

A PRIYANKA ESTATES INTERNATIONAL P. LTD. & ORS. ✓

v.

STATE OF ASSAM & ORS.
(Civil Appeal No. 8026 of 2009)

DECEMBER 3, 2009

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[V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Guwahati Metropolitan Development Authority Act, 1985 ✕

– ss. 24 and 25 – Construction of extra floors without sanction

C – Authority concerned directing demolition of the extra floors

– Writ petition – High Court directing demolition of extra floors

– On appeal, held: construction of building beyond 5½ floors was illegal, unauthorized and without any sanction or approval of plans – However, if half unsanctioned portion of 5th floor,

D is found to be compoundable, the same not to be demolished

– Authorities at liberty to demolish 6th to 8th floors and half of the 5th floor if not compounded ultimately – Urban Development. ✕

E s. 88 – Notice to individual – Failure in – Effect of – Held: Public notice by authorities cautioning the proposed purchasers to enter into agreement of purchase of flats on seeing Completion and Occupancy Certificates in favour of builders, would be deemed to be notice to the individuals – Notice. ✕

F Pursuant to permission granted by Guwahati Metropolitan Development Authority (GDMA) for sale of the land for residential-cum-commercial use, the land was sold to appellant No. 1. Thereafter Guwahati Municipal Corporation (GMC) granted permission for construction of basement, ground and upto 5½ floors. Thereafter, applicant No. 1 applied for grant of permission for construction of remaining part of 5th floor and 6th, 7th and 8th floors. The permission was refused by GMC. Appellant

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preferred appeal against refusal order and the same was allowed by Standing Appellate Committee (SAC) directing that permission be granted. Despite the order, no formal permission was granted by GMC. Appellant moved further application, wherein Administrator-cum-Minister reviewed the verdict in appeal and granted permission for further construction, subject to fulfilment of certain conditions. Appellants continued with construction of building beyond 5½ floors, without compliance of the conditions and without getting actual sanction for such construction. GMDA issued notices to the appellant for demolition of the construction beyond 5½ floors. Appellants filed writ petition challenging the order, *wherein status quo* was ordered to the effect that the Municipal Authority shall take no steps to pull down the building and operation of notices for demolition was stayed.

Subsequently GMDA passed order of demolition. This order was also challenged in other writ petition, by the appellants. Despite the order of *status quo*, appellants continued with the construction. By a further clarificatory order, High Court directed that no further construction to be carried out. Third parties also filed writ petitions seeking demolition of extra construction. High Court, by the impugned order dismissed the petitions filed by appellants and allowed that filed by third parties directing demolition. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. Rules, regulations and bye-laws are made by Corporation or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental

A right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent. [Para 74] [108-B-D]

B 1.2. In view of the admitted position that the width of the road is only 38 feet and under the building bye-laws, maximum allowable height can be double the width of the road, i.e. 76 feet, but in the instant case the SAC has allowed construction upto 93 feet, which contravenes the building bye-laws, therefore, such an order of SAC has no legal force and cannot be basis for construction beyond 76 feet, allowable under building bye-laws. [Para 29] [94-H; 95-A-B]

D 1.3. The only plan approved was for 5½ floors by GMC. Order passed by SAC also does not give them blanket permission to construct upto 8th floor. The respondents have come to the conclusion and have conceded before this court, plan or sanction approved by either of the two authorities, that is, GMC or GMDA will hold good and permission from both the authorities simultaneously would not be required for the same, if it has already been accorded by any one of the authorities. Thus, if no permission u/s. 24 and 25 of the Development Act was obtained by the appellant, then it would not be detrimental to the interest of the appellants, provided there is sanction and approval of plans by the Corporation for remaining 3½ floors i.e. beyond 5½ floors. [Paras 51 and 52] [101-C-D]

G 1.4. The order of SAC cannot be construed as an order of sanction as it is not a semblance of permission. It was not end of the matter because necessary sanction or permission could have been granted only by the Municipal Commissioner and not by the Appellate Authority. Admittedly, even after passing of the order by SAC in appeal, there was no further sanction by the H Municipal Commissioner or by Chief Executive Officer of

the Development Authority granting permission to raise the height of the building upto 8th floor. [Para 57] [103-E-F] A

1.5. Clause (a) of building bye-law 37 stipulates that for the purpose of calculation of building height, existing width of the road shall be taken into account and not the proposed width. Even if the proposed width is 40 feet or 50 feet, it will not make any difference because it clearly contemplates that what is to be taken into consideration is the existing width of the road. There is nothing on record to show that the existing width of the road is more than 38 feet. Thus, at the most, the construction could have been only upto the height of 76 feet, provided there was sanction granted by either of the two Authorities. [Para 54] [101-G-H; 102-A-B] B C D

1.6. Construction of the building beyond 5½ floors was not only illegal, unauthorized and without any sanction or approval of plans but was also against the spirit of Appellate Order of SAC. Thus, Respondent-authorities are directed to demolish 6th, 7th and 8th floor. [Para 58] [103-G] E

1.7. Addition of extra floor falls in the category of non-compoundable items. Thus, in any case anything that has been constructed beyond 5th floor would be non-compoundable and same cannot be compounded at all. In other words, minor deviations from the sanctioned plan should be confined only to the FAR permissible but should not extend to the extra floor. [Para 55] [102-B-D] F

1.8. Respondent-authorities conceded that on suitable representations being made by the occupants, the cases as regards construction of two flats on remaining half of 5th floor can be considered afresh to find out if the same would fall within the category of compoundable items or not. If the same are found within H

A the category of compoundable items then necessary order by respondents in this regard would be passed otherwise order of demolition would follow for them also. [Para 59] [104-A-C]

