IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 6751 of 2021

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Re: Suo Motu cognizance taken by the Court vide order dated 01.03.2021 of a structure on the north side adjacent to the Centenary Building of the Patna High Court which came up during Covid-19 Pandemic.

.....Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The High Court of Judicature at Patna through its Registrar General, Patna, Bihar.
3. The Chief Secretary, Government of Bihar, Patna, Bihar.
4. The Secretary, Minority Welfare Department, Government of Bihar, Patna, Bihar.
5. The Secretary, Building Construction Department, Government of Bihar, Patna, Bihar.
6. The Director General of Police, Government of Bihar, Patna, Bihar.
7. The Patna Municipal Corporation through its Municipal Commissioner, Patna, Bihar.
8. Municipal Commissioner, Patna Municipal Corporation, Patna, Bihar.
9. The Bihar State Building Construction Corporation Ltd., through its Managing Director, Patna, Bihar.
10. The Managing Director, Bihar State Building Construction Corporation Ltd., Patna, Bihar.
11. The District Magistrate, Patna, Bihar.
12. The Senior Superintendent of Police, Patna, Bihar.
13. The Bihar State Sunni Waqf Board through its Chief Executive Officer, Patna, Bihar.
14. The Managing Committee of Waqf Estate No. 663 Hazrat Syed Shaheed Peer Muradshah Mazar, Near High Court, Patna, through its President, Sri Khursheed Alam, AAG, High Court, Patna, resident of T2, Surya Triveni Apartment No.3H, New Patliputra Colony, Patna.

.....Respondents

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Appearance:

For the Petitioner : Mr. Amicus Curiae Rajendra Narayan, Sr. Advocate
For the State : Mr. Lalit Kishore, Advocate General
For the Sunni Waqf Board : Mr. P.K. Shahi, Senior Advocate
For the PMC : Mr. Prasoon Sinha, Advocate
For the Bihar State Building Construction Building Corporation Ltd. : Mr. Tej Bahadur Singh, Sr. Advocate
For the High Court : Mr. Mrigank Mauli, Advocate
For the Managing Committee of Waqf Estate No. 663 : Mr. Khursheed Alam In Person as President of the Managing Committee

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE VIKASH JAIN
and
HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT
Date : 03.08.2021

PER VIKASH JAIN, J. —

Noticing, during the hearing of Cr.W.J.C. No. 887 of 2013 and an analogous case on 01.03.2021, a huge structure being constructed in close proximity of the northern side of the newly inaugurated Centenary Building of the Patna High Court, this Court formulated the following questions in view of the serious security concerns posed by such construction, and referred the matter to the Hon'ble the Chief Justice for being taken on the judicial side –

1. *Who is constructing the building and at whose instance it is being constructed?*

2. *Whether such person has right and title over the land on which the construction is being made?*

3. *Whether the map of the building has been duly approved by the Patna Municipal Corporation and the construction is in accordance with the approved plan?*

4. *What is the proposed use of the building?*

2. The matter was registered as public interest litigation and directed by Hon'ble the Chief Justice to be placed before the present Special Bench for its consideration.

3. As observed above, the very purpose for taking up this matter was the serious security concern for Judges, lawyers, litigants, staff and security personnel alike, having regard to the close proximity of the structure to the High Court building. Accordingly, this Court in its order dated 15.03.2021 took note of the submission of learned Advocate General that the structure in question was about 40-42 feet in height and stood approximately 30 feet away from the boundary wall of the High Court building. This Court opined that such construction was in clear breach of Bye-law 21 of the Bihar Building Byelaws, 2014 (‘the Bye-laws’) which prohibits the existence of any building exceeding 10 feet in height within 200 meters radius of the boundary of important buildings including the High Court. Interim orders were passed to the effect that no such construction and related activities whatsoever shall be undertaken or continued without prior leave of the Court.

4. Affidavits have been filed on behalf of the Building Construction Department (Respondent No. 5), the Bihar State Sunni Waqf Board (Respondent No. 13), the Patna Municipal Corporation (Respondent No. 7), the Bihar State Building Construction Corporation Ltd. (Respondent No. 9), the Managing Committee of Waqf Estate No. 663 (Respondent No. 14) as well as the Minority Welfare Department (Respondent No. 4).

5. The broad facts may be culled out from the somewhat detailed affidavit filed on behalf of the Bihar State Sunni Waqf Board (for short 'the Waqf Board'). It has been stated that one Hazrat Jalaluddin Shah, popularly known as Hazrat Shah Syed Peer Murad Rahmatullah Alaih, a leading personality of the reformist movement in the State of Bihar, died a Martyr and was buried in the Qabristan during the 18th Century in what was then Village Maholi with a Muslim dominated population. Various sections of society started paying homage to the said departed saint at his Dargah. The adjoining land of the Dargah began to be used by local Muslims for the purposes of Mosque, Eidgah, Khanqah, Dargah and Graveyard. Under the provisions of Bihar Tenancy Act, 1885, the land of Tauzi No. 34/197, Thana No. 06 of village Maholi was surveyed and Khatiyan was published in the year 1911, and the relevant lands were recorded as "Shamilat" Musamat Bibi Wazirun Nisan Wagairah Neyaz Dargah. It is stated that the land of Khata No 48, Plot No. 194 was recorded as Qabristan and Dargah and was under possession of

Musamat Shahidan and some other persons named therein. Other plots stood as follows –

Plot No.	Khata No.	Area	Recorded as
193	156	0.07 decimal	Graveyard
195	426	0.36 decimal	Dargah
196	424	0.28 decimal	Dargah
197	423	0.16 decimal	Dargah
138	96	10 kathha	Dargah
142	68	0.82 decimal	Neyaz Dargah
143	119	0.38 decimal	Neyaz Dargah

6. It was therefore claimed that the above properties were being used as Mosque, Eidgah, Khanqah, Peer Khana and Maqbara Graveyard since time immemorial and thus constitute 'Waqf by user' under the provisions of Section 2 (m) of the Bihar Waqf Act, 1947 ('the Bihar Act'). As such, a Waqf in the name of Dargah Hazrat Shah Jalal Shaheed adjacent to the Patna High Court came to be registered on 17.03.1953 as Waqf Estate No. 663 and managed by a Managing Committee under the supervision of the Waqf Board. The Circle Officer, Sadar, Patna by his memo No. 618 dated 29.03.2000, upon measurement and determination of Waqf Estate Plot No. 663, furnished details describing the land as Graveyard, Dargah.

7. As regards the construction of the structure in question, it was stated that pursuant to an amendment in the Waqf Act, 1995 ('the Central Act' for short) in the year 2013, the Waqf Board took a decision to acquire the Waqf property and place it under its direct control for the purpose of development. As such, by Resolution No. 5 in its meeting dated 15.02.2018, the Waqf Board took a decision to

develop the property of Waqf Estate No. 663 by constructing a G+3 Waqf Bhawan comprising a guest house, a guard room and a parking space on the ground floor; a library and a conference room on the first floor; and offices of the Waqf Board on the second and third floors. The Bihar State Building Construction Corporation Limited (for short 'the Building Corporation') prepared the sanction map for the proposed construction, which was approved by the Minority Welfare Department. The Building Corporation gave its administrative sanction to the construction at an estimated cost of Rs. 14,67,86,000/-. The Minority Welfare Department accorded technical sanction and released Rs. 500 lakhs for construction. The Building Corporation issued a notice inviting tenders for construction and thereafter issued a work order. In the light of the above facts, it is claimed that the Waqf Bhawan is being constructed on Plot No. 194, Khata No. 48, Area 1.05 Acres, which is the property of Waqf Estate No. 663 as acquired by the Waqf Board.

8. It is further stated that the plan was approved by the Government Architect of the Building Corporation who is competent to sanction the said plan under Bye-law 8(1)(A) of the Bye-laws.

9. With regard to compliance with Bye-law 21, it has been admitted that the Waqf Bhawan is being constructed at a distance of about 16 ft. from the boundary wall of the High Court. In the sketch plan enclosed with the affidavit, this distance has been shown to be less at only 15 feet 6 inches.

10. The Building Construction Department of the State of Bihar (erroneously described as Respondent No. 3 instead of Respondent No. 5) in its affidavit sworn by one 'Ashutosh' posted as Deputy General Manager of the Building Corporation, has similarly stated that the building in question is being constructed on the basis of the drawing and administrative approval of the Minority Welfare Department over Plot No. 194 of Waqf Estate No. 663 (mistyped as 683) over which title is claimed by the Waqf Board. Tender for construction of the said building was issued on 31.07.2019 in the Hindi daily newspaper 'Hindustan', and on the basis of bids, and pursuant to the decision taken in the meeting of the tender committee of the Building Corporation on 06.03.2020, work order was issued on 13.03.2020.

11. The Patna Municipal Corporation in its brief affidavit has also stated that the structure is being constructed by the Building Corporation for the Minority Welfare Department on land belonging to the Waqf Board.

12. On the question whether the plan for the building has been approved by the Patna Municipal Corporation, a common stand has been taken by the Waqf Board and the Building Corporation in their respective affidavits to the effect that no such permission of the Patna Municipal Corporation was required in view of Bye-law 8(1)(A). The Patna Municipal Corporation in its affidavit has stated that as permission was not required, the plan for construction of the

building was not submitted to it by the concerned Department at any point of time.

13. Considering the complex nature of the issues as well as questions of general public importance being involved, this Court requested Mr. Rajendra Narayan, a Senior Advocate of this Court, to assist this Bench as *amicus curiae*. Mr. Narayan readily accepted the responsibility and has taken great pains to make detailed submissions elucidating the relevant provisions of law.

14. He has at the outset submitted that the acquisition of the property of Waqf Estate No. 663 by the Waqf Board has no legal basis under the provisions of the Central Act. He has then submitted that the construction of a multi-purpose multi-storied building on land claimed to have been used as a graveyard since time immemorial, and which has been recorded as such, is also questionable. It has further been submitted that admittedly no attempt was made for obtaining sanction of the plan from the Patna Municipal Corporation as has been admitted in the latter's affidavit. It has been contended that exemption under Bye-law 8(1)(A) is not applicable to the present case inasmuch as the Architect of the Building Corporation who has sanctioned the plan is not a 'Government Architect' as required by the said Bye-law and therefore, sanction of the plan by Patna Municipal Corporation was mandatory. It has been pointed out that the structure under consideration has ostensibly been constructed surreptitiously and in

haste immediately after a complete lockdown was imposed on the city in the later part of March 2020 in the wake of outbreak of Covid-19 pandemic, when all construction activities had come to a complete halt. The High Court was also functioning only in virtual mode.

15. With a view to ascertaining the facts with greater clarity, this Court by its order dated 15.03.2021, directed the Respondents Nos. 3 to 5, 9, 10 and 13 to submit the original records relating to the land and to the construction of the building in question, retaining photocopies with respective counsel.

16. While the original records have since been received in the office of the Registrar General, it transpired that little assistance could be offered by learned counsel appearing for most of the respondents at the time of hearing for want of photocopies of the records being available with them. The managing committee of Waqf Estate No. 663 did not submit its records at all. All records as received were digitised and made available to us by the Registrar General.

17. Learned Advocate General, appearing on behalf of the State, has referred to the provisions of Section 313 of the Bihar Municipal Act (the 'Municipal Act') to submit that every building or structure to be constructed, and any addition, alteration and modification to an existing building in any municipal area, must necessarily abide by the Building Bye-laws. Section 314 of the Municipal Act provides that such work may be undertaken only if the

building plan is approved by a competent authority designated under the Rules and the Bye-laws. No Architect may sanction a building plan unless it is in conformity with the Building Bye-laws, under threat of prosecution.

18. He then referred to Bye-law 8(1)(A), to submit that wherever works are carried out by Central Government and State Government departments/the Bihar State Housing Board, no permission is required if the building plans are signed by the Government Architect, who shall no doubt, ensure that such plans accord with the Bye-laws.

19. In the instant case, the construction in question has been carried out by the Building Corporation, which is wholly owned by the State Government. Such construction has been carried out at the instance of the Minority Welfare Department of the State Government. It is, therefore, his contention that this construction made on the basis of the building plan signed by the Government Architect, did not require any permission.

20. He further submitted that Bye-law 8(1)(A) must be read as an independent provision, and not as part of Bye-law 8(1) which deals with “alterations and the like.” This is evident from the use of words such as “plans” and “government projects” in the former provision which have no relevance in the context of mere “alterations and the like”.

21. He also sought to extend the applicability of Bye-law

8(1)(A) to constructions made by the Building Corporation such as the instant one, as, according to him, the Building Corporation should be held to stand at par with the Bihar State Housing Board which has been specified only illustratively in the provision.

22. Learned Advocate General did not however dispute that the building sanction plan did violate Bye-law 21 in terms of permissible height. It was accordingly submitted that, if at all, only the construction made in excess of the permissible height be ordered to be demolished.

23. Mr. Tej Bahadur Singh, learned senior counsel, appearing on behalf of the Building Corporation, essentially adopted the arguments made on behalf of the State, particularly with reference to Bye-law 8(1)(A).

24. He further referred to the supplementary counter affidavit to state that a meeting was held on 08.04.2021 under the Chairmanship of the Chief Secretary, Bihar, in which a decision was taken to limit the height of the building to 10 meters to accord with Bye-law 21. It was assured that various other measures would be undertaken to ensure security and safety of all concerned in the High Court premises, such as screening the boundary towards the High Court, not using the construction as musafirkhana but as the office of the Waqf Board, not using the rooftop, installing CCTV in the premises, and screening the entry of visitors.

25. Mr. P.K. Shahi, learned senior counsel appearing on

behalf of the Sunni Waqf Board, submitted in similar refrain, admitting lapse on the part of the respondents with respect to construction in excess of the permissible height of 10 metres.

26. Learned counsel Mr. Khursheed Alam, appearing in person as President of Managing Committee of Waqf Estate No. 663, made an earnest request that demolition be restricted only to the extent necessary, leaving a structure of up to two-storeys which could be used as lawyers' chambers, considering the proximity of the building to the High Court. He did not press any other issue, much less as raised in his counter affidavit.

27. The Patna Municipal Corporation was represented by learned counsel Mr. Prasoon Sinha, who requested that his counter affidavit be adopted for the purposes of his submissions. He referred to the "Bihar Municipal Competent Authority For Sanction of Building Plan Rules, 2014" to submit that the Patna Municipal Corporation was required to supervise only those constructions, plans of which had been sanctioned by the Chief Municipal Officer in terms of Rule 4 of the said Rules.

28. He drew reference to Table 25 under Bye-law 77 which provides for compounding rates payable in case of violation of the Bye-laws in the matter of construction. However, he could not specify the category, out of the three categories enumerated therein, under which the present construction would fall.

29. Lastly, Mr. Mrigank Mauli, learned counsel for the

High Court, also agreed that there was apparent violation of Bye-law 21 as the construction far exceeded the permissible height of 10 metres. Such violation could not be defended with reference to any other provision in the Bye-law creating an exception to Bye-law 21.

30. He went on to submit that the term "boundary" as used in Bye-law 21 must not be understood in the restricted sense of a physical boundary, but should take within its sweep all buildings and constructions falling within a radius of 200 meters of the land owned by the High Court.

31. In his reply, Mr. Rajendra Narayan, amicus curiae, submitted that violation of Bye-law 21 has not been disputed by the respondents. So also, his submission that the respondents have acted in a grossly negligent manner, ignoring mandatory requirements of law at various levels and stages, is not in dispute. He reiterated that the requisite checklist as prescribed under the Bye-laws has been given a complete go-by, and this aspect of the matter has not been controverted.

