

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

+ WRIT PETITION Nos.5978 and 9673 of 2017

% Dated 22.03.2018

Sri A. Murali and another

....Petitioners

VERSUS

\$ The State of Andhra Pradesh,
rep. by its Principal Secretary,
Municipal Administration Department,
Secretariat, Velagapudi, Amaravathi,
Guntur District and three others.

... Respondents

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< GIST:

> HEAD NOTE:

? CITATIONS:

1. (1978) 1 AP LJ 459
2. AIR 1956 SC 110
3. 1990(2) ALT 202 (D.B.)
4. 1976 AIR (SC) 1785
5. 2007 (5) ALT 676
6. AIR 1995 AP 17
7. 1991 AIR 1453
8. 2006 AIR SCW 5192
9. (2004) 8 SCC 733
10. (1999) 6 SCC 464
11. (2000) 7 SCC 425
12. 2016 (4) ALT 426
13. 2009 (15) SCC 705
14. (2013) 5 SCC 336
15. (2006) 7 SCC 597

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

+ WRIT PETITION Nos.5978 and 9673 of 2017

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The State of Andhra Pradesh,
rep. by its Principal Secretary,
Municipal Administration Department,
Secretariat, Velagapudi, Amaravathi,
Guntur District and three others.

... Respondents

DATE OF JUDGMENT PRONOUNCED: 22.03.2018

THE HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

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|----|--|--------|
| 1. | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2. | Whether the copies of judgment may be marked to Law Reporters/Journals? | Yes/No |
| 3. | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | Yes/No |

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**WRIT PETITION Nos.5978 and 9673 of 2017****COMMON ORDER:**

W.P.No.5978 of 2017 is filed by one A.Murali and C. Prabhakar Rao against the State represented by Principal Secretary (Respondent No.1), Commissioner, Venkatagiri Municipality (Respondent No.2), G. Chenchiah (Respondent No.3), and this Court in the course of hearing impleaded Smt. Subhashini W/o.Chenchiah as respondent No.4.

2. The prayer in the writ petition reads as follows:

“.....to issue a Writ, order or direction more particularly one in the nature of Writ of mandamus, declaring the action of the 2nd respondent in not taking action for removal of illegal construction made by the 3rd respondent in the premises bearing door No.13-09 of Sivalayam Veedhi, Venkatagiri town as illegal and arbitrary and consequently direct the 2nd respondent to take action for removal of the constructions made in contravention of building permit dated 18.09.2015 and not to allow the 3rd respondent to use the residential building for commercial purpose, and pass such other or further order or orders as deem fit and proper in the circumstances of the case.”

3. W.P.No.9673 of 2017 is filed by respondent Nos.3 and 4 of above W.P.No.5978 of 2017 by name G. Chenchiah and his wife G. Subhashini against the State represented by Principal Secretary (Respondent No.1), the Commissioner, Venkatagiri Municipality (Respondent No.2) and by showing the petitioners 1 and 2 in

W.P.No.5978 of 2017 as respondent Nos.3 and 4, by name, A. Murali and C. Prabhakar Rao.

4. The prayer in the writ petition reads as follows:

“.....to issue an appropriate writ or direction or order, more particularly one in the nature of Writ of Mandamus declaring the notice dt.10.03.2017 bearing U/C notice No.8/2015 issued by the 2nd respondent as illegal, arbitrary and unjust and in violation of Articles 14 and 21 of Constitution of India and provisions of Sec 217 of A.P. Municipalities Act and principles of natural justice and consequently to set-aside the above said notice and pass such other orders or further reliefs as this Hon'ble Court deems fit and proper in the interests of justice.”

5. The sum and substance of the both the writ petitions are the first one is in complaining in action of the 2nd respondent Municipality for directing to take action against the said Chenchaiiah and Subhashini for removal of the illegal constructions made in the premises Door No.13-9, Sivalayam Veedhi, Venkatagiri Town, in contravention of the building permit, dated 18.09.2015, and not to allow the use of residential building for commercial purpose and the subsequent writ petition prayer by Chenchaiiah and Subhashini is impugning the notice, dated 10.03.2017, referring to the construction made in deviation to the approved plan in B.A. 47/G1/2015 contrary to the A.P. Building Rules, 2012 (for short, 'Rules, 2012) and zoning regulations and even earlier notice under Section 228(1) and (3) of the A.P. Municipalities Act, 1965 (for short, 'the Act') issued seeking explanation for the construction with deviations made as to why

cannot be removed, which is with no reply and no compliance by removing the deviations or violations and referring to W.P.No.5978 of 2017 filed by Murali and Prabhakar Rao, there was a direction to dispose of the representation of them to the Municipality for removal of the constructions made in deviation to the building permit and in directing under Section 228(1) & (3) and 340 of the Act, 1965, and Rule 27 of the Rules, 2012, to remove the deviated and violated portion, failing which, the same will be removed by the Municipal Authorities.

