(See : *Administrative Law*, *9th Edition, by H.W.R. Wade & C. F. Forsyth* - Part V Discretionary Power - Chapter 11 Abuse of Discretion on *page 343)*"

36. In view of this, though the Government has power to pass order, the same should be exercised within the legal limits. When the order has been passed without statutory limits, the order can be struck down.

37. For the foregoing reasons, this petition is allowed. In view of the judgment of this Court in the case of *Mukesh Himatlal Sheth v. State* (supra) and other cases which I have referred to hereinabove particularly judgments of the Hon'ble Supreme Court in the case of *Alka Subhash Gadia* (supra), *Navalshankar Ishwarlal Dave & Anr. v. State of Gujarat & Ors.* (supra) and judgment of this Court in the case of *H. A. Grover v. State* (supra) and other principles laid down which I have discussed earlier, the purported action of the respondent authorities is liable to be quashed and set aside. The respondent authorities are restrained from executing and implementing detention order No. 2830 of 2005 dated 18-10-2005 passed by the District Magistrate, Patan - respondent No. 2 whereby the authorities are seeking to detain the petitioner under the provisions of Gujarat Prevention of Anti-Social Activities Act, 1985 and the said impugned order namely order No. 2830 of 2005 dated 18-10-2005 is quashed and set aside. Rule is made absolute with no order as to costs. Direct Service is permitted.

(SBS) *Petition allowed.*

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APPEAL FROM ORDER

Before the Hon'ble Mr. Justice Akshay H. Mehta

AL VIJAY OWNERS ASSOCIATION v. AHMEDABAD MUNICIPAL CORPORATION*

Bombay Provincial Municipal Corporations Act, 1949 (LIX of 1949) — Secs. 253, 254, 260, 264 & 267(2) — Civil Procedure Code, 1908 (V of 1908) — Order 39, Rules 1 & 2 — Unauthorised construction — New construction put up by plaintiff without complying with statutory requirement of notice to Commissioner — Construction also found to be in violation of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Suit challenging notice issued by Municipal Corporation — Held, trial Court rightly rejected application for injunction restraining the Corporation from demolishing the buildings.

So far the expression "to erect the building" is concerned, it means newly to erect building on any site whether previously built upon or not. It also means any masonry building of which 3/4th of the superficial area of the external walls above the level of the plinth has been pulled down. The notice is required to be given even if a person intends to construct in a wall adjoining any street or land not vested in the owner of the wall, a door opening on such street or land. Section 253 states that

*Decided on 12-4-2006. Appeal From Order No. 206 of 2005 with Civil Application No. 3939 of 2005 against judgment and order in application Exhs. 28 & 29 for injunction in Civil Suit No. 227 of 2003.

these operations shall be deemed to be the erection of new building for the purposes of Chapter XV, which deals with building regulations. Similarly, Sec. 254 requires a person to give notice to Commissioner of his intention to make additions, etc., to building. It includes any measure to repair, remove, construct, reconstruct or add to any portion of a building abutting very street within the regular line of such street. However, provisions of Secs. 253 and 254 of the Act do not come into play, if notice under Sec. 264 of the Act for removal of the dangerous structures which are in ruins or likely to fall, is served on the concerned person by the Corporation and in pursuance of such notice, the dangerous structure is pulled down and in its place new structure is erected. The appellant has banked upon this provisions and has averred that since it has received a notice under Sec. 264 of the Act, there is no question of complying with the provisions of Secs. 253 and 254 of the Act. (Para 4)

The appellant has taken disadvantage of the notice issued under Sec. 264 of the Act in respect of the given 4 city survey numbers and has extended its construction of the suit property to other 14 city survey numbers. There is no doubt about the fact that on 14 such city survey numbers new construction has been put up by the appellant. When this is the position, the appellant is bound to comply with the provisions of Secs. 253 and 254 of the Act. If no compliance is there, it will render the construction illegal. The appellant is, therefore, not right in contending that it was not required to comply with Secs. 253 and 254, because there was notice under Sec. 264 of the Act. (Para 4)

The provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 do not permit construction activity within the distance of 100 mtrs. Admittedly, this structure is within the limit of 100 mtrs. Hence, the appellant is required to obtain necessary permission of the competent authority *i.e.* Department of Archaeology, Government of India. Without such permission, the respondent-Corporation will not be in a position to grant the approval. (Para 4.1)

Apart from the illegal construction of the suit property even the occupation thereof was illegal. Under Sec. 263 of the Act a person is required to obtain completion certificate and permission to occupy or use the new building. This is commonly known as B. U. permission. It is also an admitted fact that such B. U. permission has not been obtained and many of the shops out of 254 shops have been occupied without such permission. Before the respondent-Corporation applied it seals, these shops were used as commercial property. In view of the same, the respondent was required to resort to provisions of Sec. 267 of the Act. This Section empowers the Commissioner to direct removal of person directing unlawful work. (Para 4.2, *See* also Paras 4.4, 4.6 and 6)

Syed Muzaffar Ali v. Municipal Corporation of Delhi (1), Ahmedabad Municipal Corporation v. Vijay Owners' Association (2), Pratibha Co-operative Housing Society Ltd. v. State of Maharashtra (3), Swet Rajhansh Co-operative Housing Society Ltd. v. Surat Municipal Corporation (4), M. I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (5), Yogesh D. Sheth v. Ahmedabad Municipal Corporation (6), Empire Construction and Hotel Co. Ltd. v. Municipal Corporation of the City of Ahmedabad (7), Chandigarh Administration v. Jagjitsingh (8), referred to.