32. He further submitted that the respondents are not entitled to claim the exemption under Bye-law 8(1)(A) in absence of the sanction of the building plan by a Government Architect. It was his submission, therefore, that the entire construction is illegal from the very inception, having been undertaken without a valid sanction plan.

33. He invited reference to Section 315 of the Municipal

Act to submit that the consequence of illegal construction is that it shall be liable to be demolished, apart from imposition of penalty upon the owner or the occupier or any person responsible for such construction.

34. Having heard learned *amicus curiae* Mr. Rajendra Narayan and learned counsel appearing on behalf of all the respondents at considerable length, I shall now proceed to consider the legality of the construction of the building from the standpoint of compliance with the relevant provisions of law.

35. This court, in order to satisfy itself with regard to the extent of compliance with the Acts, Rules and Bye-laws, put a few queries to the respondents. To begin with, the Court called upon the respondents to cull out any material from the records to show that in compliance of the scope and spirit of Section 32 of the Waqf Act 1995, the Waqf Board at any stage served a notice upon the Waqf Estate No. 663 to develop its property. Resting on the decision of Waqf Estate No. 663, did the Waqf Board then record its satisfaction that the Waqf Estate No. 663 was either not willing or not capable of executing the work required to be executed in terms of the notice, prior to taking over the property for development? Clarification was then sought whether a building of the nature proposed, that is, for use as guest house, library, conference room and offices of the Waqf Board (subsequently it has been undertaken that its use shall be restricted only as the offices of the Waqf Board) could at all be

constructed on land primarily used, and entered as such in the land records, as ‘Dargah’ and ‘Qabristan’. This court also wanted to know who was a “Government Architect” within the meaning, and for the purposes, of Bye-law 8(1)(A). Lastly, as a corollary, whether the plan sanctioned by the Architect of the Building Corporation could be said to be legally valid?

36. It is common ground that the structure in question has been constructed by the Building Corporation for the Minority Welfare Department upon Plot No. 194, Khata No. 48, area 1.05 acres of Waqf Estate No. 663 which has been acquired by the Waqf Board. The land in question is claimed as Waqf property on the basis of its use as Dargah and Qabristan since time immemorial as provided in terms of the definition in Section 2(m) of the Bihar Act [since repealed by Section 112(3) of the Central Act].

37. The Waqf Board has claimed in its affidavit that it has acquired the land of Waqf Estate No. 663 for purposes of its development and a building has accordingly been constructed thereon making provision for a guest house, a library, a conference room as well as offices of the Waqf Board. When questioned about the legal basis for such acquisition of the land, none of the respondents provided a satisfactory reply. A stand has been taken in paragraph 22 of the counter affidavit filed by the Managing Committee of Waqf Estate No. 663 to the effect that it had resolved to develop the Waqf and had requested the Waqf Board for

construction of building.

38. A similar statement is to be found in paragraph 6 of the counter affidavit of the Minority Welfare Department that the proposal was initiated by the Waqf Estate No. 663 and its Managing Committee had requested the Waqf Board for development and upliftment of its Waqf properties.

39. These averments however remain unsubstantiated by records and nothing whatsoever has been produced before the Court in support thereof. The averments made in this regard are, in the circumstances, not found credible in absence of records substantiating such claim.

40. In this context, I may examine Section 32 of the Central Act which enumerates the powers and functions of the Waqf Board, extracts from which, to the extent relevant, are reproduced–

> *"**Section 32**. Powers and functions of the Waqf Board.—(1) Subject to any rules that may be made under this Act, the general superintendence of all auqaf in a State shall vest in the Waqf Board established in the State; and it shall be the duty of the Waqf Board so to exercise its powers under this Act as to ensure that the auqaf under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such auqaf were created or intended:*
>
> *Provided that in exercising its powers under this Act in respect of any waqf, the Waqf Board shall act in conformity with the directions of the waqif, the purposes of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs.*
>
> *(2) Without prejudice to the generality of the*

foregoing power, the functions of the Waqf Board shall be—

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every waqf;
(b) to ensure that the income and other property of auqaf are applied to the objects and for the purposes for which such auqaf were intended or created;
(c) to give directions for the administration of auqaf;
(d) to settle schemes of management for a waqf:
Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;
xxxxxxxxxxxx
(o) generally do all such acts as may be necessary for the control, maintenance and administration of auqaf.
xxxxxxxxxxxx

(4) Where the Waqf Board is satisfied that any waqf land, which is a waqf property, has the potential for development as an educational institution, shopping centre, market, housing or residential flats and the like, market, housing flats and the like, it may serve upon the mutawalli of the concerned waqf a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.

(5) On consideration of the reply, if any, received to the notice issued under sub-section (4), the Waqf Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, take over the property, clear it of any building or structure thereon, which, in the opinion of the Waqf Board is necessary for execution of the works and execute such works from waqf funds or from the finances which may be raised on the security of the properties of the waqf concerned, and control and manage the properties till such time as all expenses incurred by the Waqf Board under this section, together with interest thereon, the expenditure on maintenance of such works and other legitimate charges incurred on the property are recovered from the income derived from the property:

> *Provided that the Waqf Board shall compensate annually the mutawalli of the concerned waqf to the extent of the average annual net income derived from the property during the three years immediately preceding the taking over of the property by the Waqf Board.*
>
> *(6) After all the expenses as enumerated in sub-section (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned waqf.*

41. Section 32 of the Central Act does not accord unlimited power to the Waqf Board to acquire property of a Waqf for its own use on a permanent basis. On the contrary, Waqf property may be taken over only for furtherance of the object of the Waqf and upon the *mutwalli's* unwillingness or incapability to execute the work of development. The development work is required to be done using Waqf funds or out of finances raised from the security of Waqf property. Once the expenses incurred by the Waqf Board in the control and management of the developed property have been recovered and recouped out of income derived from it, the developed property is required to be handed over to the *mutwalli* of the concerned Waqf.

42. The primary duty of the Waqf Board is to ensure that the auqaf under its superintendence are properly maintained, controlled and administered and their income applied towards the objects and purposes for which they were created or intended. There is no averment by the Waqf Board that there is any proposal to create an income generating asset through construction on the land with a

view to augment the income of the Waqf. Clearly therefore, the action of the Waqf Board in acquiring the land for the stated purposes, particularly earmarking two floors of the building for its own use, is ex-facie in the teeth of Section 32 of the Central Act and destructive of the very object of a Waqf. In such circumstances, the actions of the Waqf Board were completely unauthorised and it must be held to have acted contrary to the preconditions in Section 32 of the Central Act.

43. No other provision of law has been referred to by the Waqf Board or other respondents to justify or support the Waqf Board's action of permanently acquiring the said land for constructing a building of the proposed nature and arrogating a significant portion of it for its own office use.

44. That apart, Section 32(5) of the Central Act empowers the Waqf Board to execute development work from Waqf funds or from the finances which may be raised on the security of the properties of the Waqf concerned.

45. In the present case, however, the funds of the Waqf have not been used for developing the land, rather it is the clear stand of the Waqf Board that it is the Bihar State Minority Welfare Department, Government of Bihar which, after granting technical sanction, has released Rs. 500 lakhs for purposes of construction of the proposed building. The respondents have not shown from the records the origin of the proposal that the Minority Welfare

Department pay for the construction. From paragraphs 7 and 8 of the counter affidavit of the Minority Welfare Department, it transpires that the "Bihar State Waqf Development Scheme" was formulated and notified in the Official Gazette on 27.08.2018 and it provided for the grant of revolving funds to the Waqf Board for the purpose of developing and maintaining Waqf properties and enhancing their income. It is surprising to note however that the Waqf Board had sent its proposal to the Building Corporation for the construction of the building as early as on 19.01.2018, well before the aforesaid Scheme was notified. Nothing has been brought on record by the respondents to suggest that the works could be executed from funds of Waqf Estate No. 663 or from finances which might be raised on the security of the properties of Waqf Estate No. 663, as contemplated under section 32 (5) of the Central Act.

46. Yet another striking aspect is whether a building of the nature proposed could at all be constructed on Plot No. 194, Khata No. 48, as this land is said to have been used as Qabristan and Dargah since time immemorial and duly stands recorded as such in the land records. In a passing reference, the Managing Committee of Waqf Estate No. 663 has stated in paragraph 9 of its counter affidavit that "perhaps it is permissible". This is neither here nor there. No material or document has been brought before us to indicate that the nature of the land was ever changed to allow construction of building of the nature proposed.

47. On the crucial question of the legal validity of the sanction plan, it has been the consistent stand of the Waqf Board and the Building Construction Department that the building plan was sanctioned by the Architect of the Building Corporation, which was given administrative approval by the Minority Welfare Department. Based on the map so sanctioned, Rs. 500 lakhs were released by the Minority Welfare Department in terms of its letter No. 318 dated 12.07.2019 to the Accountant General Bihar, Patna. Notice inviting tender for construction was published in Hindi daily newspaper 'Hindustan' on 31.07.2019. Upon consideration of the bids received and in view of the decision of the Building Corporation's tender committee in its meeting held on 06.03.2020, the work order was issued by the Building Corporation through letter No. 681 dated 13.03.2020.

48. The Building Corporation proceeded with the construction on the strength of Bye-law 8(1)(A), submitting that the building plan having been sanctioned by the Government Architect, there was no further requirement of obtaining the sanction of the Patna Municipal Corporation. In turn, the Patna Municipal Corporation in its affidavit has categorically stated that the plan was never submitted to it by the concerned Department at any point of time. It therefore becomes necessary to examine the relevant provisions of law in this regard. The relevant extracts from the Bihar Municipal Act, 2007 ('the Municipal Act') as well as the Bihar

Building Bye-laws, 2014 ('the Bye-laws') may be taken note of at this stage.

Bihar Municipal Act, 2007

312. Definitions. - *In this chapter, unless the context otherwise requires, the expression -(1) "to erect a building" means -*

(a) to erect a new building on any site, whether previously built upon or not,

313. Prohibition of construction without sanction. *–No person shall construct, or commence to construct, any building or any structure of a permanent nature or execute any of the work relating to construction of building including addition, alteration or modification of an existing building in any municipal area, save and except in accordance with building bye-law.*

314. Sanction of building plan. *–No persons shall construct or commence to construct, any building or structure of permanent nature or execute any work relating to construction of building undertake or any alteration addition or modification of an existing building unless, the building plan is approved by a competent authority to be designated under Rules and Bye Laws to be framed by the Government.*

Provided that no Architect shall sanction any building plan unless it is in conformity with building bye-law framed by the State Government / Municipality.

Provided further that in case the building plan is in contravention or deviation of the building bye-law, in addition to any other action that may be taken under this Act, the registered Architect, the builder and the approving authority shall be liable to be prosecuted and shall be liable to pay fine of Rupees fifty thousand or sentence to imprisonment for a period which may extend to one year or both.

315. Construction of building in contravention of building bye-law. *– Any building or structure of permanent nature which has been constructed or*

construction has commenced in contravention or breach or deviation of building by-law shall be liable to be demolished, notwithstanding that it may have been approved by a competent authority.

Provided further that the owner or occupier or any person responsible for construction of a building or structure of permanent nature or commencement of construction in contravention, breach, or deviation of building by-law shall further be liable to pay a penalty of minimum of Rupees one lac, which may extend up to Rupees 10 lacs depending upon size of the building or structure and extent of deviation.

Provided further that the penalty under this Section shall be in addition to any other fine provided under this Act including fine for compounding as may be provided under building bye-law.

316. Building plan prepared by registered Architect to be submitted to the competent authority. *–(1) Every registered Architect who prepares a building construction plan shall within seven days from approving the plan submit detail of construction plan along with approval granted by him to the Chief Municipal Officer of the municipality.*

(2) On receipt of the building construction plan prepared by a registered Architect, the competent authority may enquire and verify and satisfy himself that the building construction plan conforms to building bye-law and other parameters required under this Act or Rules or Bye Law and approve.

(3) If Chief Municipal Officer, on such inquiry or verification finds that the building or structure of permanent nature construction plan has been approved by the registered Architect in contravention, breach or deviation of building bye-law or other parameters under this Act, he shall immediately stop construction work and proceed to take action against owner, occupier or any person responsible for construction of such building in contravention, breach or deviation of building bye- law and other parameter and shall also proceed to take action against registered Architect, who approved such building construction plan.

321. Framing of Building Bye-law. *–(1) The State*

Government shall frame Building Bye-law for the Municipalities;

Provided that State Government may frame one Building Bye-law for all the municipalities or separate Bye-law for separate Municipalities.

(2) Building Bye-law framed by the State Government shall be enforceable from the date it is published.

Bihar Building Bye-Laws, 2014

8. Permission.-*(1) No permission or notice shall be required for the works related to the following alterations and the like which do not otherwise violate any provisions regarding general building requirements, structural stability and fire and health Safety requirements of the National Building Code – 2005 :*

(i) Opening and closing of a window or door or ventilator;
(ii) Providing intercommunication doors;
(iii) Providing partitions;
(iv) Providing false ceiling;
(v) Gardening;
(vi) White washing;
(vii) Painting ,
(viii) Re-tiling and Reproofing
(ix) Plastering and patchwork
(x) Re-flooring
(xi) Construction of sun-shades on ones' own land

(A) No permission shall be necessary for works carried out by Central Government and State Government Departments/ Bihar State Housing Board if the plans are signed by Government Architects. However, the Government Architects shall ensure that the plans are prepared as per the provisions of these bye laws and the masterplan / development plan wherever applicable. In case of such Government Projects lying in the area outside of any development plan/ scheme, the Government Architects shall ensure to obtain NOCs required as per provision of this bye laws and Acts

(B) A separate guideline may be issued for

sanctioning of project within the Gram Panchayat area but falling outside the jurisdiction of any planning authority.

49. It follows from the above provisions that construction of a building must accord with the conditions, requirements and parameters prescribed in the Bye-laws which are enforceable as law, having been framed by the State Government in exercise of the powers under Section 321 of the Municipal Act and Section 81(2)(w) of the Bihar Urban Planning and Development Act, 2012, breach of or deviation from which entails rather severe consequences by way of demolition despite approval of the competent authority, apart from other action against the erring persons. It is mandated that no Architect shall sanction a building plan unless it is in conformity with the Bye-laws. Notably, Section 315 of the Municipal Act requires a registered Architect to submit the building plan as approved by him to the Chief Municipal Officer in order that the latter may satisfy himself that it conforms to the Bye-laws.

50. The stand of the respondents on the strength of Bye-law 8(1)(A) that permission of Patna Municipal Corporation was not required, is not acceptable for several reasons –

(a) Primarily, Bye-law 8(1) is relevant only for the purpose of 'works related to alteration' of the nature enumerated in clauses (i) to (xi) thereof. In other words, the main body of Bye-law 8(1) exempts from permission in cases only of certain alterations and not those of new erection of a building within the meaning of Bye-law 2(135)

read with Section 312(1)(a) of the Municipal Act referred to above. Thus, 'alteration' is the pre-condition which controls the applicability and interpretation of Bye-law 8(1)(A) which is but a part of Bye-law 8(1).

(b) Even otherwise, Bye-law 8(1)(A) specifically enjoins the Government Architect to ensure that the plans are prepared as per the provisions of the Bye-laws. No averment has been made in any of the affidavits that the sanction plan was in accord with the Bye-laws.

(c) The respondents have not brought any material on record to satisfy this Court that the Architect of the Building Corporation who sanctioned the building plan is a 'Government Architect' in order that exemption be available from obtaining permission of Patna Municipal Corporation as contemplated under Bye-law 8(1)(A). The respondents have not come forward with any satisfactory reply to the Court's query in this regard, much less with reference to the definition of "Government Architect" in any statute or notification. Learned Advocate General offered that a Government Architect would be one who is registered under the Architects Act and performs the work of the Government. No clear basis for this was however shown. On the other hand, Mr. Tej Bahadur Singh submitted that the Architect engaged by the Building Corporation as the executing agency ought to be construed as the Government Architect. This submission is a tacit admission that the Building Corporation's Architect is indeed not a Government Architect.

