section 351. An order under section 351 leads to civil consequences, there is a large area of discretion in the matter of passing orders under section 351, it is on this ground that the concerned Municipal authorities are required to follow the principles of natural justice. An order passed under section 351, therefore, is a quasi-judicial order and it cannot be termed an administrative order. Hence, such an order is neither revisable nor open to review. Had the Legislature intended to make these orders subject to appeal, revision or review, it would have so provided in specific terms. Provisions of appeal, revision or review cannot be inferred by implication. They have to be provided for in specific terms. The power of review as is understood in common parlance is the exercise of a power by the very officer who passed the order and not by his superior officer. An order can only be made appeal able or revisable by a superior officer. Hence, in the absence of a specific provision in that behalf, I hold that the order under section 351 is neither revisable nor review able."

He also cited Mansukhlal Vitaldas Chauhan vs. State of Gujarat, 1 in respect of the question as to whether the High Court could issue a Mandamus of this nature and whether the order of sanction in these circumstances is valid.

"22. Mandamus which is a discretionary remedy under Article 226 of the Constitution is requested

to be issued, inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature. Statutory duty may be either directory or mandatory. Statutory duties, if they are intended to be mandatory in character, are indicated by the use of the words "shall" or "must". But this is not conclusive as "shall" and "must" have, sometimes, been interpreted as "may". What is determinative of the nature of duty, whether it is obligatory, mandatory or directory is the scheme of the statute in which the "duty" has been set out. Even if the "duty" is not set out clearly and specifically in the statute, it may be implied as correlative

to a "right".

23. In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion."

Mr. U.U Lalit, learned senior counsel appearing for the intervenors(Developers), Ismail Yakub Payak, submitted that the intervenor seeks neither to support nor challenge the impugned order dated 23.03.2006 passed by the High Court against the appellants but the intention of the intervenor was only to protect his property CTS 205, 205/1-34, New Mill Road, Kurla West from the claims of the appellant's trust. It was further submitted that the intervener has a direct interest in the matter as he would be affected by order of this Court. Respondent No.1 has also filed I.A. No. 5 of 2006 for permission to place additional documents on record such as the indenture or conveyance entered into and executed on 16.08.2002 between Benjamin Sebastian Fernandes, Thomas maxim Fernandes and Sadhna Builders etc. We have given our anxious and careful consideration to the rival claims made by the respective counsel appearing for the parties.

Before proceeding further to consider the rival contentions, it is very useful and pertinent to reproduce the proceedings of the Executive Engineer (Building Proposal) Eastern Suburbs dated 16.09.2005 of Brihanmumbai Mahanagarpalika which reads thus:

"In connection with the above subject, it is noted that the Joint Commissioner Municipal Corporation has via Order dated 6th August, 2004 ordered that while issuing Occupation Certificate regarding the building Saiba Palace, the arrangement for access Road to Jain Temple will be considered in accordance with the final order of the Court."

The above order was issued on 16.09.2005 whereas the first respondent filed the writ petition in October, 2005 in the Bombay High Court. On 20.01.2006, Brihanmumbai Mahanagarpalika refused the proposal for regularization of temple. Stop work notice was issued on 08.06.2005. In the counter affidavit filed by the Corporation in the writ petition NO. 2841 of 2005, the Corporation has stated that since the construction work was in progress at site without permission from the Corporation Authorities stop work notice under Section 354A of the MMC Act dated 08.06.2005 was issued to the trustees of the temple and by the said notice the addressees were called upon to stop the erection of the building/execution of the said work in the construction of RCC columns on the rear side in the above address without permission from the authorities. According to the appellant the work

commenced in the year 2001 whereas the writ petition was filed after 5 years.

When the special leave petition was heard on 04.07.2006, this Court issued notice limited to the question as to whether the provisions of Section 351 of the MMC Act where it has been left to the discretion of the Commissioner to demolish or not to demolish, the High Court could direct a mandamus for demolition. Respondent No.1 filed a counter affidavit dealing not only with the limited question but also to deal with various other matters which have no bearing on the said question. Respondent No.1 in the counter affidavit mentioned various disputed facts.

It is seen that no notice under the provisions of Section 351 has been issued by the Municipal Commissioner in this matter against the appellant. In the special leave petition, it is clearly mentioned by the appellant that the Corporation had issued a notice to stop the work under Section 354A of the BMC Act. No reference is made to any notice under Section 351A of the Act. It is specifically mentioned that the affidavit which was filed on behalf of the Corporation had categorically stated that after the service of stop work notice under Section 354A no work was carried out. Respondent No.1 is fully aware that the provisions of Section 354A of the Act deals with stop work notice whereas the provisions of Section 351 of the Act deals with show cause notice for demolition of unauthorized structure. The grievance of the appellant herein has been that without issuing a notice under Section 351 of the Act and without giving an opportunity to the appellant of being heard the structure of the temple could not be ordered to be demolished by the High Court. The power under Section 351 of the Act, in our opinion, has to be exercised only by the Municipal Commissioner and it is left to the Municipal Commissioner under the provisions of Section 351(2) either to order or not to order the demolition of the alleged unauthorized temple. In fact, respondent No.1 by himself through his advocate's letter dated 16.04.2005 (annexed to his counter affidavit) requested the Municipal Authorities to take action under Section 351 of the Act. At the time of admission of this special leave petition, the provision of Section 351 of the Act was pointed out by the learned senior counsel to show that the Municipal Commissioner had only been conferred the power under the said provisions to demolish or not to demolish unauthorized structure and, therefore, the High Court ought not to have issued a mandamus for demolition of the temple before any order was passed by the Commissioner on the question of demolition. The provisions of Section 354A have nothing to do with the question of demolition. It is specifically averred and contended at the time of hearing that respondent No.1 is an agent set up by the developer who is developing the adjoining land and who is interested in dividing the right of way claimed by the appellant through the said adjoining plot bearing CTS No. 206.