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(1) 1995 Suppl. (4) SCC 426 (2) 2000 (3) GLR 2505 : 2000 (3) GLH 510
(3) 1991 (3) SCC 341 (4) 1994 (2) GLR 1553 (5) 1999 (6) SCC 464
(6) 1996 (3) GLR 416 (7) 1995 (2) GLH 511 (8) JT 1995 (1) SC 445

K. S. Nanavati, Sr. Advocate, for Nanavati Associates, for the Appellant.

S. I. Nanavati, Sr. Advocate, for Nanavati & Nanavati, for Defendant No. 1.

AKSHAY H. MEHTA, J. Admit. At the request of learned Advocates appearing for the appellant and respondent, the matter was taken up for final hearing on 3rd April, 2006 and it was kept for C.A.V. judgment, which I now propose to deliver as under :

2. Appellant is the original plaintiff of Civil Suit No. 277 of 2003 pending on the file of the learned City Civil Judge, Ahmedabad. The suit is filed for declaration and permanent injunction. The appellant has challenged the notice served on it by respondent under Sec. 260(1) and (2) of the Bombay Provincial Municipal Corporations Act (hereinafter referred to as 'the Act') on the ground that the said notice is illegal and without any justification and prayed for declaration to that effect. The appellant has also prayed for permanent injunction to restrain the officers of respondent Corporation from demolishing the property developed by the appellant, which is situated in Ward Kalupur - 3 known as Bababhai Atmaram's Chawl, bearing Survey Nos. 2697, 2696, 2695, etc. (hereinafter referred to as 'the suit property'). According to the appellant, there is immovable property bearing Survey No. 4441 also which is occupied by tenants. The suit property is of the ownership of the appellant. It is the say of the appellant that on account of the earthquake that occurred on 26th January, 2001 the suit property had sustained considerable damage, and therefore, the respondent had served a notice under Sec. 264 of the Act for dismantling or demolishing the suit property and securing it in accordance with the prevailing building bye-laws. It is the say of the appellant that in compliance with the said notice, the damaged structure has been pulled down and instead fresh construction in accordance with the bye-laws has been erected. It is the say of the appellant that since new construction has been put up in pursuance of the notice under Sec. 264 of the Act, and it has been on the same line as it existed before the earthquake, there was no need for the appellant to submit the plans and to get them sanctioned by respondent. It is the case of the appellant that in spite of that, respondent served notice under Sec. 260(1) of the Act calling upon the appellant to show cause on or before 25th October, 2002 why the construction should not be pulled down. It is the say of the appellant that the respondent, without granting any opportunity of hearing, served the appellant with another notice dated 30th October, 2002 under Sec. 267(2) of the Act calling upon it to stop the construction forthwith, failing which the Commissioner of respondent would take steps to remove the occupiers and also would take steps to prevent there-entry of such persons. According to the appellant, since the said action of the respondent was not in accordance with the provisions of the Act and there was no reason or justification for the respondent to give such notice to the appellant, now there is need to declare these notices illegal and without any justification and to quash them and also there is need to prevent them from taking any further action on the basis of said notices. It appears that the appellant had filed a suit prior to the present one, being Civil Suit No. 3777 of 2002, which was withdrawn since the statutory notice was not served on the respondent.

Now, on the basis of the aforesaid averments, the appellant has filed the present Civil Suit No. 277 of 2003 on 3rd February, 2003. Along with the suit the appellant also preferred injunction application for seeking interim relief being application at Exh. 7. The trial Court issued notice to respondent making it returnable on 11th February, 2003. In response to the notice of motion, respondent filed its reply on 25th February, 2003.

2.1 Respondent has contested the suit and the application by filing reply at Exh. 14. The respondent's say is that upon visit by the Inspector of the respondent at the site of the suit property on 7th October, 2002 and 29th October, 2002 and upon making the personal investigation and verification, it was found that the appellant was carrying on unauthorized construction and the Construction that had already been made was against the provisions of the Act. Hence, on the same dates prohibitory order under Sec. 267 of the Act was served on the appellant with a direction to stop the construction forthwith. It is the say of the respondent that in spite of order/notice under Sec. 267(1), the construction was not discontinued. Hence, a complaint under Sec. 267(2) of the Act was lodged with the Inspector of Police, Kalupur Police Station at Ahmedabad. One complaint was also lodged in the Court of learned Metropolitan Magistrate, Court No. 8 at Ahmedabad. According to the respondent, in response to the show-cause notice issued by the respondent, no satisfactory replies were received, and therefore, the respondent decided to demolish the offending structure *i.e.* the suit property. It is the say of the respondent that the notice under Sec. 264 of the Act was issued in respect of only 4 survey numbers, but taking undue advantage of the same, the appellant has raised construction on several other survey numbers also without submitting the plans and seeking approval of the respondent. It is the say of the respondent that the suit property is situated in the vicinity of a protected monument, and hence, the appellant is required to obtain "no objection certificate" from the competent authority under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as 'Ancient Monuments Act'). However, the same has not been obtained. Without such no objection certificate, no plans can be sanctioned. It is the say of the respondent that since the construction is raised without submission of the plans and obtaining approval of the respondent, the same is required to be demolished.