6. The writ petition supporting averments of W.P.No.5978 of 2017 filed by Murali and Prabhakar Rao reads that they are the owners bearing municipal No.13-08 and 13-10 of Sivalayam Veedhi, Venkatagiri Town, and in between the property bearing No.13-09 purchased by Chenchiah and Subhashini and on the application for construction of residential building made in Municipal Door No.13-9 supra, the 2nd respondent Municipality sanctioned permission on 18.09.2015 for the residential building of ground + first floor with specific setbacks to say two metres front and one metre on rare side of one and side I and side II as setbacks that are to be left and without leaving setbacks the said Chenchiah and Subhashini commenced construction of the building, that on 11.05.2016 the said Murali applied to the Municipality to furnish information of the building permission accorded to Chenchiah and Municipality furnished information on 08.06.2016 and after verification a representation,

dated 11.07.2016, made to the Municipality complaining about the illegal construction making by Chenchaiyah and on 12.07.2016 the said Murali also made another representation to the Director of Town and Country Planning. The Director, vide letter No.3794/2016/G, dated 21.07.2016, directed the 2nd respondent-Municipality to take appropriate action against the unauthorised constructions supra. However, the 2nd respondent-Municipality did not choose to take action and the inaction of the Municipality is thereby illegal. The Municipality sanctioned permission to the said Chenchaiyah for construction of ground and first floor only and setbacks have been specified in the building permit, however Chenchaiyah constructed second and third floors also, without leaving an inch on either side of the building and there is no space left on front side of the building and towards the building of the 1st petitioner Murali (Door No.13-08) and the said Chenchaiyah without leaving space extended sun shade up to building of Murali and even Chenchaiyah and Subhashini purchased from the mother of Prabhakar Rao, where Vaarasandhu with specific boundaries was left and mentioned the 3rd respondent-Chenchaiyah in construction at Municipal Door No.13-09 extended the building up to Vaarasandhu and laid drainage and manhole just adjacent to the bedroom of Prabhakar Rao (Building No.13-10) and the Director of Town Planning even directed the 2nd respondent-Municipality to take action against the unauthorised construction by the Chenchaiyah and same even furnished by the 2nd respondent to Murali under Right to Information Act by saying there is no permission granted to the said

Chenchaiah in respect of the fourth floor and even complained about the illegal construction to cause remove, no action taken to remove the illegal construction made by Chenchaiah. Further, the building permission accorded was for residential purpose and the entire area is a residential area and the said Chenchaiah proposing to establish hospital therein and without converting the building from residential to commercial, it cannot be used for such commercial purpose, apart from no parking place or proper drainage to utilise for such non-residential purpose by putting lot of inconvenience to the neighbours, which thereby constrained to file the writ petition, for no alternative and from the inaction of the Municipality supra.

7. The affidavit averment of W.P.No.9673 of 2017 of Chenchaiah and Subhashini are that they are absolute owners of the house bearing No.13-09, purchased old building bearing No.1-11 with an extent 284 sq. yards site in Sy.No.279, Ward No.13, from Ch.Indira, who is the mother of Prabhakara Rao supra, under registered sale deeds, dated 26.04.2000, 27.07.2000 and 24.04.2000, for lawful considerations and they dismantled the old building and constructed new one after obtaining necessary permission from the authorities and covered by the municipal sanction permission by proceedings, dated 18.09.2015, having spent huge amount by availing loan from Andhra Bank in construction of the building. It is however averred that they are not aware of the building permit rules and from instructions of their mason mastery they constructed additional floors to suit their future

