(2010) 09 DEL CK 0342

Delhi High Court

Case No: Writ Petition (C) 9300 of 2009

MCD		APPELLANT
	Vs	
S.L. Meena		RESPONDENT

Date of Decision: Sept. 9, 2010

Acts Referred:

- Central Civil Services (Classification, Control and Appeal) Rules, 1965 - Rule 14, 19
- Constitution of India, 1950 - Article 226, 227, 31, 311, 311(1)
- Delhi Municipal Corporation Act, 1957 - Section 311, 311(2), 332, 336, 337(4)
- Delhi Municipal Corporation Services (Control and Appeal) Regulations, 1959 - Regulation 9, 9

Hon'ble Judges: Pradeep Nandrajog, J; Mool Chand Garg, J

Bench: Division Bench

Advocate: Parag P. Tripathi, ASG, Monisha Handa and Ajay Arora, for the Appellant; Sumit Bansal, Manish Paliwal, Ateev Mathur, in W.P. (C) 9300, 10789, 10791, 10795, 10799/2009, Vikas Singh, V.P. Singh, Anil Grover, R.K. Garg, in W.P. (C) 10790, 10792, 10793, 10794, 10796, 10797, 10798, 10800/2009 and Rajat Aneja in W.P. (C) 12608/2009, for the Respondent

Judgement

Mool Chand Garg, J.

Municipal Corporation of Delhi (MCD) has filed the aforesaid writ petitions aggrieved of the order passed by the Central Administrative Tribunal, New Delhi (hereinafter referred to as "the Tribunal") dated 26.03.09 whereby the Tribunal has set aside the orders passed by the petitioners dated 07.04.06 in having dismissed all the respondents with immediate effect without holding any Departmental Enquiry as well as the Orders of the Appellate Authority dated 03.04.07 upholding the aforesaid order but converting dismissal to compulsory retirement.

2. The orders dated 07.04.2006 were passed by invoking provisions of Section 95(2)(b) of the DMC Act r/w Regulations 9(ii) of the DMC Services (Control & Appeal)

Regulations, 1959 and under Article 311(2) of the Constitution of India and which are similar in all the cases. The respondents challenged those orders by filing appeals before the Hon�ble Lt. Governor of Delhi, which were disposed of by the Appellate Authority vide common orders dated 03.04.2007 upholding the order dated 07.04.2006 but converting the order of dismissal to that of compulsory retirement.

3. The respondents thereafter filed writ petitions before this Court to assail the orders dated 07.04.2006 and dated 03.04.2007 which were transferred to the Tribunal registered as TA Nos. 23/2009, 1/2009, 21/2009, 37/2009, 40/2009, 41/2009, 42/2009, 43/2009, 45/2009, 46/2009, 68/2009, 80/2009 and 81/2009 respectively.

4. The Tribunal vide impugned order dated 26.03.2009 allowed all these transfer applications and set aside the orders dated 07.04.2006 and 03.04.2007. The Tribunal also directed reinstatement of all the respondents in service with immediate effect with full backwages with continuity of service. However liberty was granted to the petitioners to proceed against the respondents departmentally in terms of the following:

We may reiterate that the controversy insofar as, delinquency of the respondent is concerned, has to be thoroughly gone into in a departmental enquiry, wherein the department may choose to bring on record all the relevant facts, which, according to it, may show that the respondents in fact and in reality indulged in misconduct, and the respondents would have equal opportunity to project their view point. Any observations made by us on facts Constituting misconduct or otherwise, as mentioned in the order, are for the purpose of deciding these applications, and shall not be construed as a final expression of opinion. Concerned authority would be at liberty to come to its own conclusion on the basis of evidence and material placed before it.

5. The petitioners have come before us by way of the aforesaid writ petitions with a prayer to set aside the impugned order passed by the Tribunal. The lis subject matter of the aforesaid writ petitions arise out of a PIL titled as Kalyan Sanstha Social Welfare Organization v. Union of India and Ors. CWP 4582/03, wherein a Division Bench of this Court (hereinafter referred to as the "PIL Bench") taking cognizance of mushroom growth of unauthorized construction throughout Delhi besides misuse of the properties, passed various orders from time to time against the petitioners from time to time. In the order dated 30.11.2005, it was observed:

that the menace of unauthorized construction would remain rampant unless and until serious action was taken and major penalty imposed on the executive engineers of the area concerned along with the assistant engineers as well as junior engineers all of whom were mainly responsible for the same. In view of the MCDs own case as stated by Mr Kutty that unauthorized constructions have been on rise, we direct Mr Kutty to fix responsibility of the concerned engineers and other officials who allowed or took no notice of unauthorized constructions in relation to the

admitted figure of 18299 and initiate action of major penalty against all such persons who are found guilty of having bated or in any manner connived with those who indulge in unauthorized construction.

6. Vide order dated 18.01.2006, the PIL Bench also observed:

With regards to the action taken against erring engineers and the officers of the MCD, it is stated in the Action Taken Report that 95 officials of the level of Junior Engineers and Assistant Engineers have been identified for major penalty proceedings. Since the MCD itself has booked over Rs. 18,000 properties as unauthorized and illegal, the same could not have come up without the active or passive connivance of the Junior Engineers, Assistant Engineers and Executive Engineers of all zones. We direct the Commissioner of MCD to identify all such engineers and other officials who were involved or abetted coming up of such constructions and initiate major penalty proceedings against them as well. Such an exercise would send message to all concerned that it is not the buildings alone which are being targeted but even the delinquent officials who were involved connived or abetted in coming up of such buildings are being dealt with severely. These penalty proceedings should be time bound. We direct that the action for major penalty be taken against all delinquent officials within a period of two months from today.

7. Vide order dated 16.02.2006, the Bench further observed:

In our last order we have made it very clear that the unauthorized construction could not have been possible but for the abetment of these persons who were responsible for checking the unauthorized constructions in spite of our direction. When a person is appointed to carry out a public duty in terms of statue and if it is found that statue has been violated inspite of putting the custodian on duty by providing funds from the public exchequer, the principle of audi alteram partem cannot be invoked by such delinquent persons. Those officers and engineers of the MCD who were involved or connived or abetted in the coming up of such buildings have to be dealt with severely. As in our last order we have granted two months time on 18.01.2006 and time will expire on 18.03.2006, we would like the Commissioner of MCD to submit the action taken report against all these officers. The MCD has got 12 zones. Mr Chandihok says that process to identify is on. Why this delay? It is open to naked eye as to who were responsible if the MCD look to their own register of posting and the unauthorized construction in the zones, no further evidence is required but still we are giving time till next date of hearing to have these persons booked and action taken. Another strange thing is that these so called 94 We were also not happy as to why only officers in the six zones have been identified engineers who have been identified are still continuing in the building department. Commissioner of MCD to submit a report as to why in spite of issuance of charge-sheet, they have been still retained in the building department. We do expect the Commissioner of MCD at least not to allow these coloured people to

continue for a day in the MCD and they are still continuing with the building department. Why it has happened, under whose instructions and why this lapse? The affidavit of Commissioner of MCD be filed on the next day of hearing.

8. Vide order dated 23.03.2006, it was further observed:

We appreciate the stand of Union of India in realising that but for the connivance on the part of the enforcement machinery for wrongful gain these violations could not have taken place. We also appreciate the desire of the Union of India to punish these delinquent officials with exemplary and deterrent punishment including launching of criminal prosecution apart from other major penalties of dismissal....

It is keeping in view the authoritative direction issued from time to time from 1990 till this matter was dealt by us, the Courts have been emphasizing that action has to be taken if Delhi has to get rid of unauthorized construction, erring officials, builders, influential and powerful people, who have promoted or have indulged in unauthorized construction. It seems that our direction has also not been taken too seriously. On January 18, 2006 we were told that the MCD has taken action against 95 officers who were Junior Engineers and very few Assistant Engineers. In our order dated 16.2.2006 we made reference to a circular of MCD which lays down that a Construction Watching Register has to be maintained and such a register is required to be filled by functionaries of MCD which are under an obligation to fill the same right from Junior Engineers up to the Deputy Commissioner. Nothing has been stated in the status report filed by MCD as to why the same has not been done. The status report is also silent about the action taken against the Deputy Commissioners downwards? Time has come when action has to be taken from the top to the bottom. Merely by punishing few Junior engineers, the persons who are at the helm of affairs cannot escape their responsibility. Furthermore, why action has been initiated only against engineers for the year 2001 when we had directed action to be taken against all those officers who have allowed unauthorized constructions from 2001 to 2005.