(d) If at all, the question of exemption from permission by virtue of Bye-law 8(1)(A) might apply only in respect of works carried out by the Central Government and State Government Department/Bihar State Housing Board. In the present case, it is the admitted stand of the respondents that the construction work is being carried out by the Building Corporation which has issued the notice inviting tender, taken decision in its tender committee and issued the work order for construction. The Building Corporation has not been granted the privilege of exemption as the Building Corporation cannot be equated with the Central or State Government, much less the Bihar State Housing Board, rather it is an entirely distinct, separate and independent entity. The submission of Learned Advocate General that the Building Corporation be treated at par with the Bihar State Housing Board cannot be accepted. It is well settled that a provision for exemption must be strictly construed and in that view of the matter, nothing should be read as implied or the scope of the provision extended in absence of indication to that effect in the provision itself.

51. The Patna Municipal Corporation has played a rather dubious role in supporting the stand of the Building Construction Department. It has not been explained how the Patna Municipal Corporation came upon the details of construction, such as who was constructing the building, for whom the construction was being made, on which land the building was being constructed, and the

location and situation of the construction, considering that the building plan was admittedly never submitted to it. The Patna Municipal Corporation has blindly supported the stand that it was not required to sanction the building plan in view of Bye-law 8(1)(A), which amounts to abdication of its statutory duty and responsibility. The Patna Municipal Corporation was duty bound to have enquired into the construction to satisfy itself that the same was in conformity with the Building Bye-laws and for the breach of which it ought to have taken action under Section 314 and Section 323 of the Municipal Act. Instead of so doing, it became a mute spectator to the illegal construction being carried on in gross violation of Bye-law 21.

52. The most extraordinary aspect is the brazen manner in which the provisions of Bye-law 21 have been flouted by the respondents. The said Bye-law 21 and other related provisions of the Bye-laws are as follows –

> *"**21. Construction near important buildings.** –No building exceeding 10 meters height shall be permitted within 200 meters radius from the boundary of the Governor's House, Bihar State Secretariat, Bihar Legislative Assembly, High Court and such other buildings as may be decided by the Authority or the State Government from time to time."*

53. Bye-law 21 stipulates an unexceptionable and absolute embargo upon construction of any building exceeding 10 meters in height within 200 meters radius of the boundary of important

buildings including the High Court. As noticed from the affidavit of the Waqf Board, construction far in excess of 10 meters in height has been made at a distance of only 15 feet 6 inches on the northern side of the boundary wall of the High Court in complete, utter and outright violation of Bye-law 21.

54. The respondents have rather blatantly defaulted compliance of Bye-law 5 which itself would have cautioned the respondents against breach of Bye-law 21. The Waqf Board claiming to be the owner was duty bound to file an application for the development of the land or for the construction of a building in Form-I or Form-II, as the case may be, prescribed under Bye-law 5, requiring a check-list issued by a technical person to be submitted along with the application. The check-list is prescribed in Form-VI, serial 16 of which is directly relatable to Bye-law 21, which has been completely ignored and disregarded by the Waqf Board as well as the Architect of the Building Corporation. The relevant provisions may be extracted for ready reference –

5. Application – (1) Any person who intends to develop land, erect, re-erect or make additions or alterations in any building, demolish any building or subdivide a plot for development shall apply to the Competent Authority. The Competent Authority may prescribe separate formats for different categories of buildings and group housing and land development.

(3) Application for development permit – The application shall be made to the Competent Authority in Form-I. …

FORM I
APPLICATION FOR LAND DEVELOPMENT

BYE LAWS No. - 5(3), 68(1)

xxxxxxxxxxxx

Documents furnished.

11. Checklist

Signature of Owner

(4) Application for building permit - Application shall be made to the Competent Authority in Form-II. The following shall accompany the application for building permit in the case of permission for erection, re-erection of making material alternation. The documents shall be submitted in 4 copies along with a soft copy in PDF and CAD format.

FORM II
BUILDING PLAN APPLICATION FORM
BYE LAW NO. - 5(4)
Application No. …

Application For Permission To Erect, Re-erect, Demolish Or To Make Any Additions Or Alterations In A Building

Documents furnished.

11. Checklist of the proposed building

Signature of Owner

(6) Certificates/Clearances :

(x) A check list in Form-VI shall be furnished by the empanelled/registered technical person.

FORM VI
CHECK LIST
BYE LAW NO.-5(6) (x)

16. Whether the plot is within 200 meter radius of important buildings (i.e. Governor House, High Court, State Secretariat,

Legislative Assembly)

Signature of Technical Person

55. There can be no gainsaying that from the early stages of the process itself, the respondents were fully conscious and aware that Plot No. 194, Khata No. 48 was situated adjacent to the boundary of the Patna High Court. This is easily established from the letters of the Building Corporation dated 23.03.2018 and 22.12.2018 (Annexures 'E' and 'F' of the Waqf Board's affidavit) addressed to the Chief Executive Officer of the Waqf Board.

56. During the ongoing hearing of the present case, another affidavit sworn on 10.04.2021 by the said 'Ashutosh' as D.G.M. of the Building Corporation, which is described as a supplementary counter affidavit on behalf of respondent no. 3 (The Chief Secretary, Government of Bihar), respondent no. 5 (Building Construction Department, Government of Bihar), respondent no. 8 (The Municipal Commissioner, Patna Municipal Corporation, Patna) and respondent No. 9 (Building Corporation through its Managing Director, Patna) has been filed. It is stated therein that in a subsequent development, a meeting under the Chairmanship of the Chief Secretary was held on 08.04.2021 for deliberating the matter. The following decisions are said to have been arrived at in the meeting –

(a) To limit the building in question, within 10 metres height in compliance of Bye-law 21,

(b) To screen the boundary towards High Court with steel / alloy

sheet,

(c) Not to use the said premise for "musafirkhana" rather as office of the Sunni Waqf Board,

(d) Roof-top of the building shall not be used,

(e) CCTV shall be installed in the premise,

(f) Entry of visitors in the premises will be examined and only with a valid entry pass.

57. The offers and assurances in the said affidavit cannot be accepted in view of the aforesaid discussion, it being too late in the day for damage control. The respondents have collectively undermined the statutory provisions with complete abandon and lack of accountability far beyond the limits of mere negligence.

58. It will be fruitful at this point to cogitate on the rationale and purpose behind the enactment of Bye-law 21. The main object would, of course, be from the safety and security standpoint in view of the sensitive nature of duties discharged within these buildings. Apart from that, the 'important buildings' referred to therein have special significance and stand as a symbol of the rich heritage, culture and history of the city. The grand Architecture of these imposing structures bear testimony to the skilled artistry of an era gone by, which would be nigh impossible to replicate even with all the available modern technology. It is apparent that the purpose of restricting any major construction around buildings such as the High Court is to ensure that they continue to retain their majesty, glory and grandeur by providing an unobstructed view, which is all at once

stunning, magnificent and awe-inspiring.

59. In this context, it is worth noticing that one of the decisions taken in the meeting of the Government Officials held on 08.04.2021 aforesaid was "*to screen the boundary towards the Hon'ble High Court at required height by steel/alloy sheet*". Am I then to understand that they propose to erect at least a 10 metre high steel/alloy sheet boundary wall separating the structure and the High Court? Do I even want to visualize what such an over 30-feet high wall of sheet will look like and what it will do to the aesthetics of the area? This is definitely not the best strategy for preserving the beauty and grandeur of the High Court building, to say the least. I'm frankly not quite sure which is worse – the problem or the proposed solution.

60. None of the respondents has disputed that the building has been constructed in violation of Bye-law 21. The question now is what should be done. Should only the offending portion of the construction above 10 metres in height be directed to be demolished as prayed by the respondents? Or would it be necessary to demolish the entire structure from the ground up?

61. On a detailed consideration of the conspectus of attendant facts and circumstances of this case, it must be held that the structure cannot be allowed to stand and must be demolished in its entirety. There are several reasons for so holding.

62. The primary reason is that the structure has been constructed in utter and brazen violation of provisions of law across

statutes, starting from Section 32 of the Central Act, through the various provisions of the Municipal Act, and finally Bye-law 21, as discussed above, and must be held to be illegal and non-est from the word go.

63. The very initiation of the entire project with the takeover of the property of Waqf Estate No. 663 by the Waqf Board was unauthorised and without fulfilling the preconditions of section 32 of the Central Act. No prior notice for the purpose is shown to have been issued by the Waqf Board to the Waqf Estate No. 663 specifying the nature of work proposed for development of its property, nor has the latter been shown to have expressed its unwillingness or incapability to execute the development work on the property as specified in such notice. Such notice was statutory in nature and could not have been waived or ignored.

64. It has nowhere been indicated that the proposed building would be an income generating asset intended for purposes of recouping the expenses incurred by the Waqf Board before returning the property to Waqf Estate No. 663. On the contrary, the respondents have now taken the stand that the building would be used mainly as the offices of the Waqf Board. There is still no averment to suggest that there is any proposal to ever return the property to the Waqf Estate No. 663. In my view, the primary objective of the Waqf Board is in self interest by way of providing office space for itself, rather than for the development of Waqf Estate

No. 663, which is contrary to the very spirit of section 32 of the Central Act.

65. The respondents have failed to show that the proposed building with the purpose of its use, as initially stated, by way of guest house, library, conference room and offices of the Waqf Board, could at all have been constructed on land admittedly recorded as Dargah and Qabristan. The land in question is claimed to have been used in this capacity since time immemorial and it remains a moot question whether the nature of its use can be so modified by constructing a building thereon for unconnected purposes.

66. In paragraph 7 of the affidavit of the Bihar State Building Construction Department, it is an admitted fact that the work order for the construction was issued vide letter No. 681 dated 13.03.2020. It follows that the construction of the G+3 structure commenced soon thereafter, and surprisingly, most of it was raised during the period of complete lockdown. The surreptitious conduct of the respondents, particularly the State Respondents, becomes suspect and raises serious doubts.

67. At a more fundamental level, none of the respondents were able to satisfactorily explain who exactly is a ‘Government Architect’ within the meaning of Bye-law 8(1)(A). They have not been able to show any Act, Rule, Bye-law, Circular or Notification whatsoever defining the term, much less that an Architect employed by the Building Corporation is a Government Architect. On the other

hand, it was the specific submission of the Building Corporation that its Architect "be construed as the Government Architect", which itself is tacit acceptance that the two terms are incapable of being equated. The submissions of the respondents on this issue must therefore be rejected.

68. The approval of the building plan by the Architect of the Building Corporation does not satisfy the condition laid down in Bye-law 8(1)(A) which requires the plan to be sanctioned by a 'Government Architect'. In absence of any enabling words in the Bye-laws, it is also not possible to accept the submission that the Building Corporation be treated at par with the Bihar State Housing Board mentioned in Bye-law 8(1)(A) for purposes of exemption from obtaining permission thereunder.

69. I accordingly hold that there was no valid sanction plan approved by a 'Government Architect' on the basis of which construction of the building could have been initiated. Such construction made without a valid sanction plan must thus be held to be an illegality rather than a mere irregularity.

70. The distinction between the terms "illegality" and "irregularity" is well recognised. While an irregularity is capable of being cured or regularised, an act which was illegal ab initio cannot be rectified.

71. In **Ashok Kumar Sonkar v. Union of India, (2007) 4 SCC 54**, it was held in the context of appointments as follows –

"34. It is not a case where appointment was irregular. If an appointment is irregular, the same can be regularised. The court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non est in the eye of the law, which renders the appointment to be a nullity."

72. An irregularity may thus include a case of construction with some deviation from an existing valid sanction plan and may be capable of being rectified, but not a case where a valid sanction plan did not exist at all. In the present case, the very basis and foundation for the construction of the building were contrary to law. The acts of the respondents were equally unauthorised by law, which are thus rendered substantively illegal and non-est, and hence cannot be saved.

73. Yet another compelling reason which necessitates demolition is the perceived threat to the safety and security of Court records, litigants, lawyers, staff and all stakeholders, arising from the extreme proximity of the structure which stands a mere 15 feet 6 inches from the boundary of the High Court.

74. Concern for safety and security stems from the fact that construction was initiated without a valid sanction plan. The need for a building plan duly and validly sanctioned by a competent authority hardly needs to be emphasized. It ensures that the proposed construction complies with all applicable laws and would be

structurally strong and safe, not only for itself but for all those in the vicinity. It is noteworthy that Bye-law 8(1)(A) contemplates the building plan to be sanctioned not by any Architect but by a 'Government Architect' who has specifically been required to ensure that the plans are prepared as per the provisions of the Bye-laws.

75. The respondents have erroneously proceeded on the assumption that sanction was accorded to the building plan by a Government Architect, and thus no permission from the competent authority had been sought nor compliance of all applicable safety laws ensured. As such, there is no assurance of the structural safety of the construction starting with its very foundation. As a matter of fact, all the respondents have unequivocally and uniformly admitted that the Architect of the Building Corporation who has sanctioned the present plan has failed to comply with the Bye-laws. Directing demolition merely of the upper portion of the construction in excess of 10 metres height would therefore not ensure safety.

76. Further, the respondents have negligently allowed the construction in a manner not keeping in mind the dignity of the Court. In the sketch plan attached with the counter affidavit of the Waqf Board, space is allocated for a septic tank almost abutting the boundary wall of the High Court. This is enough to jar the sensibilities of any right thinking person.

77. The respondents have acted without due regard to the peaceful functioning of the High Court in constructing the structure

for housing the offices of the Waqf Board, apart from a musafirkhana, library, conference hall, etc. so close to the High Court, as it would certainly have caused perpetual disturbance.

78. In the above circumstances and for the foregoing reasons, the Building Corporation (Respondent No. 9) is hereby directed to demolish the entire building forthwith. In case the Building Corporation fails to do so within one month from today, the Municipal Commissioner, Patna Municipal Corporation, (Respondent No. 8) shall be required to ensure demolition of the entire structure and realise the cost of demolition from the Building Corporation.

79. Considering the circumstances in which the construction has been made, it is directed that any future construction within a radius of 200 metres from the boundary of the Patna High Court shall only be made with prior information to the Registrar General of the Patna High Court.

80. A disturbing aspect is the surreptitious manner in which the construction of the building has come up during the period of complete lockdown. It is not understood how, in the circumstances, the structure could have been constructed by the side of the arterial Bailey Road on which there is constant patrolling and policing. The Chief Secretary shall ensure fixing of responsibility on the concerned persons after ascertaining whether any Covid-19 norms as notified under the Disaster Management Act, 2005 or any other law had been violated during the period of construction.

81. Considering that none of the respondents has disputed that the structure has been constructed in clear violation of Bye-law 21 thereby incurring an exorbitant loss of several crores in public funds, the Chief Secretary is hereby directed to cause an enquiry into all aspects of the matter, appropriately fix responsibility and decide what action is proposed against the erring Architect and all other persons who have caused or allowed the illegal construction to come up, including by way of recovery of such loss from them.

82. Let the Chief Secretary, Bihar (Respondent No. 3), the Municipal Commissioner, Patna Municipal Corporation (Respondent No. 8) and the Managing Director of the Building Corporation (Respondent No. 10) inform the Registrar General of the Patna High Court, not later than by 31.08.2021 whether or not the building has been demolished in its entirety in terms of the aforesaid direction of this Court.