requirements and in the construction they have not deviated in leaving setbacks except making few adjustments as per vaastu. The area known as Shivalayam street is a old locality and the house sites are lying in narrow width and none of the residents of the locality left any setbacks. Respondent Nos.3 and 4-Murali and Prabhakar Rao, being adjacent owners to them with municipal No.13-8 and 13-10 respectively on either side, constructed their buildings without leaving any setbacks and they are inimical towards them from local political factions and in order to trouble them W.P.No.5978 of 2017 filed by them alleging as if they deviated in construction of the building/approved plan/sanctioned plan and obtained interim order in W.P.M.P.No.7323 of 2017, dated 22.02.2017, directing the 2nd respondent-Municipality to consider their representation, dated 11.07.2016, for removal of the deviations in the construction of the building. In fact, the said Murali and Prabhakar Rao did not raise any objection at the time of construction, though they are neighbours, and having allowed to proceed with the construction later started threatening to cause demolish. The said Chenchiah and Subhashini were advised and accordingly submitted a representation to the Municipality on 05.01.2017 to regularise their construction with revised plan and necessary challans, dated 02.03.2017, which are pending with 2nd respondent. The 2nd respondent-Municipality pursuant to the interim order of the High Court, dated 22.02.2017, supra, issued notice, dated 10.03.2017, bearing No.8/2015 under Section 228 and 340 of the Act and Rule 27 of the Rules in directing

to remove the deviations within 10 days, else to cause remove and above notice strangely reflects earlier notices said to have been issued on 29.12.2015 and 13.07.2016, though the said Chenchiah not aware of such notices. The constructions made by them no way infringed the rights of the said Murali and Prabhakar Rao including from the additional constructions and the said notice is unsustainable and there was no any prior notice under Section 217 of the Act before issuing the impugned notice under Section 228 and 340 of the Act and said notice is at the influence of said Murali and Prabhakar Rao, they submitted revised plan and sought for the regularisation and the impugned notice for removal of the deviations thereby unsustainable and thereby constrained to file writ petition, for the reasons of the said notice is incomplete, vague in directing to cause remove the building without issue any show-cause notice under Section 217 of the Act and without considering their representation that revised plan for regularisation and thereby liable to be set aside/quashed.

8. In W.P.No.5978 of 2017 the counter-affidavit with stay vacate petition filed by Chenchiah is practically reproduction of the writ petition averments of him of W.P.No.9673 of 2017 and several of those facts no way requires repetition including those denying the writ petition affidavit averments of W.P.No.5978 of 2017. What they further stated at best from the total reading closely is that even under Section 228 of the Act, the Commissioner may issue provisional order directing the owner to remove or alter or pull down any building

which is constructed in deviation to the sanction plan or without sanction plan and he does not confer power on removal illegal construction except to invoke penal provisions under Section 340 of the Act and if the prosecution initiated by the Municipality under Section 340 and fails then it is precluded from issuing fresh orders requiring the owner of building to demolish and the use of the wording *may* and not *shall* in Section 228 of the Act is clear in this regard. Almost all buildings in the locality have no permissions and applications for regularisation with compounding fees alleged to have been rejected by the Municipality. The setbacks required are left till the building line and in fact the constructions made by Murali and Prabhakar Rao, without leaving setbacks, are required to be removed.

9. In W.P.No.9673 of 2017 the counter-affidavit with stay vacate petition filed by Murali and Prabhakar Rao are almost selfsame of the averments of the writ petition affidavit in W.P.No.5978 of 2017 and denial of the further averments of the writ petition in W.P.No.9673 of 2017 supra apart from what more stated at best of close reading of the entire contents are that the so-called averment of the writ petition filed by them in W.P.No.5978 of 2017 is outcome of political vendetta is untrue and it is only for the inaction of the Municipality despite their representations to remove the illegal constructions in deviation to the approved plan made by said Chenchiah, they filed writ petition. In fact, in the impugned notice issued by the Municipality it referred about earlier giving of notices in December 2015 and July 2016 and

the said Chenchiah did not give any replies to it and it is false to say that the impugned notice issued is without opportunity or without prior notice while admitting about the deviations and the deviations are liable to be demolished as sought for.

