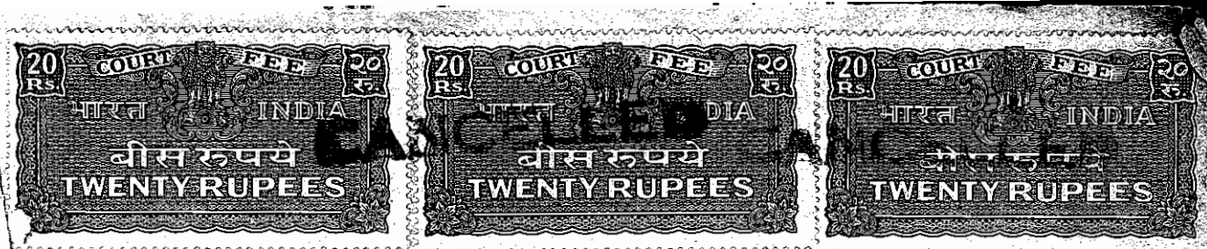

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)

Writ Petition No. 4562/2000 (2)

PETITIONERS :

1. Raj Kumar College Society, a Society registered under the provisions of Societies Registrikaran Act, 1860 and having deemed registration under the provisions of M.P. Societies Registrikaran Adhiniyam, 1973, through its Secretary, College Ward G.E. Road, Raipur, District Raipur (M.P.)

2. Ashok Singhania, S/o. Shri Virdichand Singhania, aged about 45 years, Managing Partner M/s. Avinash Builders, a partnership firm registered under the Indian Partnership Act, 1932, resident of G.E. Road Raipur (M.P.)

V E R S U S

RESPONDENTS :

1. State of Madhya Pradesh, Through Secretary, Urban Administration & Development Department, Vallabh Bhawan, Bhopal

2. Collector, Raipur (M.P.)

3. Joint Director, Town & Country Planning, Raipur (M.P.)

4. Municipal Corporation Raipur, a body incroprated under Section 5 of the M.P. Municipal Corporation Act, 1956, having its office at G.E. Road, Raipur (M.P.)

Surendra Kumar Khare
S. K. Khare
Advocate

WRIT PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA

HIGH COURT OF CHHATTISGARH : BILASPUR

WRIT PETITION NO. 4562/2000

Raj Kumar College Society and Another

- Versus –

State of Madhya Pradesh (Now Chhattisgarh)

And Others.

ORDER

POST FOR 28 /09/2001

Sd/-
R.S. Garg
Judge

(304) AFR

HIGH COURT OF CHHATTISGARH : BILASPUR

WRIT PETITION NO. 4562/2000

Raj Kumar College Society and Another

- Versus –

State of Madhya Pradesh (Now Chhattisgarh)

And Others.

ORDER

Per Hon'ble R.S.Garg,J. :

By this petition Under Article 226 of the Constitution of India the petitioners seek to challenge the correctness, Validity and propriety of the Order dated 06.05.2000. (Annexure- P/19) passed by the Ministry of Urban Administration and Development Department, cancelling the building permission No.398, dated 27.06.98. on the ground that the order passed by the State Government is contrary to law and is also bad on the factual foundation. The order - Annexure- P/19 has been issued by the State Government in exercise of Powers under Section 299-A of the M.P. Municipal Corporation Act, 1956.

2). The facts necessary for the disposal of the petition are that the petitioner No.1 Raj Kumar College as alleged was founded at Jabalpur in 1882 and was later on shifted to Raipur at its present site in 1894. By a

(205)

registered indenture of lease dated 24.10.1964 . the State Government leased out an area ad-measuring 54,06,612 Sq. Ft. of nazul land situate at West Civil Station, G.E. Road, within the limits of Municipal Corporation, Raipur for a term of 30 years, commencing from 24.10.64. The lease was later on renewed and is effective upto 31.3.2022. The details of the demised premises are mentioned in paragraph 5.2 of the petition and have not been disputed by the respondents. According to the petitioners, in March 1953 memorandum of association and rules and regulation of Petitioner Society were amended for the second time by which Hon'ble Governors of Madhya Pradesh, Orissa and Bihar were made Patrons of the Society and the President of India as Patron-in-chief. According to the petitioners, it has almost 800 students studying in the said college/ School. The school is affiliated to the Central Board of Secondary Education. They submit that the Government of India so also the State Government due to financial constraints have drastically reduced their contribution for education and the State Government has advised the educational institutions to devise ways and means to generate their own funds for carrying out their further developmental activities in the institution.