2.2 The learned Judge on 25th March, 2003 passed an order directing the appellant to submit plan regarding the suit property before the respondent within three months from the date of the order and till such time the respondent took decision thereon, it was directed to maintain *status quo*. The notice of motion, thereupon, was disposed of.

2.3 It appears that the appellant did not submit the plans as per the direction of the learned Judge. Hence, on 27th October, 2004 the respondent applied its seals on all the shops constructed on all the survey numbers. The appellant, therefore, filed notice of motion at Exh. 28 and also at Exh. 29. Exh. 28 was injunction application and Exh. 29 was for removal of the seals. These applications were filed on 27th October, 2004. They were contested by the

respondent by filing reply at Exh. 29 on 2nd November, 2004. The main averments that were made in the reply were that the appellant had failed to comply with the directions given by the Court for submission of the plans and that the illegal use of the suit property was continued by the occupiers. It is the say of the respondent that the appellant constructed 254 shops on all the survey numbers illegally and these shops were put to use by the occupiers even without obtaining Building Use permission (B. U. permission) as required under the Act. These shops are known as "*China Bazar*" at Pankornaka, Ahmedabad. Hence, respondent was constrained to apply seals to prevent their re-entry in the shops. The learned Judge by order dated 2nd November, 2004 disposed of the notice of motion on the ground that the prayer for removal of seals was of mandatory nature which could not be granted without verifying the evidence and so far prayer 9(a) was concerned, it could not be granted since the appellant had not complied with order of the Court dated 24th March, 2003. The learned Judge observed that respondent could not be directed to open the seal.

2.4 Against the said order, the appellant approached this Court by filing Appeal From Order No. 385 of 2004. It appears that in view of the *Diwali* and *Id* festivals, for temporary period, the seals were removed to enable the shop keepers to do the business, but thereafter, the premises have been again sealed. The said Appeal From Order was finally disposed of by this Court by order dated 21st March, 2005. The order of the learned City Civil Judge dated 2nd November, 2004 was quashed and set aside and this Court remanded the matter to the trial Court for its reconsideration, keeping in view the development which took place subsequent to the date of the said impugned order.

2.5 Upon remand of the proceedings, the learned Judge, City Civil Court No. 19, heard the matter extensively and disposed of Exhs. 28 and 29 by order dated 29th April, 2005, which is impugned in this appeal. It was contended that though appellant had tried to submit plans to the respondent, the same were not accepted. It was also contended that the appellant had already taken steps to obtain No Objection Certificate from the competent authority under the Ancient Monument Act, and the same was awaited. It was also submitted that under the provisions of the Act, the respondent had no power to apply seals and restrain the occupiers from making use of the property. It was further contended that because of the action of the respondent, number of families have been forced to vacate the premises and their plight has become miserable. According to the appellant, there was no need for it to comply with the provisions of Secs. 253 and 254 of the Act by giving notices to the Commissioner of intention to erect building and to make additions, etc., in the building. As against that, the respondent contended that since the appellant had failed to comply with notice under Sec. 261, the seals were required to be applied. It was contended by the respondent that the exercise of power under Sec. 267(2) of the Act was completely justified, and therefore, there was no need to grant the relief prayed for by the appellant. The learned Judge came to the conclusion that the construction of 254 commercial shops was illegal, without obtaining prior permission of the respondent, and therefore, the respondent was justified in

applying the seals. The learned Judge also observed that the balance of convenience was not in favour of the appellant. On the Contrary the learned Judge observed that if such illegal use was permitted, it would become very difficult for the respondent to carry on the administration of the City. The learned Judge, therefore, rejected the notice of motion Exhs. 28 and 29 with no order as to costs. Against the said order, the present appeal under Order 43, Rule 1 read with Sec. 104 of the Code of Civil Procedure is filed.

3. I have heard Mr. K. S. Nanavati, learned Senior Advocate of Nanavati Associates for the appellant and Mr. S. I. Nanavati, learned Senior Advocate of Nanavati and Nanavati for respondent. I have also perused the record of the appeal including the compilations submitted by the learned Counsels.