83. Before parting with this judgment, I may take notice of the submission of Mr. P.K. Shahi, senior counsel to the effect that a number of religious structures have mushroomed in an unauthorised manner by encroaching public land including public roads all over the State of Bihar. It is hoped and expected that the respondent State of Bihar and concerned local bodies shall look into this aspect with right earnest and take steps for the removal of such illegal structures in the larger public interest.

84. The original records be returned by the Registrar

General to the respondents respectively.

85. I record my sincere appreciation for the valuable and tireless assistance extended during the proceedings before this Court by all counsel appearing in this case, particularly Senior Counsel and amicus curiae, Mr. Rajendra Narayan.

86. The public interest litigation stands disposed of.

(Vikash Jain, J)

Per Ashwani Kumar Singh, J:

87. I have had the privilege of going through the judgment of Brother Vikash Jain, J., which narrates the facts of the case and elaborately deals with the relevant legal provisions of The Waqf Act, 1995, The Bihar Waqf Act, 1947, The Bihar Municipal Act, 2007 and The Bihar Building Bye-Laws, 2014.

88. While finding myself in complete agreement with the reasonings and conclusions of Brother Vikash Jain, J. and endorsing them in their entirety, I may only add a few supplemental reasons and observations of my own, considering the importance of the matter as the structure in question has not only been constructed surreptitiously during the period of complete lock-down in clear violation of Bye-Law 21 of the Bihar Building Bye-Laws, 2014 and without valid sanction causing loss of several crores to the public exchequer, but also poses threat to the safety and security of the litigants, lawyers,

staffs and all stakeholders due to the extreme proximity from the boundary of the High Court.

89. The Bihar Building Bye-Laws, 2014 were introduced in the year 2014, Clause 21 whereof categorically interdicts construction within 200 meters radius of the boundary of important buildings including the High Court. The said Building Bye-Laws have been framed in exercise of delegated powers, and executive actions must conform and not violate the same.

90. The law-makers repose confidence in the authorities that they would ensure compliance of laws. If the authorities breach that confidence and act in dereliction of duties by encouraging illegal activities, judicial notice will have to be taken and judicial discretion exercised wherever it is required to uphold the law.

91. In ***Indian Council for Enviro-Legal Action v. Union of India & Others*** since reported in ***(1996) 5 SCC 281***, the Hon'ble Supreme Court held as under: -

> *"Enactment of law, but tolerating its infringement is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the Enforcement Authorities encourages lawlessness and adoption of means which cannot, or ought not to, be*

> *tolerated in any civilized society. Law should not only be meant for law abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the Legislature feels that it is necessary. ...When a law is enacted containing some provisions which prohibits certain types of activities, then, it is of utmost importance that such legal provisions are effectively enforced. If a law is enacted but is not being voluntarily obeyed, then, it has to be enforced. Otherwise, infringement of law, which is actively or passively condoned for personal gain, will be encouraged which will in turn lead to a lawless society."*

92. Faced with a situation where exercise of power by the authorities has been visible more in its violation than in its adherence, the High Court while acting under Article 226 of the Constitution of India cannot turn a blind eye to the same. The Court is under a solemn obligation to ensure that the executive, while exercising its statutory powers, not only does certain things but also does not do certain things.

93. In ***Bandhua Mukti Morcha v. Union of India*** since reported in ***(1994) 3 SCC 161***, the Hon'ble Supreme Court held: -

> *"In his Law in the Modern State, Leon Duguit observed: "Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First,*

> *the holders of power cannot do certain things; Second, there are certain things they must do. ... the second has begun substantially to engage the functional attention of the judicial administration. ... In India, we are now beginning to apply a similar concept of constitutional duty."*

94. The wanton impunity with which law has been violated by the various authorities, firstly in granting sanction and allowing construction, and secondly in not halting the illegal construction which continued for several months, discloses serious lapses and errors of both omission and commission. This leaves the Court with no other option but to correct the executive error.

95. A word of caution needs to be sounded at this point - every action of a constitutional court vested with vast plenary powers, must be informed by fundamental norms of law and by principles embodied in the Constitution and other sources of law. Its actions may appear to be harsh but it is under obligation to ensure that vested discretion of the executive is exercised in conformity with the standards of the very law it has prescribed its action to be judged by.

96. One need to look no further than to the decision of the Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** as under: -

> *"There is great merit in the Court proceeding to decide an issue on the basis of*

> *strict legal principle and avoiding carefully the influence of purely emotional appeal. For that alone gives the decision of the Court a direction which is certain, and unfaltering, and that particular permanence in legal jurisprudence which makes it a base for the next step forward in the further progress of the law. Indeed, both certainty of substance and certainty of direction are indispensable requirements in the development of the law, and invest it with the credibility which commands public confidence in its legitimacy".*

97. The pleadings and records of the case show a very sorry state of affairs of the Government which has been the instrument of the origin and perpetuation of illegality in the present case.

98. It is surprising to note that the State Government which sanctioned the impugned structure was unaware of its laws while sanctioning the construction. It was completely unmindful of the fact that while it confronts its citizens with the axiom '*ignorance of the law is no excuse*', it has tried to defend an illegal act of its own by pleading before this Court that they were ignorant about the existing law, namely Bye-Law 21.

99. No effort at all had been made by any of the authorities concerned to verify either irregularity or illegality of the structure and the construction was made with impunity as there

appeared to be some amount of urgency to construct the illegal structure mostly during the period of complete lock-down imposed by the Government on account of the COVID-19 pandemic.

100. The anguish of the Court is best expressed in the words of the Hon'ble Supreme Court in ***Friends Colony Development Committee v. State of Orissa*** since reported in ***(2004) 8 SCC 733*** as under: -

> *"... Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. ... responsibility should be fixed on the officials whose duty was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance."*

101. It is the fate of the illegal structure, raised with the sanction of the State Government, which needs to be decided by this Court. There has been repeated emphasis that laws are

created while being mindful of the objects behind the prescription and consequences that may ensue on account of interdict prescribed. Town Building Bye-Laws are specifically framed for orderly, structured and organized growth of the city. It takes into consideration the welfare of the citizens; the ecology; sanitation and hygiene and in the process the citizens and various organs of the society are required to give up some rights for greater good of the society.

102. The purpose of having laws regulating construction has been emphasized by the Hon'ble Supreme Court in ***Friends Colony Development Committee (supra)*** as under: -

> *"The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention*

of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and plot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building."

103. It has repeatedly been emphasized by the Hon'ble Supreme Court that the illegal structures are to be distinguished from the irregular structures. While the former cannot brook any latitude of forensic generosity, the latter can be regularized to the extent provided by law. No equity can be

pleaded by any party in favour of allowing the existing illegal structure to remain standing. Equity and law work in favour of the innocent and not in favour of the deliberate defiance of the provisions of the law and especially by those who have framed the law and now plead ignorance of its very existence.

104. In ***Municipal Corporation of Greater Mumbai and Others v. M/S. Sunbeam High Tech Developers Pvt. Ltd.,*** since reported in ***(2019) 20 SCC 781,*** the Hon'ble Supreme Court held: -

> *"Cities and towns must be well planned and illegal structures must be demolished. ... Rule of law comprises not only of the principles of natural justice but also provides that the procedure prescribed by law must be followed. Rule of law also envisages that illegal constructions which are constructed in violation of law must be demolished and there can be no sympathy towards those who violate law.*

105. Brother Jain has underscored the need for preservation and conservation of the High Court building. He has highlighted the importance of the buildings referred to in the Bye-Law 21 of the Bihar Building Bye-Laws, 2014. He has observed that the 'important buildings' have special significance and stand as a symbol of the rich heritage, culture and history of the city. He has further observed that the purpose of restricting any major

construction around buildings such as the High Court is to ensure that they continue to retain their majesty, glory and grandeur by providing an unobstructed view, which is all at once stunning, magnificent and awe-inspiring.

106. In this context, it would be of salience to note that history shapes the present and future of any country. In any State, preservation of historical buildings tells the story of that State's architectural history. While defining the purpose of architecture Richard George Rogers, an Italian born British architect noted for his modernist and functionalist designs in high-tech architecture said:

> "***It serves society and improves quality of life. It's a physical manifestation of the society's wishes to be civilised! …public domain being the obvious place which encapsulates this as buildings, alongside being art and science, are part of the public domain. As architecture is very important in society, it makes sense as to why anyone who is looking to maintain a building's structure would look into something like truss and glulam beam repair, with the assistance of professionals who know exactly what they are doing."***

107. The independent identity of any State is reflected through the independence of its Legislature, Executive and Judiciary. Such identity for the State of Bihar came in the year 1912, when a Proclamation was made by the Governor General of India on 22nd

March 1912 separating Bihar and Orissa from the Presidency of Fort William in Bengal. With Bihar and Orissa thus becoming a separate Province, it was imperative to have its independent institutions. The importance of the Judiciary as an institution for the nascent State can be gauged from the fact that when the world was still reeling under the financial crunch of World War I and the construction of the Secretariat and other buildings were postponed or retarded, the construction of the High Court building was pushed on with utmost expedition. (***See Patna Law Weekly, 1917, Vol.1, Page 9n-14n and 1st Edition of The Patna District Gazetteer, 1967***).

108. The importance of any institution in the eyes of its people is physically reflected through the building from which it is functioning. That being so it was for the authorities to construct the building which could have done justice to the ethos, values and majesty of the Court.

109. Judiciary being one of the founding pillars and vanguards of life, liberty and freedom, was one of the first institutions to be established in the newly separated State. The foundation-stone of the High Court Building was laid on 1st December, 1913 by His Excellency the then Viceroy and Governor-General of India, Sir Charles Hardinge of Penshurst. The Patna High Court building on its completion was formally opened by the same Viceroy on 3rd February, 1916. On this occasion, Lord Hardinge made the following observations emphasizing the object for which

the building was erected which holds true even today and for times to come:

> "*I am about to perform an almost unique duty and one which I do not think has fallen to the lot of any previous Viceroy…… I think when I look at this fine building that the people of this province may congratulate themselves in many ways on their new institution. It will be adequately and even magnificently housed and* ***the building itself is an emblem of great functions the Court has to discharge – great functions not only in its decrees as between man and man but as great, and, perhaps, even weightier, in its decision as between the individual and the State*** *……. With my most earnest wishes that the labour of this Court maybe inspired with wisdom, justice and mercy I will now proceed to open the building.*" (emphasis supplied)
>
> (***See Patna Law Weekly, 1917, Vol.1, Page 9n-14n and 1st Edition of The Patna District Gazetteer, 1967***).

110. Further, *vide* Letters Patent issued on 9th February, 1916 the Patna High Court was ushered into existence with Orissa placed under its jurisdiction and circuit sittings at Cuttack. Thereafter, from 26th February, 1916, the date on which the aforesaid Letters Patent was published in the Gazette of India, the High Court of Judicature at Fort William in Bengal ceased to exercise jurisdiction in all matters in which the jurisdiction was given to the Patna High Court which commenced the work on 1st March 1916.

(***See Patna Law Weekly, 1917, Vol.1, Page 9n-14n and 1st Edition of The Patna District Gazetteer, 1967***).

111. The construction of the building of the Patna High Court was pushed on with utmost possible expedition. It was constructed by Calcutta's contractor M/s Martin & Co. The Government of the United Provinces permitted to make use of the plans which had been prepared for the Allahabad High Court by their architect Mr. Lishman which enabled the work to be started at a much earlier date. (***See Patna Law Weekly, 1917, Vol.1, Page 9n-14n and 1st Edition of The Patna District Gazetteer, 1967***).

112. The High Court building is a huge structure in neo-classical style based on the Palladian concept of country house. The two-storied building is spread out in a U-shaped and has a pedimented portico behind which rises a high dome over the central hall of the imposing structure. The pedimented portico is carried on Doric column and beneath the dome is Marble Hall, which adds to grandeur of the interior of the building. It follows symmetry in form while the Centre is emphasized by elevation treatment. It has an arcaded colonnaded veranda all around.

113. The building since more than 100 years has stood the calamity of quakes including that of 1934, which had practically ruined the State of Bihar. It has also withstood the footfall of thousands of citizens, who come to this temple everyday with hope for justice, equity and freedom from their woes. However, as the

workload increased so did the number of Judges increase from 7 in 1916 to 53 in 2019. The building was accordingly altered to accommodate the needs of the institution while keeping in view the overall design of the building.

114. The Chief Justice's Court on the northern side is the largest Court room with high ceiling and magnificent sky light through which the sunlight filters through and enlightens the entire Court room as if it has come to remove darkness of injustice and spread the light of justice, freedom and liberty. Similarly, on the southernmost side of the building is an almost equally large and similarly designed Courtroom as that of the Chief Justice, which is called the 'Sessions Court'. This Court was so named as in the past, Sessions trials of "English Persons" were held in this courtroom. To accommodate more Courtrooms, it was partitioned into three different Courtrooms but its grandeur has now been restored.

115. The majesty and architectural grandeur and craftsmanship are reflected in the famous Marble Hall which is the main entrance of the High Court with a large Dome towering over the skyline. This hall has tall square marble columns with designs carved on it and a marble staircase going to its first floor. Most of the High Court functions and judges' oath-taking ceremonies are held in this hall.

116. The antique open lifts with wrought iron grills for use by Hon'ble Judges are an integral part of the architecture of the

High Court Building and greatly enhance its character. The main entrance lobby of the building faces an oval-shaped green lush lawn known as the western lawn where large functions of the High Court are hosted.

117. Keeping in view the expanding needs of the High Court since its constitution a century ago, a new building has been built to the East of the existing building. With most of the functioning of the High Court shifting to the new premises with time, the glory and grandeur of the present building may be preserved, conserved and even enhanced by converting it into a museum to showcase the evolution of the legal history of the State of Bihar, under supervision of the High Court. Some functioning Courtrooms like that of the Chief Justice and the Sessions Court may be continued in the present building both for historical, heritage and traditional values.

118. Preservation of the historical, heritage and traditional values of buildings in the State is one of the most neglected aspects of governance in the State of Bihar. While in other States the authorities have enacted laws to preserve and conserve heritage buildings and other structures of heritage value by constituting expert bodies for the same, the State of Bihar has lagged behind in creating an effective framework to preserve/conserve its heritage buildings.

119. It appears that the intention and will to preserve its

history is lacking in the State's executive. The State has, under the provisions of Section 77 of the Bihar Urban Planning and Development Act, 2012, formally constituted an expert body by the name of 'Bihar Urban Arts and Heritage Commission', but despite over eight years since the said enactment, the project has remained largely on paper. The lack of the State's will in taking effective steps in this direction is evident from the fact that recently a seven members panel comprising of various government officials only, headed by the Principal Secretary, Department of Art, Culture and Youth, has been constituted. However, the panel does not include conservation architects, preservationists, historians, scholars and other independent domain experts. Thus, it remains a far cry from achieving any effective results at the ground level. The delay itself speaks volumes about the seriousness, actually the lack of it, with which the State authorities have shown their commitment towards their duty to conserve the valued historic buildings and architecture of the State.

120. To my mind, the scenario where no effective authority exists in the State to protect the valued historic buildings, which are thus at the mercy of the whims and fancies of the authorities, brings out a protective concern for the present magnificent and towering building of the Patna High Court. Owing to the existence of the huge illegal structure in the close proximity of the boundary of the High Court, the question of preservation of the

grandeur of the present High Court building hangs like the sword of Damocles.

121. In cities like Delhi, Mumbai, Bangalore and Jaipur, Commissions have provided constructive and valuable suggestions for amalgamating modern and ancient buildings to develop those cities into modern metropolises.