10. Heard both sides with reference to the above at length.

11. Surprisingly, despite opportunities the 2nd respondent-Municipality in both the writ petitions did not choose to file any counter-affidavit. Even the statutory time for filing counter/counter affidavit of six months that was lapsed long back in both the writ petitions from February/March 2017. Chapter IV of the A.P. Municipalities Act, 1965 deals with building regularisations and as per Section 209 of the Act, if any person intends to construct a building other than a hut, he shall send to the Commissioner an application in writing for approval of the site, together site plan of the land and an application in writing for permission to execute the work together with ground-plan, elevations and sections of the building and a specification of the work and copy of the title of the land duly attested by a Gazetted Officer of Government with Urban Ceiling Clearance Certificate or as the case may be an affidavit referred in Section 184 shall be submitted. Under Section 210 of the Act, the Commissioner shall not grant permission to construct or re-construct a building unless and until it has approved of the site or an application made under Section 209 supra. Further, Section 211 speaks that the construction of a building shall not be begun unless and until the

Commissioner has granted permission for the execution of the work. Section 217 speaks that if the Commissioner finds that the work is otherwise than in accordance with the plans or specifications which have been approved, or contravenes any of the provisions or any bye-law, rule, order of declaration made thereunder he may, by notice, require the owner of the building within period stated either to make such alterations as may be specified in the notice with the object of bringing the work into conformity with the said plans or provisions or to show-cause why alteration should not be made and if the owner does not show-cause, he shall be bound to make alternations specified in such notice and if he shows cause, the Commissioner shall by an order cancel the notice or confirm the same subject to such modifications as it may think fit.

12. Section 227 of the Act says the provisions of this Chapter and of any rules or bye-laws made under the Act relating to construction and reconstruction of buildings shall also be applicable to any alteration thereof or addition thereto, but for that works necessary repair which do not affect the position or dimension of a building or a room.

13. From the above, now coming to Section 228 of the Act, which speaks of demolition or alteration of building work unlawfully commenced, carried on or completed. For more clarity the Section is reproduced with sub-sections:

(1) If the Commissioner is satisfied--

(i) that the construction or reconstruction of any building or well--

(a) has been commenced without obtaining the permission of the Commissioner or the Chairperson as the case may be, or where an appeal has been made to the council, in contravention of any order passed by the council; or

(b) is being carried on, or has been completed, otherwise than in accordance with the plans or particulars on which such permission or order was based; or

(c) is being carried on, or has been completed, in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye laws; or

(ii) that any alterations required by any notice issued under Section 217 have not been duly made; or

(iii) that any alteration of or addition to any building or any other work made or done for any purpose into or upon, any building, has been commenced or is being carried on or has been completed in breach of Section 227.

he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, bye-laws, rules, direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well.

(2) The said officer shall serve a copy of the provisional order made under sub-section (1) on the owner of the building or well, together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed.

(3) If the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as he thinks fit to make, and such order shall then be binding on the owner.

14. From the reading of Section 228(1) of the Act supra, there is nothing making mandatory on the part of the Commissioner to issue notice under Section 217 of the Act, before issuing notice under Section 228 (1) and (2) of the Act. Thus the contention of no notice that is contemplated to be given, under Section 217, before issuing notice under Section 228 of the Act is thereby baseless.

15. The writ petition averments of Chenchaiyah and his wife Subhashini in W.P.No.9673 of 2017, the counter affidavit with vacate petition averments in W.P.No.5978 of 2017, there is no denial of the writ petition averments or of Murali and Prabhakar Rao of the constructions are with deviations without leaving setbacks and there is no denial of the original permission is for ground and first floor and the constructions were made on second and third floors without permission illegally. What the averments of said Chenchaiyah for and on behalf of his wife Subhashini also that the street is an old one and many buildings not left the setbacks. In fact, they cannot take it a ruse, much less after obtaining permission, without leaving the setbacks to make construction, in defiance to the sanctioned plan by taking law to their hand. The contention of Chenchaiyah and his wife of they are illiterates is untenable as having applied and obtained the plan and while plan submitted blue print with measurements and particulars and once the sanctioned plan is there, they are bound to see

that there shall not be any deviations in the construction under their regular supervision.

16. Section 228(1) supra speaks in case of construction without obtaining permission and spirit of those carried on or completed, otherwise than in accordance with the plans or particulars of the permission or in violation of any provision or rule or byelaw or direction. From this now coming to the scope on satisfaction of the Commissioner in ordering demolition or alteration of a building work unlawfully commenced or unlawfully carried on or unlawfully completed as the case may be.