3). The premises which have been leased out in favour of the petitioners on the northern side abuts national high-way No.6, popularly known as Great Eastern Road(G.E.Road) and passes through the middle of the city of

(306)

Raipur. According to the petitioners for the past several years the petitioner No.1 was facing acute problems of encroachment over the demised land abutting on the G.E.Road, the recurring encroachment became regular nuisance and the same was also posing a potential threat to the peace and tranquility of the hostel run and managed by the petitioner No.1 Society in which according to the petitioner No.1 almost about 500 students have been boarded. The society took a decision to construct permanent shops all along the northern boundary wall facing G.E.Road and covering approximately an area of 20,000 Sq. Ft. The Society by a resolution dated 30th June, 1994 gave powers to its Managing Committee to control and administer the property movable and immovable of the Society to raise funds, acquire and sell the property to hold interest for the Society. This resolution was approved by the Registrar of Firms and Societies, Bhopal. The Managing Committee thereafter took-up the project for construction of the shops/ shopping complex on the strip of the land facing G.E. Road admeasuring 40 x 1120 Ft. on the eastern side of the northern gate and 40 x 960 Ft. on the western side of the gate and invited tenders from the builders and contractors to undertake the project.

4). According to the petitioners M/s Avinash Builders, Raipur represented by Ashok Singhania- petitioner No.2 agreed to the terms and conditions of the petitioner society, therefore, the Society approved the offers of M/s Avinash Builders - Petitioner No.2 and one

(307)

M/s Jitendra Properties to develop both the strips of the land and to pay premium of Rs. 12,00,000/- each and also to pay annual lease money of Rs.6,00,000/- after completion of the complex. The petitioners submit that after some time M/s Jitendra Properties backed out of the agreement, therefore, M/s Avinash builders were requested to take-up the project left by M/s Jitendra Properties, who in his turn accepted the proposal and agreed to pay premium of Rs. 24,00,000/- and annual lease money of Rs.12,00,000/-. The petitioners say and submit that in accordance with Section 29 of the M.P.Nagar Tatha Gram Nivesh Adhiniyam,1973, they made an application to the Joint Director, for grant of permission to develop the land. The Joint Director, Town and Country Planning, vide Order dated 30.1.96.- Annexure-P/4 was pleased to grant permission subject to terms and conditions mentioned in the said order.

5). Being aggrieved by the conditions imposed in the said order the petitioners filed a revision petition under Section 32 of the Adhiniyam. The State Government vide its Order dated 26.3.97. set aside the order dated 30.1.96. passed by the Joint Director and required the petitioners to make a fresh application in accordance with Section 29 of the Act. In accordance with the liberty given by the State Government the petitioners made yet another application to the Joint Director for according permission. The Additional Collector after obtaining reports from different persons and departments issued his no objection te

(308)

on 27.10.97. The Joint Director, Town & Country Planning, Raipur after reconsidering the entire matter afresh, vide his order dated 23.1.98.(Annexure-P/7) accorded permission to the petitioners to develop the land subject to terms and conditions mentioned in the order. Subsequent to that the petitioners made an application to the Municipal Corporation,Raipur. Municipal Corporation, Raipur vide its permission No.398, dated 6.6.98. (Annexure- P/8) allowed the construction.

6). The petitioners were permitted to raise height of the building upto 22 feet. The petitioners thereafter, proceeded with the work. The petitioners say and submit that the land on which proposed shops were to be constructed, was undulated and had number of ditches. The land was atleast about 7 or 8 feet below the road level, therefore, pillars were erected in order to bring the level of the construction to the height of the road. The petitioners thought changes in the proposed construction as sanctioned by the Municipal Corporation, have become inevitable. The petitioner No.1 on 15.4.99. submitted an application to the Commissioner, Municipal Corporation, for proposed changes in the height of the ground floor from 12 Ft. to 16.5 Ft.. According to them, a copy of the application (Annexure-P/9) was received by the Corporation on 19.4.99., but the Municipal Corporation did not convey its refusal to the proposed modification within the statutory period of 30 days as provided under Sub-Section

309

(3) of Section 295 of the M.P.Municipal Corporation Act, therefore, the petitioners taking benefit of the statutory fiction of deemed permission proceeded further with the construction. According to them, the petitioners had deemed sanction in their favour w.e.f. 18.05.99. in view of the Section 295(3) of the Act. According to them, the respondent/Corporation served them with a communication dated 6.8.99. (Annexure- P/10) beyond the prescribed statutory period of 30 days informing the petitioners that the revised plan submitted by them could not be sanctioned. According to the petitioners, Annexure- P/10 issued by the respondent/Corporation was null and void. The petitioners further say that they were served with a notice dated 15.6.99. (Annexure- P/11) purporting to have been issued under Section 293 and 307 of the Municipal Corporation Act,1956 by which an objection was raised with regard to construction of Mezzanine floor at the height of about 9 Ft. from the ground floor. The petitioners were required to stop the construction work. According to the petitioners, under the legal advise they continued with the work on the basis of deemed sanction. Vide Annexure- P/12, notice dated 13.8.99. the petitioners were required to comply with Annexure-P/11. The petitioners in their turn Vide Annexure-P/13 sent reply to the Corporation Authorities that the construction was being carried out in accordance with the sanctioned plan and they were not committing any violation. Vide Annexures P/14 to P/16, notices dated 29.9.99, 15.9.99 and 3.1.2000. were again issued to the