In our order dated 16.2.2006 we have categorically stated that it is not only the Junior Engineers, Executive Engineers or Assistant Engineers with whom the responsibility lies, it also lies with the Superintending Engineers and the Deputy Commissioners of the zone concerned and we had asked as to what action has been taken against the Deputy Commissioners or the Superintending Engineers by the MCD. Status report is totally silent about the same. We have been told that two Deputy Commissioners of Karol Bagh zone and Rohini zone were found wanting and, therefore, they have been repatriated. What a way to dealt with corrupt officers? Instead of taking any action against them they have simply been repatriated to their parent departments. Nothing has been brought on record as to the reasons for their repatriation nor the same has been communicated to their parent departments. Mr. Parasaran, Additional Solicitor General who is present on behalf of the Union of India says that action will be initiated by Union of India

against those Deputy Commissioners who have been repatriated by the MCD on account of dereliction of duty.

We have time and again observed that if the citizens of Delhi because of unauthorized constructions carried out by them have to face demolition and consequently suffer loss, we find no reason as to why those who allowed these unauthorized constructions to come up in spite of the fact that they were suppose to keep a vigil and were to ensure that no unauthorized constructions come up, should be allowed to go scot free. We have also observed that a person put on a public duty cannot be allowed to continue on that duty and such a person has no right to invoke the principle of audi alteram partem. It seems that the MCD lacks the desire to check the rampant corruption and unauthorized construction and to take action against unauthorized construction which has already taken place. We direct that on the next date of hearing record of posting of Junior Engineers, Assistant Engineers, Executive Engineers, Superintendent Engineers and Deputy Commissioners posted in south zone, central zone, karol bagh zone and rohini zone from 2002 to 2005 be produced. We further direct that action be taken against such delinquent officials/ officers and report be submitted in this Court.

We are adjourning this matter at the request of Mr Chandihok. We are not satisfied with the way the MCD has dealt with the problem. We make it very clear that if MCD fails to carry out its statutory obligations under the Act, we will have to go for other options as prescribed under the MCD Act with regard to dealing with these delinquent officials. We also make it clear that if the MCD is not serious in taking actions and showing the door to these corrupt delinquent officers, we will use other machinery for probe.

9. According to the petitioners in a nutshell the effect of these orders was that once the petitioners identified the persons responsible for the unauthorized construction going on unchecked inasmuch as at least a list of Rs. 18,299 such properties were identified where rampant unauthorized construction/misuse had taken place forming part of various municipal zones in Delhi in the relevant period, in view of the orders passed by the PIL Bench being in the nature of a writ of mandamus were obliged to take action against the guilty officers, who according to the Bench were not even entitled to audi alteram partem, the petitioners passed the order dated 7.4.2006 against the respondents as they were posted as Executive Engineers (B) in their respective zone in the relevant period and were directly responsible for the menance as aforesaid.

10. To understand the reasoning of such orders; a sample order issued in the case of S.L. Meena (CWP No. 5282/2007) which is similar to all other cases invoking procedure as per the proviso of Sub-clause 95(2)(b) of the MCD Act read with Regulations 9(ii) of the DMC Services (Control & Appeal) Regulations, 1959 and Article 311 of the Constitution of India, is reproduced hereunder for the sake of reference:

16, Rajpur Road,

Civil Lines, Delhi-110054.

No. DLO/Vig./P/2006/D-174 Dated: 07/04/2006

OFFICE ORDER

In compliance of directions of the Hon'ble High Court of Delhi passed in WP (C) No. 4582/2003 Kalyan Sanstha Social Welfare Organisation v. Union of India and Ors., the entire record was scrutinized by the Vig. Deptt. and the same was placed before the Commissioner/MCD. The Commissioner by invoking the provisions of Section 95(2)(b) read with Regulation 9(ii) of the DMC Services (Control & Appeal) Regulations, 1959 and the provisions contained in Article 311 of the Constitution of India has inflicted the penalty of 'dismissal from services which shall ordinarily be a disqualification for future employment upon Shri S.L. Meena, Executive Engineer, is reproduced below:

'Shri S.L. Meena had worked as Executive Engineer' in Najafgarh Zone during period w.e.f. 1.11.2002 to 19.2.2004 and in Shahdara North Zone during period w.e.f. 18.8.2004 to 7.9.2005. He while working as EE(B) was duty bound to get stopped/demolished the unauthorized construction carried out in the area/ zone, under DMC Act. He was also to maintain/get maintained Construction Watch Register/ supervise the entire construction carried out in his area/zone. He was also duty bound to take action against the misuse of property resulting into large scale commercialization of the area.

The MCD has filed a list of total 18299 properties which were booked as unauthorized construction during the period from Jan. 2001 to December 2005 in PIL titled as "Kalya Sanstha Social Welfare Organization v. Union of India and Ors." in WP No. 4582/2003. The Hon'ble Court observed vide order dated 30.11.2005 that the officers of MCD, its engineers are hand in glove with those indulging in unauthorized construction and that without their active or passive connivance, it was not possible for such mushrooming of unauthorized construction in the capital of this country. Accordingly, the Court directed to initiate major penalty proceedings against all such persons who are found guilty of having abetted and connived with those who indulged in unauthorized construction.

The Hon'ble High Court of Delhi vide orders dated 18.1.2006 had directed MCD to take action against all such engineers who were involved or abetted in the coming up of such constructions and initiate major penalty proceedings against them as well. Such an exercise would send message to all concerned that it is not the buildings alone which are being targeted but even the delinquent officials who were involved, connived or abetted in coming up of such buildings are being dealt with severely. These penalty proceedings should be time bound. The Hon'ble Court directed that the action for major penalty be taken against all delinquent officials

within a period of two months from today.

It is stated that power to punish an employee for misconduct as contained in Sub Section (2) of Section 95 mandates that, the said power can be exercised after due opportunity is given to an employee to answer the charges. Proviso (b) of this sub-section, which is identical to Regulations 9 (ii) of the DMC Services (Control & Appeal) Regulations, 1959, reads as follows:

where the authority empowered to remove or dismiss an officer or other employee is satisfied for reasons to be recorded in writing that it is not reasonably practicable to follow the procedure prescribed in these regulations; the Disciplinary Authority may consider the circumstances of the case and pass such orders thereon as it deems fit.

It is well settled law that every action of an administrative or executive authority which visits adverse or evil consequences upon a citizen or any person has to be preceded by rules of natural justice and fair procedure. This is more so in cases where an employee's services are sought to be terminated/dismissed. However, a small area has been carved out to cater to exceptional cases i.e. where the nature of charge is either so sensitive or public interest warrants that an enquiry would not be either practicable or would lead to unfair results or in cases where public interest warrants not to hold a full fledged inquiry and material are sufficient to warrant a view to be taken. Article 311 of the Constitution of India also empowers the Competent Authority to dispense with an inquiry if it is deemed to be not reasonably practicable to hold it. Thus, the condition precedent for the application of Clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by Clause (2) of Article 311. What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Proviso to Section 95 Clause 2(b) and Regulation 9(ii) of the DMC Services (Control & Appeal) Regulations, 1959 is directly in line with provisions contained in Article 311 of the Constitution of India. A consideration that would be valid to conclude that it is "not reasonably practicable" in one given case may not be valid and justifiable in another case. In other words, there is no absolute standard or "yardstick as to what would be reasonable not practicable to hold an inquiry. The expression "practicable" would imply that either the witnesses are not available or the nature of charge is so sensitive that it would not be in the public interest to hold the full fledged inquiry and that the material are sufficient to warrant the view to be taken. This requirement ought to be construed in the strictest possible manner where the principles of natural justice are not followed but are dispensed with. (As held by Hon'ble High Court of Delhi in the case titled T.R. Gupta v. MCD and Ors. in CWP No. 7463/2002 vide judgment dated 15.9.2005).

In compliance of the directions of the Hon�ble Court, the records of the properties booked for unauthorized construction, a list of which has been filed in the court, has been scrutinized. From perusal of the records, it is clear that total of 734 properties have been booked for unauthorized construction pertaining to the working tenure of Shri S.L. Meena, Executive Engineer, Najafgarh Zoe & Shahdara North Zone. It is also not in dispute that large number of buildings have been allowed commercial user in violation of the sanctioned use without following due process of law resulting into large scale commercialization in the area. Shri S.L. Meena, Executive Engineer, Najafgarh Zone & Shahdara North Zone who was posted in the zone for over one year is primarily responsible for not taking action as per the provisions of DMC Act with malafide intention which establishes his connivance with the owner/builder. Shri S.L. Meena, Executive Engineer, Najafgarh Zone & Shahdara North Zone has failed in maintaining the standard of integrity. He not only failed in his duties as a team leader but also betrayed the confidence of his senior officers reposed in him by not taking action against the unauthorized construction and allowing large scale commercialization of the zone.