3.1 It clearly appears that the suit property comprises 254 commercial shops. It also appears that these shops have been constructed without submission of the plans and without obtaining prior approval of the respondent. Whether plans are required to be submitted and the prior approval was needed are the questions to be considered. It is also clear that even after the direction of the Court, the appellant had not submitted the plans within stipulated time, but they were submitted very late. These plans were not approved by the respondent. It also appears that at the State level, the authority under Ancient Monument Act has refused permission and now the representation is made to the Director General at the Central level. The main contention of Mr. K. S. Nanavati is that decision on notice under Sec. 260(1) was taken without granting any opportunity of hearing, and therefore, such decision was illegal and violative of principles of natural justice. It is submitted by Mr. K. S. Nanavati that whether compliance of Secs. 253 and 254 was required is the question under consideration in the suit, and hence, there was no need for the respondent to resort to the drastic remedy of demolition of the premises, as that would cause irreparable loss to the appellant and others. It is contended by Mr. K. S. Nanavati that the plans were submitted on 10th November, 2004 and they were accepted by the respondent on 17th November, 2004, and thereafter, the same were disapproved by respondent by raising about 45 objections on 22nd November, 2004. However, subsequently, on 28th December, 2004 the plans were resubmitted after taking care of the objections raised by the respondent, and therefore, all those objections have lost their significance. He has, therefore, submitted that even if there is no No Objection Certificate received from the Department of Archaeology, plans could be approved subject to the grant of No Objection Certificate. He has also submitted that under the Act, the respondent has no authority to seal the premises. He has placed reliance on the decision of the Apex Court and has submitted that the respondent could compound the objections and condone certain irregularities. According to him, when these are triable issues, the interest of the appellant is required to be protected.

3.2 As against that, Mr. S. I. Nanavati for the respondent has submitted that the appellant cannot be granted any equitable relief since his action is dishonest. He has submitted that the appellant was served with notice under Sec. 264 only in respect of 4 survey numbers, but taking disadvantage of the same,

the appellant acquired other surrounding survey numbers which were essentially residential premises and constructed the suit property which is a commercial property housing 254 shops, without complying with the provisions of Secs. 253 and 254 of the Act. He has submitted that the appellant has not submitted any plan and sought approval before raising construction and such construction cannot be allowed to exist. He has further submitted that the No Objection Certificate under the Ancient Monument Act is compulsory. In its absence, the respondent cannot grant any approval to the appellant. He has further submitted that apart from the No Objection Certificate, there are about 45 irregularities which have been committed by the appellant by non-compliance with the provisions of the Act as well as the General Development Control Regulations (G.D.C.R.), and therefore, it is not possible for the respondent to approve the plans or grant the sanction to the appellant. He has also submitted that the respondent has power and authority under the Act to apply the seal to prevent re-entry in the offending premises. According to him, the illegal construction has been raised on 18 survey numbers including 4 survey numbers for which notice under Sec. 264 has been given. However, out of them, for 7 survey numbers the appellant is neither owner nor the power of attorney holder, and therefore, he has no *locus standi* to prefer these proceedings. According to him, Sec. 267 read with Sec. 478 gives power to respondent to prevent re-entry. Such power would include power to apply seal to the shops as it would not be feasible for respondent to employ security guards for 254 shops. In his submission, in view of non-compliance of notice under Sec. 267, which was given at the stage when the construction was on, respondent was compelled to apply seals. Mr. S. I. Nanavati has also placed reliance on several decisions of the Apex Court as well as this Court which will be referred to in due course.

3.3 In reply, Mr. K. S. Nanavati for the appellant has submitted that the G.D.C.R. came subsequent to the construction, and therefore, there was no cause for the appellant to comply with those provisions. He has also submitted that even if there is power to seal the premises, it can be exercised only when the activity of construction is going on, and not thereafter. He has also submitted that powers under Sec. 478 cannot be invoked since no notice has been given under that Section. He has submitted that issues are such that compounding his permissible and the respondent should adopt that course instead of taking drastic action against the appellant. He has reiterated the submission that when the disputes are under consideration before the trial Court, the action of application of seal or demolish of the premises cannot be resorted to.

3.4 In reply to the reply of Mr. K. S. Nanavati, Mr. S. I. Nanavati has submitted that in the present proceedings only the question with regard to action of the respondent in applying seals to 254 shops is under consideration and there is no question of demolishing the premises under Sec. 478 of the Act at this stage. He has, therefore, submitted that this appeal be dismissed with costs.

4. From the aforesaid narration, it clearly appears that the appellant has constructed building in Kalupur ward within the limits of respondent-Corporation. It is also clear that the said building is constructed on 18 city survey numbers.