B 1.9. However, it is not acceptable that if cases of two flat owners on the 5th floor are to be considered so as to find out whether the constructions raised by the builder in their cases would fall within the compoundable items or not, then the case of the person, whose flat is situated on the 6th floor should also be directed to be considered on a suitable representation being made by her. The construction of an extra floor does not fall within the category of compoundable items which is manifest from Appendix III of the building bye-laws of the Corporation. What would ultimately constitute a sanctioned and duly approved map would be the one approved by the Commissioner as he alone has authority to do so. The appellants have failed to produce any such duly approved map. [Paras 68, 69 and 72] [106-G-H; 107-A, F]

E 1.10. Respondent-authorities shall be at liberty to proceed with demolition of half of the 5th floor, if not ultimately compounded; and 6th, 7th and 8th floors. [Para 82] [110-B]

F *M.I Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.* (1999) 6 SCC 464; *Friends Colony Development Committee v. State of Orissa and Ors.* (2004) 8 SCC 733; *Royal Paradise Hotel (P) Ltd. vs. State of Haryana and Ors.* (2006) 7 SCC 597; *Mahendra Buburao Mahadik and Ors. v. Subhash Krishna Kanitkar and Ors.* (2005) 4 SCC 99, relied on.

H *Corporation of Calcutta v. Mulchand Agarwala* AIR 1956 SC 110; *Syed Muzaffar Ali and Ors. v. Municipal Corporation of Delhi* 1995 Supp. (4) SCC 426; *Muni Suvrat-Swamy Jain S.M.P. Sangh v. Arun Nathuram Gaikwad and Ors.* (2006) 8

SCC 590; *Municipal Corporation, Ludhiana v. Inderjit Singh and Anr.* (2008) 13 SCC 506; *Olga Tellis and Ors. etc. v. Bombay Municipal Corporation and Ors. etc.* (1985) 3 SCC 545; *S.L. Kapoor v. Jagmohan and Ors.* (1980) 4 SCC 379, referred to. A

2. Respondents had also issued a public notice on 02.07.2002, published in local newspaper in vernacular giving general warning and information to all proposed purchasers of flats that unless builder is able to show Completion Certificate and Occupancy Certificate duly issued by authorities, no one should enter into agreement to purchase flat/flats from the builder. It is, therefore, to be construed that public notice will hold good even with regard to adherence to the requirement of Section 88 of the Development Act, if individual person had not been noticed by the authorities. [Para 53] [101-E-F] B
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3.1. It is a sound policy to punish the wrong-doer and it is in that spirit that the courts have moulded the reliefs of granting compensation to the victims in exercise of the powers conferred on it. In doing so, the courts are required to take into account not only the interest of the petitioners and the respondents but also the interest of public as a whole with a view that public bodies or officials or builders do not act unlawfully and do perform their duties properly. [Para 77] [108-H; 109-A-B] E
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3.2. The instant case is not a case of breach of contract. It is a clear case of breach of the obligation undertaken to erect the building in accordance with building regulations and failure to truthfully inform the warranty of title and other allied circumstances. [Para 79] [109-D] G

3.3. The jurisdiction and power of courts to indemnify a citizen for injuries suffered due to such unauthorised or illegal construction having been erected by builder/ H

- A coloniser is required to be compensated by them. An ordinary citizen or a common man is hardly equipped to match the might and power of the builders. This court has restrained itself from giving relief under Article 142 of constitution of India, of compensation to the flat owners for variety of reasons and on account of various disputed questions that may be posed in the matter. However, liberty is granted to those, whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law. [Paras 75 and 80] [108-E-F; 109-F-G]

Case Law Reference :

	AIR 1956 SC 110	Referred to.	Para 61
	1995 Supp. (4) SCC 426	Referred to.	Para 61
D	(2006) 8 SCC 590	Referred to.	Para 62
	(2008) 13 SCC 506	Referred to.	Para 62
	(1985) 3 SCC 545	Referred to.	Para 63
E	(1980) 4 SCC 379	Referred to.	Para 64
	(1999) 6 SCC 464	Relied on.	Para 65
	(2004) 8 SCC 733	Relied on.	Para 65
	(2006) 7 SCC 597	Relied on.	Para 65
F	(2005) 4 SCC 99	Relied on.	Para 65

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8026 of 2009.

- G From the Judgment & Order dated 28.07.2006 of the Gauhati High Court in Writ Petitions. No. 5018, 5146 of 2002 & 2747 of 2006.

WITH

- H C.A. No. 8025, 8027, 8028 & 8029-8032 of 2009.

PRIYANKA ESTATES INTERNATIONAL P. LTD. & 87
ORS. v. STATE OF ASSAM

Shekhar Naphade, Mukul Rohtagi, Vijay Hansaria, Anoop A
Chaudhary, June, Chaudhary, Milly Hazarika, Ramji Srinivasan,
P.I. Jose, Anupam Mishra, Kajori Roy, Vivek Kafari Ray, Dhruv
Mehta, Yashraj Singh Deora, Mohit, T.S. Sabarish (for K.L.
Mehta & Co.), Shankar Divate, Kamal Mohan Gupta, Manish
Goswami (for Map & Co.), Jagjit Singh Chhabra, H. Baruah, B
Balbir Dosanjh, Rameshwar Prasad Goyal, Jitendra Kumar,
Ranjan K. Pandey, Galib Kabir, Corporate Law Group (NP),
Rauf Rahim, for the appearing parties.

The Judgment of the Court was delivered by

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DEEPAK VERMA, J. 1. Leave granted.