(310)

petitioners. According to the petitioners the notices were unnecessarily interfering with their right to construct because by that time the petitioners had made huge investment of about Rs.60,00,000/- towards the construction of building. The petitioners submit that the State Government in exercise of its powers vested in it under Section 421 of the M.P.Municipal Corporation Act, issued a notice dated 4.2.2000. (Annexure- P/17) to show-cause as to why the building permission No.398 be not recalled or cancelled. From Annexure- P/17 which has also been filed by respondent No.4 as Annexure- R-4(2), it would appear that the notice was issued under Section 299-A of the Corporation Act. The petitioners submit that they submitted their reply vide Annexure- P/18 and informed the State Government that they did not make any illegal construction. The construction was in accordance with the sanction and deemed sanction and as they have not made any illegal construction, sanction could not be recalled or cancelled. According to the petitioners, they had informed the State Government that they have not made any illegal construction in the marginal open space (MOS) nor they had constructed the basement. According to the petitioners the construction was in accordance with law and therefore, there was no good reason for the State Government to recall the order, but, however, the State Government vide its order dated 6.5.2000. (Annexure- P/19) cancelled the earlier sanction and directed the Municipal Corporation to take action in accordance with law. The petitioners submit

311

that the order passed by the State Government and subsequent action taken by the Municipal Corporation are bad, illegal and contrary to law, therefore, the order passed by the State Government and all consequent actions taken by the other authorities deserve to be quashed. The petitioners further submit that on 14.1.2000. they made an application to the Joint Director, Town & Country Planning, Raipur, that the land use be changed from educational to commercial. According to them vide Annexure-P/22, the Joint Director made recommendations in favour of the petitioners and submitted to the Director that the land use may be changed in relation to part of the land from educational to commercial. The petitioners also submit that the State Government in accordance with the application of the petitioners and the recommendations of the Joint Director/Director published its intention in two news papers on 16th September and 17th September, 2000, but within the period specified no objections were received, therefore, vide notification No. F-3-149-32-2000, dated 17.10.2000, published in Gazette, dated 20.10.2000. the State Government changed the land use of land Nos.27, 30 and 31, total area of 80,000 Sq. Ft. from "public and demi-public (education)" to commercial parking etc. They submit that if the land use has already been changed from educational to commercial, at this stage the respondents cannot be allowed to say that the construction of shops was contrary to the provisions of law. The petitioners also submit that if the area has now become commercial, the

312

State Government or Municipal Corporation cannot be allowed to say that the sanction was given for construction of small shops and as the petitioners have constructed 60 shops, the petitioners have violated the spirit of the order passed by the Joint Director, Town & Country Planning.

7). The respondent Nos.1 and 2 have filed their separate returns, but virtually have raised identical pleadings. According to these respondents, permission granted by the Municipal Corporation was wrong, illegal, improper and was against the order of the permission of Housing and Environment Department dated 23.6.97. According to these respondents, the Joint Director, Town & Country Planning granted permission to the petitioners subject to certain conditions, the petitioners could raise the construction in accordance with the said permission only. They further submit that the petitioners were never accorded permission for construction of 60 shops (Shopping complex) nor they were granted permission for construction of residential units. According to these respondents, permission granted by the Municipal Corporation was running contrary to Annexure R-1 (3). It is also submitted by these respondents that only 12 shops could be raised by the petitioners in accordance with the Annexure- P/6. It is further submitted by them that the Government was Competent to take action under Section 299-A of the Municipal Corporation Act. These respondents also submit

that the permission granted by the Municipal Corporation was cancelled because the petitioners violated the lease conditions by converting/developing the lease hold property for commercial purposes. Denying the grounds, they have prayed for dismissal of the petition.

8). The respondent No.3 did not propose to file any return.

9). The respondent No.4 - Municipal Corporation filed its separate return. In its return, it has submitted that the respondent No.1 was justified in cancelling the building permission. According to them, they had submitted their comments before the State Government. They also submit that the petitioners were raising illegal constructions, were constructing the basement, had constructed mezzanine floor and did not leave three and half feet marginal open space on either side of the shop, therefore, ~~Also~~ R.S. the Corporation issued notices to the petitioners and the State Government was justified in cancelling the building permission. It is also submitted by them that they received the petitioners' application dated 15.4.99. and have rightly rejected the same on 6.9.99. According to them, the petitioners have not challenged the order dated 6.9.99., therefore, they cannot be allowed to say that there was a deemed sanction in their favour and the petitioners were entitled to proceed with the construction. It is also submitted by them that in

(314)

accordance with Annexure- P/19 they have to take steps and they are not acting illegally.

10). Shri Alok Aradhe, learned counsel for the petitioners submits that the State Government is unjustified in saying that only 12 shops were to be constructed. According to him, the Collector in Annexure-P/6 recommended construction of 12 shops, but the Joint Director, Town & Country Planning, did not restrict the construction to 12 shops only. According to him, from Annexure-P/7 it would clearly appear that no such condition was imposed.

11). Shri Ranbir Singh, learned counsel for the State, on the other hand submitted that only 12 shops were to be constructed.