The disputed question is whether it is altogether a new construction or reconstruction or merely renovation or retrofitting of the original structure. The appellant has claimed that during earthquake that occurred on 26th January, 2001 the original structure standing on the site was damaged and it was in precarious condition. The respondent, therefore, had issued notice under Sec. 264 requiring the appellant to pull it down. In pursuance of the said notice, the damaged structure was pulled down and in its place the present structure is erected. This claim of the appellant has been strongly opposed by the respondent. The facts of the case show that the present structure is constructed on 18 city survey numbers. They are City Survey Nos. 2693, 2694, 2695, 2696, 2697, 2698, 2700, 2708, 2702, 2705, 2712, 2713, 2714, 2715, 4440, 4401, 4441 and 4448. The record shows that majority of these survey numbers were previously residential premises. They have now been converted into commercial shops, 254 in number, popularly known as '*China Bazar*'. The respondent has pleaded that the appellant has set up altogether new construction which is totally illegal since the appellant has failed to comply with mandatory provisions of the Act prior to raising construction. It is an admitted fact that before raising disputed construction, the appellant has not complied with provisions of Secs. 253 and 254 of the Act. Section 253 of the Act requires a person intending to erect building to give notice to the Commissioner of his such intention. It is to be given in the form prescribed in the bye-laws and it has to contain all such information as may be required to be furnished under the bye-laws. So far the expression "to erect the building" is concerned, it means newly to erect building on any site whether previously built upon or not. It also means any masonry building of which 3/4th of the superficial area of the external walls above the level of the plinth has been pulled down. The notice is required to be given even if a person intends to construct in a wall adjoining any street or land not vested in the owner of the wall, a door opening on such street or land. Section 253 states that these operations shall be deemed to be the erection of new building for the purposes of Chapter XV, which deals with building regulations. Similarly, Sec. 254 requires a person to give notice to Commissioner of his intention to make additions, etc., to building. It includes any measure to repair, remove, construct, reconstruct or add to any portion of a building abutting very street within the regular line of such street. However, provisions of Secs. 253 and 254 of the Act do not come into play, if notice under Sec. 264 of the Act for removal of the dangerous structures which are in ruins or likely to fall, is served on the Concerned person by the corporation and in pursuance of such notice, the dangerous structure is pulled down and in its place new structure is erected. The appellant has banked upon this provisions and has averred that since it has received a notice under Sec. 264 of the Act, there is no question of complying with the provisions of Secs. 253 and 254 of the Act. This stand of the appellant does not get complete support from the material produced by both the sides on record. It clearly appears that out of the aforesaid 18 city survey numbers in respect of only 4 survey numbers, notice under Sec. 264 has been served on the appellant. They are city survey Nos. 2696, 2705, 4440 and 4441. The appellant is not in a position to dispute this fact because all

this is a matter of record. It is, therefore, obvious that the appellant has taken disadvantage of the notice issued under Sec. 264 of the Act in respect of the given 4 city survey numbers and has extended its construction of the suit property to other 14 city survey numbers. There is no doubt about the fact that on 14 such city survey numbers new construction has been put up by the appellant. When this is the position, the appellant is bound to comply with the provisions of Secs. 253 and 254 of the Act. If no compliance is there, it will render the construction illegal. The appellant, is therefore, not right in contending that it was not required to comply with Secs. 253 and 254 because there was notice under Sec. 264 of the Act. The construction of the appellant, which is made on at-least 14 city survey numbers is illegal on this count.

4.1 It is the say of the respondent that the appellant was required to submit the plans of the proposed building and obtain its prior approval. No such plans had been submitted before raising construction. The appellant is also not in a position to dispute this fact. It is an admitted fact that the respondent had served the appellant notice under Sec. 260(1) of the Act. Section 260 deals with proceedings to be taken in respect of building or work commenced contrary to rules or bye-laws. By such notice the concerned person is required to be called upon to show cause why the construction of a building commenced contrary to rules or bye-laws should not be removed, altered or pulled down and sub-sec. (2) prescribes that if person failed to show sufficient cause, to the satisfaction of the Commissioner, the Commissioner may remove, alter or pull down the building or work and recover the expenses thereof from the person concerned. It appears that to such show-cause notice, the reply was given by the appellant, but it was found to be vague, evasive and misleading and it did not satisfy the Commissioner that building was not required to be removed. It is an admitted fact that the appellant had failed to submit the plan and seek the approval of respondent. Submission of the plans to the Corporation and obtaining its approval are mandatory provisions and if the same are not complied with, it would render the structure in question illegal. According to the respondent, the appellant was guilty of committing number of breaches of the provisions of the Act, Rules and bye-laws and that has rendered the structure absolutely illegal and unauthorized one. It may be noted here that according to the appellant, the suit property is situated near the protected monument under the Ancient Monuments Act. This monument is famous' *Juma Masjid* of Ahmedabad'. The provisions of the Ancient Monuments Act do not permit construction activity within the distance of 100 mtrs. Admittedly, this structure is within the limit of 100 mtrs. Hence, the appellant is required to obtain necessary permission of the competent authority *i.e.* Department of Archaeology, Government of India. Without such permission, the respondent-Corporation will not be in a position to grant the approval. This fact has already been brought to the notice of the appellant by the respondent. The record shows that at the State level the appellant has not been granted such approval, and therefore, representation has been made to the Director General at the Central level. This is one of the major hurdles in the way of the appellant, which has tried to overcome it by submitting that the respondent can issue necessary approval subject to the approval received from

the Department of Archaeology. It of course appears that even if such course is adopted, the task does not become easy for the appellant because, according to respondent, there are around 42 other objections. In this situation, irrespective of the approval of the Department of Archaeology, the respondent-Corporation is not in a position to grant approval. It may be stated here that the appellant for the first time submitted plans much after the construction activity had commenced. In fact by order dated 25th March, 2003 the appellant was directed by the learned Judge while disposing of application at Exh. 7 (notice of motion) to submit plan within three months from the date of the order. However, even then the plans were not submitted within stipulated time, but they were submitted after about 18 months. Even those plans were not approved by the respondent. Thus, today the position is that there are no plans pending before the respondent.