2. The principal question that emerges for consideration
in these appeals is whether to sustain the order of demolition
as passed by the Gauhati High Court vide impugned judgment
and order or to put an imprimatur of this Court to the
unauthorised constructions raised by M/s. Priyanka Estates
International (P) Ltd. (Appellant No.1 herein) beyond 5½ floors.
Facts material for deciding the said appeals are mentioned
hereinbelow.

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3. For the sake of convenience, the facts appearing in SLP
(C) No. 14480 of 2006 titled as *M/s. Priyanka Estates
International (P) Ltd. & Others Vs. State of Assam & Others*
are taken into consideration. Appellant No.1 is a company of
which Appellant Nos.2 & 3 are Directors.

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4. Appellant No.1 herein purchased an open piece of land
approximately admeasuring 4.62 Kathas from one Smt. Nandita
Banerjee on 9.8.1999 by registered deed of sale. Prior to
execution of sale, the vendor of Appellant No.1 applied to
Guwahati Metropolitan Development Authority (hereinafter
referred to as 'GMDA') for grant of 'No Objection Certificate'
for sale of land. The said permission was accorded on
17.7.1999 mentioning therein that permission is granted for
"residential-cum-commercial use" of the said plot and that

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A proposed width of the road abutted by plot is approximately 50 feet.

B 5. Pursuant to the said permission, Sale Deed was executed in favour of Appellant No.1, whereafter it applied to Guwahati Municipal Corporation (hereinafter referred to as 'GMC') on 16.11.1999 for according permission for construction of basement, ground, mezzanine, first, second, third, fourth and half of 5th floors. The permission was accorded to M/s. Priyanka Estates International (P) Ltd. on 03.02.2000 by the GMC for construction of basement, ground floor, mezzanine upto fourth floor and half on the 5th floor. For 1st floor to fourth, the floor area permissible was 7283 sq. ft. but on 5th floor, the permissible floor area was fixed at half of it, i.e., 3817 sq. ft only. It was granted on certain conditions as mentioned in the sanction dated 3.2.2000.

D 6. Thereafter, on 08.02.2000, Appellant No.1 applied for grant of permission for construction of remaining part of 5th, 6th, 7th and 8th floors. This permission was refused by GMC on 27.3.2000 on the following grounds.

E "(i) Maximum allowable height of building can be 76' and proposed height would be 93'.

(ii) The margin on both sides and rear is less than required norms.

F (iii) FAR is exceeded than allowable 300.

(iv) The structural certificate is not submitted."

G So, proposal for 5th (part) 6th, 7th and 8th floor building, permission was rejected.

H 7. Feeling aggrieved by the said rejection by GMC, appellants preferred an appeal under Section 438 of the Guwahati Municipal Corporation Act, 1971 (hereinafter referred to as 'the Act') before the Standing Appellate Committee (in

short 'SAC').

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8. This came to be disposed of on 5.5.2000 with the following directions:

"In view of the above discussion as well as observation, in our considered opinion, the appellant's case deserve consideration. Accordingly, we hold that the appellant be accorded permission as sought for. We hereby set aside the impugned order, as aforesaid, passed by the Commissioner, GMC, the Respondent.

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In the result, the appeal is allowed."

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9. Since, despite the fact that SAC had allowed the appeal of Appellants with regard to construction of 5th (part), 6th, 7th and 8th floors, no formal permission was still accorded by Commissioner GMC to it, they moved further application on 28.8.2001 before Administrator-cum- Minister, Guwahati Development Department, as it appears by that time, GMC had been dissolved.

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10. The said appeal was considered by Administrator-cum-Minister and the appeal verdict was reviewed on 29.5.2002 with certain conditions as mentioned hereinbelow :

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"(i) To obtain NOC from State Fire Department;

(ii) Submit affidavit regarding the Structural Certificate;

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(iii) Compulsory covered parking and private service system like drainage, sewage, storm drain, water supply etc.;

(iv) No further FAR beyond 487.00;

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(v) To submit completion certificate and obtain Occupancy Certificate from GMC;

(vi) To pay a penal charge to the Corporation amounting

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A to Rs.10,00,000.00 (ten lacs);

(vii) Your building is liable for instant demolition at your own risk and cost in case of non-compliance of the above."

B 11. However, it appears that without compliance of the aforesaid conditions fully and without getting actual sanction for construction of building beyond 5½ floors from the Commissioner of G.M.C. Appellants continued with the construction activities and tried to complete the same.

C 12. Guwahati Metropolitan Development Authority (As already referred to as 'GMDA') now came into picture and issued notice to Appellant No.2 on 02.02.2001 to show cause and to give explanation as to without grant of proper sanction under GMDA Act, how the construction work is progressing.

D 13. Another notice by GMDA was issued to the Appellant No.2 on 5.9.2001 asking to remove/demolish the building/ construction/ development or the portion erected by them which is in violation of the provisions of Guwahati Metropolitan Development Authority Act (for short 'the Development Act'). No replies to the aforesaid two notices were sent by the Appellants herein on the ground that the same were not received.

E 14. Last and final notice in this regard was issued by GMDA on 18.2.2002 mentioning therein with regard to earlier two notices sent on 2.2.2001 and 5.9.2001 and finally asking the Appellants to remove the construction within three days from the receipt of this last notice failing which, necessary action as per provision of the Development Act will be initiated without giving further intimation.