122. The Delhi Urban Art Commission (DUAC) is engaged in preserving, developing and maintaining the aesthetic quality of urban and environmental design within Delhi and provides advice and guidance to any local body in respect of any building project or engineering operations or any development proposals which affects or is likely to affect the skyline or the aesthetic quality of the surroundings or of any public amenity. It exclusively covers areas with old buildings and heritages which have been associated with the history and culture of the city.

123. A similar role has been played by the Jaipur Smart City Limited which, while developing the city into a modern city, has come up with the novel idea of smart heritage and tourism precincts which, in the initial phase, has selected 11 major heritage sites, based on area, for development and conservation while amalgamating them into a smart city project. This is aimed at conservation of the old grandeur while providing a modern fabric for the city.

124. Vide Notification dated 20th July, 2021, the Government of Assam has declared the present residence of the Chief

Justice of the Guwahati High Court as a ‘living heritage building’. As a result of such declaration, the residence will now be extended protection and preservation as per the provisions of Assam Ancient Monuments and Records Act, 1959, The Assam Ancient Monuments and Records Rules, 1964 and the Assam Heritage (Tangible) Protection, Preservation, Conservation and Maintenance Act, 2020.

125. The purpose of referring to the aforesaid Commissions engaged in different cities is to remind the State of the duty it owes to its citizens to preserve its past glory and heritage so that future generations may take pride in its rich heritage and culture and not suffer a feeling of rootlessness. The High Court building is one of the buildings in the State which deserves the immediate attention of the Commission.

126. The authorities must activate the Commission in the State of Bihar to achieve the object of conservation and preservation of the heritage and historic buildings by domain experts. These buildings are a shining testimony to the evolution of the history of the State, which, if lost, would result in irreversible loss of the State heritage. There is immediate need for such conservation and preservation, which is central to the idea and spirit behind Bye-Law 21 of the Bihar Building Bye-Laws, 2014.

127. At this stage, it would be befitting to say that the lack of care in the preservation of the glory of the High Court building is testimony to the State’s lackadaisical approach to

guarding the ideals of the Preamble to the Constitution of India. Its preservation and conservation will be a gift to the coming generations in that they will see it as a symbol of justice, protecting the life and liberty of the citizens of the State.

128. To conclude, with the aforesaid observations of mine, I fully agree with the findings and conclusions arrived at by Brother Vikash Jain, J.

(Ashwani Kumar Singh, J.)

Per Ahsanuddin Amanullah, J:

129. Having had the benefit of going through the scholarly judgment penned by my esteemed Brother Justice Vikash Jain, in his inimitable style, with all the humility at my command, I am unable to agree with Brother Jain for the reasons set out hereunder.

130. The present matter has been assigned to this Bench, especially by Hon'ble the Chief Justice, in view of order dated 01.03.2021 passed in Cr. WJC No. 887 of 2013 and its analogous cases. It related to the concern of the Bench of the structure on the north side adjacent to the Centenary Building of the Patna High Court, which had come up during the COVID-19 pandemic. Hon'ble the Chief Justice had then, *via* order on the

administrative side, directed for registration of a Public Interest Litigation, and marked the same, to this special Bench.

131. As per the order dated 01.03.2021 (*supra*), it was opined that the matter be brought to the notice of Hon'ble the Chief Justice for taking it up on the judicial side to consider the following:

> '*(i) Who is constructing the building, and at whose instance it is being constructed?*
> *(ii) Whether such person has right and title over the land on which the construction is being made?*
> *(iii) Whether the map of the building has been duly approved by the Patna Municipal Corporation and the construction is in accordance with the approved plan?*
> *(iv) What is the proposed use of the building?*'

132. At the very outset, it is important to set out that this is a specially-constituted Bench, the scope whereof already stands crystallised in the order dated 01.03.2021 (*supra*). Amidst this backdrop, it is necessary to take note of the arguments advanced by the parties on the issues, which Brother Jain has noted *in extenso*, as well as the provisions concerned. Hence, I have only referred to the submissions and provisions relevant for my eventual conclusion.

133. Mr. Rajendra Narain, the learned *Amicus Curiae* assisted the Court with regard to the legality of the structure in question and submitted that as per the provisions of the Bihar

Municipal Act, 2007, (hereinafter referred to as the 'Act'), there was a prohibition of construction without sanction under Section 313 thereof, save and except in accordance with the Bihar Building Bye-laws, 2014 (hereinafter referred to as the 'Bye-laws'). He submitted that Section 314 of the Act stipulates that no person shall construct or commence to construct or undertake any alteration, addition or modification to an existing building unless the building plan is approved by a competent authority to be designated under Rules and Bye-laws to be framed by the government and the proviso that no Architect shall sanction any building plan unless it is in conformity with the building Bye-laws framed by the State Government/Municipality. Further, he pointed out, that in case the building plan is in contravention or deviation of the building bye-laws, in addition to action taken under the Act, the registered Architect, the Builder and the approving authority were liable to be prosecuted and also pay fine of rupees fifty thousand or sentence to imprisonment for a period which may extend to one year or both. He further referred to Section 315 which deals with the construction of building in contravention of the Bye-laws which provides that any building or structure of a permanent nature which has been constructed or construction has commenced in contravention or

breach or deviation of building by-law shall be liable to be demolished, notwithstanding, that it may have been approved by a competent authority and penal consequences are also provided. Reliance was placed on Section 316 of the Act which deals with the building plan approved by registered Architect to be submitted to the Chief Municipal Officer of the municipality and Section 321 which deals with framing of the Bye-laws. He then referred to the provisions of the Bye-Laws, and submitted that the same apply in the present case and Bye-law no. 5 deals with an application to be made to the competent authority in Form I, which relates to application for land development [*viz*. Bye-laws No. 5(3), 68 (1)]. It was submitted that the said Form I has a check list and Form II relating to an application for a building plan application under Bye-law no. 5(4) also has a check list for documents to be furnished and further, that for the type of building which has been erected, additional information was required to be furnished as also certificates/clearances as per Form VI BI which is a checklist pertaining to Bye-law no. 5(vi)(x) and item 16 thereof which required information as to whether the plot was within 200 metres radius of important buildings, such as the Governor House, the High Court, the State Secretariat, the Legislative Assembly. Thereafter, learned

Amicus Curiae referred to Bye-law no. 8 which deals with permission. It was contended that no permission was required for work related to alteration and likes which do not otherwise, violate any other provision regarding a general building requirement, structural stability, fire and health safety requirements under the National Building Code, 2005. He also referred to Bye-law no. 14 which deals with cancellation in the event that at any time after permission to proceed with any building or development work has been given, the authority is satisfied that such permission was granted in consequence of any material misrepresentation or fraudulent statement contained in the application given or information furnished and finally, to Bye-law no. 21, which prohibits construction near important buildings stipulating that no building exceeding 10 meters height shall be permitted within 200 meters from the boundaries of the Governor House, the Bihar State Secretariat, the Bihar Legislative Assembly, the High Court and such other building(s) as may be decided by the authority or the State Government from time to time.

134. Learned *Amicus Curiae* emphasized that the structure was hurriedly constructed during the lock-down period when this Court was having virtual proceedings till December,

2020. He submitted that no permission was obtained from the Patna Municipal Corporation/competent authority for approval/sanction of the map and it was never submitted for approval and sanction. It was contended that the Architect of the Bihar State Building Construction Corporation Limited (hereinafter referred to as the 'Corporation'), is not a government Architect and the map/plan which was sanctioned did not contain any statement regarding Bye-law no. 21 and no checklist was submitted/produced by the concerned respondents and, thus, the requirement of checklist and declaration regarding Bye-law no. 21 was not fulfilled. It was further contended that there is no power of acquisition of a waqf estate by the Waqf Board under the Waqf Act, 1995, and the plan for constructing a multi-storied structure on the graveyard was unknown and that the construction has been erected in clear violation of law. Reliance was placed by him on ***Kerala State Coastal Zone Management Authority v State of Kerala*, (2019) 7 SCC 248**, whereby the Hon'ble Supreme Court ordered removal of the structures in question therein.

135. Mr. Lalit Kishore, the learned Advocate General for the State of Bihar submitted that the building in question was constructed by the Corporation in the light of the decision

dated 26.02.2019 of the Minority Welfare Department, Government of Bihar. He submitted that after due process of tender etc., work was allotted and construction commenced. He submitted that under Bye-law No. 8(A) of the Bye-laws, the Government Architect has been empowered to approve the maps of all government buildings. He submitted that, therefore, in light of the same, there is no requirement to seek approval of the Patna Municipal Corporation (hereinafter referred to as the 'PMC') in the present case and procedure has been adopted which is in conformity with law. It was contended that Bye-law no. 8(A) starts with the phrase '*No permission shall be necessary*' and, thus, in the present case as well, the approval/sanction of the PMC was not required. He submitted that Bye-law 8(A) cannot be read as a part of Bye-law 8(1) for the reason that Bye-law 8(1) also employs the phrase '*No permission or notice shall be required for works*' and thereafter, perusal of the sub-clauses in Bye-law no. 8(1), from (i) to (xi), make it apparent that Bye-law no. 8(A) as well as 8(B) are not connected with Bye-law 8(1) and are not sub-clauses of the said Bye-law no. 8(1). It was submitted that Bye-law no. 8(A) goes on to read that in case of such government project lying in the area outside of any development plan/scheme, the Government

Architect shall ensure obtainment of NoCs required as per provision of the bye laws and Acts and, thus, it was contended that such provision relates to a government project. It was submitted that the very opening line stipulating 'N*o permission shall be necessary for works carried out by Central Government and State Government Departments/Bihar State Housing Board if the plans are signed by Government Architects*', is clear indication that such works includes all types of work i.e., construction/erection of a new building also. It was submitted that this would be further clear from Bye-law no. 8(B), which provides that separate guidelines may be issued for sanctioning of a project within the Gram Panchayat area, but falling outside the jurisdiction of any Planning Authority. Learned Advocate General submitted that such was the true import of Bye-law no. 8(A).

136. However, he submitted that Bye-law no. 21 stipulating height of the building within 200 meters of the High Court to be within 10 meters is required to be adhered to and further, that in a high-level meeting of the State Government of the authorities concerned, it has been decided that the existing building would also be brought within the parameters of such stipulation. Further, it was contended that all concerns with

regard to the security of the High Court, as expressed by this Bench, would be taken care of in consultation with the concerned stakeholders, especially the High Court, on the administrative side.

137. Mr. Tej Bahadur Singh, learned senior counsel appearing for the Corporation submitted that the construction has been made in accordance with law as plan was signed by the Senior Architect and since the Corporation is a Government Company, within the meaning of Section 6(1)(7) of the Companies Act, 1956, therefore, the Architect is a Government Architect for the purpose of Bye-law no 8(A). It was submitted that provisions of the Bye-laws have been kept in mind while approving/sanctioning the map in question, but the same can be reviewed and any deficiency shall be removed, especially *qua* bringing the height of the structure within ten meters in conformity with Bye-law no. 21 of the Bye-laws. It was contended that this Court may take note of the fact that various government buildings including that of Courts in Bihar have been constructed by the Corporation in which also the Corporation's Architects have signed without taking approval either, from the PMC or the local bodies all over the state. The details of the government buildings constructed by the

Corporation, in this manner, department-wise is noted below:

i. Law Department- 16 (sixteen) buildings;

ii. SC & ST Welfare Department- 27 (twenty seven) buildings;

iii. BC & EBC Welfare Department- 3 (three) buildings;

iv. Pollution Department- 2 (two) buildings;

v. Minority Welfare Department- 6 (six) buildings;

vi. Department of Art, Culture and Youth- 10 (ten) buildings;

vii. State Society For Ultra Poor and Social Welfare (SSUPSW) under Social Welfare Department- 1(one) building;

viii. Department of Agriculture- 3 (three) buildings.

138. Mr. P K Shahi, learned senior counsel for the Bihar State Sunni Waqf Board (hereinafter referred to as the 'Waqf Board') submitted that as per the amendment brought into force in the year 2013 to the Waqf Act, 1995, provision has been made for development of Waqf property and in terms thereof, the Managing Committee of the *Dargaah Hazrat Shah Jalal Shaheed* (hereinafter referred to as the 'Waqf estate'), bearing registration no. 663, had requested the Waqf Board for development of the land available with it and upon such request, the Waqf Board by Resolution No. 05 in Meeting dated

15.02.2018 approved the development of the Waqf property by proposing construction of a Waqf Bhawan in which the ground floor was to be used as a Guest House, Guard Room and Parking place; the first floor as a Library and Conference Room; and the second and third floors to be used as offices of the Waqf Board. It was submitted that the concern regarding security etc. of the High Court could and would be worked out in consultation with all concerned agencies to ensure that there is no breach of security of the High Court and further, that the height of the building would be restricted to 10 metres in terms of Bye-law no. 21 of the Bye-laws.

139. Mr. Md. Khurshid Alam, learned counsel for the Waqf estate submitted that from time immemorial, the entire Waqf land, which includes a *Dargaah* and mosque, was being used for performing religious functions including serving as *Eidgaah*, *Peerkhana*, *Makbara, Kabristaan* and *Urs* was also being celebrated by people from all walks of life and religious communities. Learned counsel contended that is reflected in the cadastral survey of the year 1911 and entry in the *Khatiyaan* relating to the lands in question bearing Tauzi No. 34/197, Thana No. 06. With regard to construction being made on a graveyard, it was submitted that besides the graveyard, *Dargaah*

and the mosque, there is open land available, and on such open land, the construction had been made. He went on to submit that such argument would not hold much water for the reason that the High Court has also been constructed on plot no. 220, which itself is shown as a graveyard in the *khatiyaan*. It was submitted that land of the Waqf estate has been demarcated in terms of an order of the High Court by the authorities concerned in the year 2000 and the boundary wall has also been constructed in terms thereof and, thus, there is no dispute to the right and title of the Waqf estate over the land in question. He summed up by submitting that if there is any shortcoming in terms of the Bye-laws, the same can be, and will be, rectified to bring it in conformity with the Bye-laws.

140. Mr. Mrigank Mauli, learned counsel for the Patna High Court submitted that the structure in question does pose security issues.

141. Coming to the issue at hand, the undisputed facts of the present case are:

(a) That the land in question is owned by the Waqf estate;

(b) That the said Waqf estate is registered with the Waqf Board;

(c) That the scheme for development of the land was prepared by the Waqf Board and sent to the Minority Welfare Department of the State Government and after approval, the building has been constructed by the Corporation;

(d) The building is at a distance of approximately 16 feet from the north eastern boundary of the High Court;

(e) That the height of the building currently exceeds 10 meters, and;

(f) That the map has been signed by the Architect of the Corporation (the 'Senior Architect').