12). Annexure-P/7 dated 23.1.98.is the sanction accorded by the Joint Director, Town & Country Planning, it says that 20,000 Sq. Ft. of land of Block No.27, 30 and 31 of Plot No.8.22 admeasuring 540612 Sq. Ft. is permitted to be developed in accordance with Section 30(3) of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 read with Rule 27 of the M.P. Bhoomi Vikas Niyam, 1984, the Joint Director imposed as many as 12 conditions in the said order, but no-where said that only 12 shops were to be constructed. Undisputedly, the order Annexure-P/7 is still stands and the State Government or any authority has not recalled or

315

revised the said order. The conditions say that the shops would be constructed in accordance with M.P. Bhoomi Vikas Niyam,1984; without offending the archeological beauty of the building. It imposed certain conditions that what would be distance from the center of the main road, maintenance of parking and corridor in front of the shops, trees would not be fell, the petitioners would be required to obtain sanction or permission from the competent authority before raising construction and the said sanction would be valid for a period of 3 years, but on an application it may be extended to a total period of 5 years.

13). After going through the entire order (Annexure-P/7), I am unable to find that the Joint Director accorded permission or sanction only for 12 shops. In fact, the Joint Director, Town & Country Planning, Raipur allowed development of 20,000 Sq. Ft. of land and permitted construction of the shops and residential purposes.

14). Shri Manindra Shrivastava, learned counsel for respondent No.4 submitted that in accordance with the sanctioned map three and half feet land was to be kept open as the marginal open space meaning thereby that between two shops atleast 7 feet land was to be kept open. Referring to the sanctioned map, he submits that the petitioners without leaving the said marginal open space covered the area of marginal open space and as such they have raised illegal construction.

316

15). Shri Alok Aradhe, learned counsel for the petitioners submits that a perusal of the map along with the conditions appended on the back of the map would show that three and half feet or seven feet marginal open space was not to be left open between two shops. He submits that a perusal of the map, design and elevation would show that no marginal open space between two shops was to be left open.

16). I have gone through the original map which was produced by the Corporation at the time of final hearing and the conditions appended with Annexure-P/8. The condition Nos. 1 to 16 appended to sanctioned map do nowhere say that on either side of the shops three and half feet land was to be kept open and/or between two shops a distance of 7 feet was to be maintained.

17). Shri K.P.Bajpai, Officer-in-Charge, for respondent No.4, who also happens to be Town Planner was present in the Court at the time of hearing. Placing strong reliance upon the sanctioned map, the Town Planner Mr.K.P.Bajpai made a submission before this Court that the block was to be constructed in a fashion and design that three and half feet open place was left on either side of the block. According to him, between two blocks, an open place of 7 feet was to be made available because between two blocks three and half feet distance from each block was to be left open. He submitted before the Court that the

317

conditions under which map was sanctioned are typed on the back of the sanctioned map. He made a statement before the Court that in the said typed matter this particular condition of leaving three and half feet open place from the side of the block was mentioned.

18). I went through the said conditions and to my surprise I found that there was no such condition imposed. I gave the original document to Mr. Bajpai, who after going through these documents says that on the back of the sanctioned map, no such condition has been imposed . The Town Planner admits before this Court that when the construction was going on, he himself inspected the spot. According to him, he found that the construction was contrary to the sanctioned map because he did not find 7 feet open place between two blocks but he did not issue any notice to the petitioner or the builder that the construction was being raised contrary to the sanctioned map. The Town Planner Mr.Bajpai admits in presence of his counsel that when the construction was going on, number of persons inspected the constructions but not even a single officer ever reported to the Corporation that the required 7 feet open place was not left between two blocks and no notice was ever issued on any such report by the Corporation to the petitioner or the builder that the construction was contrary to the sanctioned map.

(318)

19). On being asked that if the sanctioned map does not show that open place of three and half feet was to be left on either side of every block making an open place of 7 feet between two blocks and on inspection it was so found that no open place was left, why the notices were not issued, the Town Planner, Mr. Bajpai through his counsel says that specifically such notices were not issued but the notices saying that the construction was illegal were issued. I pointedly asked that in a case where the open place was not left why the construction was allowed to continue, neither the counsel nor Mr.Bajpai said anything. When I asked that why it should not be presumed on strength of the map and the conditions appended on the back of the map that no such open place was to be left, learned counsel said that a fair reading of the map would show that open place of three and half feet on either side of block was to be left making it total 7 feet between two blocks.

20). After going through the map and the conditions appended on the back of the sanctioned map, I am unable to hold that the petitioners were required to leave three and half feet marginal open space on either side of the shop or required to maintain distance of 7 feet between two shops. The argument raised by learned counsel for the respondent No.4 deserves to and is accordingly rejected.

21). Shri Manindra Shrivastava,learned counsel for the Corporation submitted that contrary to the sanctioned plan

319

the petitioners raised construction of basement below the ground floor and as the basement was not allowed to be constructed, total construction is contrary to the plans.