F 15. Appellants replied to the said last notice on 18.2.2002 mentioning therein that they had not received the earlier two letters but mentioned that permission has been granted by GMC on 3.2.2000, and is still operative, which clarified the position of construction of the building beyond 5½ floors also

but did not actually present any sanctioned or approved plans/ maps beyond 5½ floor. A

16. Not being satisfied with the reply to the show cause notice, submitted by the Appellants, the Respondents proceeded to issue another notice to the Appellant No.2 on 3.5.2002, with a categorical statement that construction over and above 6th and 7th floor was wholly illegal, without due sanction and therefore, the same be removed/demolished. B

17. It appears that, thereafter, some correspondence between the parties continued. Finally on 31.7.2002 by two orders, the Commissioner, GMC informed the Appellant No.1 that plans submitted by them are insufficient for the following reasons and requested it to furnish the required materials as under and to forthwith stop the construction : C

“1. Affidavit for structural design as per format at the building bye laws. D

2. NOC from State Fire Department.

3. Declaration in affidavit to maintain the FAR within 487.” E

18. The Appellants, therefore, were constrained to move the High Court challenging the said order dated 31.7.2002 by filing W.P.(C) No.5018 of 2002 purportedly under Articles 226 and 227 of Constitution of India. F

19. Further order of demolition came to be issued to the Appellant No.2 by GMDA on 30.5.2006, clearly mentioning therein that no sanction was obtained by the Appellants under Section 24 & 25 of the Development Act and had actually violated the provisions of Building Bye-laws of Guwahati Municipal Corporation (for short, ‘building bye-laws’), in the following manner : G

“1. FAR of the building is 490 which exceeds allowable H

- A FAR 300.
2. Maximum floor height 93' exceeds allowable height 76' in this road.
- B 3. Since the building is mixed used with residential at top floors, setback required is 15' side to 20' rear, which is not maintained.
4. Balcony projection is allowed, maximum $\frac{1}{4}$ of the building length in any side, which is not maintained.
- C 5. Two staircases and lift on opposite direction is required which is not available in the building as per building plan.
- D 6. Construction of building is going on despite our order to stop construction."

20. The said order further directed demolition of the building beyond the sanctioned plan dated 3.2.2000. The Appellants, therefore, challenged the said order dated 30.5.2006 issued by Chief Executive Officer GMDA by filing another W.P.(C)No.2747 of 2006. In W.P.(C) No.5018 of 2002, (earlier W.P. filed in the Gauhati High Court) an order of *status quo* came to be passed on 12.8.2002 and it further directed that Municipal Authority shall take no steps to pull down the building and the operation of the letter dated 31.7.2002 was stayed.

21. It appears that pursuant to the said order, Appellants continued with the construction activities presumably on the ground that order of *status quo* is against the Respondents of the Writ Petition and not against the Appellants. Thus, Sanatan Dharam Sabha, Guwahati filed an application seeking permission to be impleaded in the said petition and also bringing to its notice that despite the order of maintenance of *status quo*, Appellants are continuing with the construction.

H Thus, another order clarifying the earlier order came to be

passed by the High Court on 20.9.2002 whereby a categorical direction was issued that no further construction over the said land shall be made and all construction activities should come to a standstill immediately. It appears that only after passing the said order, Appellants stopped the construction work.

22. Sanatan Dharam Sabha alongwith three residents of Panbazar locality of Guwahati city filed W.P.(C) No.5146 of 2002 in the Gauhati High Court against the action of GMC and GMDA granting permission to the appellant, M/s. Priyanka Estates for multi-storeyed building in question and prayed for its demolition.

23. Thus, all the three petitions, i.e. W.P.(C) No.5018/2002, W.P.(C) No.2747/2006 and W.P.(C) No.5146/2002 were consolidated for the purpose of analogous hearing and have been disposed of by Division Bench of Gauhati High Court vide impugned judgment and order dated 28.7.2006. Vide impugned judgment, the Writ Petitions preferred by Appellants herein numbered as 5018/02 and 2747/06 having been found devoid of merit and substance were dismissed but W.P.(C) No. 5146/2002 filed by Sanatan Dharam Sabha has been allowed to the extent indicated in the impugned order.

24. Feeling aggrieved and dissatisfied with the aforesaid judgment and order, civil appeal arising out of S.L.P.(C)No.14480/06 titled, 'M/s. Priyanka Estates International (P) Ltd. & Ors. vs. State of Assam & Ors.' has been filed by Builder and its Directors; civil appeals arising out of S.L.P.(C) No.15546/06 titled, '*Vishal Saraf v. State of Assam & Ors.*' and civil appeal arising out of S.L.P.(C)No.15547/06 titled, '*Suresh Kumar Harlalka v. State of Assam & Ors.*' have been filed by owners of flats on 7th floor and civil appeal arising out of S.L.P.(C) No. 16898/06 titled, '*Sarla Devi Lahoty vs. State of Assam & Ors.*' has been filed by owner of one flat on 6th floor. Insofar as civil appeals arising out of S.L.P.(C) Nos.28291-28294/2009 titled, '*Shyam Sunder Agarwala vs. State of Assam & Ors.*' are concerned, the same

A have been filed by owner of one flat on 5th floor only. Since the matters were common and identical challenging primarily the order passed by Division Bench of the High Court and pertained to the same building claiming identical reliefs, these Appeals have been heard together. Perused the records.

B 25. Mr. Shekhar Naphade, learned Senior Counsel, Mr. Mukul Rohtagi, learned Senior Counsel with Mr. Shankar Divate, Mr. Dhruv Mehta, Mr. Yashraj Singh Deora, Advocates, Mr. Vijay Hansaria, learned Senior Counsel with Mr. P.I. Jose and Mr. Kamal Mohan Gupta, Advocates appeared for the C Appellants in the aforesaid appeals. Mr. L. Nageshwar Rao, learned Senior Counsel with Ms. Millie Hazarika and Mr. Manish Goswami appeared for the Respondents.

D 26. Respondents have contended that for construction of any building, permission from GMC is a condition precedent and unless such permission is granted no construction can be raised.