17. The word 'may' used in sub-section (1) of Section 222 of the Commissioner if satisfied may make a provisional order requiring the owner or the builder to demolish the work done or so much of which as in the opinion of the said officer has been unlawfully executed or to make such alterations as may in his opinion be necessary to bring the work in conformity with the work, bye-law, rules, direction or requisitions as afore-stated concerned, there are expressions in saying the word 'may' is read to be as 'shall' and what is the rider of the expressions is said power to exercise shall not be arbitrary. There are expressions in saying any unauthorised deviations in the constructions made of the sanctioned plan cannot be compounded or regularised much less as a matter of course. In **Municipal Corporation of Hyderabad represented by its Special Officer, Hyderabad v.**

Shamsuddin Hasan Khudankmai & another¹ referring to GHMC Act, 1955, Section 452 which is nearer in terms to Section 228 of the Municipalities Act, 1965 and it was observed that if such person shall failed to show sufficient cause as required to the satisfaction of the Commissioner as to why said building shall not be removed or altered or pull down, the Commissioner may remove or alter or pull down the said building, to mean not mandatory on the part of the Commissioner to remove or pull down the building, without seeing as to the construction is made in process regarding to the material provisions of the Act or may be injures to the public health or sanitation or public interest or it may have been done in encroaching any municipal land on public street for it may cause inconvenience to neighbours and similarly its constructions may be done offensive to town planning that may not be desirable to retain, then the Commissioner may direct its demolition though those are all only illustrative and not exhaustive for exercise of the discretion by the Commissioner depends upon the facts of each case for neither possible nor desirable laid down the contention in exercise of the said discretion and for that referred the expression of the Apex Court in **Calcutta Corporation v. Mulchand²** referring to Section 363 of the Calcutta Municipality Act in use of the word ‘may’ in passing order for any demolition of the building, what is to be decided is whether the breaches are of a formal or trivial character in which case the imposition of a fine might meet the

¹ (1978) 1 AP LJ 459

² AIR 1956 SC 110

requirements of the case, or whether they are serious and likely to affect adversely the interests of the public, or the like, in which case it would proper to pass order of demolition.

18. A Single Judge of this court in S.A.No.629 of 1997 in **Kurmina Venkatarama Reddy v. The Visakhapatnam Municipality, represented by its Commissioner, Visakhapatnam and another** referring to Section 228 of the Municipalities Act observed that the section empowers the Commissioner to make a provisional order requiring the owner of the building to demolish the work done on receipt of the provisional order or the confirmatory order, as the case may be, and the owner if fails to comply with the directions given in the order, the only course open to the Municipality is to launch prosecution and once prosecution launched by the municipality fail, it is precluded from issuing fresh order requiring owner to demolish the building. In fact, a reading of Section 228 of the Act supra, no way speaks giving of notice under Section 340 or launching of prosecution under Section 340 of the Act before issuing notice under Section 228 of the Act or passing of order thereunder for demolition of the building. Thereby, this judgment is not laying down the correct law to place reliance thereon.

19. In **Kukatpally Municipality v. P.Satyanarayana**³ referring to Section 228 and 345 of the Municipalities Act, the Division Bench of this Court referring to Division Bench judgment of Shamshuddin

³ 1990(2) ALT 202 (D.B.)

Hasan supra of 1978 of a matter pertaining to Kukatpally Municipality area from the Commissioner of Municipality issued notice under Section 228(1) that was served under Section 228(2) with no reply and passed the confirmation order under Section 228(3) for the unauthorised construction asked to be removed, when questioned by filing writ petition disposed of to give an opportunity to reply within one week and pass orders therefrom. In the second round of litigation covered by the writ petition, pursuant to the reply, orders were passed in directing for demolition from consideration of the explanation that was impugned. By considering Section 228 of the Municipalities Act and Section 452 of the GHMC Act, any co-relation observed as to whether the word 'may' does not mean 'shall', what the Supreme Court held in *M/s.Rajata Enterprises V. Sk. Sharnai of justice and equity* should guide the exercise of power to demolish a building the construction of which is unauthorised. It referred to **Siemens Engineering vs. Union of India**⁴ of the function of quasi judicial authority must support by reasons and the order for demolition passed by Single Judge of the Court was set aside by Division Bench for a direction to reconsider by Municipal Council, the appeal of the party and the twin requirements of whether the construction without valid sanction and non-violated of so-called regularisation can be just to order demolition or not.