This conduct of Shri S.L. Meena, Executive Engineer, Najafgarh Zone & Shahdara North Zone is most reprehensible and totally unexpected of an officer holding such a high position. Due to his gross misconduct and dereliction of duties, the image of Municipal Corporation of Delhi in the eyes of public has been tarnished and as such he is not worthy to be retained in municipal service any more. The present case is glaring example of gross misuse of power and dereliction of duty on the part of Shri S.L. Meena, Executive Engineer, Najafgarh Zone & Shahdara north Zone which gravely affected the public interest. The nature of charge is so sensitive and the public interest warrants that the inquiry would not be either practicable or would lead to unfair results. Further, the public interest warrants not to hold a full fledged inquiry and material on record is sufficient to warrant a view to be taken in the matter because of the reason that unauthorized buildings booked are clearly identifiable matching the tenure of the person who worked in the zone. It is a well known fact that in large number of cases, the unauthorized construction has not even been booked which makes it much more difficult to hold inquiry with regard to the such lapses. The conduct of Shri S.L. Meena, Executive Engineer, Najafgarh Zone & Shahdara North Zone in allowing mushrooming of unauthorized construction and in not taking action as per the provisions of DMC Act and further allowing misusing of properties from sanctioned use or from residential to commercial is unbecoming of a municipal employee and injurious to public interest and the evidence on record is sufficient and clear enough for the purpose of taking action against him under Clause 9(ii) of the aforesaid regulations. Considering the sensitiveness of the charge, the public interest and the material available on the record any lastly that holding of a full fledged inquiry would lead to unfair results, I hereby dispense with the inquiry against such charged official as the same is not reasonably practicable in the present state of circumstances.

Dy. Law Officer (Vig.)

In all other cases similar orders were passed against the respondents with the difference about number of properties booked for unauthorised construction in their respective zones. However, the reasoning given as reflected in the italicized portion for dispensing with the enquiry while dismissing the respondents from their services in the MCD are same.

11. According to the petitioners since that order was not sought to be interfered with by moving a review application or an impleadment application before the PIL Bench despite the orders were available on website, the respondents were not entitled to assail the order before the Tribunal where they approached clandestinely, inasmuch as initially through the Forum of MCD Engineers, they tried to assail the order passed by the PIL Bench in Kalyan Sanstha's case (supra) by filing a SLP before the Supreme Court but did not follow it and allowed the same to be dismissed in default and in this manner allowed considerable time to lapse for reasons best known to them. Thereafter, they filed appeals before the Lt. Governor of Delhi. The petitioners submit, that it was only another attempt to buy time because the Hon'ble Lt. Governor also in the light of directions of this Court in PIL Case probably was not in a position to interfere with the orders dated 7.4.06.

12. In the alternative, it is submitted that the information with regard to unauthorized construction in various zones had been collected by the MCD through the respondents themselves. Thus, there is an admission on the part of the respondents that there was unauthorized construction in their area in the relevant period which was unchecked and this tantamount to admission of their guilt. In such circumstances, where there was gravity and sensitivity in the charges levied against them and the possibility of witnesses coming forward to depose against those officers, if any enquiry would have been conducted was remote. In these circumstance keeping public interest in view invocation of the provisions contained u/s 95(2)(b) of the MCD Act read with Article 311(2)(b) of the Constitution of India was fully justified and did not call for any interference by the Tribunal. The Lt. General of Delhi acting as the Appellate Authority vide order dated 03.04.2007 has dismissed the appeals filed by the respondents except by converting the punishment of dismissal to that of compulsory retirement. The relevant observations in that order are:

8. I have gone through the observations of Commissioner, MCD in the impugned order dated 07.04.2006, the averments made by the Respondents in their written appeal and during the personal hearing granted to them as per his request and the relevant facts and records of the case. I find that the appellants utterly failed to check the unauthorized constructions and large-scale commercialization of the area in his Zone. The plea of shortage of staff, non-availability of skilled workforce and proper equipments, non-availability of police force is only an excuse to cover his misconduct and dereliction to duty.

9. Considering the above facts and circumstances of the case, the provisions of DMC Act, DMC Services (Control & Appeal) Regulations 1959 and the nature of misconduct committed by the appellants, I am of the considered opinion that the penalty so imposed upon the appellant is not proportionate to the gravity of his misconduct. The appellant, although failed in his duties, which resulted in large scale unauthorized construction and commercialization, cannot be held solely responsible for the same. I, therefore, feel that the ends of justice would be met if the penalty of dismissal from service imposed upon him vide the impugned order dated 07.04.2006 is reduced to that of "compulsory retirement" I order accordingly....

13. Petitioners have also submitted that the Tribunal while passing the impugned order has failed to appreciate that the order dated 07.04.2006 was passed by the petitioners pursuant to and in compliance with orders of the PIL Bench of this Court passed in WP(C) No. 4582/2003 titled as Kalyan Sanstha Social Welfare Organization which was a Public Interest Litigation entertained by this Court in view of large scale unauthorized construction which had come up in Delhi. In the said case the Bench expressed a severe dismay over the large scale unauthorized construction which had come up in Delhi and observed that officers of the MCD and its engineers who include the respondents herein were hand in glove with those indulged in unauthorized construction and that without their active or passive connivance, such mushrooming of unauthorized construction in the capital of the country would not have been possible. Various Orders as stated above were passed directing actions to be taken against the officers responsible for it. The order dated 7.4.06 was passed accordingly in compliance with the orders passed by this Court.

14. It is stated that accordingly the matter was entrusted to the Vigilance Department of the MCD by the competent authority. They obtained tenures of EEs (Bldg.) who worked in different zones, number of buildings which had come up and booked during their tenure. It was revealed that total 18299 unauthorized constructions were booked by all 12 zones between the period 2001 to 2005 and the same has also been put on the website of MCD. It is further averred that the Executive Engineer is primarily responsible for taking necessary action against ongoing/booked properties, and that had timely deterrent action been taken against the same, no unauthorized construction would have come up in the zone, and that failure of the respondent to discharge his duties would be evident from the fact that effective actions were not taken against the unauthorized construction, and whatever action was planned/taken on paper, was never taken to its logical conclusion citing one reason or the other. It is pleaded that construction watch registers which were required to be maintained in respective zones in compliance of the orders of Additional Commissioner dated 28.8.2001 were also not maintained, and that the duty has been cast upon the Executive Engineer to get the entries made in the said register for effective monitoring of construction activities in the zone, and further that since no construction watch register was maintained in the

zone, apparently no checking was being done against the ongoing constructions in the zone. In addition, large-scale unauthorized constructions have been alleged to come up in whole of Delhi. Executive Engineers with minimum of one year continuous tenure in building department have been broadly identified and held prima facie responsible for unauthorized construction in their respective zone. Number of properties that have come up during their tenure have also been indicated to give a broad idea regarding the extent of unauthorized construction during their tenure. Following Executive Engineers have been identified who worked during the period 2001 to 2005:

S. No.	Name of EE	Period	Zone	No. of Prop.
1.	Sh. Manohar Diwani	28.09.01 to Oct. 02	City	143
2.	Sh. B.P. singh	15.04.02 to 09.05.03	West	1612
3.	Sh. Vijay Kadiyan	05.05.03 to 31.05.05	West	161
4.	Sh. Naresh Gupta	18.04.02 to 06.05.03	K.B. Zone	701
5.	Sh. R.K. Bhattacharya	07.05.03 to 07.09.05	K.B.Zone	1551
6.	Sh. M.M. Dahiya	01.03.02 to 31.05.05	Central	1698
7.	Sh. S.P. Gautam	12.05.01 to 31.10.02	Shah. South	284
8.	Sh. RBS Bansal	09.05.03 to 09.08.04	Shah. South	305
9.	Sh. R.K. Gupta	09.08.04 to 31.12.05	Shah. South	357
10.	Sh. BB Jaiswal	28.10.02 to 27.10.03	South	567
11.	Sh. RBS Bansal	09.08.04 to 01.12.05	South	446
12.	Sh. Mohd. Ilyas	01.03.01 to 18.06.02	Rohini	403
13.	Sh. SL Meena	01.11.02 to 19.02.04	N.G. Zone	241
14.	Sh. RP Dabas	20.02.04 to 31.12.05	N.G. Zone	573
15.	Sh. Piar Singh	01.01.01 to 30.10.02	Shah. North	160
16.	Sh. RK Jain	30.10.02 to 17.08.04	Shah. North	545

17.	Sh. SL Meena	18.08.04 to 07.09.05	Shah. North	493
18.	Sh. Nazrul Islam	02.11.02 to 02.08.04	Civil Line	566
19.	Sh. SRK Kochar	22.08.01 to 28.10.02	S.P. Zone	25
20.	Sh. AC Garg	25.08.04 to 19.12.05		166

15. It is then pleaded that since it was not possible to hold a regular departmental enquiry in a short time as indicated by this Court and further it is not possible to have exact date of construction, for which no concrete evidence is available on record, but the fact remains that the unauthorized constructions came up and remained unchecked without any effective punitive action being taken by the respondents during their tenure, and no further enquiry into exact culpability was required at that stage. Further the public interest warranted not to hold a full fledged enquiry in view of the material on record. A view was taken that unauthorized buildings booked and inaction thereon was clearly identifiable matching the tenure of the persons who worked in the zone. It is further pleaded that it is well known fact that in a large number of cases, the unauthorized construction had not even been booked which made it much more difficult to hold enquiry with regard to such lapses, and that further enquiry would not have been practicable because of the apparent nexus between the beneficiary of unauthorized construction and the official concerned. In the light of material on records, vigilance department of MCD placed the matter before the Commissioner after obtaining necessary advice from the Chief Law Officer, and the Commissioner in his capacity of disciplinary authority, after considering the record passed detailed speaking order dated 7.4.2006 thereby imposing the penalty of dismissal from service.