E 27. It has further been submitted that such construction has to be as per the sanctioned plan approved by GMC and no deviation from such approved plan can be made.

F 28. According to them, Appellant No.1 was admittedly granted permission for construction of 5½ storeyed building, apart from basement, ground and mezzanine floor vide order dated 03.02.2000, thereafter, no further permission has been granted for raising any construction on remaining part of 5th floor and upwards. The order of the SAC dated 05.05.2000 setting aside the order of Commissioner, GMC dated 27.3.2000 rejecting the permission to raise construction on part G of the 5th floor up to 8th floor was itself illegal, beyond the jurisdiction and competence of SAC as it violated the building bye-laws.

H 29. In view of the admitted position that the width of the road is only 38 feet and under the building bye-laws, maximum

allowable height can be double the width of the road, i.e., 76 feet but in the instant case the SAC has allowed construction upto 93 feet, which contravenes the building bye-laws, therefore, such an order of SAC has no legal force and cannot be basis for construction beyond 76 feet, allowable under building bye-laws. A B

30. It has been submitted by them that the order of the SAC dated 05.05.2000 lost its force and sanctity after the communication dated 29.05.2002 was issued by GMC by which the Appellants were asked to comply with certain conditions before granting any permission for construction of a building for remaining part of 5th floor and above. C

31. It has also been contended that even though the order passed in Appellants' Writ Petition was to maintain *status quo* but taking advantage thereof, they continued with the construction and only on subsequent order being passed on 20.09.2002, the construction activities were stopped but by that time Appellants had already raised construction upto 8th floor, in flagrant violation of building bye-laws. D

32. They have also contended that GMDA passed an order under Section 88 of the Development Act for demolition of construction for remaining part of the 5th floor and above and that too after issuance of notices to Appellants and giving reasonable opportunity to them to show cause. Appellants were aware that construction beyond 5½ floor was without due sanction and approval, thus, obviously illegal, yet they continued with the same. E F

33. They further submitted that there was no violation of principles of natural justice. It was contended that Appendix III of the building bye-laws provides for compoundable and non-compoundable items. It is evident therefrom that construction of extra floor falls in the category of non-compoundable items meaning thereby if extra floor is constructed without due sanction/approval, then, it would be beyond the purview of G H

A compoundable items. As regards violation of principles of natural justice, they have contended that before passing the order of demolition, notices were issued to the Appellants to show cause, as required under Section 88 of Development Act but they did not take any action thereon.

B 34. Whenever Respondents asked for sanctioned/ approved plans for construction beyond 5½ floors, Appellants only showed them the plans which were sanctioned and/or approved for construction of, only upto 5½ floors. It was also contended by them that even upto that stage Appellants had failed to show any approved sanctioned plans and maps allowing them to construct beyond the permissible limit of 5½ floors. Thus, they have contended that the building constructed beyond 5½ floors is absolutely illegal, unauthorized and without any sanction plans, thus liable to be demolished.

D 35. In order to understand the various provisions of the Act, it is necessary to know the import of the relevant sections of the Act material for deciding the appeals.

E 36. Section 327 of the Act prohibits any person from erecting or re-erecting any building without written permission from the Corporation. Section 328 provides for submission of an application by a person interested to erect or re-erect a building to the Corporation for approval of the site together with site plan with land title document, elevation and sections of the building, specification of the work and also containing such particulars as may be required by bye-laws in that behalf. Section 329 empowers the Commissioner of the GMC to refuse such permission and to disapprove the site on the grounds formulated in Section 330. Section 331 provides for the grounds on which permission to erect or re-erect the building can be refused by GMC. Section 332 empowers the Commissioner to direct modification of the sanctioned plan. Section 333 stipulates the period within which erection or re-erection is to be completed. Section 337 empowers the

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Commissioner to require the removal or alteration of the work which may not be in conformity with bye-laws etc. Section 416 of the Act empowers the GMC to formulate different bye-laws including the bye-laws relating to the building. Section 438 of the Act provides for appeal from the order passed by the Commissioner including the order refusing to grant permission to construct or re-construct a building to the SAC. Sub-section (3) of Section 438 of the Act empowers the State Govt. to call for the records of any matter from the Corporation and to pass such orders as may be deemed necessary after examination of such records.

37. It is necessary to refer to Section 88 of the Development Act which reads as under :

"88. Power of demolition of building.-(1) Where any development has been commenced or is being carried on or has been completed in contravention of the Master Plan or development scheme or without the permission, approval or sanction referred to in Section 25 and Section 30 of the Act or in contravention of any conditions subject to which such permission, approval or sanction has been granted, the authority may in addition to any prosecution that may be instituted under the Act, make an order directing that such development shall be removed by demolition, filling or otherwise by the owner, occupier, manager or by any person at whose instance the development has been commenced or is being carried out or has been completed within such period not being less than five days and more than thirty days from the date on which a copy of the order of removal with brief statement of the reasons thereof has been delivered to the owner, occupier and manager or the person at whose instance the development has been commenced or is being carried out or has been completed as may be specified in the order and on his failure to comply with the order, the authority may remove or cause to be removed the

A development and the expenses of such removal shall be recovered from the owner, occupier, manager or any person at whose instance the development was commenced or was being carried out or was completed as arrears of land revenue; provided that no such order shall be made unless the owner, occupier, manager or the person concerned has been given a reasonable opportunity to show cause why the order shall not be made.

(2) The provisions of this section shall be in addition to and not in derogation of any other provision relating to demolition of buildings contained in any other law for the time being in force.

(3) No compensation shall be claimed by any person for any damage which he may sustain in consequence of the removal of any development under this section or the discontinuance of the development under Section 87 of this Act."