It is also denied that plot No. 206 on which the temple is situated is a land locked plot. Both the plots now bearing CTS No. 206 and the adjoining plot bearing CTS No. 205 developed by the builder (the intervenor) originally belonged to one A.H. Wadia. Before the said plot now bearing CTS No.205 was leased out, the land now bearing CTS No. 206 was sold by A.H.Wadia to one Fernandes who had constructed thereon a number of structures including a bungalow as shown in the city Survey Plan relied upon by the respondent no.1 in the annexure "A" to his writ petition before the High Court. The said plan shows that the temple is now located at the same site where originally the bungalow of Fernandes family was constructed. The said bungalow had become old and hence it was renovated in such a manner so as to convert it into a temple.

Thus the Fernandes family had a right of way of necessity through the land now bearing CTS No. 205 adjoining the land bearing CTS No. 206 as shown on the said plan. The said access was 12 wide and consisted of land bearing CTS No.212 and part of CTS No. 205. However, while developing the adjoining land bearing CTS No.205, the developer forcibly reduced the said access by digging about 7' wide stretch of land earlier used for the said access and encroach upon the part of CTS No. 212 which belongs to the appellant. This right of way has been claimed by the appellants in the suit which they have filed in the Bombay City Civil court at Bombay being Suit No. 5755 of 2005 which is now pending before the City Civil Court. The said 12' wide access was the only access available to the said Fernandes family and the appellant Trust from the main road which is now named as A.H.Walia Marg for approaching the property bearing CTS No.206. The said position is clear from the plans bearing Annexure No. "PP-1" and "P-2" annexed to the Special Leave Petition.

Though the respondent no.1 claims that he has been residing in a room in the chawl located on the temple plot since his birth, he has not referred to the existence of the said bungalow on the temple plot owned by the Fernandes family in his writ petition filed before the High Court.

According to the appellants, the Municipal Commissioner and his subordinate officers have been made aware that the construction of the temple has not violated in any manner the FSI Rule. However, the proposal submitted for regularizing the construction of the temple was not granted on account of the mandatory order issued by the High Court as also on the ground that 12 feet access is not available for the temple plot from A.H.Wadia Marg. It is also submitted that in the event of appellant succeeding the suit filed before the Bombay City Civil Court, they would get the 12" vide access to the temple plot in which event it would not be impossible for the appellant to get their proposals approved. In our opinion, Section 351 obliges the Municipal Commissioner in the construction of any building or the execution of any work is commenced contrary to the provisions of the Act to give notice requiring the person doing the work to show because why it should not be pulled down. The word used in this context is shall. If sufficient cause is not shown it is left to the Commissioner's discretion whether or not to demolish the unauthorized construction and, therefore, the High Court, in our opinion, cannot impede the exercise of that discretion by the issuance of a mandatory order. We, therefore, direct the Commissioner to decide the question as to whether he should pass an order for demolition or not.

This Court in Corporation of Calcutta vs. Mulchand Agarwalla, was considering an identical question under Section 363 of the Calcutta Municipal Act, 1923. This Court held that the word may in Section 363 of the Act does not mean shall and the Magistrate had under that Section discretion whether he should pass an order for demolition or not. This Court held that the orders of the Courts below were passed on mistakes and mis-directions and, therefore, could not be supported. But this Court did not think that to be a fit case for an order for the demolition of the building in view of certain special circumstances, namely, though Section 363(2) which directs that no application for demolition shall be instituted after the lapse of 5 years from the date of the work did not in terms apply as the proceedings had been started in time, it was nearly 5 years since the building had been completed and the interest of the public did not call for its demolition.

As pointed out by this Court in Syed Muzaffar Ali and Others vs. Municipal Corporation of Delhi (supra) that the mere departure from the authorized plan or putting up of a construction without

sanction does not ipso fact and without more necessarily and inevitably justify demolition of the structure. There are cases and cases of such unauthorized construction and some are amenable to compounding and some may not be. According to learned counsel for the first respondent, the appellants have constructed the temple without obtaining any sanction whatsoever. There is serious breach of the licensing provisions or building regulations which may call for extreme step of demolition. In our view, these are matters for the Municipal Commissioner to consider at the appropriate time.

Taking into consideration of all the relevant facts and circumstances and while deciding the matter, we make it clear that we are not expressing any opinion on merits of the rival claims. The Authorities are entitled to examine and grant such relief as the appellants may be entitled to under the law. The respondent-Commissioner is directed to decide the matter absolutely on merits after affording opportunity to the first respondent herein within 3 months from the date of this judgment. During this period however, no demolition shall be made.

We also make it clear that the appellant shall not put up any further construction or alter the construction already made.

The civil appeal therefore stands allowed with the above direction. No costs.