16. It has been denied that the respondents only had a peripheral role in checking unauthorized construction in the zone. It was stated that the organizational structure of the building department of MCD, which is responsible for initiating action against the unauthorized construction in the zone, is such that the entire supervisory responsibility for the said purpose in the zone would be placed on Executive Engineer (Building) with other officers functioning under him. Subordinate officials like AE (Building)/JE (Building) are under direct control and supervision of Executive Engineer (Building), who is also vested with the powers of allocation of area amongst the subordinates so as to ensure proper check and action against unauthorized constructions. Monthly schedule of demolition programmes are also exclusively drawn by EE (B), and in that process, he may consult OI (Bldg.) or any subordinate official. The main issue which was raised in the PIL aforesaid was regarding failure to initiate demolition action against the booked unauthorized construction wherein demolition orders were passed during the period 2001-2005. In the said context, it is averred, the role of EE (Bldg.) is pivotal. It is averred that

other than giving one excuse or the other for not carrying out demolition, the respondent has conveniently chosen to put the blame on other authorities.

17. The respondents on the other hand have justified the orders passed by the Tribunal by stating that in the PIL case this Court only passed orders for taking disciplinary action against the erring officials who were found to have abetted or connived in unauthorized construction with unscrupulous builders. Vide order dated 18.1.2006 two months time was granted to the MCD for completing the enquiry and disciplinary proceedings by 17.3.2006. According to them the PIL Bench never directed the petitioners to take any action against the officials who were not found wanting in their responsibilities. In compliance with the directions of the Bench various authorities in the MCD conducted enquiries and disciplinary proceedings against various officials including JEs(B), AEs(B), EEs(B) and Superintending Engineers in accordance with the Regulations were initiated by giving them chance to defend themselves and the procedure as contemplated under the Regulations was followed. Nothing has been explained in the order as to what happened suddenly which warranted immediate disciplinary action of dismissal from service. It is stated that the PIL Bench never passed any order for dispensing with the departmental enquiries and for terminating services of the respondents by invoking Section 95(2)(b) that too without finding and ascertaining the guilt or even not giving the erring officer a show cause notice as required even by the aforesaid provision. Had there been any such directions, no enquiry would have been necessary against any of the officials of MCD posted in or looking after the work of the building department. However there is no explanation as to why were enquiries conducted against 178 SEs, EEs, AEs and JEs. It is further the case of the respondent that though the High Court gave two months time to the petitioners to find the erring officials and take disciplinary action against them, but the records of MCD would reveal that the entire exercise for terminating services of 17 Executive Engineers was completed merely within ten days under the apprehension that the Court would not be satisfied in less than the dismissal of the engineers without enquiry, and if the services of the respondent were not terminated without conducting enquiry, the Court would pass severe strictures against the vigilance department of MCD. It is pleaded that the respondents were not a party to the said PIL, and for that reason as well the orders passed by the High Court were not applicable in the case of the respondents and further the MCD has not brought all the facts regarding functioning of the respondents or the actions taken by the building department in their zone during his tenure respectively where almost every day demolition/sealing actions were planned and taken whenever police assistance was made available. In addition to that they have also referred to the procedure which regulates the functioning of the Building Department of MCD which does not rest the responsibility solely on the Executive Engineers (B).

18. The Common issues arising out of the order dated 7.4.06 which is similar in all the aforesaid matters, passed by the petitioners in having dispensed with the

services of the respondent without holding any enquiry relying upon Section 95(2)(b) of the MCD Act read with Article 311(2)(b) of the Constitution of India are:

(i) Whether the various orders of the PIL Bench of this Court in the PIL titled as Kalyan Sanstha Social Welfare Organization (CWP 4582/03) were in the nature of mandamus, directing the petitioner to dispense with the services of the respondents without holding any enquiry?

(ii) Whether the observations of the PIL Bench that a public servant entrusted with legal duty in law to do a thing in a proper manner, if violates that law is not entitled to audi alteram partem justifies the order dated 7.4.06 in the case of the respondents who were neither a party to those proceedings nor were heard before the orders were passed?

(iii) Whether there was enough material attracting invocation of the provisions contained u/s 95(2)(b) of the MCD Act r/w Article 311(2) of the Constitution of India for issuing the aforesaid orders?

(iv) Whether the order dated 26.3.09 passed by the Tribunal in TA Nos. 23/2009, 1/2009, 21/2009, 37/2009, 40/2009, 41/2009, 42/2009, 43/2009, 45/2009, 46/2009, 68/2009, 80/2009 and 81/2009 in having set-aside the order dated 7.4.06 and the Appellate Order dated 3.7.07 with a direction to reinstate the respondents with full back wages with continuity of service is sustainable or needs to be interfered with by this Court in its Writ Jurisdiction under Article 226/227 of the Constitution of India?

19. The Tribunal has dealt with all the aforesaid issues. As regard the procedure prescribed under rules/instructions for booking the properties and for demolition/sealing etc the tribunal has observed that as per Section 343 of the DMC Act, the properties are first booked for unauthorized construction by the field staff as and when the same is either detected by the field staff or on the basis of any complaint/reference or court case. An FIR is prepared by the JE concerned at the site of unauthorized construction in the printed book duly numbered. That is the first step taken towards taking action against unauthorized construction. Under provisions of the DMC Act, the Commissioner, MCD has to exercise his powers and discharge his functions as prescribed under Chapter XVI of the Act, which deals with the building regulations under the general superintendence, directions and control of the Central Government. That indeed is so, as by virtue of provisions contained in Section 343 of the DMC Act, where the erection of any building or execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in Section 336 or in contravention of any condition subject to which such sanction has been accorded or in contravention of any of the provisions of the Act or bye-laws made thereunder, the Commissioner may, in addition to any other action that may be taken under the Act, make an order directing that such erection or work shall be demolished by the person at whose

instance the erection or work has been commenced or is being carried on or has been completed. According to the respondents the FIR should be prepared by the JE concerned and placed before the AE, who is his next superior on the same very day for appropriate orders, to whom powers u/s 343 and 344 have been delegated by the Commissioner u/s 491 of the Act; a printed and numbered show cause notice u/s 344(1) and Section 343 is to be prepared by the JE according to the orders of the AE on the FIR and the same is to be placed before the AE for approval; entry of the FIR and notices are to be made by the office incharge (OI) in the misal band register on the same day, and the case number as entered in the misal band is also to be recorded on the FIR as well as on the notices; the EE (B) of the zone has to ensure the closure of the said misal band register at the end of each day. With regard to ongoing unauthorized construction, the JE prepares a requisition u/s 344(2) for police intervention. A show cause notice is then issued u/s 344(1) and Section 343, to be served by the JE under signatures of the AE on the owner/builder/occupier. After expiry of the stipulated period as mentioned in the order of demolition, formal speaking order for demolition is to be passed by the AE and the file is sent to OI for demolition purposes. In cases of blatant unauthorized construction, action for sealing of the property can also be initiated u/s 345A. The power of sealing has been delegated by the Commissioner to the Deputy Commissioners of the zones. In case it is found that owner/builder is still continuing with the unauthorized construction of blatant nature, a complaint is to be lodged with the concerned police station u/s 332/461 of the DMC Act. Power of lodging complaint has been delegated to the Deputy Commissioners of the zones. The last checks to be applied by various officers in the missal band register for unauthorized construction are mentioned in office order dated 4.7.01 which has been discussed in Detail by the Tribunal which supports the aforesaid observations.