⁴ 1976 AIR (SC) 1785

20. In **B. Uma Devi v. Greater Hyderabad Municipal Corporation, rep. by its Commissioner, Hyderabad and another**⁵

a Single Judge of this Court relied upon several expressions of the Apex Court under Municipalities Act including under Section 228 of the Municipalities Act observed that the Full Bench of this court in **Aces v. Municipal Corporation of Hyderabad**⁶ dealt with number of issues under the Act including of any construction on a deemed permission consequent to the silence of the municipal authorities in responding to an application of the building permission within the stipulated time, that deemed permission is not a licence to vagrant and malignant construction and it would enable construction only in accordance with the existing building regulations and rules, pointed out to comply. Enabling power conferred on the Commissioner under Section 452 of the Act in use of the word 'may' though discretionary including of the power coupled with the duty to exercise when circumstances warrant in public interest, the word 'may' is in fact thereby a mandatory command and not mere 'may'.

21. Referring to the expression of the Apex Court in **Pratibha Co-Operative Housing Society Ltd. V. State of Maharashtra**⁷, it is observed that the alarming increase in the magnitude of unlawful constructions and unauthorized encroachments all over the country, such delinquency must be dealt with firmly. In respect of illegal constructions, the Full Bench at para 36 issued guidelines saying not

⁵ 2007 (5) ALT 676

⁶ AIR 1995 AP 17

⁷ 1991 AIR 1453

exhaustive but illustrative. It is observed that where applications for building permission have been duly filed, the power of demolition should be exercised and one of the guidelines speak was only if the deviations made during the construction are not in the public interest or cause public nuisance or are hazardous or dangerous to public safety including the residents therein. If the deviations or violations are however minor, minimal or trivial and do not affect the public at large, the Corporation should not resort to demolition. It is made clear that these guidelines do not supplant the law nor do they constrain by judicial fiat the spectrum of discretion granted to the Commissioner to rationally act in accordance with the power conferred under Sections 452 and 636 of the Act, being a statutory power to comply with an obligation. With reference to the Full Bench expression in B.Uma Devi supra, the learned Single Judge observed that the scale and magnitude of violations of building Regulations with undisguised impunity and alarming regularity, undermines the Sovereign will of the Nation, as by law spelt out. There is a dyslexia between the legislative command and its enforcement. The deviation from the sanctioned plan, thus cannot be considered as a casual transgression. It is a conscious and wilful defiance of the law. What were the compulsions which disabled the petitioner from complying with the terms of the sanctioned permit, once not explained it is a case for demolition. On facts, the front side open space usurpations by the petitioner are in excess of 50% and on one side 33 1/3 % and it is impossible to manoeuvre even a mobile fire fighting equipment

through one metre passage on that side and reasons for violation not forthcoming.

22. The learned Single Judge observed that characterization of violations of minor or trivial or otherwise cannot depend solely on the physical extent of the violation. But, the magnitude must be judged in the context and in relation to the locality, area of the plot, nature of the building, reasons if any for the deviation, impact of the deviation on the habitat and contribution of the deviance to orderly society. These are all to be considered by the Commissioner in exercise of discretion. It is observed referred to the expression of the Apex Court in **Muni Suvrat Swami Jain Smp Sangh v. Arun Nathuram Gaikwad**⁸ that jurisdiction conferred on the Commissioner to proceed towards the demolition of an unauthorised construction, the law presumes until the contrary is established by the petitioner that the discretion was properly exercised and within the spectrum of discretion. The learned Single Judge there from observed except asserting of deviations are minor or trivial, the petitioner does not either plead or establish that the decision in the impugned notice constitutes and abuse of discretion by the Municipal Commissioner. The learned Single Judge in Uma Devi referred the other expression of the Apex Court in **Friends Colony Development Committee v. State of Orissa and others**⁹ by reproduced the observations in paras 20, 22 to 26 as follows:

⁸ 2006 AIR SCW 5192

⁹ (2004) 8 SCC 733

20. The pleadings, documents and other material brought on record disclose a very sorry and sordid State of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers find search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions coming up, they often fall in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.

22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed there under. Zoning and planning do result in hardship to individual

property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

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

24. Structural and lot area regulations authorize the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments

and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship, which is posed to the occupants of the building. (For a detailed discussion reference may be had to the chapter on "Zoning and Planning" in American Jurisprudence, 2d, Vol.82).

25. Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.

26. The applicant for compounding the deviations made by the builders should always be dealt with at a higher level by a multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of staff which is supposed to keep a watch on building activities should be suitably increased in the interest of constant and vigilant watch on illegal or unauthorized constructions.