38. Mr. Shekhar Naphade, learned Senior Counsel for Appellants firstly strenuously contended before us that NOC dated 17.7.1999 granted by GMDA clearly stipulated that the plot purchased by Appellants would fall in the category of "residential-cum-commercial use" and width of the road abutted by the plot is proposed to be 50 feet. Thus, according to him, the height of the building can be 100 feet, being the double of the width of the road. Since the height of the building of the Appellants even after construction upto 8th floors is only 93 feet, the part of the building beyond 5½ floors is not liable to be demolished.

39. It was also contended by him that initial permission was granted by GMC whereas notices of demolition have been issued by GMDA which appears to be absolutely contrary and against the provisions of law. It was also contended that Respondents have failed to prove that any notices were sent

to them on 02.02.2001 or 05.09.2001 by GMDA as it has been categorically mentioned by the Appellants pursuant to third notice received by them and replied to. A

40. It was also argued that in the light of specific order passed by SAC, conscious decision has been taken by the Government and denial of hearing itself would amount to prejudice, consequently, violation of principles of natural justice. B

41. If Commissioner was dissatisfied with the modification of his order by the SAC then as provided under sub-section (2) of Section 438 of the Act, he was required to make a reference to the Corporation within 60 days thereof which he failed to do. He was, therefore, bound by the Appellate Order of SAC and could not have super-imposed his own views or conditions. C

42. Mr. Mukul Rohtagi, learned Senior Counsel appearing for Shyam Sunder Agarwala submitted that he is owner of part of the 5th floor which has not been sanctioned. D

43. According to Mr. Mukul Rohtagi half of the 5th floor has already been sanctioned and even if the width of the road abutted to the building is taken as 38 feet, the height allowed would be 76 feet. Thus, it will have no height problem. At the most, the only objection can be with regard to FAR which objection can be waived as the same falls within compoundable items. E F

44. Shri Shyam Sunder Agarwala had purchased the said flat on 18.04.2005 for a total amount of Rs.9,43,850. It has also been contended that after purchase of the said flat his name has been mutated in the Corporation records. He is paying property tax, water tax etc., which Corporation is accepting. Thus, for this reason also it is not liable to be demolished. G

45. He further contended that two parallel bodies, that is, GMC and GMDA cannot take action for demolition of the building as the permission was accorded by GMC whereas H

A notices of demolition have been issued by GMDA. Thus, according to him, whole procedure is illegal and void, thus liable to be quashed.

B 46. In the light of this, it has been contended that Section 88 of the Development Act could not be put into service against the Appellants as the same amounts to violation of principles of natural justice as no notice has been served on the said Appellant.

C 47. Mr. Vijay Hansaria, learned Senior Counsel appearing for other Appellants submitted that they are owners of flat No.7A/7C and 7D having purchased on 14.06.2004 and 03.01.2005 for a sum of Rs.17,72,460 and 9,43,850 respectively. He has reiterated that Section 88 of the Development Act has not been complied with inasmuch as no opportunity to show cause has been given to these Appellants, thus violation of principles of natural justice is writ large from the record. Commissioner had no other alternative but to abide by the Appellate Order of SAC and in any case it should have been treated as deemed sanction.

E 48. Shri Kamal Mohan Gupta, learned counsel appearing for Sarla Devi Lahoty, owner of a flat on 6th floor has also reiterated the aforesaid arguments already advanced by M/s. Shekhar Naphade, Vijay Hansaria and Mukul Rohtagi. Additionally, he has submitted that Sarla Devi Lahoty purchased a flat on 27.12.2004 for Rs. 8,63,010, after making due inquiries with regard to sanction of building plans etc. Thus, she would be a bonafide purchaser for value and for any acts of omission or commission said to have been committed by builder M/s. Priyanka Estates International Pvt. Ltd. this Appellant cannot be put to any loss.

G 49. After having gone through the record carefully, the crux of the matter is whether M/s. Priyanka Estates International Pvt. Ltd. is in possession of any approved or sanctioned plan

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beyond 5½ floors, i.e., for the remaining 3½ floors or not. If not, A
then what is the effect thereof?

50. It is clear from the record that the only plan approved
was on 03.02.2000 for 5½ floors by GMC. Order dated
05.05.2000 passed by SAC also does not give them blanket B
permission to construct upto 8th floor.

51. It is also to be seen that respondents have come to
the conclusion and have fairly conceded before us that plan or
sanction approved by either of the two authorities, that is, GMC
or GMDA will hold good and permission from both the C
authorities simultaneously would not be required for the same,
if it has already been accorded by any one of the authorities.

52. On the strength of this, we can safely proceed that if
no permission under Section 24 and 25 of the Development D
Act was obtained by M/s. Priyanka Estates International Pvt.
Ltd. then it would not be detrimental to the interest of the
Appellants, provided there is sanction and approval of plans by
the Corporation for remaining 3½ floors i.e. beyond 5½ floors.

53. Here, it is pertinent to point out that Respondents had E
also issued a public notice on 02.07.2002, published in local
newspaper in vernacular giving general warning and information
to all proposed purchasers of flats that unless builder is able
to show Completion Certificate and Occupancy Certificate duly F
issued by authorities, no one should enter into agreement to
purchase flat/flats from the builder. It is, therefore, to be
construed that public notice will hold good even with regard to
adherence to the requirement of Section 88 of the Development
Act, if individual person had not been noticed by the authorities.