20. We find that the subsequent order dated 20.08.2001 is also relevant and reads as under:

Office Order

Subject: Workng of the building department under

New set up

In partial modification of circular No. D/167/EE (B) HQ/99 dated 22.3.99 the following instructions shall be incorporated in addition to the instructions already issued.

1. Under S. No. 2 Approval of Building Plans

In addition to maintenance of building plan register at zonal level another register for Watching Construction shall be maintained at each ward level.

With a view to evolving a mechanism for fixing accountability for non-compoundable deviations against sanctioned plans, a register printed in Mpl. Press duly numbered be got issued ward wise for each J.E. in the zone for watching

construction activity. Every property for which building plan has been sanctioned should find mention in the said register. The JE incharge of the ward will be required to make an entry about his observations/ findings, each time he inspects the said property. In the first instance whenever he notices that a new construction has been started in his area, he will be duty bound to ascertain whether the owner/ builder has informed the Corporation of his intentions to start the construction as required u/s 337(4) of the DMC Act. In case of failure, prosecution action must be taken without fail and entry to this effect be made in the Constitution Watching register. It will be made mandatory on the part of the J.E. to carry out inspections of such buildings every fortnightly and to record his observations in the said register about any non-compoundable deviation against sanctioned plan and action taken against the said deviation. AE incharge of the area and EE of the zone will carry out test checks to the extent of 40% and 20% respectively of the properties entered in the said construction Watching register and will also record their findings. The modalities of test checks will be similar to that as laid down for unauthorized construction in office order No. D/158/Addl.Cm.(E)/2001 dated 4th July, 2001. This register should also be reviewed by S.E. once in three months and by D.C. once in six months.

In order to ensure that the building is being constructed with due sanction and is supervised by Architect and Structural Engineer, J.E. concerned should ascertain from the site and further confirm this fact in writing from the Architect/Structural Engineer, who has furnished certificate at the time of submission of building plans. In case it is found that building is being constructed without supervision, the construction should be got stopped and a show cause notice should be issued to the Architect as to why communication be not made to the Council of Architect/Authority to whom the said Architect is registered with for cancellation his empanelment.

2. Under S. No. 3 Action against the unauthorized construction.

A criterion for test checks has been fixed for unauthorized construction booked in a month to the tune of 40% by A.E. and 20% by E.E. Since it was not mentioned as to how the test check is to be applied, it was felt to evolve a mechanism and accordingly, a circular No. D/458/ADDL. CM(E)/2001 dated 4th July, 2001 was issued. However, there is still a need to involve the participation of higher officers in the hierarchy for having effective control and supervision.

Henceforth Superintending Engineer at least once in two months should call for a meeting of the staff of Building Department to check whether the record is being maintained properly and the staff is following instructions issued from time to time. The minutes of this meeting must invariably be sent to Dy. Commissioner of the zone thereafter. In case of non-performance, he should also initiate action against the erring official.

Under the same Clause IInd para lays down the criterion for carrying out inspection of the area by J.E., A.E. & E.E. Time limit fixed for inspection is presently 3, 7 and 10 days respectively.

This has now been increased to 7 days for J.E., 15 days for A.E. and 30 days for E.E. for effective inspection of the area. To ensure that each officer carried out inspection of the area, weekly inspection report is to be sent positively to the next higher officer in the hierarchy. This inspection report should clearly mention about the areas visited on each visit and uanuthorised construction detected if any and further action taken against the same. These inspection reports should be reviewed by Suptdg. Engineer at least once in two months and by Dy. Commissioner once in three months.

2. Under S. No. 5 Issue of Completion Certificate

In addition to test check as prescribed for A.E. & E.E., S.E. should once in two months review the completion certificate register to ensure that no case of completion certificate if pending without a valid reason.

3. Under S. No. 6 Demolition Gang

Apart from the existing instructions, S.E. will carry out a random check at least once in two months to ensure that the demolition actions are being taken as per the priority fixed. Similar checks will also be carried out by Dy. Commissioner once in three months.

Under S. No. 6 Recovery of demolition charges

S.E. will review once in three months, whether demand notice is being sent to the owner for making payment of demolition charges or not. In case of non-recovery, he will ensure that reference is made to House Tax Department to recover such charges as arrears of Taxes.

(S.P. Aggarwal)

Commissioner

20/08/2001

21. A reading of the aforesaid circular makes it clear that the responsibility is not on the Executive Engineers alone but also lies with the senior officers who alone are in fact final authorities for taking action for sealing and demolition of the Building in case of un authorized construction.

22. According to the Tribunal, any head of department who may be in the wrong would always be morally responsible, as surely being the head of department, overall supervision may vest with him, but from that alone, it cannot be said that he is directly responsible for any lapse that may happen in the department. In the matter of demolition of illegal construction, the responsibility may be joint and

several as well, but from that also it cannot be said that the role of EE(B) even though, he may be the head of department of the building department, would be pivotal. To illustrate, if the concerned JE or AE may not even book an unauthorized construction, the matter may not proceed any further. Insofar as, booking the properties and passing orders for demolition are concerned, it does not appear from the material placed that the EE(B) may be directly responsible for the same. In fact, in the matter of booking, issuing notices and passing orders, it appears, he has no role to play. His role may be in supervising demolition of the illegal constructions but from that alone it cannot be said that his role is pivotal in the matter of demolition of illegal construction. It has been observed that vide office order dated 2.6.1997 issued by the MCD it has been directed by the Commissioner in exercise of powers vested in him u/s 491 DMC Act, that the powers conferred on him under various Sections of the Act shall be subject to his overall supervision, control and review, be also exercised by the officers mentioned in column 3, to the extent indicated in column 4 of the schedule. In column 1 of the schedule, against the scope of powers u/s 343, mention is of power with regard to order of demolition and stoppage of building and works in certain cases and appeal. In column 3, the officers to whom the powers have been delegated are mentioned as all Deputy Municipal Commissioners/Superintending Engineers of the zones, all Executive Engineers (Building), and all Assistant Engineers of zones. Insofar as Section 345A dealing with powers to seal unauthorized construction is concerned, such powers have been delegated to all Deputy Municipal Commissioners. The power of removal of dangerous buildings, as per provisions of Section 348, has been delegated to all Executive Engineers, but we may mention here that the power is with regard to removal of dangerous buildings and not of unauthorized construction. Thus the power of demolition and stoppage of buildings and works in certain cases is concerned, the same has not been delegated to Executive Engineer (Building) alone. The same has also been delegated to all Deputy Municipal Commissioners/Superintending Engineers and all Assistant Engineers (Building) as well. It is also observed that even though, the Lt. Governor may have found no merit in the appeal of the respondents, but one thing that was accepted and so held, was that it was a case of joint and several responsibility. It is in consideration of that fact only that the punishment of dismissal from service of the respondent was converted to that of compulsory retirement.

23. Relying upon the appellate order the Tribunal further observed that in view of the conflicting stand of the parties with regard to the extent of role played by the respondents in the matter of demolition or unauthorized construction, it is necessary to hold a regular departmental enquiry to find out as to what was the exact role played by the respondents and only then after it is adjudicated upon then only the issue of punishment would have arisen. The Tribunal further observed that when it was not certain that it is only the Executive Engineer (Building) was wholly responsible and the petitioners decided even to hold departmental enquiry against

J.E./A.E. wherein the charges were exactly the same as were against the respondents, it cannot be held that such an enquiry cannot be held against Executive Engineers, while enquiry could be conducted against J.E./A.E. in so far as respondents and other Executive Engineers were concerned it was not practicable is a misnomer and such arguments could not be accepted. It was thus stated that in these circumstances, there was no occasion for the petitioners to have invoked the procedure prescribed u/s 95(2)(b) of the MCD Act r/w Regulation 9 thereof.

24. Referring to the plea taken by the petitioners that the orders were outcome of observation made by the High Court in the PIL titled as Kalyan Sanstha Social Welfare Organization, to the effect that a person put on a public duty if found committing the law or grave violation of duty cannot be continued on duty and such persons is not entitled to audi alteram partem, the Tribunal has observed that in the order given by the PIL Bench there were no findings that the respondents alone by virtue of some specified provisions in the Act of 1957 or the Rules framed thereunder were the only persons who were to book unauthorized constructions, issue notices against the parties, pass orders of demolition and to carry out the demolition process either by himself or through subordinates or to supervise the demolition process. Thus it is stated that the observation made by the High Court that the delinquent/respondents would have no right to invoke the principles of audi alteram partem was not applicable to the case of the respondents in the given facts. Once the petitioners who held regular departmental enquiry against number of Junior Engineers and Assistant Engineers facing similar charges as were contemplated there was no reason to dispense with regular departmental enquiry in the case of the respondents. In any case no finding has been returned in the order dated 7.4.2006 to the effect that it was the respondents alone who were persons responsible to book unauthorized construction, issue notice against the concerned parties, pass orders of demolition and carry out the demolition process. In this regard it was submitted that the High Court only required the petitioners to proceed against all concerned who were responsible for coming up unauthorized constructions by way of regular departmental enquiry. Further the Tribunal has also observed that in the present case the respondents were not before the Court. They were also not heard and therefore even if it is presumed that the observation of the High Court that they were not entitled to any opportunity of hearing the said observations were sub-silentia and per inquirium.