22). Shri Alok Aradhe, learned counsel for the petitioners countering the argument submitted that the ground was undulated; there were big ditches and the level of the ground was about 3 to 7 feet below the road level, therefore, after going further excavation the pillars were raised. The petitioners thought that if the basements are constructed it would raise some revenue for them, but immediately after the objection was raised by the Corporation they did not construct the basements and covered the entire area from the side walls and thereafter put the floor of ground floor on the columns. According to him, the area underneath the floor or ground floor is hollow and none have any access to it. He further submits that as the area was left as it is it cannot be used and utilized as a basement. According to him underneath no flooring has been done, no proper walls have been raised, no water proofing has been done and as there is no access to the said hollow area it cannot be termed as a basement.

23). It is to be noted that in accordance with the directions of this Court parties were required to file their affidavits and photographs. The petitioners in accordance with the directions have filed photographs and

320

affidavit inter-alia submitting that there is no access to the hollow area. In support of this contention the petitioners have filed as many as six photographs. The affidavit filed by Ashok Singhania says that during the course of the construction it was felt that provision for basement would be a good proposition to over come the drawback of ditches, but as the request for basement was rejected by the Municipal Corporation the idea was abandoned and the work was restricted to excavation work only. Mr. Ashok Singhania has clearly stated that no basement has been constructed; the space between the pillars is covered by wall; there is no approach to the alleged basement; the said area has no walls or floors and he clearly stated that the basement is not in existence.

24). Respondent No.4 has filed its detailed reply supported by an affidavit of Mr. K.P.Bajpai, Town Planner. In relation to the basement it is submitted that the petitioners constructed basements in 11 blocks. In support of this submission certain photographs have been filed. I require Mr. Manindra Shrivastava to go through the photographs and make submission that whether the basements are in existence or not and Shri Manindra Shrivastava and Mr.K.P.Bajpai after going through the photographs filed by the petitioners and the Corporation admitted that in fact there are no basements as such, but the hollow area underneath the floor of the ground floor has the potential of being converted into basements. Mr. K.P.Bajpai, however,

(321)

admitted that there is no approach to the hollow area and unless the side walls or the floor of the ground floor is demolished, the vacant area cannot be used or utilized as a basement. They, however, submit that if the petitioners under-take to fill this hollow area, the Corporation would have no objection.

25). In the opinion of this Court when the basements are not in existence but the columns have been raised from the depth of 6 or 7 feet and the surrounding area has been simply covered by walls to avoid any accidents, it would be too-much to say that the basements are in existence. The respondent/ Corporation shall always be free to take action against the petitioner or the occupants of the shops if they convert the hollow area into a basement.

26). Shri Alok Aradhe, learned counsel for the petitioners submitted that they made an application to the Corporation on 15.4.99. and as the application was not rejected within the statutory period of 30 days, the petitioners were justified in assuming that they had the deemed sanction.

27). Shri Manindra Shrivastava, learned counsel for respondent No.4 submits that in a case where an application for erection or re-erection is submitted and no orders are passed on the application within the period of 30 days, then in accordance with Section 295(3) of the Municipal

(322)

Corporation Act, the parties making an application may presume that there would a deemed sanction and it may proceed with the work. He further submits that in a case where a party makes an application for erection or re-erection and without awaiting any orders from the Corporation, proceeds with the construction, then in a case like such construction would be illegal. According to him, in the present matter the Corporation had issued notices to the petitioners to stop construction, therefore, deeming fiction would not come into operation.

28). Section 295 (3) of the Municipal Corporation Act reads as under :-

> "Notwithstanding anything contained in sub-section (2)but subject to the provisions of sub-section (10) of section 291 if the Commissioner within thirty days of the receipt from any person of a valid notice of such person's intention to erect or re-erect a building, or within sixty days of such receipt if the notice relates to a building on the same or part of the same site on which sanction for the erection of a building has been refused within the previous twelve months, neglects or omits to pass orders sanctioning or refusing to sanction such erection or re-erection, such erection or re-erection,

323

shall, unless the land on which it is proposed to erect or re-erect such building belongs to or vests in the Corporation , be deemed to have been sanctioned, except in so far as it may contravene any (rule) or bye-law or any town-planning scheme sanctioned under this Act or any other enactment for the time being in force.

Provided that if an order granting or refusing such sanction is suspended under Section 421 the period specified by this sub-section shall commence to run afresh from the date of communication of final orders under the said sanction by the Government."

A fair perusal of the Section 295 (3) would make it clear that if the sanction is not refused within the statutory period, then the plan shall be deemed to have been sanctioned.

29). Unfortunately, the original records which were produced before me do not contain any notices that in anticipation of the sanction the petitioners were proceeded with the work. In fact vague notices were issued to the petitioners that the construction was illegal. The Corporation did never issue any notice to the petitioners

(324)

that during the pendency Of his application for further sanction he was proceeding with the construction.

30). It is to be seen from the records available in this file and the original records maintained by the Corporation that notices were issued to the petitioners, but not even a single notice said that without awaiting final orders from the Corporation the petitioners were proceeding with the construction. There is nothing on record to show or suggest that before expiry of the statutory period of 30 days, the petitioners raised any construction. The petitioners' contention that they started construction after 30 days has to be accepted.