23. The learned Single Judge in B. Uma Devi further observed referring to another expression of the Apex Court in **M.I. Builders (P) Ltd., v. Radhey Shyam Sahu**¹⁰ that no consideration should be shown to the builder or any other person where a construction is unauthorized and that this is principle almost bordering on a rule of law. The Court also held that unauthorized constructions, if illegal cannot be compounded but have to be demolished; there was 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; and Judges are not entitled to exercise discretion for passing orders based solely on their personal predilections. The learned Single Judge also referred to expression of the Apex Court in **Consumer Action Group v. State of Tamilnadu**¹¹ held that every individual right including fundamental right is within reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large to protect the individual rights. For all these reasons, the learned Single Judge dismissed the writ petition upholding the notice under Section 636 of the GHMC proceeded by notice under Section 452 for the deviations without leaving setbacks to the approved plan in making the construction to the public inconvenience.

¹⁰ (1999) 6 SCC 464

¹¹ (2000) 7 SCC 425

24. Another Single Judge of this Court later in **K.M. Pratap R. Koteswara Rao v. State of Telangana and others**¹² referring to several earlier expressions of the Apex Court in pointing out the inaction of the municipal authorities for the illegal construction made in brazen violation of the building laws, by one of the unofficial respondents happened to be Member of the Legislative Assembly in showing apathy by the authorities to him including the conduct of the municipal authorities before the Court shows no mood to prevent the *ex facie* illegal constructions, with cold approach towards him; that for the unauthorised construction made even the unofficial respondent wanted to take advantage of the regularisation of the rules of 2015 subsequently brought into force in G.O.Ms.No.152, dated 02.11.2015 to cover regularisation of the building constructed from 01.01.1985 to 28.10.2015 stated applied on 07.11.2015, that could not excuse for the municipal authorities not to remove the unauthorised constructions from 21.04.2015 made by unofficial respondents when notice under Section 636 of the Act already issued, to sleep under the shelter of the regularisation application made. It is observed in reference to the building bye-laws putting an obligation on the authority in deviation to the sanctioned plan with periodical inspection to take appropriate action. It is pointed out referring to the Building Rules 2012, which are a self contained code of which Table III Rule 5 when prescribes minimum setbacks and permissible height depending upon the size of the plot and table 5 Rule 13 prescribes parking requirements etc., and

¹² 2016 (4) ALT 426

Sl.No.4 thereof pertains to residential apartments, complexes, schools, colleges and other educational buildings strictly to be adhered to, for the notice issued under Section 452 of the GHMC Act by the Commissioner requiring the person making the unauthorised construction contrary to the approved plan to show cause why it shall not be removed, altered or pulled down, if that person failed to show sufficient cause, later may remove, alter or pull down the building or the work and the expenses thereof shall be borne by such person. It is observed Section 636 of the GHMC Act enables either for the construction without obtaining permission or for deviation or permission subsequently suspended or revoked, all such works shall be deemed to be unauthorised by writing notice requiring to remove, pull down or undone, as the case may be, if not applied within time prescribed, the authorities shall cause remove, alter or undo such thing at the expenses of that making unauthorised construction.

25. It is observed referring to the expression of the Apex Court in **Shanti Sports Club v. Union of India**¹³ by reproduction of paras 74 and 75 of the same that “In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc.

¹³ 2009 (15) SCC 705

in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic

congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.... Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the

lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions." and also by referring to later expression of the Apex Court in **Dipak Kumar Mukherjee v. Kolkata Municipal Corporation**¹⁴ taking note of the judicial notice of the menace of illegal and unauthorized constructions of buildings and other structures in different parts of the country for the last four decades in rapid are acquired monstrous proportions. Referring to earlier expressions of the Apex Court, it is observed that common man feels cheated when he finds that those making illegal constructions or supported by the people entrusted with the duty of preparing and executing master plan, development plan, zonal plan and their failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors, where consciously and deliberately with impunity violated the sanctioned plans in a conceivable way, this Court cannot remain a mute spectator only for the reason that during the pendency of the writ petition the State come with a scheme to protect violators of law to regularise. It is further observed referring to the expression of the Apex Court in **Royal Paradise Hotel (P) Ltd. V. State of Haryana**¹⁵ where the Supreme Court declined to interfere with the

¹⁴ (2013) 5 SCC 336

¹⁵ (2006) 7 SCC 597

High Court's judgment setting aside the decision of the municipality not to regularise the illegal construction in defiance of the provisions of the law, in saying such violations cannot be compounded and, the prayer of the unauthorised constructor was rightly rejected by the municipal authorities and High Court was right in dismissing the writ petition against it.