25. The Tribunal also referred to a status report filed by the petitioners before the PIL Bench in the form of an affidavit mentioning about holding of regular departmental action for major penalty against 178 SEs, EEs, AEs etc., who had failed in their endeavour to restrict the violation of the building bye laws had been undertaken by the MCD. Out of 178 cases, inquiry had been completed in 151 cases and final orders issued on 96 cases. In an annexure to affidavit it is also mentioned that in the first lot, 95 engineers were identified for having abetted and connived for allowing unauthorized construction of Delhi, consisting of 59 JEs and 36 AEs, and

further that 66 engineers were identified for having abetted and connived unauthorized construction in their respective zones, consisting of 33 JEs, 21 AEs and 12 EEs. The abstract of cases is given as, total number of regular departmental action ordered in 178 cases, enquiry completed in 151, final orders issued in 96 and major penalty imposed in 75 cases. It is the positive case of the respondent, as mentioned, not controverted, and therefore, admitted, that the major penalty against the officers found guilty as mentioned above, was only to the extent of stoppage of increments. With regard to 1698 properties booked by S 1 Meena for demolition, insofar as the role of the respondent is concerned, it is also the positive case of the respondent, and not controverted by the respondents, that all the AEs and JEs who were given opportunity to defend their cases in departmental enquiries have been exonerated by either of the authorities.

26. The Tribunal further observed that if it was practical to hold departmental proceedings against Junior Engineers, Assistant Engineers and Superintending Engineers pertaining to the same very charges as alleged against the respondent, there was no impediment in the way of the respondents in resorting to departmental proceedings in the case of the respondent as well. It is significant to mention that to the plea raised by Learned Counsel for the respondent that if others facing similar charges were departmentally tried, there could be no earthly reason to deviate from the said procedure qua the respondents no reply except that the respondents in the matter of demolition of illegal constructions had a pivotal role to play has been stated. It is not denied that those who were departmentally tried also at least shared the responsibility in the matter of demolition of illegal constructions. The Tribunal thus held that the only distinction sought to be made by the respondent MCD in adopting different procedures for its employees is wholly unjustified. If the petitioners found it practicable to hold departmental proceedings against as many as 178, including officers junior and senior to the respondent, there should not have been any difficulty in resorting to the same procedure insofar as, the respondent is concerned. Even if it be admitted that the respondent being the Executive Engineer (Building) had a pivotal role to play in the matter of demolition of unauthorized constructions, at the most, it would make difference in the quantum of punishment and not in holding departmental proceedings with regard to others, and resorting to procedure for summary dismissal insofar as, the respondents are concerned. It is stated that even from the orders passed by the PIL Bench (supra) no distinction between the case of the respondent and those who were departmentally proceeded can be made out. In fact, the role of all officers, be it Junior Engineers, Assistant Engineers, Executive Engineers, Superintendent Engineers, Deputy Commissioners and even SHO of the area concerned, came to be commented adversely in equal measures. No distinction whatsoever on that count has been made that may even remotely show that different treatment was to be meted out to the Executive Engineers.

27. The Tribunal has observed that in the first order dated 09.11.2005 the PIL Bench only observed that until and unless severe action was taken, major penalty was taken the unauthorized construction will remain rampant. The Executive Engineer as well as Junior Engineer were the persons mostly responsible for unauthorized constructions. On the next date of hearing i.e. on 30.11.2005 the Court observed that the officers of MCD are hand in glove with those who indulge in unauthorized construction, and it was not possible for such mushrooming of unauthorized construction in the capital of the country, role of SHO concerned also came up for adverse opinion. It was also observed that the primary responsibility of unauthorized construction though vests in the Engineering department of MCD but the SHO concerned cannot take the plea that no cognizance can be taken by him. After so observing that the direction came to Commissioner to fix responsibilities of SHO and Engineers who allowed, no notice of unauthorized construction in relation to admitted figure of Rs. 18,299 properties where unauthorized construction has been raised and directed action to be taken of major penalty against all such persons who were found guilty of having abated or in any manner connived with those who indulged in unauthorized construction. The Tribunal observed that once again there was no observation to dispense with the regular departmental enquiry. In fact observation was to impose major penalty but after holding enquiry.

28. In the order dated 6.12.2005, while giving reference of order dated 30.11.2005 with regard to taking of major penalty proceedings, the court noted the tardy progress in the matter of demolition of unauthorized construction. Vide order dated 18.1.2006, insofar as the issue in the present Application is concerned, the High Court observed that with regard to taking of major penalty proceedings against the concerned officials of MCD, it was stated in the action taken report that 94 officials of the level of Junior Engineers and Assistant Engineers had been identified for major penalty proceedings. The PIL Bench further observed that once, the MCD itself had booked over 18000 properties as unauthorized and illegal, the same could not have come up without the active or passive connivance of JEs, AEs and EEs of the zones. The Commissioner, MCD was directed to identify all such engineers and other officials who were involved or abetted in the coming up of such constructions and initiate major penalty proceedings against them as well. These penalty proceedings were to be time-bound. The Court only the MCD to initiate major penalty proceedings not only against the 94 officials of the level of JEs, AEs and EEs, but the higher officials as well, which were to be time-bound. The next relevant observations came to be made on 16.2.2006, after two months and ten days, when observations with regard to initiating major penalty proceedings against all the concerned officials were made by the court. The court was not satisfied with the action taken only against JEs and AEs. It was of the opinion that Superintending Engineers and Deputy Commissioners of the zones concerned were also responsible. The respondents were required to intimate the court as to what action had been taken against them. The court, it appears, was of the firm view that only JEs and AEs were

not responsible for illegal constructions. Deputy Commissioners and Superintending Engineers, in that context, it was also observed, would be equally responsible. In the context of responsibility of higher officers with regard to illegal construction and demolition, it also came to be observed that When a person is appointed to carry out a public duty in terms of statute and if it is found that statute has been violated in spite of putting the custodian on duty by providing funds from the public exchequer, the principle of audi alteram partem cannot be invoked by such delinquent persons. Even while so observing, the court referred to its last order dated 18.1.2006 when time of two months was given to the respondents to take action. This time limit was to expire on 18.3.2006, as observed in the order itself. The Commissioner was directed to submit the action taken report against all officers. The court after observing that there was no reason for delay as the responsibility would be fixed on the basis of records, still gave time to the respondents to take action by the next date of hearing. It is observed that we are giving time till the next date of hearing to have these persons booked and action taken. It may appear from the earlier part of the order where observation has been made that when a person is appointed to carry out a public duty in terms of statute and if it is found that statute has been violated in spite of putting the custodian on duty by providing funds from the public exchequer, the principle of audi alteram partem cannot be invoked by such delinquent persons, the High Court was of the opinion that action could be taken by dispensing with the enquiry, but in ultimate analysis, time was given to the respondents to take action against all the concerned, as mentioned in order dated 16.2.2006 including the senior officers such as Deputy Commissioners, Superintendents.

29. The Tribunal has rightly observed that the PIL Bench in the orders passed later only expressed its annoyance and anguish for no action having been taken against the higher officers even though, it was suggested on number of occasions that action should be taken against them as well. That being so, it was observed by the Bench that it was not satisfied with the way MCD had dealt with the problem, and that if MCD failed to carry out its statutory obligations under the Act, the court would have to go for other options as prescribed under the DMC Act with regard to dealing with the delinquent officials. It was also made clear that if MCD was not serious in taking action and showing door to the corrupt officials, the court would use other machinery for probe.

30. Before us, the Learned Counsel appearing for the respondents also made two-fold additional arguments to justify the order of the Tribunal impugned before us for having set-aside the orders dated 7.4.2006 and 3.7.2007, i.e.

(i) No mandamus had been issued by the PIL Bench to dispence with the services of the respondents without holding any enquiry inasmuch as, no such order could have been issued by the High Court because a mandamus can be issued for doing a thing only in accordance with law.