142. In my considered opinion, the parameters for consideration have to remain strictly confined to the issues raised in the order dated 01.03.2021 (*supra*), as marked to this Bench by Hon'ble the Chief Justice in exercise of his administrative powers. As such, the need for a detailed examination of The Waqf Act, 1995 and connected enactments is obviated. Taking note of the *dicta* in ***Kesho Nath Khurana v Union of India,*** **1981 Supp SCC 38**; ***Samaresh Chandra Bose v District Magistrate, Burdwan*****, (1972) 2 SCC 476**, and; ***K C P Ltd. v State Trading Corporation of India,*** **1995 Supp (3) SCC**

466, the Hon'ble Supreme Court, in ***Kerala State Science & Technology Museum v Rambal Co.,*** **(2006) 6 SCC 258**, held as follows:

> '*8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to*.'
>
> (emphasis supplied)

143. It is no longer *res integra* that the Reference Court should not go beyond the scope of its reference. A similar view was expressed in ***T A Hameed v M Viswanathan*****, (2008) 3 SCC 243**. However, a slight departure therefrom, so to state, was made in ***State of Punjab v Salil Sabhlok*****, (2013) 5 SCC 1**, and has been considered by the Hon'ble Supreme Court in ***Aneesh Kumar V S v State of Kerala*****, (2020) 7 SCC 301**, holding:

> '*24. After cogitating over the rival submissions,* ***the first issue which needs to be examined is about the limitation on exercise of jurisdiction by the Full Bench*** *[Unnikrishnan Nair G.S. v. State of Kerala, 2019 SCC OnLine Ker 704 : (2019) 2 KLJ 152] of the High Court, in a reference made by the Division Bench.* ***Ordinarily, the Full Bench is expected to decide only those issues which are referred to it*** *by the Division Bench and* ***must eschew from examining merits of the case as such****. We are fortified in so observing in light of the dictum of this Court in T.A.*

Hameed v. M. Viswanathan [T.A. Hameed v. M. Viswanathan, (2008) 3 SCC 243]. At the same time, we are also guided by the dictum of this Court in State of Punjab v. Salil Sabhlok [State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1] . In that case, the Full Bench [Salil Sabhlok v. Union of India, 2011 SCC OnLine P&H 10362 : ILR (2012) 1 P&H 1] of the High Court while deciding the Reference [Salil Sabhlok v. Union of India, CWP No. 11846 of 2011, order dated 13-7-2011 (P&H)] , adjudicated other matters. In the concurring opinion, Madan B. Lokur, J., as he then was, observed thus : (Salil Sabhlok case [State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1] , SCC pp. 63-64, paras 137-40)

"Additional questions framed by the Full Bench

137. The learned counsel supporting the appointment of Mr Dhanda submitted that the Full Bench could not expand the scope of the reference made to it by the Division Bench, nor could it frame additional questions.

138. ***Generally speaking, they are right in their contention, but it also depends on the reference made****.*

139. The law on the subject has crystallised through a long line of decisions and it need not be reiterated again and again:

***

140. ***There is no bar shown whereby a Bench is precluded from referring the entire case for decision by a larger Bench—it depends entirely on the reference made****. In any event, that issue does not arise in this appeal and so nothing more need be said on the subject."*

(emphasis supplied)

25. In view of the above, our answer to the issue under consideration must depend on the Reference Order as made by the Division Bench. At the same time, we must hasten to advert to the Kerala High Court Act, 1958

(for short "the High Court Act") providing for the procedure on Reference to Full Bench. Section 7 of the said Act reads thus:

"7. Procedure on reference to Full Bench.— When a question of law is referred to a Full Bench, the Full Bench, may finally decide the case or return it with an expression of its opinion upon the question referred for final adjudication by the Bench which referred the question or, in the absence of either or both of the referring Judges, by another Bench."

(emphasis supplied)

26. On a plain reading of this provision, it is amply clear that the Full Bench is competent to finally decide the case itself. It is an enabling provision. Nevertheless, we may first advert to the nature of Reference made by the Division Bench in the present case vide order dated 16-11-2018 [Unnikrishnan Nair G.S. v. State of Kerala, OP (KAT) No. 256 of 2017, order dated 16-11-2018 (Ker)] . The Division Bench in its Reference Order, had articulated the question posed by the appellants herein as to whether the candidates from the first Ranked List (RL-I) or from the second Ranked List (RL-II) have to be advised for the 93 (NJD) vacancies reported to KPSC on 12-7-2016. From para 5 onwards of the Reference Order, the Division Bench adverted to the relevant facts and noted that the candidates in the first Ranked List (RL-I) have to be advised for appointment to fill up the 93 NJD vacancies reported on 12-7-2016. After so observing, the Division Bench adverted to Rule 13 of the 1976 Rules and two maxims of equity — actus curiae neminem gravabit (an Act of Court shall prejudice no man) and lex non cogit ad impossibilia (the law does not compel the man to do that which he cannot perform) — to be apposite, but entertained some doubt about the observations of coordinate Bench of the same High Court in Kesavankutty Nair [Kerala Public Service

Commission v. Kesavankutty Nair, ILR (1977) 2 Ker 687 : 1977 KLT 818] . Resultantly, the Division Bench thought it appropriate to refer the entire matter to the Full Bench. The relevant extract of the reference order reads thus:

"... We doubt the correctness of the decision in Kesavankutty Nair case [Kerala Public Service Commission v. Kesavankutty Nair, ILR (1977) 2 Ker 687 : 1977 KLT 818] and judicial propriety compels us to refer this batch of cases to a Full Bench therefore.

The counsel submits that an early hearing of the cases is warranted since the 93 NJD vacancies have not yet been filled up and that the candidates have been anxiously waiting for their turn to come. The Registry shall therefore place the papers before the Hon'ble Chief Justice for appropriate constitution of the Full Bench and an early resolution of the dispute."

27. ***On perusal of the Reference Order, it appears that the Division Bench analysed the factual matrix of the case*** *to opine that the candidates empanelled in the first Ranked List (RL-I) have to be advised for appointment to fill up the 93 NJD vacancies reported on 12-7-2016. However, it stopped short of issuing direction to the respondents on account of the exposition in Kesavankutty Nair [Kerala Public Service Commission v. Kesavankutty Nair, ILR (1977) 2 Ker 687 : 1977 KLT 818] and the purport of the governing rules.* ***Further, the Reference Order had not formulated any specific question to be answered by the Full Bench****, but an omnibus direction issued to the Registry to place the papers before the Hon'ble Chief Justice for constitution of the Full Bench and "an early resolution of the dispute". Such an omnibus reference would include exercise of jurisdiction by the Full Bench under Section 7 of the High Court Act, to finally decide the*

case itself. Ostensibly, it may appear as if Full Bench was sitting over in appeal on the findings of fact already recorded by the Division Bench. However, we find from the impugned judgment [Unnikrishnan Nair G.S. v. State of Kerala, 2019 SCC OnLine Ker 704 : (2019) 2 KLJ 152] of the Full Bench ***that it was fully conscious about the limited scope of enquiry in reference placed before it, but after due consideration of all aspects, deemed it necessary to analyse the factual matrix of the case in its correct perspective to justly answer the reference****. In the process, the Full Bench had to deviate from the observation made by the Division Bench that the candidates empanelled in the first Ranked List (RL-I) ought to be advised for appointment to fill up the 93 NJD vacancies reported on 12-7-2016, as, in its view, in law, the first Ranked List (RL-I) had expired on 1-6-2016. In other words, the* ***Full Bench was fully conscious of the scope of its jurisdiction****, as is evinced from the opening statement, in paragraph four of the impugned judgment [Unnikrishnan Nair G.S. v. State of Kerala, 2019 SCC OnLine Ker 704 : (2019) 2 KLJ 152] . After recording the factual matrix and rival submissions, in para 47 of the impugned judgment [Unnikrishnan Nair G.S. v. State of Kerala, 2019 SCC OnLine Ker 704 : (2019) 2 KLJ 152], the Full Bench noted that it was proceeding to answer the legal contentions within the parameters of the applicable law and after adverting to Rules 13 and 14 of the 1976 Rules, it analysed the factual matrix to conclude that since the last batch was advised by KPSC from the first Ranked List (RL-I) on 11-11-2015 and it had joined training on 1-5-2016 in terms of the first proviso to Rule 13, the first Ranked List (RL-I) ceased to operate from 1-6-2016 (namely, on completion of one month from 1-5-2016).*

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29. Thus understood, ***in the peculiar facts of this case, the Full Bench had no other option but to analyse the factual matrix for ascertaining the applicability of extant rules and to answer the matters in issue involved in reference appropriately****. Suffice it to observe that the impugned judgment [Unnikrishnan Nair G.S. v. State of Kerala, 2019 SCC OnLine Ker 704 : (2019) 2 KLJ 152] cannot be overturned on the basis of threshold (technical) plea under consideration. We are inclined to say so also because this is the second round of proceedings emanating from the selection process which had commenced with issuance of notification as back as on 28-9-2007, for appointment to the post of Sub-Inspector of Police (Trainee). We are of the considered opinion that no fruitful purpose will be served by relegating the parties before the High Court on technicality. That objection, for the reasons already recorded, does not commend to us. Instead, in the peculiar facts of this case, we deem it necessary to answer the merits of the controversy so as to give quietus thereto concerning selection process commenced as back as in 2007 vide Notification dated 28-9-2007.'*

(underlining in original by the Hon'ble Supreme Court; emphasis supplied in bold)

144. As manifest, in ***Aneesh Kumar*** (*supra*) while noting that, ordinarily, the Reference Court cannot go beyond the reference, a departure from the said rule was permitted only in view of the peculiar facts and circumstances of the case therein, holding that the judgement impugned therein could not be set aside as the questions/decisions, rendered beyond the

scope of the reference, were such that necessarily had to be gone into for the reference to be answered. I may only refer to ***Sundeep Kumar Bafna v State of Maharashtra,*** **(2014) 16 SCC 623**, holding that if a later judgement strikes a discordant note, the demand of judicial discipline compels that the decision of the co-ordinate Bench of earlier vintage shall prevail. Even otherwise, I am of the opinion that the authoritative judgements in ***Kerala State Science & Technology Museum*** (*supra*) and ***T A Hameed*** (*supra*) have not been diluted, but only qualified in ***Salil Sabhlok*** (*supra*) and ***Aneesh Kumar*** (*supra*).

145. I am conscious that the present case is formally, not a 'reference', *stricto sensu*. However, I see no reason not to apply the principles relating thereto, which serve as a useful guide to both, defining and exercising, our extraordinary writ jurisdiction in the instant case. I find no exceptional circumstances in existence so as to warrant examination of any issue(s) or the need to return findings stretching beyond the order dated 01.03.2021 (*supra*) in the present case.

146. In this view, coming to Issues no. (i) and (ii) i.e., who is constructing the building, and at whose instance it is being constructed and whether such person has right and title over the land on which the construction is being made, the

ownership of the land being that of the Waqf estate and the competency of the Waqf Board for such development has been found to be legal and nothing has been pointed out by the learned *Amicus Curiae* with regard to the non-competence of the Waqf Board and the Waqf estate for development of such land.

147. However, Issue no. (iii) is the primary issue which the Court is required to address i.e., whether the map of the building has been duly approved by the Patna Municipal Corporation and the construction is in accordance with the approved plan? Arguments thereon have been strenuously canvassed at the Bar; as per the learned *Amicus Curiae*, the plan not being sanctioned/approved by the PMC, the building has to be termed, unequivocally, as an unauthorized construction, and the Court is required to order its demolition. *Per contra*, the respondents have emphatically taken the stand, that the Corporation being a Government Company, its Architect would be deemed to be a Government Architect and in terms of Bye-law no. 8(A), once he has prepared the map for the building, no permission was required from the PMC and, thus, there is no illegality in the same. However, the parties are, fairly, *ad idem* that '*Government Architect*' as a term *per se* has not been

defined in the Bye-laws. It was the common submission of the Bar that it was open to this Court to interpret as to whether the Architect of the Corporation, which, admittedly, is a Government Company, would fall within Bye-law no. 8(A).

148. The Court also finds that there is an existing provision in the Bye-laws which takes care of the present scenario, even if it is assumed that the building was constructed in the absence of sanction from the competent authority. The same would be apparent from Chapter IX of the Bye-laws entitled '*Compounding, Penalties and Compliance*', especially Bye-law no. 77 titled '*Compounding Rate*'. Bye-laws no. 76-77 and Table 25 are reproduced below:

> '*76. Restriction on Compounding.- Any deviation pertaining to unauthorized development shall not be compounded;*
>
> *A. Where construction has been undertaken on Government land or land belonging to local body or land not owned by the person undertaking such development;*
>
> *B. Where FAR or height has been exceeded or front setback has been reduced from the prescribed norms under these bye laws.*
>
> *C. Where development has been undertaken un-authorisedly within the prescribed limits of ancient or archaeological monuments.*
>
> *D. Where such developments interfere with the natural drainage of the locality;*
>
> *E. Where development has been undertaken un-authorisedly over the area earmarked/ approved for parking; and*
>
> *F. Where road or drain whether public or private, whether constructed or natural, has been encroached.*
>
> *G. Where numbers of floors have been*

increased from permissible limit/ sanctioned map.

(2) Subject to the provisions contained in sub bye law (1), the Authority shall have the power to determine such other circumstances under which compounding may be prohibited.

(3) The Authority may, either before or after the institution of the proceedings under the provisions of the Act compound any offence;

A. Where development has been undertaken without permission, but within the framework of use restrictions and the provisions of these bye laws applicable to the concerned plot;

B. Where development has been undertaken in deviation of the approved plan, but within the framework of the use restriction and the provisions, norms, and stipulations of these bye laws; and

C. The Authority may however compound deviations beyond the permissible norms of these bye laws up to 10% in respect of side and rear setbacks, 5% in respect to FAR and 5% in respect to height with a maximum limit of 0.90 m.

77. **Compounding Rate.-**Compounding Rates for various categories shall be as per Table-25;

Table 25: Compounding rates

SN	Situations	Compounding fee per sq.m. (in Rs.)	
		Residential/ Institutional	Others
1.	Where development has been undertaken without permission, but within the framework of use restrictions and the provisions of the Bye laws applicable to concerned plot	2000	3000
2.	Where development has been undertaken in deviation to the approved plan, but within the frame work of use, restrictions and the provisions of norms and stipulations of these bye laws.	2000	2000
3.	Constructions beyond permission but within the limit as mentioned in bye-laws 76(3)(C)	10000	20000

149. Bye-law no. 76(3) provides for compounding

where development has been undertaken without permission, but within the framework of use restrictions and the provisions of the Bye-laws, whilst Bye-law no. 77 provides for the rate for such compounding.

150. From the aforesaid, it is clear that compounding even for construction which has been taken without permission is permissible. As such, *arguendo*, if it is accepted that permission/sanction of the PMC was indeed required, the map of the building can very well be submitted to the PMC for *post facto* approval. It would, then, be for the PMC to decide thereupon, in accordance with law, in terms of the provisions of the Act and the Bye-laws. At this juncture, the Court may refer to Bye-laws no. 8(1), (A) and (B), which are extracted below:

> '*8. Permission.- (1) No permission or notice shall be required for the works related to the following alterations and the like which do not otherwise violate any provisions regarding general building requirements, structural stability and fire and health safety requirements of the National Building Code-2005;*
> *(i) Opening and closing of a window or door or ventilator;*
> *(ii) Providing intercommunication doors;*
> *(iii) Providing partitions;*
> *(iv) Providing false ceiling;*
> *(v) Gardening;*
> *(vi) White washing;*
> *(vii)Painting;*
> *(viii)Re-tiling and reproofing;*
> *(ix) Plastering and patch work;*

(x) Re-flooring; and
(xi) Construction of sunshades on one's own land.
(A) No permission shall be necessary for works carried out by the Central Government and State Government Departments/Bihar State Housing Board if the plans are signed by the Government Architects. However, the Government Architects shall ensure that the plans are prepared as per the provisions of these bye laws and the master plan/ development plan whereever applicable. In case of such Government Projects lying in the area outside of any development plan/scheme, the Government Architects shall ensure to obtain NoCs required as per provision of this bye laws and Acts."
(B) A separate guideline may be issued for sanctioning of project within the Gram Panchayat area but falling outside the jurisdiction of any Planning Authority.'