4.2 Apart from the illegal construction of the suit property even the occupation thereof was illegal. Under Sec. 263 of the Act a person is required to obtain completion certificate and permission to occupy or use the new building. This is commonly known as B. U. permission. It is also an admitted fact that such B. U. permission has not been obtained and many of the shops out of 254 shops have been occupied without such permission. Before the respondent Corporation applied it seals, these shops were used as commercial property. In view of the same, the respondent was required to resort to provisions of Sec. 267 of the Act. This Section empowers the Commissioner to direct removal of person directing unlawful work. This Section is required to be quoted verbatim because the main controversy that is involved in the present proceedings is regarding the interpretation of this Section.

> "267. *Power of Commissioner to direct removal of person directing unlawful work.*-
>
> (1) If the Commissioner is satisfied that the erection of any building or the execution of any such work as is described in Sec. 254 has been unlawfully commenced or is being unlawfully carried on upon any premises he may, by written notice, require the person directing or carrying on such erection or execution to stop the same forthwith.
>
> (2) If such erection or execution is not stopped forthwith, the Commissioner may direct that any person directing or carrying on such erection or execution shall be removed from such premises by any police officer and may cause such steps to be taken as he may consider necessary to prevent the re-entry of such person on the premises without his permission.
>
> (3) The cost of any measures taken under sub-sec. (2) shall be paid by the said person."

4.3 It appears that during the course of hearing on earlier occasions before the trial Court as well as before this Court several attempts have been made for finding a way out of this problem and suggestions were made to appellant to remove all the defects such as construction violating the road line, the structure which is in contravention of the provisions of the Act, Rules and the bye-laws, to show the proper measurement, etc. However, it is the say of the respondent that the appellant will never accede to such suggestion and put up fresh plans

because with the introduction of the G.D.C.R. which have been brought into force by notification dated 18th May, 2002, the appellant is now regulating by the provisions of G.D.C.R. also. If the G.D.C.R. are applied, the appellant will have to remove 50% of the Construction and to do that, the appellant will never agree. The say of the respondent appears to be true. A faint attempt has been made by Mr. K. S. Nanavati that G.D.C.R. will not apply to the present construction because it has come into force subsequently *i.e.* after the construction had already been commenced. According to the respondent, the plot area is 814.13 sq.mtrs. In accordance with the G.D.C.R., the F.S.I. can be of 407.50 sq.mtrs. being 50% of the total area. This F.S.I. will be for each floor. However, the appellant has constructed each floor of 814.13 sq.mtrs. *i.e.* 100% F.S.I. has been used. This of course is challenged by Mr. K. S. Nanavati, as already stated above, by submitting that the construction would be governed by the old G.D.C.R. since it is of 26th December, 2001. It is submitted by Mr. S. I. Nanavati that G.D.C.R. do not apply to the Construction, but they apply to the plan of the proposed building. In his submission, for the first time, the appellant submitted plan was only on 30th October, 2004, meaning thereby, after new G.D.C.R.were brought into existence. He has also submitted that proposal for issuance of G.D.C.R. was made by Ahmedabad Urban Development Authority (for short 'A.U.D.A.') on 1st July, 1979 and that proposal was approved on 4th May, 2001. The construction is of December, 2001. Para 1.1.1 of the Schedule to the G.D.C.R. shows that G.D.C.R. are made applicable to the respondent also. Therefore, also it can be said that G.D.C.R. are applicable to the plans of present construction.The appellant's anxiety to get out of the G.D.C.R. is understandable, but if there is no escape, the appellant is bound to face the consequences thereof.

4.4 When the respondent has found that there is no compliance of the notice issued under Sec. 260, it has decided to resort to provisions of Sec. 267 of the Act. The respondent has applied seals to these shops so as to prevent the occupiers of the shops to use them. It is this action of the respondent which is essentially under scrutiny in the present proceedings. The say of the appellant is that there is no power conferred upon the respondent to apply seals to the offending property under the Act, and therefore, the action is illegal. It is also its say that when there are *bona fide* dispute and triable issues pending before the competent Court, such action or the action of demolition of the property should not be taken. The appellant has submitted that the differences between the parties are of such nature that the same can be compounded because power of compounding has been conferred upon the civic body and these powers can be exercised in such case. In support of the submissions, the learned Counsels have referred to many decisions. Mr. K. S. Nanavati has placed reliance on only one decision rendered in the case of *Syed Muzaffar Ali v. Municipal Corporation of Delhi,* reported in 1995 Suppl. (4) SCC 426 for canvassing the proposition that compounding is permissible and considering the breaches that have been alleged, it clearly appears that they are all compoundable. He has relied on the observations made by the Apex Court in Para 4 of the said judgment. It reads as under :

"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."