(ii) That even otherwise provisions contained u/s 95(2)(b) of the MCD Act r/w Regulation 9 read with Article 311 of the Constitution of India could have been invoked taking into consideration all the facts of this case as discussed above. It is stated that a bear reading of the order dated 7.4.06 do not justify such an action at least against the petitioners who were neither heard nor were the parties before the PIL Bench.

31. The question that arises for our consideration is whether even if it is presumed that the orders passed by the PIL Bench are to be treated as a mandamus can it compel MCD to act contrary to law? The answer has to be in the negative.

32. It has been held by the Apex Court in State of West Bengal v. Subhas Kumar Chatterjee and Ors. Civil Appeal No. 5538/2008 decided on 17.08.2010 that neither the government can act contrary to the rules nor the court can direct the government to act contrary to rules. No Mandamus lies for issuing directions to a government to refrain from enforcing a provision of law. No court can issue Mandamus directing the authorities to act in contravention of the rules as it would amount to compelling the authorities to violate law. Such directions may result in destruction of rule of law.

33. Further the Apex Court in Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, held:

The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A.K. Kraipak v. Union of India. Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known if more than one choice is available to the administrative authorities; they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (Lord Diplock in Secy. of State for Education and Science v. Tameside Metropolitan Borough Council. The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene.

34. We have considered the aforesaid observations made by the Tribunal and have also given our thoughtful consideration to the rival submissions made by the

parties.

35. It is not necessary for us to agree with each and every word which has been mentioned by the Tribunal in its order subject matter of the present writ petition regarding the interpretation of the orders passed by this Court in Kalyan Sanstha's case (supra) but we agree with the Tribunal to the extent that even if the principle of audi alteram partem were to be dispensed with and the regular departmental enquiry as contemplated in the orders of the PIL Bench were not to held, the petitioners while resorting to provisions of Section 95(2)(b) of DMC Act read with regulation 9(ii) of the Regulations of 1959, as also Article 311 of the Constitution were required to follow pre-conditions for invoking such provisions in accordance with law and in any case the observation of the High Court to dispense with the principle of audi alteram partem could not be invoked against the respondents who were not a party before the High Court.

36. We also agree with the observations made by the Tribunal that the orders passed by the PIL Bench contained directions only to proceed against the delinquent officials in regular departmental enquiry. It is apparent that the petitioners have invoked the provisions of Section 95(2)(b) of DMC Act read with regulation 9(ii) of the Regulations of 1959 only because they failed to take action against the delinquent officials within the time frame as directed by the High Court. We have no difficulty to accept the argument raised by the Learned Counsel representing the respondent that such provisions were invoked for fear of action being taken by the High Court against those who failed to do so, within the time frame as mentioned above. Dispensing with enquiry against the respondent on the basis of interim orders passed by the High Court and observations made therein does not appear to be justified in the facts and circumstances of the case. Having found that observations made by the High Court were not sufficient reason so as to hold that it was not reasonably practicable to hold an enquiry, time is now ripe to see the other grounds, if any, either mentioned in the impugned orders or in the counter reply endeavouring to justify that it was not reasonably practicable to hold a regular enquiry in these cases.

37. Counsel representing the respondent, as mentioned above, has urged that the other grounds are sensitivity of the issue and public interest. Before, however, we may deal with the contention of the Learned Counsel as noted above, we may briefly advert to the relevant provisions in the Constitution of India and the DMC Act as well as the Constitution of India. We may observe here that the provisions contained u/s 95(2)(b) read with regulation 9 are akin to Article 311 of the Constitution of India. By virtue of provisions contained in Article 311(1) no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State, shall be dismissed or removed by an authority subordinate to that by which he was appointed. He also cannot be dismissed or removed or reduced in rank except after an inquiry in which he has been informed

of the charges against him and given a reasonable opportunity of being heard in respect of those charges, as provided in Clause (2) of Article 31.

38. There are three exceptions, provided in sub-Clauses (a), (b) and (c) of Clause (2) of Article 311, which may justify not to hold an enquiry before inflicting punishment upon a government servant. The first exception is where the person concerned has been convicted in a criminal charge. The second exception is where the authority empowered is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. The last exception is where the President or the Governor is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

39. The Order dated 7.4.06 is sought to be justified on the basis of the second exception as provided under Article 311(2)(b). By virtue of provision contained in Article 311(3), when a question may arise as to whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final. It is an admitted position that provisions contained in Section 95(2)(b) of the Act of 1957 are pari materia to Article 311 of the Constitution. There would be thus no need to make a mention of the same. We may first deal with the contention raised by the Learned Counsel representing the petitioners based upon Article 311(3) that once, the concerned authority found it to be a case that it is not reasonably practicable to hold an inquiry, the decision of the said authority would be final and, therefore, once, such authority had arrived at such conclusion, there would be no scope to deal with the issue any further. This contention needs to be rejected straightway, as in our view such decision is always justifiable and can be called in question in a competent court of law. Reference can be made to the judgment delivered by the Apex Court in the case of Union of India and Another Vs. Tulsiram Patel and Others,

40. In the impugned order, even though it is mentioned that it is a settled law that every action of an administrative of executive authority which visits adverse or evil consequences upon a citizen, or any person, has to be proceeded by rules of natural justice and fair procedure, and this would be more so in a case where services of an employee are sought to be terminated/dismissed, it is, however, observed that a small area has been carved out to cater to exceptional cases, i.e., where the nature of charge is either so sensitive or public interest warrants that an enquiry would not be either practicable or would lead to unfair results or in cases where public interest warrants not to hold a full-fledged enquiry and material are sufficient to warrant a view to be taken. After making general observations as mentioned above, the conduct of the respondent has been stated to be reprehensible, and it is then stated that the charge is so sensitive and the public interest warrants that the enquiry would not be either practicable or would lead to unfair results, and further that the public interest warrants not to hold a full fledged enquiry and material on record is

sufficient to warrant a view to be taken in the matter because of the reason that unauthorized buildings booked were clearly identifiable matching the tenure of the person who worked in the zone. In the operative part of the order, it is mentioned that considering the sensitiveness of the charge, the public interest and material available on record and lastly that holding of a full fledged inquiry would lead to unfair results. It is with these observations enquiry has been dispensed with against the respondents holding that the same is not reasonably practicable in the present state of circumstances. We have quoted the order passed by the petitioners dated 07.04.2006 but found that except for stating the legal position, the only observation for justifying dispensing with the enquiry is the italicized portion of the order.

41. We are satisfied that the reasons for dispensing with the enquiry, as mentioned above, are wholly irrelevant and unjustified. What was sensitive about the charges on which the respondent may have been tried is not explained either in the impugned orders or in the counter reply filed before the Tribunal or in the submissions made during the course of arguments. The issue of unauthorized construction may be sensitive, but the issue of holding an enquiry in case of an official who is alleged to have not checked or taken measures to demolish illegal constructions, in our considered view, cannot be stated to be sensitive at all. Once again, public interest may be with regard to demolition of illegal constructions, but there was no public interest involved in proceeding against individuals.

42. At this stage we would take note of the observations made by the Tribunal in para 24 of the impugned order where the general principles and conditions for the application of Article 311(2)(b) have been distilled from various Judgments of the Apex Court and we agree with the same. They are as follows:

i) reasons for dispensing with the regular departmental enquiry must be established by holding that it is `not reasonably practicable to do so and reasons for this must be recorded in writing;

ii) disciplinary enquiry should not be dispensed with lightly or arbitrarily or out of ulterior motive;

iii) disciplinary enquiry should not be dispensed with to avoid the holding of an enquiry or because the departments case against the government servant is weak and must fail;

iv) the reason for dispensing with enquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of Clause (b) of second proviso;

(v) the authority is obliged to show that his satisfaction is based on objective facts. The decision to dispense with the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authority;

(vi) the subjective satisfaction must be fortified by independent material to justify dispensing with the enquiry envisaged by Article 311(2);

recourse to Article 311(2)(b) can be taken even after enquiry has been started;

the gravity of offence is not a ground for dispensing with regular departmental enquiry and invoking Article 311(2)(b);

(ix) courts can interfere with such orders on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exercised, notwithstanding Clause (3) of Article 311;

(x) in examining the relevance of reasons, the court will consider the situation, which led the disciplinary authority to conclude that it was not reasonably practicable to hold the enquiry;

(xi) court should examine whether the reasons are relevant and in order to do that the court must put itself in place of the disciplinary authority and consider what in the then prevailing situation a reasonable person acting reasonably would have done. Where two views are possible, the court will decline to interfere;

when the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of whim or caprice of the concerned officer.