31). Shri Manindra Shrivastva, learned counsel for the respondent No.4 submitted at this stage that as the Corporation issued a notice under Section 307 of the Municipal Corporation Act, the petitioners could not proceed with the construction. I am unable to concede to this argument.

32). Section 307 relates to the powers of the Corporation/ Commissioner to require removal or alteration of the work which is not in conformity with bye-laws or any scheme or any other requirement. Section 295 is not controlled by Section 307 so far as it relates to deemed sanction. So far as the deemed sanction is concerned it shall not affect the rights of the Corporation to alter or

325

remove the construction which is not in conformity with bye-laws or any scheme or any other requirement nor it would clothe the party with a right to make construction in contravention of any rule or bye-laws or town planning scheme sanctioned under the Corporation Act or any other enactment for the time being in force. It is not the case of the Corporation that the construction was in contravention of any rule or bye-laws or any town planning scheme sanctioned under the Act or any other enactment for the time being in force. In fact their submission is that as a notice under Section 307 was issued to the petitioners, the deeming fiction would not come into operation. I am unable to concede to the argument. When a party makes an application seeking building permission and the Corporation or its authorities do not come out of their slumber or hibernation for a period of 30 days, then, the party is entitled to presume that there is a deemed sanction and it can proceed with the construction.

33). It is also to be noted that notices issued under Section 307 of the Municipal Corporation Act would not stop running of the time as provided under Section 295 (3) of the Corporation Act. Undisputedly, the application dated 15.4.99. was rejected for the first time on 6.9.99.,therefore, the petitioners were justified in presuming that there was deemed sanction. The Corporation and its authorities cannot take advantage of their own lapses. When this Court asked as to how the right of

(320)

demolition as expressed under Section 307 and right of construction envisaged under Section 295 be read together, Shri Manindra Shrivastava submitted that if a person raises any construction in anticipation of the sanction or the deemed sanction, then, the Corporation has a right to demolish. He, however, was unable to to say anything that the time provided under Section 295 (3) would stop running against the Corporation.

34). Shri Ranbir Singh and Shri Manindra Shrivastava submitted that in accordance with the permission granted by the Joint Director, Town & Country Planning it was presumed that small shops for utilities would be constructed. They submit that the manner in which the area is sought to be used would show that in place of small shops a big complex is to be made. On being asked that how the area of 40 x 35 Feet would be deemed as a small area, placing reliance upon the sanctioned map, they submit that in each block there were supposed to be five shops. It is not the case of the Corporation that the petitioners have changed basic plan. Their argument is that the area wherein five shops were to be constructed, one big shop or hall has been constructed. Neither Shri Ranbir singh nor Shri Manindra Shrivastava say that building is out of proportion, it is not in accordance with line or out-side construction infringes the sanctioned plan. Their argument is that in place of small shops, big shops have been constructed. I fail to understand that how the Corporation or the State Government

(327)

would be adversely affected if one wall is placed at a particular place or not inside the building. The Corporation no-where says nor is the stand of the State Government is that the petitioners have encroached upon the other persons land or have constructed a shop larger than 40 x 35 feet. The stand of the Corporation and the State Government was that only small utility shops were to be constructed, but when they were confronted with the sanction granted by the Corporation for raising residential premises they said that the petitioners might have asked the Corporation that the residential area would be used by their staff; in-fact this argument is in oblivion of Annexure -P/7. A perusal of condition No.2 of Annexure-P/7 would make it clear that permission was accorded to the petitioners to construct the shops and residential area. After going through the records, Shri Manindra Shrivastva and Mr. K.P.Bajpai were unable to say that any request in writing was made to the Corporation by the petitioners that the residential area would be used by their staff. In fact the petitioners made their applications in accordance with the permission accorded by the Joint Director and the respondent/ Corporation with open eyes sanctioned the plan.

35). When this Court asked Mr. K.P.Bajpai and Mr. Manindra Shrivastava that if internal walls in the construction are to be removed and four or five different rooms/ shops are converted into one big shop or hall how the Corporation would be adversely affected, they simply

(328)

submit that such construction would be contrary to sanctioned plan. They do not say that the construction raised on the spot was contrary to the sanctioned plan. They also do not say that the front side or elevation was changed or the petitioners offended out-side construction. The grievance which should have been raised by the State Government ~~is~~ that in place of small utility shops a commercial complex was sought to be raised, is raised by the Corporation. When the Court required learned counsel for the respondents to make their submission in relation to the notification dated 17.10.2000, under which about 80,000 Sq. Ft. land has been converted from educational to commercial, learned counsel for the respondents did not say anything but simply said that it was subsequent to the construction and would not help the petitioners.

36). Shri Ranbir Singh,learned counsel for the State however, was not in a position to say that order dated 17.10.2000. was bad or illegal. Learned counsel for the Corporation submitted that the State was competent to do it and if the State has converted the land use, then the Corporation has nothing to say. From the perusal of the said notification it would clearly appear that the State Government invited objections and finding that nobody was objecting to the change in the land use, the State Government changed the land use. If the State Government has changed the land use from educational to commercial finding that the said area has potentiality of commercial

329

use, then by no stretch of imagination it can be said that the shops could not be used for commercial purpose. This Court pointedly asked the learned counsel for the respondents that what would be the effect of the sanction now accorded by the State Government declaring the entire area as commercial, learned counsel for the respondent/Corporation submitted that commercial activities can be carried out there. It is however, to be noted that when commercial activities even otherwise are going on in a particular area, it may not be so declared by the State Government but the said area would be deemed to be commercial area. It was not disputed before me that the particular area where the land in dispute situates is now being used and utilized as a commercial area.