54. Clause (a) of building bye-law 37 stipulates that for the G
purpose of calculation of building height, existing width of the
road shall be taken into account and not the proposed width.
Even if the proposed width is 40 feet or 50 feet, it will not make
any difference because it clearly contemplates that what is to H

A be taken into consideration is the existing width of the road. There is nothing on record to show that the existing width of the road is more than 38 feet. Thus, at the most, the construction could have been only upto the height of 76 feet, provided there was sanction granted by either of the two Authorities.

B 55. Appendix III of building bye-laws deals with penalties to be levied for violation of provisions of Master Plans, Zoning Plans Regulations and Bye-laws. Certain items are compoundable items but certain items fall in the category of non-compoundable items. However, addition of extra floor falls in the category of non-compoundable items. Thus, in any case anything that has been constructed beyond 5th floor would be non-compoundable and same cannot be compounded at all. In other words, minor deviations from the sanctioned plan should be confined only to the FAR permissible but should not extend to the extra floor.

56. For better appreciation of the aforesaid provision the same is reproduced hereinbelow :-

E "Appendix III

PENALTIES TO BE LEVIED FOR VIOLATIONS OF
PROVISION OF MASTER PLAN/ZONING PLAN
REGULATIONS AND BYE LAWS.

F (i) All provisions of Bye-laws except items given below shall not be compounded/regularized and shall have to be rectified by alteration/demolition at the risk and cost of owner.

G **Compoundable items:**

- | | |
|--------------|------------------|
| (1) Coverage | - maximum of 15% |
| (2) F.A.R. | - maximum of 10% |
| (3) Set Back | - Upto 2'- 6" |

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- (4) Open Space - Maximum 10% reduction A
(5) Total Height of Building - 1.5%

Non Compoundable items:

- (1) Use of building B
(2) Addition of extra floor
(3) Parking Norms C
(4) Parking Norms
(5) Projection/encroachment of public land."

Critical and analytical perusal of the same would show that addition of extra floor falls within the ambit of non-compoundable items. D

57. The order of SAC cannot be construed as an order of sanction as it is not a semblance of permission. It was not end of the matter because necessary sanction or permission could have been granted only by the Municipal Commissioner and not by the Appellate Authority. Admittedly, even after passing of the order by SAC in appeal, there was no further sanction by the Municipal Commissioner or by Chief Executive Officer of the Development Authority granting permission to raise the height of the building upto 8th floor. E F

58. Thus, looking to the matter from all angles, we are of the opinion that construction of the building beyond 5½ floors was not only illegal, unauthorized and without any sanction or approval of plans but was also against the spirit of Appellate Order of SAC. Thus, except for directing the Respondent-authorities to demolish 6th, 7th and 8th floor, we are left with no alternative. G

59. As regards construction of two flats on remaining half H

- A of 5th floor, Mr. L. Nageshwar Rao, learned Senior Counsel for Respondent-authorities fairly conceded that on suitable representations being made by the occupants, their cases can be considered afresh to find out if the same would fall within the category of compoundable items or not. If the same are found within the category of compoundable items then necessary order by respondents in this regard would be passed otherwise order of demolition would follow for them also. Thus, on the promise of Sr. Advocate Mr. L. Nageshwar Rao, we hope and trust, suitable orders would be passed by the Authorities as regards two flats on 5th floor are concerned within two months from the date of submission of the Representations.

60. Even though various authorities had been placed before us by the learned counsel appearing for parties, it is not required to deal with them in extenso. However, a cursory reference to the same would meet the ends of justice.

61. Mr. Shekhar Naphade has placed reliance on *Corporation of Calcutta v. Mulchand Agarwala* AIR 1956 SC 110 to contend that it should be a last resort to direct demolition of a building and if it falls within the compoundable limit then it should not be directed to be demolished. To advance contentions further in this regard, reliance has been placed on para 4 of an order of this Court in the case of *Syed Muzaffar Ali & Others v. Municipal Corporation of Delhi* 1995 Supp. (4) SCC 426 which is reproduced hereunder :

- "4. However, it is to be pointed out that mere departure from the authorized plan or putting up a construction without sanction does not ipso facto and without more necessarily and inevitably justify demolition of the structure. There are cases and cases of such unauthorized constructions. Some are amenable to compounding and some may not be. There may be cases of grave and serious breaches of the licensing provisions or building regulations that may

call for extreme stage of demolition.

A

62. Reliance has also been placed on yet another judgment of this Court in the case of *Muni Suvrat-Swamy Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & Others* (2006) 8 SCC 590, which dealt with Section 351 of the Bombay Municipal Corporation Act to hold that if execution of work has commenced contrary to provisions of the Act, then to give notice to the person carrying on the construction work to show cause why it should not be pulled down, is a must. The use of the word "shall" would signify that it is mandatory to issue notice and then to pass any order. Lastly, a recent judgment of this Court in the case of *Municipal Corporation, Ludhiana v. Inderjit Singh & Anr.* (2008) 13 SCC 506 has been pressed into service. This also deals primarily with the requirement of issuance of show cause notice to the person who had raised construction, so as to enable the said party to show cause, if the construction has been made in total violation of the sanctioned map or it falls within the category of compoundable items.

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63. Mr. Vijay Hansaria has placed reliance on the famous off-quoted judgment of this Court in the case of *Olga Tellis and Others etc. v. Bombay Municipal Corporation & Others etc.* (1985) 3 SCC 545 which dealt with plight of the pavement dwellers, who were in unauthorised possession and were sought to be evicted. He sought to contend that the fundamental rule of principles of natural justice should have been followed before passing the order of demolition.

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64. Further with regard to opportunity of hearing he has placed reliance on a judgment of this Court in the case of *S.L. Kapoor v. Jagmohan and Others* (1980) 4 SCC 379.