151. From a plain reading of the aforesaid, it is clear that Bye-law no. 8(1) starts with words '*No permission or notice shall be required*' and Bye-law no. 8(A) also starts with the words '*No permission shall be necessary*'. Thus, on a harmonious reading of the two, endeavouring to make it practical and workable, the necessary import would be that Bye-law no. 8(1) and Bye-law no. 8(A) are separate and distinct and Bye-law no. 8(A) is not a sub-clause of Bye-law no. 8(1). This would also be clear from the difference, subtle albeit, that in Bye-law no. 8(1), the phrase is '*No permission or notice shall be required for the work related to the following alterations and*

the like...' whereas the language of Bye-law no. 8(A) reads '*No permission shall be necessary for works carried out by*...'. *Ergo*, the scope of Bye-law no. 8(A) is wider and more general in nature and would cover all scenarios, including, but not limited to, fresh construction/erection as also alteration, repairs etc. Furthermore, Bye-law no. 8(A) also stipulates that a Government Architect shall ensure that the plan is prepared as per the provisions of the Bye-laws and the Master Plan and the Development Plan, wherever applicable.

152. It is settled that Court must endeavour that no provision is rendered otiose, if the same can be harmonised and/or reconciled without difficulty. There can be no quarrel with the proposition laid down by the 5-Judge Bench of the Hon'ble Supreme Court in ***Chief Justice of Andhra Pradesh v L V A Dixitulu*, (1979) 2 SCC 34** that '*Where two alternative constructions are possible, the court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment*...'. This was affirmed by a 9-Judge Bench of the

Hon'ble Supreme Court in ***Jindal Stainless Limited v State of Haryana*, (2017) 12 SCC 1**. I do not think it expedient to burden my opinion with reiterations of the afore-referred principle, except to extract from ***Managing Director, Chhattisgarh State Co-operative Bank Maryadit v Zila Sahkari Kendriya Bank Maryadit*, (2020) 6 SCC 411**:

> '*33. It is a settled principle of law that where two provisions of an enactment appear to conflict, courts must adopt an interpretation which harmonises, to the best extent possible, both provisions. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:*
>
> *"To harmonise is not to destroy. A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific… The principle is expressed in the maxims generalia specialibus non derogant and generalibus specialia."*
>
> *...*
>
> *xxx*
>
> *44. As we have noted before, it is settled principle of law that where two provisions of an enactment appear to conflict, courts must adopt an interpretation which harmonises, to the best extent possible, both provisions. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:*
>
> *"... It is the duty of the court to avoid "a head on clash" between two sections of the same Act and, whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise."*

Francis Bennion in his work Statutory Interpretation states:

"Inconsistent enactments — A common application of the principle is in relation to contradictory enactments within the same Act. Enactment A may in itself be clear and unambiguous. So may enactment B, located elsewhere in the Act. But if they contradict each other, they cannot both be applied literally. A undoes B, and B undoes A. The court must do the best it can to reconcile them, but this can be achieved only by giving one or both a strained construction."

Where two provisions of an enactment appear to be in conflict, courts do not readily presume an "either/or" situation. Courts must construe the provisions harmoniously to ensure, as far as possible, the effective operation of both provisions in a manner that furthers the purpose of the enactment. Every provision, phrase, clause and word must be interpreted in a manner to further the object of the enactment. No word or part of a statute can be construed in isolation. Courts must be mindful that an interpretation which renders either provision otiose must be avoided unless the conflict does not yield any possible reconciliation.

45. In Krishan Kumar v. State of Rajasthan [Krishan Kumar v. State of Rajasthan, (1991) 4 SCC 258], the Rajasthan State Road Transport Corporation, Jaipur proposed a scheme in 1977 under Section 68-C of the Motor Vehicles Act, 1939 (the 1939 Act) for the exclusive operation of the disputed road. Upon the enactment of the Motor Vehicles Act, 1988 (the 1988 Act), a writ petition was filed contending that due to undue delay in notifying the scheme under the 1939 Act, the scheme was not saved by the 1988 Act. Section 100(4) of the 1988 Act stipulated that a draft scheme must be finalised within one year from the date of its

publication, failing which it would lapse. Section 217(2)(e) stipulated that notwithstanding the repeal of the 1939 Act, a scheme proposed under Section 68-C, if pending immediately before the commencement of the 1988 Act, shall be finalised in accordance with the provisions of Section 100 of the 1988 Act. The Court noted that, contrary to legislative intent, no scheme under the 1939 Act would be saved if schemes under that Act were to be assessed with reference to the date of their publication. Noting the apparent conflict between the two provisions, a two-Judge Bench of this Court interpreted both provisions harmoniously and held : (SCC pp. 266-67, paras 10-11)

"10. There appears to be some apparent conflict between Section 100(4) and Section 217(2)(e) of the Act. While Section 217(2)(e) permits finalisation of a scheme in accordance with Section 100 of the new Act sub-section (4) of Section 100 lays down that a scheme if not finalised within a period of one year shall be deemed to have lapsed. If the appellant's contention is accepted then Section 217(2)(e) will become nugatory and no scheme published under Section 68-C of the old Act could be finalised under the new Act. On the other hand if the period of one year as prescribed under Section 100(4) is not computed from the date of publication of the scheme under Section 68-C of the old Act and instead the period of one year is computed from the date of commencement of the Act both the provisions could be given full effect.

11. It is settled principle of interpretation that where there appears to be inconsistency in two sections of the same Act, the principle of harmonious construction should be followed in avoiding a head on clash. It should not be lightly assumed that what Parliament has given with one hand, it took away with the other. The provisions of one section of statute cannot be used to defeat those of another

unless it is impossible to reconcile the same."

The Court held that where Parliament confers a benefit, it must not be readily assumed that it intends to withdraw a benefit at the same time. Furthermore, the provisions of one section cannot be used to defeat another, unless there is no possibility of reconciling the two conflicting provisions.

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47. A two-Judge Bench of this Court noted held that while Section 42 operated to expedite the clearance of goods, Section 116 operated to ensure the protection of cargo. Consequently, the two provisions subserved different purposes. Further, by an amendment in Section 148 which was a provision for the liability of an agent of the person-in-charge, sub-section (2) was inserted which stipulated that any person who represents himself to any officer of customs as an agent of any such person-in-charge, and is accepted as such by that officer, shall be liable for the fulfilment of any obligation of the person-in-charge. The Court held that effect must be given to the amendment, which would be rendered redundant if the contention of the appellant was accepted. Relying on the principle of harmonious interpretation, the Court held : (British Airways Plc. case [British Airways Plc. v. Union of India, (2002) 2 SCC 95] , SCC p. 100, para 8)

"8. ... It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A

> *particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the court to make such construction of a statute which shall suppress the mischief and advance the remedy."*
>
> *This Court held that courts must ensure that every provision is construed in a manner to render seemingly contradictory provisions workable. In interpreting two provisions of a statute, courts must adopt the interpretation which does not defeat either provision and advances the remedy envisaged by their enactment.*
>
> *48. In this view, this Court must ensure that neither provision — Section 49-E(2) nor Sections 54(3)(a) and (b) is reduced to a dead letter of law...*'
>
> (emphasis supplied)

153. No doubt, Bye-law no. 8, including 8(1) and 8(A), as a whole are not happily-worded and have been placed in a somewhat unstructured manner. The State should ensure that, while framing its Rules, Regulations and/or Bye-laws, conscious attention is paid to their drafting, lest it result in forcing Courts to intervene. Fortuitously, in the present instance, I do not see any irreconcilable conflict, much less a conflict *simpliciter*, between Bye-laws no. 8(1) and 8(A) leading me to the inescapable conclusion that the same can easily be construed in harmony. Thus, I hold that Bye-law no. 8(1) and Bye-law no. 8(A) are distinct, operating in different fields and relating to different situations and Bye-law no. 8(A) is not a sub-clause of

Bye-law no. 8(1) of the Bye-laws.

154. I do not subscribe to the finding by my learned Brother Justice Vikash Jain, that essentially, the construction of the structure is void *ab initio* and being so, has to be necessarily demolished regard being had to the serious concern relating to the safety and security of the High Court, the Judges, learned counsel, litigants etc.; for the reason that the area already has heavy footfalls, in the usual course, and merely being in the proximity of the High Court premises would not, *ipso facto*, mean that all activities in the building in question threaten the Court's security. I would hasten to add that I may not be understood to mean that the security concerns of the High Court should not be dealt with, but the same has to be in consultation with all stakeholders, from a practical and realistic point of view, which the respondents have, be it noted, agreed to address. The stand of the respondents concerned is taken on record, and they are held bound by the same. Moreover, use of the building in question, having been disclosed as initially being of a guesthouse and office of the Waqf Board, has been subsequently modified to function only as an office. From the high-level meeting held under the chairmanship of the Chief Secretary, Government of Bihar, on 08.04.2021, it transpires that the

following decisions have been taken (Paragraphs 6-7 at pages 2-3 and Annexure-A at pages 7-8 of the Supplementary Counter Affidavit on behalf of respondents no. 3, 5, 8 and 9, dated 08.04.2021):

> '*(i) Held a meeting under the Chairmanship of Chief Secretary of Bihar on 08.04.2021 and following decisions were taken:*
> *(a) To limit the building in question, within 10 meters height in compliance of "Clause 21" of Bye Laws 2014,*
> *(b) To screen the boundary towards High Court with steel / alloy sheet,*
> *(c) Not to use the said premise for "Musafirkhana" rather as office of the Sunni Waqf Board,*
> *(d) Roof-top of the building shall not be used,*
> *(e) CCTV shall be installed in the premise,*
> *(f) Entry of visitors in the premise will be examined and only with a valid entry pass.'*

155. It is also not to be lost sight of that the right of the Waqf Board and the Waqf estate in question for construction of a building cannot be curtailed as long as there is no violation of any legal provision and in the present case, the plan of the building which has been constructed can very well be reappraised by the PMC with regard to it being in conformity with the provisions of the Act and the Bye-laws, as also to bring it within the stipulated height of 10 metres. The same would not necessitate the demolition of the structure.

156. Additionally, if the Architect of the Corporation has prepared and signed the building plan, the same cannot be simply brushed aside and held to not conform to the Bye-laws. The Court, while bound by law, cannot ignore the impact of ordering demolition. Given the data extracted above, of constructions of various buildings of the government/its agencies as well as courts in Bihar, having been carried out in the same fashion, a domino effect would necessarily have to ensue, resulting in demolitions of multiple government buildings, which, besides burdening the State exchequer would deal a serious blow to such institutions which clearly would go against the public interest at large. The deleterious and crippling effect of such consequential demolitions on the administrative system and also the justice system will be of manifold proportions. A direction of such wide-reaching import cannot be issued, without necessitating an evaluation of factors beyond the ambit of the order dated 01.03.2021 (*supra*). I respectfully strike a note of dissonance thereto. Apropos this context, ***Shivashakti Sugars Limited v Shree Renuka Sugar Limited*, (2017) 7 SCC 729** is instructive:

> '*43. It has been recognised for quite some time now that law is an interdisciplinary subject where interface between law and other sciences (social sciences as well as*

natural/physical sciences) come into play and the impact of other disciplines on Law is to be necessarily kept in mind while taking a decision (of course, within the parameters of legal provisions). Interface between Law and Economics is much more relevant in today's time when the country has ushered into the era of economic liberalisation, which is also termed as "globalisation" of economy. India is on the road of economic growth. It has been a developing economy for number of decades and all efforts are made, at all levels, to ensure that it becomes a fully developed economy. Various measures are taken in this behalf by the policy-makers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. It calls for an economic analysis of law approach, most commonly referred to as "Law and Economics" [Richard A. Posner in his book Frontiers of Legal Theory explains this concept as follows: "Economic analysis of law has heuristic, descriptive and normative aspects. As a heuristic, it seeks to display underlying unities in legal doctrines and institutions; in its descriptive mode, it seeks to identify the economic logic and effects of doctrines and institutions and the economic causes of legal change; in its normative aspect it advises Judges and other policy-makers on the most efficient methods of regulating conduct through law. The range of its subject-matter has become wide, indeed all-encompassing. Exploiting advances in the economics of nonmarket behaviour, economic analysis of law has expanded far beyond its original focus on antitrust, taxation, public utility regulation, corporate finance, and other areas of explicitly economic regulation. (And within that domain, it has expanded to include such fields as property and contract law.) The "new" economic analysis of law embraces

such nonmarket, or quasi-nonmarket, fields of law as tort law, family law, criminal law, free speech, procedure, legislation, public international law, the law of intellectual property, the rules governing the trial and appellate process, environmental law, the administrative process, the regulation of health and safety, the laws forbidding discrimination in employment, and social norms viewed as a source of, an obstacle to, and a substitute for formal law." Posner also mentioned that this interface between Law and Economics might grandly be called "Economic Theory of Law", which is built on a pioneering article by Ronald Coase [R.H. Coase, "The Problem of Social Cost", 3 Journal of Law and Economics 1 (1960)]:"The "Coase Theorem" holds that where market transaction costs are zero, the law's initial assignment of rights is irrelevant to efficiency, since if the assignment is inefficient the parties will rectify it by a corrective transaction. There are two important corollaries. The first is that the law, to the extent interested in promoting economic efficiency, should try to minimize transaction costs, for example by defining property rights clearly, by making them readily transferable, and by creating cheap and effective remedies for breach of contract. ...The second corollary of the Coase Theorem is that where, despite the law's best efforts, market transaction costs remain high, the law should simulate the market's allocation of resources by assigning property rights to the highest-valued users. An example is the fair-use doctrine of copyright law, which allows writers to publish short quotations from a copyrighted work without negotiating with the copyright holder. The costs of such negotiations would usually be prohibitive; if they were not prohibitive, the usual result would be an agreement to permit the quotation, and so the doctrine of fair use

brings about the result that the market would bring about if market transactions were feasible."]. In fact, in certain branches of Law there is a direct impact of Economics and economic considerations play predominant role, which are even recognised as legal principles. Monopoly laws (popularly known as "Antitrust Laws" in USA) have been transformed by Economics. The issues arising in competition laws (which has replaced monopoly laws) are decided primarily on economic analysis of various provisions of the Competition Commission Act. Similar approach is to be necessarily adopted while interpreting bankruptcy laws or even matters relating to corporate finance, etc. The impress of Economics is strong while examining various facets of the issues arising under the aforesaid laws. In fact, economic evidence plays a big role even while deciding environmental issues. There is a growing role of Economics in contract, labour, tax, corporate and other laws. Courts are increasingly receptive to economic arguments while deciding these issues. In such an environment it becomes the bounden duty of the Court to have the economic analysis and economic impact of its decisions.

44. We may hasten to add that it is by no means suggested that while taking into account these considerations, specific provisions of law are to be ignored. First duty of the Court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind. Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves

> *the economic interest of the nation. Conversely, the Court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative.*'
>
> (emphasis supplied)

157. On the strength of *Shivashakti Sugars Limited* (*supra*), while my principal duty is to apply the law, I cannot be unmindful of the impact of directions on the State's finances. Merely because the building in question is in proximity to the High Court, the same is necessarily required to be razed to the ground – cannot be a view that this Court ought to approve, given that, in law, the affected party has a right to construct up to the height of 10 metres, subject to satisfying other conditions under the Act and/or the Bye-laws. Thus, when a structure up to 10 metres of height is admittedly legally permissible, the only stipulation is that the same should be in conformity with other provisions of the Act and the Bye-laws. It is not in this Court's powers to add conditions not engrafted under the Act and/or the Bye-laws.

158. ***Kerala State Coastal Zone Management Authority*** (*supra*), referred to by the learned *Amicus Curiae*, is distinguishable from the present case, in view of paragraph no.