26. From the above legal position, so far as the contention of the said Chenchiah and his wife in their W.P.No.9673 of 2017 referring to the impugned notice under Section 228 of the Municipalities Act and Rule 27 of the Building Rules issued in directing to remove the deviated and violated portions of the construction unauthorisedly made within ten days of notice, failing which those will be removed at their expenditure, referring about giving of notices earlier to them on 29.12.2015 and 13.07.2016 of no such notices allegedly received, it is not their case, it is not the address at which they were living earlier. Once such is the case and it refers to the earlier giving of notices, the expression of this Court in B.Uma Devi supra referring to the expression of the Apex Court in Muni Suvrat Swami Jain Smp Sangh supra of the presumption to be rebutted by the person in claiming the same and on coming to that, no doubt, the municipality even suppose to produce or file a counter-affidavit about such notices issued and served, failed to respond, and the impugned proceedings itself refers to the previous complaints given by Murali and Prabhakar Rao including on 11.07.2016, the writ petition of Murali and Prabhakar

Rao and in their petition affidavit clearly refers by filing the copies of the complaints given of their complaining to the municipality in writing earlier of the constructions unauthorisedly making in deviation to the sanctioned plan/permission, dated 18.09.2015, one application/complaint dated 11.05.2016 and the other on 11.07.2016, they did not properly responded and the Right to Information sought and submitted by the Municipality by endorsement, dated 08.06.2016, to them clearly speaks the construction made illegally, without leaving setbacks, contrary to the building rules and already notices issued and it is also stated about did not obtain permission for the top floors which are totally unauthorised constructions, for the permission accorded is only ground + first floor and in the municipal area only ground + two floors are permissible and not beyond. All cumulatively show the construction made by the said Chenchaiyah and his wife Subhashini in the Municipal No.13-09 is in grave violation and contrary to the plan including by construction of floors without permission and not even left the setbacks, there is nothing in exercising of the discretion in asking to remove the unauthorised construction, as pointed out in B. Uma Devi supra and K M. Prathap supra by this Court referring to the catena of expressions. However, from the fact that the Municipal authorities even did not choose to come forward in producing proof regarding the giving of notices earlier to this, one issued under Section 228(3) of the Act in asking to remove within 10 days, failing which to cause remove, said Chenchaiyah and Subhashini, the writ petitioners in W.P.No.9673 of

2017, are directed to take this as a show-cause notice under Sections 228(1) and (2) of the Municipalities Act and submit their explanation within one week from the date of receipt of this order and from which the 2nd respondent-Venkatagiri Municipality is directed to take a decision either to confirm the said notice as provisional notice or for modification, as the case may be, and issue final communication under Section 228(3) of the Act for any modifications to be made or removal to be effected, else to proceed for removal or the like, as per law.

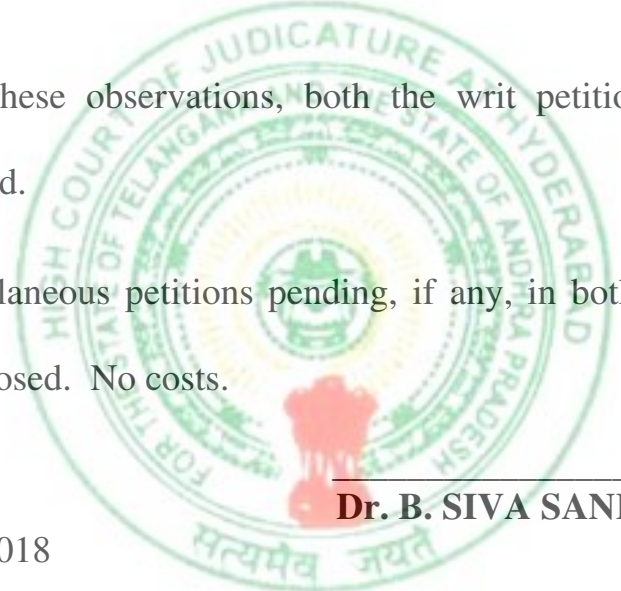
27. With these observations, both the writ petitions are to that extent allowed.

Miscellaneous petitions pending, if any, in both writ petitions shall stand closed. No costs.

22nd March 2018

L.R. Copy to be marked – Yes.

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Dr. B. SIVA SANKARA RAO, J