37). So far as raising of mezzanine floor is concerned it is to be seen from scheme of the Act that the construction should not be allowed to be made if it is in contravention of any scheme sanctioned under Section 291 or in contravention of any rule or bye-law made under the provisions of Corporation Act. The Commissioner shall refuse the permission if there are reasons for not granting the same or if the land on which it is proposed to be raised is vested in the Government or ~~the~~ in the Corporation and their consent has not been obtained or if the title to the land is in dispute between the applicant and the Corporation or the Government. Section 295 of the Act refers to the above powers of the Commissioner. Section 296 provides grounds on which site of the proposed

330

building may be disapproved. The Commissioner may refuse the permission if he is of the opinion that the construction of the building would be in contravention of a town-planning scheme under Section 291 or of any other provision of the Municipal Corporation Act or of any other enactment for the time being in force. He may also refuse the permission if the site is in a portion within the limits of the City in which the position and direction of the streets have not been determined and the construction of the building would obstruct or interfere with the construction in future of suitable streets in such portion or with the drainage, water-supply or ventilation thereof. The site can also be rejected if it has been re-claimed or used as a place for depositing sewage etc. The site can also be rejected if it is in a portion within the limits of the city for which a town-planning scheme has not been sanctioned and the construction would be likely to conflict in a manner with the provision of a town-planning scheme.

38). Section 297 of the Municipal Corporation Act requires the Commissioner not to grant permission to erect or re-erect any building unless and until he has approved of the site thereof on an application under Section 294. The Commissioner may refuse the permission if he finds that the plans and specifications show that such building is not in accordance with the town-planning scheme sanctioned under Section 291 etc. or in his opinion the erection or re-erection of such building would be a nuisance or

331

injurious to the inhabitants of the neighbourhood or the public or unless and until any plans, specifications or particulars called for by him are supplied. Section 298 provides the supervision of building and works while Section 299 authorizes the Commissioner to direct modification of a sanctioned plan of a building before its completion. Section 299-A authorizes the State Government to cancel or revise the permission for construction of a building. Section 299- A reads as under :-

> **"299-A Powers of State Government to cancel or revise permission for construction of a building:** If it is found that any permission for construction of a building has been given in violation of any provision of this Act or rules or byelaws made thereunder, the State Government shall have power to cancel or revise such permission and on such cancellation or revision, as the case may be, any construction contrary to the order regarding cancellation or revision shall be deemed to be without permission and shall be dealt with in accordance with the provisions of this Act and the rules made thereunder :"
>
> Provided that no such order shall be passed unless the aggrieved party has been given an opportunity of being heard."

(332)

Section 299-A provides that no order to cancel or revise the permission for construction of a building shall be passed unless the aggrieved party has been given an opportunity of being heard.

39). Section 293 of the Municipal Corporation Act provides that no person shall erect or re-erect any building or commence to erect or re-erect any building or make any material external alteration to any building or construct or re-construct any projecting portion of a building which the Commissioner is empowered by Section 305 to require to be set back or is empowered to give permission to construct or re-construct. Section 293 provides that it shall not apply to any work , addition or alteration which the Corporation may by bye-laws declare to be exempt. The scheme of section 293 would provide that without permission buildings are not to be erected or re-erected and no material external alteration in a building is to be carried out. It is further to be seen that Section 308-A permits the Corporation to compound of offence of construction of buildings without permission. The Corporation may compound the offence of constructing buildings without permission or contrary to the permission granted, if such construction does not affect the regular building line or the area of un-authorised construction made in marginal open spaces or in excess of the prescribed floor area, where F.S. ratio does not exceed 10% of the prescribed

(333)

floor area ratio. Section 308-A authorizes the Corporation to regularize the illegal construction. It is not the case of the Corporation or the State Government that the Construction made by the petitioners affects the regular building line or is absolutely illegal. I have already held that the petitioners have not made any construction in the marginal open space or in excess of the prescribed floor area ratio. Section 299-A as quoted above, authorizes the State Government to cancel or revise the permission if it is found that any permission for construction of a building has been given in violation of any provision of Municipal Corporation Act or rules or bye-laws made under the Municipal Corporation Act. It is not the case of the State Government that sanction or permission for construction was given in violation of any provision of this Act or rules or bye-laws made under Corporation Act.