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65. On the other hand, Mr. L. Nageshwar Rao has placed reliance on various judgments of this Court, viz., *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Others* (1999) 6 SCC

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- A 464; *Friends Colony Development Committee v. State of Orissa and Others* (2004) 8 SCC 733; *Royal Paradise Hotel (P) Ltd. Vs. State of Haryana and Others* (2006) 7 SCC 597; and *Mahendra Buburao Mahadik and Others v. Subhash Krishna Kanitkar and Others* (2005) 4 SCC 99 to contend that
 B where constructions have been made in absolute and flagrant violation of the sanctioned plan then the only alternative is to direct demolition of the same.

C 66. It is not necessary to deal with the aforesaid judgments of this Court in greater detail as the consistent *ratio decidendi* of this Court is that if the constructions are in absolute violation of sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is to order its demolition and seal of approval for such illegal activities is not required to be given by this Court.

D 67. It is pertinent to mention here that hearing of the appeals had commenced on 22.10.2009 and had almost concluded on 28.10.2009. But on the said date, Mr. Anoop George Chaudhary and Ms. June Chaudhary, learned Senior
 E Counsel, appeared with Mr. Kamal Mohan Gupta for Sarla Devi Lahoty and submitted that they would be replying to the arguments advanced by learned counsel for Respondents. Though not approved as a healthy practice, yet we granted them permission.

F 68. It was submitted by them that if cases of two flat owners on the 5th floor are to be considered so as to find out whether the constructions raised by the builder in their cases would fall within the compoundable items or not, then the case of Sarla
 G Devi Lahoty should also be directed to be considered on a suitable representation being made by her, as her flat is situated on the 6th floor. It was contended that even after taking the height of 6th floor, it would not cross the maximum height of 76 feet looking to the width of the existing road.

H 69. However, the said contention cannot be accepted as

construction of an extra floor does not fall within the category of compoundable items which is manifest from Appendix III of the building bye-laws of the Corporation reproduced hereinabove. A

70. However, with regard to two flats on 5th floor, a direction can be given to the Respondents to consider their cases if they submit their representations within a period of 30 days hereof. Respondents would examine whether their cases fall within the compoundable items/limit or not. In case, Respondents come to the conclusion that these two flats constructed on 5th floor fall within the compoundable limit, then necessary orders be passed in this regard, after charging compounding fees as may be applicable to the facts of the case, in accordance with law, otherwise, they would also face the wrath of demolition. B C

71. Even a conjoint reading of the order dated 05.05.2000 passed by SAC and the order dated 29.05.2002 of the Administrator-cum-Minister makes it clear as noon day that it does not clothe the Appellants to continue with the construction work beyond 5½ floors as these orders were passed subject to fulfilling certain conditions contained therein. D E

72. It is obvious that what would ultimately constitute a sanctioned and duly approved map would be the one approved by the Commissioner as he alone has authority to do so. The Appellants have failed to produce any such duly approved map. F

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

A public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the Builder.

B 74. Even though on earlier occasions also, under similar circumstances, there have been judgments of this Court which should have been a pointer to all the builders that raising unauthorised construction never pays and is against the interest of society at large, but, no heed to it has been given by the

C builders. Rules, regulations and bye-laws are made by Corporation or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand

D or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

E 75. The jurisdiction and power of courts to indemnify a citizen for injuries suffered due to such unauthorised or illegal construction having been erected by builder/coloniser is required to be compensated by them. An ordinary citizen or a

F common man is hardly equipped to match the might and power of the builders.

76. In the case in hand, it is noted that number of occupiers were put in possession of the respective flats by the builder/developer constructed unauthorisedly in violation of the laws.

G Thus, looking to the matter from all angles it cannot be disputed that ultimately the flat owners are going to be the greater sufferers rather than builder who has already pocketed the price of the flat.

H 77. It is a sound policy to punish the wrong-doer and it is

in that spirit that the courts have moulded the reliefs of granting compensation to the victims in exercise of the powers conferred on it. In doing so, the courts are required to take into account not only the interest of the petitioners and the respondents but also the interest of public as a whole with a view that public bodies or officials or builders do not act unlawfully and do perform their duties properly.

78. In the case in hand, admittedly, at no point of time Appellant No.1- M/s. Priyanka Estates International Pvt. Ltd. was able to show to its prospective purchasers the Occupancy Certificate or Completion Certificate issued by the authorities concerned. The same could not even be shown to us and without it, Appellant No.1 could not have embarked into sale of flats as it was mandatorily required.

79. The instant case is not a case of breach of contract. It is a clear case of breach of the obligation undertaken to erect the building in accordance with building regulations and failure to truthfully inform the warranty of title and other allied circumstances.

80. Even though at the first instance, we thought of invoking this Court's jurisdiction conferred under Article 142 of the Constitution of India so as to do complete justice between the parties and to direct awarding of reasonable/suitable compensation/interest to the flat owners, whose flats are ultimately going to be demolished, but, with a very heart, we have restrained ourselves from doing so, for variety of reasons and on account of various disputed questions that may be posed in the matter. However, we grant liberty to those, whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law.

81. We also feel it necessary and expedient to direct the Respondent-authorities that if ultimately flat owners, whose flats are going to be demolished shall be given at least three

A months' time to vacate the same. This would enable them to mitigate the losses that may be incurred by them. We accordingly direct so.

B 82. In the light of the foregoing discussions, these appeals are dismissed with the directions contained hereinabove. Respondent-authorities shall be at liberty to proceed with demolition of half of the 5th floor, if not ultimately compounded; 6th, 7th and 8th floors as mentioned hereinabove.

C 83. Counsel's fee Rs. 10,000/- each.

K.K.T.

Appeals dismissed.