Subjective satisfaction recorded in the order has to be fortified by any independent material to justify the dispensing with the enquiry envisaged by Article 311(2) of the Constitution; and

that the appellate authority must not only give a hearing to the Government servant concerned but also pass a reasoned order dealing with the contentions raised by the concerned officer in the appeal.

43. The three conditions which are available for invoking powers vested u/s 311(2)(b) which may permit dispensation of regular departmental enquiry are: firstly, where the person concerned has been convicted of a criminal charge which is not the case before us. The second exception is where the authority is satisfied for some reason to be recorded by that authority in writing it is not reasonably practical to hold such enquiry which seems to be the tenor of the order passed by the petitioners. The third exception is available in those cases where the President or the Governor is satisfied that in the interest of security of the State it is not expedient to hold such an enquiry. This is also not the case of the petitioners in this case.

44. Now coming to the second exception, we are in agreement with the Tribunal that in the present case once the petitioners themselves have resorted to holding a regular departmental enquiry in case of Assistant Engineers/ Joint Engineers numbering in hundreds for the same charges there is no reason which comes out or

has been culled out by the petitioners to justify dispensation of the enquiry in the case of the respondents who are only part of the chain which may be ultimately held to be responsible for mushrooming of unauthorized construction in the State of Delhi. However the question as to whether they are to be dismissed from service or some other punishment is to be imparted on them would require consideration by the disciplinary authority but for that it would be necessity to consider the explanation as may be furnished by the respondents. Such procedure cannot be ruled out, rather it would be necessary as observed by the Tribunal with which we also agree, more so because in this case the respondents were not before this Court in the PIL as referred to above. The directions given by the PIL Bench in that case to dispense with the enquiry by observing that principles of audi alteram partem may not be applicable against persons who are responsible in law to do a particular thing but violates the law cannot be made applicable to the case of the respondents without even giving them a preliminary hearing to satisfy the authority or to explain their role in booking sealing or ultimately demolishing the unauthorized construction which can only be done by a joint effort of all concerned including senior officers such as Divisional Commissioners who are the ultimate persons responsible for carrying out the demolition action.

45. After the judgment delivered by the Apex Court in the case of Tulsiram Patel (supra), three conditions mentioned in Sub-clause (6) to Rule 19 of the CCS (CCA) becomes relevant for invoking of Sub-clause (b) of the second proviso to Article 311(2);

(a) Where a civil servant, alone or together with his associates terrorizes, threatens or intimidates witnesses who are likely to give evidence against him with fear or reprisal in order to prevent them from doing so; or

(b) Where the civil servant by himself or though others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that the officer is afraid to hold the enquiry or direct it to be held; or

(c) Where an atmosphere of violence or of general indiscipline and insubordination prevails at the time of the attempt to hold the enquiry is made.

46. None of the situations as aforesaid exist. We may notice here that the approach of the petitioner had been as if there was mandamus issued by this Court to dispense with the services of the respondents by invoking provisions contained u/s 311(2)(b) of the Constitution of India and/or by invoking provisions contained u/s 95(2)(b) of the MCD Act r/w Rule 9 of the Regulations framed thereunder. However, it is not so for the reason that none of the orders passed in the PIL mandates the petitioners to dismiss the respondents without holding any enquiry as has been done in this case. Moreover, Section 95(2)(b) of the MCD Act requires hearing before passing of any such order which has not been done in this case. In any event, as argued by Learned Counsel appearing for the respondent, even if it is treated for

the sake of argument that the orders passed by this Court in the PIL were in the nature of mandamus, such mandamus was only to act in accordance with law, that is to say, if power was available with the petitioners even to dismiss the services of the respondent without holding any enquiry, they were required to make out a case for passing such orders in accordance with law. In the absence of making such a case, the petitioners were duty bound to proceed against the respondents departmentally and after complying with the principles of natural justice. Needless to say that rule of audi alteram partem is one of the essential rules for complying with the rules of natural justice. Even if it is presumed for the sake of argument that the directions of the PIL Bench permitted to dispense with the enquiry, this could not have been dispensed with in respect to those persons who were not before the Court and were not given any hearing at all.

47. As observed by the Apex Court the rule of audi alteram partem requires an opportunity of hearing to a person who is likely to be affected in a decision to be taken by a disciplinary authority. He or she is certainly entitled to hearing may be only by issuance of a show cause notice even if the situation is urgent. We can make reference to the case of K.I. Shephard and Others Vs. Union of India (UOI) and Others, .

48. It would be relevant to take note of para 13 of the judgment in this case, which reads as under:

13. Natural justice has various facets and acting fairly is one of them. RBI which monitored the three amalgamations was required to act fairly in the facts of the case. The situation necessitated a participatory enquiry in regard to the excluded employees. Since the decision to exclude them from service under the transferee banks is grounded upon a set of facts the correctness whereof they deny, if an opportunity to know the allegations and to have their say had been afforded, they could have no grievance on this score. The action deprives them of their livelihood and brings adverse civil consequences and could obviously not be taken on the ipse dixit of RBI officers without verification effects. It is quite possible that a maneuvering officer of the banking company adversely disposed of towards a particular employee of such bank could make a report against such employee and have him excluded from further service under the transferee bank. The possibility of exclusion on the basis of some mistake such as to identity cannot also be ruled out. There is all the more apprehension of this type as the process has to be completed quickly and very often the records of a large number of employees have to be scrutinised. We are of the view that rules of natural justice apply to administrative action and in the instant cases the decision to exclude a section of the employees without complying with requirement of natural justice was bad.

49. An enquiry can be held even by issuing show cause notice and giving an opportunity to explain before taking a final view as to whether it is a case where a regular department enquiry under Rule 14 of the CCS(CCA) Rules should be held or

further enquiry be dispensed with. However this also has not been done by the petitioners in this case.

50. While we are of the opinion that to dispense with the enquiry was wrong, we should not be understood as saying that the depth of the enquiry should be equivalent to that of a trial before a criminal court. The least which could have been done was to initiate an enquiry by issuing a show cause notice giving the employee opportunity to explain, though not necessarily to record all explanations that he gives. Thereafter the Disciplinary Authority can form its own conclusion as to whether it would be in the interests of justice to prematurely terminate the services or take some other action as may be thought proper.

51. Taking all these facts into consideration, we find ourselves in agreement with the conclusion reached by the Tribunal, though for somewhat different reasons, as we have noted above, take exception to the directions of the Tribunal to grant respondents full back wages and continuity of service.

52. At this juncture we may further like to observe that it is nobody's case that mushroom growth of unauthorized construction certainly cannot be appreciated. It is not even disputed by the respondents that officers of MCD including the respondents themselves are not blameworthy for what has happened. Nobody can dispute the concern shown by this Court in Kalyan Sanstha's case which was primarily to book the responsible officers and directions were given to MCD to take action against those who are found guilty. It is also true that the procedure declared by the respondents as per their office order dated 20.08.2001 read with relevant provisions of the MCD Act makes it impossible for a single person to take all the actions as are required to be taken up but apparently the responsibility being the head of the Building Department in their respective zones are persons who are certainly responsible for the unauthorized construction though they may have adequate explanation which after consideration may compel the authorities either to relieve them of the charges which may be leveled against them or which may persuade to take action such as dispensing with the enquiry if situation so warrants after hearing their explanation and after giving them a personal hearing or may call for a regular departmental enquiry.

53. To that extent we leave it to the petitioner as to what kind of enquiry would be required to be held in the present case though we would certainly like the petitioners to serve upon the respondents with a charge sheet; take into consideration their reply if any besides giving them a personal hearing. It is thereafter by passing a detailed speaking order the petitioner would be free to pass appropriate orders either u/s 95(2)(b) read with Section 311 of the Constitution of India if the situation so warrants or to hold a regular departmental enquiry or to pass under Rule 14 as the case may be. We make it clear that the petitioners will not be bound by the observations made by the Tribunal or by us on merits with regard to the nature of enquiry to be held in this case. However, the respondents would not

be entitled to back wages for the period w.e.f. 07.04.2006 till the pronouncement of this judgment, even though they would stand reinstated in service from 07.04.2006. In this regard, the respondents themselves have given an undertaking in this Court as recorded in our order dated 26.08.2010.

54. We also make it clear that if needed, the petitioners would also be entitled to pass an order of deemed suspension w.e.f. 07.04.2006 till the outcome of the enquiry as may be contemplated by them preferably to be over within a period of three months from today in view of the provisions available under Rule 10(4) of the Fundamental Rules r/w Rule 54 thereof.

55. Since the factual controversy and the legal issues are common in all the writ petitions though we have discussed the order passed in the case of S.L. Meena but the orders passed in the other cases have also been issued on similar facts, we dispose of the writ petitions with the directions as above by this common order with no orders as to costs.