4.5 As against that, Mr. S. I. Nanavati has placed reliance on several decisions including the decision cited by Mr. K. S. Nanavati in the case of *Syed Muzaffar Ali v. Municipal Corporation, Delhi* (supra). He has also placed reliance on this very observations and has submitted that in the present case breach is of the building regulations which may call for the extreme step of demolition. He has also relied on the observation that these are matters for the authorities to consider and has submitted that it is only the discretion of the authority to take appropriate decision on the basis of the nature of breach committed. The majority of the authorities relied on by Mr. S. I. Nanavati is relating to the action of demolition of unauthorized and illegal construction. It may be noted here that Mr. S. I. Nanavati has time and again brought to the notice of this Court that the present proceedings are only for examining the action of respondent of applying the seals to the property in question. Mr. S. I. Nanavati has extensively relied on the decision rendered by the Division Bench of this Court in the case of *Ahmedabad Municipal Corporation v. Vijay Owners' Association,* reported in 2000 (3) GLH 510 : 2000 (3) GLR 2505. In this decision, the Division Bench has exhaustively dealt with various aspects of unauthorized and illegal construction. It has also considered various decisions of the Apex Court and this Court. In this decision, the Division Bench has strictly viewed the unauthorized and illegal construction and the building not being used in accordance with the building plans or building bye-laws and it has given a loud and clear message to such unscrupulous builders that in no circumstances such unauthorized and illegal activity would be permitted to exist or to be carried out. The Division Bench has also given message to the civic authority that the illegal construction activity should be dealt with stern measure and it should not falter in taking even the extreme step of demolishing the offending structures. The Court has further deprecated the practice of the Civil Court, granting interim protection on the grounds of equities and hardship to such persons. Mr. S. I. Nanavati has further place dreliance on the decision of the Apex Court rendered in the case of *Pratibha Co-operative Housing Society Ltd. v. State of Maharashtra,* reported in 1991 (3) SCC 341. This decision has been cited especially keeping in view the proposal of the appellant that it may remove the construction which is offending the road line. The respondent has not accepted this suggestion and has placed reliance on this case wherein the suggestion of the party concerned to demolish part of the offending building vertically instead of removing two top floors was turned down by the Apex Court. Mr. S. I. Nanavati has cited decision of the learned single Judge of this Court rendered in the case of *Swet Rajhansh Co-operative Housing Society Ltd. v. Surat Municipal Corporation,* reported in 1994 (2) GLR 1553. This authority has been cited in response to the submission of the appellant to the effect that the building may be allowed to exist till the suit is finally decided and if the suit is decided against the appellant, it would demolish the unauthorized

portion of the structure. In the case before the learned single Judge, same situation had arisen and the learned Judge observed that such course is not permissible. The learned Judge has said that by accepting an undertaking a person cannot be allowed to construct or maintain something which is illegal and contrary to law. In that case, the construction was raised without building plans being passed. Mr. S. I. Nanavati has also placed reliance on the decision of the Apex Court rendered in the case of *M. I. Builders Pvt. Ltd. v. Radhey Shyam Sahu,* reported in 1999 (6) SCC 464. The Apex Court was required to deal with unauthorized construction of a building and one of the issues for consideration was whether Court should order demolition of the offending construction even though builder has invested considerable amount. It has laid down as under :

> "No consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."

By observing the aforesaid principle of law, the Apex Court held that there was flagrant violation of law and that necessitated the Court to bring the offenders to book. This action is suggested by the Apex Court over and above the direction ordering demolition of the unauthorized construction. In that case, the Maha Nagar Palika of Lucknow had permitted construction on the land which was earmarked for developing the public park. Further, the learned Counsel for the respondent has placed reliance on the decision of the learned single Judge of this Court rendered in the case of *Yogesh D. Sheth v. Ahmedabad Municipal Corporation,* reported in 1996 (3) GLR 416. The learned Judge has highlighted in the said decision, the harassment and nuisance caused to the locality and the causing of traffic congestion by the unauthorized construction. The learned Judge has also held that when the developer was given the notice under Sec. 260(1) of the Act and was heard, there was no need to hear the occupiers of the shops.