40). Annexure- P/19, cancellation order says that the permission was granted for making small shops, and as on 12 pieces of land 60 shops and 12 residential units are being raised, the sanction is bad. The order no-where says that the construction is illegal. The order says that in accordance with development scheme of 2011 entire area has been reserved for education, therefore, permission for construction could not be accorded. Unfortunately, running contrary to its own stand the State Government vide its above quoted notification dated 17.10.2000. has changed the

334

land use. If the Government has changed the land use even on a subsequent date it has to be presumed that the Government knew that the area can be used for commercial purposes. The Order Annexure- P/19 in its first four paragraphs refers to the facts. In para 4, the order says that the permission granted by the Corporation runs contrary to development scheme, 1991. The order further says that the Corporation could only allow the construction of utility shops. Unfortunately Annexure-P/19 does not take into consideration Annexure-P/7. Annexure-P/7 is an order passed by the Joint Director, Town & Country Planning, Raipur. This order in fact is an order passed by the State Government. Under this order about 20,000 Sq.Ft. land has been allowed to be developed and shops are allowed to be raised. The State appears to be aggrieved because number of the shops have been raised. This would not be a ground available to the State Government under Section 299-A. For the sake of repetition it is again to be seen that the State is entitled to cancel or revise the permission if it records a finding that the permission for construction of a building has been given in violation of any provision of the Act or rules or bye-laws made under the Act. In para 5 of the impugned order the State records that in 1997 the Revenue Department has rejected the proposal of conversion of the land use. Unfortunately, the State Government did not appreciate that the Joint Director allowed the change in the land use. In para 5 it is further said that obtaining permission for

(335)

change of the land use tantamounts to violation of the lease-deed. Unfortunately these two grounds do not fall within the ambit of Section 299-A of the Act. In para 5 the State has further observed that contrary to Raipur Development Scheme, 1991, permission to construction over 20,000 Sq. Ft. was bad. In the opinion of this Court this again goes beyond the scope of Section 299-A. It is to be seen that the State Government was not revising the sanctioned order Annexure-P/7, but was exercising its powers under Section 299-A of the Municipal Corporation Act. Raising of the height from 12 feet to 16.6 feet was legal or illegal was to be seen by the Corporation and not by the State Government under 299-A. The State Government had issued a notice to the petitioners clearly informing him that it wanted to exercise its powers under Section 299-A. The State was only required to see that the permission for construction of the building was given in violation of any provision of the Municipal Corporation act or rules or bye-laws made under the Act.

41). Instead of examining the validity and legality of the permission, the State Government started examining the nature of the construction. The State Government was not entitled to enter into the arena of the disputed facts. Unfortunately, the State Government in its zeal to quash the building permission did not even appreciate the arguments raised by the petitioners. In para 6 of the order the State Government directed that in accordance with

(336)

Raipur Development Scheme,1991 the permission deserves to be cancelled. This Court fails to understand that how the State Government could exercise the powers under Section 299-A in a case where the permission was accorded in accordance with law and nothing has been brought on the record to show or suggest that the building permission offended the Raipur Development Scheme,1991. At one Place the State Government refers to 1991 scheme and yet at another place it refers to Raipur Development Scheme,2011. From the tenor and texture of the order, it would only appear that the State Government some how or other wanted to cancel the building permission. I am fortified in my observation by the document filed as Annexure-R-4/1, filed by the respondent No.4. From this letter it would appear that Shri Satyanand Mishra, Principal Secretary, Avas Avam Paryavaran Department, was aggrieved by the construction, therefore, he required the Municipal Corporation to submit its report. The report has been submitted by the Commissioner, Municipal Corporation under Annexure-R/4/1.The State Government after receiving these comments issued notices to the petitioners on 4.2.2000. and cancelled the building permission on 6.5.2000.

42). It was nobody's case that before issuance of the show-cause notice by the State Government anybody ever observed that the construction was to offend the 1991 scheme. While granting the permission in favour of the petitioners the Joint Director, Town & Country Planning,

(337)

Raipur had taken into consideration all the prospects and consequences; he was alive of Section 30 of M.P.Nagar Tatha Gram Nivesh Adhiniyam and rule 27 of the Bhoomi Vikas Adhiniyam. He did not find that the sanction was offending or was to offend or was likely to offend to Raipur Development Scheme, 1991.

43). While exercising the powers under Section 299-A the State Government did not look into the said provisions, but simply projected and manufactured a ground to cancel the building permission. It is not expected of an authority that simply to achieve the final result it would violate the principles or provisions of law.

44). I am constrained to say that the authority while passing the order Annexure-P/19 did not take into consideration the reply filed by the petitioners. After going through the entire records, original records produced by the Corporation, factual foundation and the orders passed/issued by the State Government and the Corporation, I am unable to hold that the order Annexure-P/19 can be allowed to stand. I also cannot approve the stand taken by the Municipal Corporation. In fact, the notification dated 17.10.2000. is the death nail to the order passed by the State Government and the stands taken by the Municipal Corporation. The Order Annexure-P/19, dated 6.5.2000. deserves to and is accordingly quashed. Consequently, the notices issued by the Corporation are also quashed. The

338

Municipal Corporation however, is given liberty to take action against the petitioners if the hollow area underneath floor of the ground floor is converted into basement.

45). The petition is allowed.

Sd/-
R.S. Garg
Judge

28.9.2001

SUBRU