4.6 The aforesaid decisions clearly show that when the construction is unauthorized one, illegal and the construction activity is carried on despite notice under Sec. 260(1) of the Act, it would amount to glaring violation of the law meant for controlling and regulating the General Development in the City. Time and again, it has been found that the avaricious and unscrupulous builders more than often flout the mandatory provisions of the Act, the rules, the bye-laws and the regulations meant for the systematic development. While doing so, they completely shut their eyes to the aspects of safety, convenience of the people and the subsequent plight and predicament of the persons who purchase such unauthorized development. It is ultimately the people, most of them being in

dire need of premises to earn their livelihood, fall prey to such builders who assure them and promise them that they would not have to face any problem. These are the persons who ultimately not only suffer financially, but their life after such event, become so miserable that they are not in a position to find any solution of the problem or to earn adequate livelihood for the family, having invested sizable amount for the purchase of property, even by borrowing loan or incurring debt. As against that, the builders thrive on their unethical, unscrupulous and illegal activity. The civic bodies, therefore, should high-handedly curb such activity and the construction should not be allowed to be completed so as to make it saleable. It should also give publicity to such unauthorized construction in the popular media *i.e.* newspaper so as to dissuade innocent citizens from purchasing such property and recover the expenses from the developer.

5. It was submitted on behalf of the appellant that when many other unauthorized constructions have been allowed to remain, there is no reason why the respondent-Corporation should take drastic action against the appellant. To repel this submission, Mr. S. I. Nanavati has placed reliance on the decision of the Division Bench of this Court rendered in the case of *Empire Construction and Hotel Co. Ltd. v. Municipal Corporation of the City of Ahmedabad,* reported in 1995 (2) GLH 511. In the said decision, the Division Bench has placed reliance on the decision of the Apex Court rendered in the case of *Chandigarh Administration v. Jagjitsingh,* reported in JT 1995 (1) SC 445. In the said decision, the Apex Court has held that generally speaking, mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in the favour of the petitioner on the plea of discrimination. The order in favour of other person might be legal and valid or it might not be, that has to be investigated first before it can be directed to be followed in the case of the petitioner.

6. Lastly, the important question that is required to be considered by me is whether action of applying seal by the respondent to the shops is legal. For that purpose, the respondent has placed reliance on Sec. 267 which is quoted above. The sub-sec. (2) thereof is required to be perused closely. It states that if the unlawful erection or executionis not stopped forthwith, the Commissioner may direct that any person directing or carrying on such erection or execution shall be removed from such premises by any police officer and may cause such steps to be taken as he may consider necessary to prevent re-entry of such person in the premises without his permission. At this juncture, it would also be necessary to deal with the provision of Sec. 478 of the Act, which deals with work or thing done without written permission of the Commissioner to be deemed unauthorized. In such cases, the Commissioner is empowered to give notice for removal of the structure, failing which the Commissioner is empowered to remove or alter such work or undo such thing and to recover the expenses from the concerned person. By aforesaid discussions, I have found that the present construction is unauthorized and illegal. The Construction of 254 shops of *China Bazar* is without the authority of the Commissioner and without the compliance

of other necessary provisions of the Act and the Rules. The record also shows that the respondent has issued notices under Sec. 260(1) of the Act in each case and those notices have not been complied with by the appellant. The respondent, has therefore, taken action of sealing the premises. Mr. K. S. Nanavati for the appellant has submitted that even if this action is considered permissible under Sec. 267 of the Act, in the instant case, it is not permissible because the notice has to be given to put brake on the construction which is going on. In the instant case, the construction is over. However, this argument cannot be accepted because the record shows that at the time when the construction was at the initial stage and it was in progress, notice under Sec. 260(1) have been issued to the appellant; and that has not been complied with. The respondent has, therefore, several options available to it *i.e.* either to demolish the offending structure, restrain the occupiers from using the building or cause the appellant to demolish it. It appears that for the present, the respondent has chosen to take steps to prevent the use of the building. In these circumstances, there is no doubt in my mind that the respondent has become entitled to exercise power under Sec. 260(2) or 267(2) of the Act. When the respondent has thought it fit to prevent use of the building, it has to restrict the re-entry of the occupiers in the building. That can be done in several ways. The manner of preventing the re-entry is not prescribed in the Act and the matter has been left to the discretion of the Corporation. To prevent re-entry the respondent can seek the help of police force or it can post its own guards at the site. But considering the fact that the building is very large, housing about 254 commercial shops, it is practically not feasible for the respondent-Corporation to either ask the Police Department to provide necessary help which may require the Department to divert considerable number of police personnel at the site for indefinite period, or the Corporation may have to post number of guards to observe security only at one site. This may cause considerable inconvenience to the respondent, apart from unnecessary financial expenditure. It cannot be allowed to spend sizable amount for employing police force or post security guards. In the circumstances, most convenient and in expensive measure has been resorted to by the respondent of applying seals to all the shops. It is a known and often resorted to measure to prevent entry in the premises. The provision is also legal in justifying circumstances. Therefore, there is no use saying that the Corporation has no power under the Act to apply seals to prevent entry or re-entry in the unauthorized premises. Section 267 of the Act and in particular sub-sec. (2) thereof confers this power on the Corporation.

7. In view of the aforesaid discussion, I do not find any illegality having been committed by the trial Court in dismissing the notice of motion filed by the appellant. In other words, this appeal has no merit and it is dismissed with no order as to costs.

In view of the above, Civil Application No. 3939 of 2005 does not survive and it is disposed of accordingly.

(SBS) *Appeal dismissed.*

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