18 thereof:

> '*18. In the instant case, permission granted by the Panchayat was illegal and void. No such development activity could have taken place in prohibited zone. In view of the findings of the Enquiry Committee, let all the structures be removed forthwith within a period of one month from today and compliance be reported to this Court.'*
> (emphasis supplied)

159. Judgements are not to be read as Euclid's theorems, nor are they to be construed as statutes and all observations must be read in the context in which they appear [see ***BGS SGS Soma JV v NHPC Limited*, (2020) 4 SCC 234** and ***Chintels India Limited v Bhayana Builders Private Limited*, (2021) 4 SCC 602**]. In ***M/s Amar Nath Om Prakash v State of Punjab*, (1985) 1 SCC 345**, it was exposited thus:

> '*10. There is one other significant sentence in Sreenivasa General Traders v. State of A.P [(1983) 4 SCC 353 : AIR 1983 SC 1246] with which we must express our agreement, It was said: (SCC p. 377, para 27)*
> *"With utmost respect, these observations of the learned Judge are not to be read as Euclid's theorems, nor as provisions of a statute. These observations must be read in the context in which they appear."*
> *We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not*

interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737, 761 : (1951)-2 All ER 1, 14 (HL)] Lord MacDermott observed:

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....

In Home Office v. Dorset Yacht Co. Ltd. [(1970) 2 All ER 294 : (1970) 2 WLR 1140 : 1970 AC 1004 (HL)] Lord Reid said:

"Lord Atkin's speech [Donoghue v. Stevension, 1932 All ER Rep 1, 11 : 1932 AC 562, 580 : 101 LJPC 119 : 147 LT 281 (HL)] ... is not to be treated as if it was a statutory definition. It will require qualification in new circumstances."

Megarry, J. in (1971) 1 WLR 1062 observed:

"One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament."

And, in Herrington v. British Railways Board [(1972) 2 WLR 537 : (1972) 1 All Er 749 : 1972 AC 877 (HL)] Lord Morris said:

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

11. There are a few other observations in Kewal Krishan Puri case [(1980) 1 SCC 416 : AIR 1980 SC 1008] to which apply with the same force all that we have said above. It is needless to repeat the oft-quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and

not for what may seem to follow logically from it…'

(emphasis supplied)

160. To my mind, the facts of the instant case do not correspond to the factual matrix of ***Kerala State Coastal Zone Management Authority*** (*supra*). My analysis leads me to conclude that demolition would be too harsh a punishment to inflict, especially when the structure, at best, is an 'irregular' construction, and not an 'illegal' construction.

161. The question as to whether the existing building satisfies other conditions of the Act and the Bye-laws, obviously, has to be left, at this stage, to the PMC. This Court is, *in praesenti*, neither equipped nor required to delve into the technical niceties, which the PMC is directed to examine on its own merits. Needless to state, the height limit obviously would be within 10 metres as already accepted and assented to by the concerned respondents. Here, another consideration emerges, that is, the undeniable and uncontroverted fact that numerous government and court buildings have been constructed in a similar manner of approval/sanction, all over the State of Bihar. A drastic order of demolition holding the construction in question to be void *ab initio*, without examining that the law itself provides for *post facto* approval would tantamount to

going against the public interest. The same would also militate against the clear mandate of the law.

162. It is trite that the Courts are to rule as per law. However, the Court is required to exhibit dynamism to accommodate various contingent situations, within the ambit of law, *inter alia*, without compromising on the basis thereof. In the present case, I do not find that there has been a violation of a magnitude such that the entire structure is required to be demolished, more so, at the cost of repetition, when there is a right in law to make construction up to the height of 10 metres, subject to other conditions in the Act and the Bye-laws.

163. Moreover, many constructions, within the proximity of and around the High Court also, if tested on the touchstone of the parameter aforesaid, may be required to be, but necessarily, demolished if an order for demolition of the present structure is made, as all structures in terms of the alleged violation would have to be treated equally by this Court.

164. Further, the direction by respected Brother Vikash Jain that no structure can be constructed within 200 metres of the boundary wall of the High Court without information to the learned Registrar General of this Court would amount to legislation by the Court as the domain is covered by

the legislative enactment, specifically Bye-law no. 21. When there is no ban on construction or requirement of permission from the High Court and, rather, permission to construct upto the height of 10 metres, subject to satisfaction of all other conditions of the Act and Bye-laws, is contemplated in law, this Court cannot impose any additional restrictions on its own accord. Relying on ***Rishabh Agro Industries Ltd. v P N B Capital Services Ltd.*, (2000) 5 SCC 515**, it was held in ***Unique Butyle Tube Industries (P) Ltd. v U P Financial Corporation*, (2003) 2 SCC 455** as follows:

> '*13. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary...*'
>
> (emphasis supplied)

165. In similar vein are the observations in ***Sangeeta Singh v Union of India*, (2005) 7 SCC 484** and ***Union of India v National Federation of the Blind*, (2013) 10 SCC 772**. Moreover, the burden of enforcement of Bye-law no. 21 is on the State. It is settled that the Legislature legislates and the Court interprets. The security concerns of the High Court, no doubt, have to be heeded to, but in their garb, blanket directions on constructions without the due authority of law, cannot be

imposed. It is significant to note that Bye-law no. 21 already qualifies the High Court as an important building. That is the mandate of the Legislature as expressed through the Act and the Bye-laws. For this Court to now seek an additional privilege by way of a judicial direction may not comport with the institutional values of the judiciary, inasmuch as that this Court cannot step into the legislative arena, when the same is an occupied field.

166. The Court may also refer to Bye-law no. 17(1), which, *inter alia*, provides for *post facto* sanction/approval, attention to which has been drawn by Mr. Prasoon Sinha, learned counsel for the PMC:

> '*17. Construction not according to plan.- (1) If the Authority finds at any stage that the construction is not being carried on according to the sanctioned plan or is in violation of any of the provisions of these bye-laws, it shall notify the owner giving details of deviation and no further construction shall be allowed until necessary corrections in the plan are made and the corrected plan is approved. In case the deviation is within condonable limits the constructions shall not be stopped.*'

167. Another issue, with regard to how the construction could have proceeded during the period of lockdown, may not be of much relevance, for the reason, that complete stoppage of construction work was only for a few

initial months from end-March, 2020. Moreover, efficiency of the Corporation in construction speed cannot be a ground for either drawing an adverse inference or for passing a penal order of drastic consequences.

168. There is yet another factor not to issue directions of blanket nature, in so far as constructions near the High Court are concerned. In ***Vishaka v State of Rajasthan,*** **(1997) 6 SCC 241**, the Hon'ble Supreme Court issued guidelines enforceable in law but caveated them to be operative only till suitable legislation was framed:

> '*18. Accordingly, we direct that the above guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These writ petitions are disposed of, accordingly.*'
>
> (emphasis supplied)

169. I have no manner of doubt that the field herein is already occupied by suitable legislation *viz*. the Act. Besides, in ***Vishaka*** (*supra*), recourse was had to Article 32 of the Constitution and the Hon'ble Supreme Court observed that *'...it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.'* Indubitably, this Court's powers are wide under Article 226 of

the Constitution. Taking note of the extant judicial precedents, this Court has delineated the expansive width and amplitude of jurisdiction under Article 226 in, *inter alia*, ***Lalit Narain Mithila University v National Council for Teacher Education,*** **MANU/BH/0888/2020**; ***Sonalika Rani v the Central Board of Secondary Education,*** **2021 (2) BLJ 699**, and; ***Saurav Kumar Sharma v State of Bihar,*** **2021 SCC OnLine Pat 1205**. Yet, the High Courts have no powers corresponding to that invested in the Hon'ble Supreme Court under Article 142 of the Constitution.

170. In fact, the Hon'ble Supreme Court has itself recognised that even Article 142 cannot be resorted to, in order to supplant substantive law, in a 5-Judge Bench decision in ***Supreme Court Bar Association v Union of India*****, (1998) 4 SCC 409**:

> '*47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and*

perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly... The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It cannot be otherwise....

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject,

except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" (see K. Veeraswami v. Union of India [(1991) 3 SCC 655 : 1991 SCC (Cri) 734] but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.

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82. ... It must be remembered that wider the amplitude of its power under Article 142, the greater is the need of care for this Court to see that the power is used with restraint without pushing back the limits of the Constitution so as to function within the bounds of its own jurisdiction. To the extent this Court makes the statutory authorities and other organs of the State perform their duties in accordance with law, its role is unexceptionable but it is not permissible for the Court to "take over" the role of the statutory bodies or other organs of the State and "perform" their functions.'

(emphasis supplied)

171. Relying on a host of precedents, ***Manish Goel v Rohini Goel*, (2010) 4 SCC 393** stated that *'...the law in this*

regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions…'. It is, thus, correct to state that what is not available under Article 142 cannot possibly be achieved by Article 226.

172. On an overall appreciation of the matter, I also have no hesitation in holding that the Architect of the Corporation has to be held to be a 'Government Architect' within the ambit of Bye-law no. 8(A), subject to the architect qualifying under Bye-law no. 2(107) which reads '*"Registered Architect" means an Architect registered with the Council of Architecture and who has not been debarred by the Authority.*' The Corporation is a fully-owned Government Company under a department of the State Government *viz*. the Road Construction Department. In these facts, I see no reason not to include the Corporation within the expression '*State Government Departments*' occurring in Bye-law no. 8(A), while bearing in mind the observation in ***Bank of India v Vijay Transport*, 1988 Supp SCC 47**:

> '*11. We are unable to accept the contention. It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into*

> *consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation…*'
>
> (emphasis supplied)

173. In conclusion, on a harmonious and conjoint reading of the relevant provisions of the Act and the Bye-laws, direction is issued to the respondents, especially the PMC to scrutinize the building plan of the structure in question and decide as to whether it satisfies the conditions of the Act and the Bye-laws. As there is no dispute that Bye-law no. 21 restricts the height to 10 metres, the same shall be scrupulously adhered to. Further, the authorities shall also consult the High Court, on the administrative side, and address the security aspects in a professional manner. Security of the Courts is the State's duty and no laxity in this context on part of the State authorities will be countenanced.

174. Necessary steps and proceedings in terms of this judgement be taken forthwith by the State and all concerned. In so far as Issue no. (iv) is concerned, in light of the categorical stand of the respondents concerned that the building will be

used only as an office of the Waqf Board, and not as a guesthouse, the issue need not be further dilated on. The respondents concerned are bound by their statement.

175. The assistance rendered by all learned counsel is duly acknowledged, including Mr. Rajendra Narain (Senior Advocate), learned *Amicus Curiae*; Mr. Lalit Kishore (Senior Advocate), learned Advocate General; Mr. Tej Bahadur Singh and Mr. P K Shahi, learned senior counsel; Mr. Md. Khurshid Alam, Mr. Prasoon Sinha and Mr. Mrigank Mauli, learned counsel.

176. The petition stands disposed of in the aforesaid terms.

177. I may note that I have also gone through the judgement by respected Brother Justice Ashwani Kumar Singh, concurring with Brother Justice Vikash Jain.

178. After circulating my judgement, I have also had the opportunity of perusing the erudite opinion of learned Brother Justice Chakradhari Sharan Singh expressing his agreement *in toto* with the judgements authored by learned Brothers Justice Ashwani Kumar Singh and Justice Vikash Jain.

179. Brother Justice Chakradhari Sharan Singh, J. has referred to my concurring opinion, as a Member of, incidentally

this very Bench, in Judgement dated 12.04.2021 in ***Bablu v State of Bihar & Ors.*****, Cr. WJC No. 887 of 2013**. In this context, there is no dispute on the proposition that when a thing is to be done in a particular manner, it must be done in that manner or not at all. Here, as already held above, I find that the construction, being 'irregular' can be regularised within the confines of the Act and Bye-laws. That aside, ***Bablu*** (*supra*) dealt with a question of great significance, concerning interpretation of law *vis-à-vis* individual rights and liberties, as borne out from my eventual observation therein to the following effect:

> '*What emerges from the aforesaid, is that insistence on following procedure as prescribed by a statute is not just a safeguard in favour of individual rights and liberties, but is also meant as an effective restriction and restraint on executive excesses. When faced with a situation where there is a doubt, even if miniscule, we should ordinarily insist on strict adherence and compliance with the provisions concerned.'*
>
> (emphasis supplied)

(Ahsanuddin Amanullah, J.)

Per Chakradhari Sharan Singh, J:

180. I have had the added privilege of going through the judgments written by Brother Ashwani Kumar Singh, J., Brother Vikash Jain, J. and Brother Ahsanuddin Amanullah, J. I

fully concur with the views expressed by Brother Ashwani Kumar Singh, J. and Brother Vikash Jain, J. I have not been able to persuade myself with the opinion recorded by Brother Amanullah, J., despite my great reverence for his scholarship and legal acumen.

181. Since there are two conflicting opinions, one expressed by Brother Vikash Jain, J., with the concurring view of Brother Ashwani Kumar Singh, J., and the other expressed by Brother Amanullah, J., it has been considered apt to record, albeit briefly, the reasons for my disagreement with the opinion recorded by Brother Amanullah, J. and agreement with the view expressed by Brother Ashwani Kumar Singh, J. and Brother Vikash Jain, J.

182. Since the facts of the case have been extensively noted in the judgment authored by Brother Vikash Jain, J., I need not encumber this judgment by repeating those facts. At this juncture, it is deemed proper to mention that there is agreement, even in the aforesaid two conflicting opinions, over the conclusion that the construction of the structure in question is in clear breach of Clause 21 of the Bihar Building Bye-Laws, 2014, framed by the State Government in exercise of the powers conferred under Section 321 of the Bihar Municipality Act and

Section 81(2)(w) of the Bihar Urban Planning and Development Act, 2012, which reads as under : -

> *"**21. Construction near important buildings.-** No building exceeding 10 meters height shall be permitted within 200 meters radius from the boundary of the Governor's House, Bihar State Secretariat, Bihar Legislative Assembly, High Court and such other buildings as may be decided by the Authority or the State Government from time to time."*

183. Brother Vikash Jain, J., in his judgment, after posing a question to himself as to whether only the offending portion of the construction above 10 metres in height should be directed to be demolished, in the background of concession made by the respondents or it is essentially required to demolish the entire structure from the ground up; Brother Vikash Jain, J., has conclusively held that the structure cannot be allowed to stand and must be demolished in its entirety for several reasons as recorded therein. Following are the main reasons recorded for taking the said view : -

(i) The structure has been constructed in utter and brazen violation of the provisions of law across the Statutes starting from Section 32

of the Waqf Act, 1995, various other provisions of the Municipal Act and finally Bye-Law 21 of Bye-Laws;

(ii) The very initiation of the entire project with taking over of the property by the Waqf Board was unauthorized and without fulfilling the pre-conditions of Section 32 of the Act of 1995;

(iii) There is nothing on record to indicate that the proposed building would be an income generating asset intended for the purposes of recouping the expenses incurred by the Waqf Board before returning the property to Waqf Estate in question;

(iv) The primary object of the Waqf Board is in self interest by way of providing office space for itself rather than for the development of Waqf Estate No. 663, which is contrary to the very spirit of Section 62 of the Waqf Act. The surreptitious conduct of the respondents, particularly the State respondents, in getting the constructing of G+3 structure raised

during the period of complete lock down because of pandemic situation becomes suspect and raises serious doubt.

(v) There is no explanation as to who is the 'Government Architect' within the meaning of Bye-law 8(1)(A). The State respondents could not place any statutory provision, circular or notification defining the term; much less an Architect employed by the Building Corporation is a Government Architect. The stand of the respondents that an Architect employed by the Bihar State Building Construction Corporation (hereinafter to be referred to as 'the Building Construction Corporation') is the Government Architect has been rejected. Accordingly, the plea that approval of building plan by the Architect of the Building Construction Corporation satisfies the condition laid down in Bye-Law 8(1)(A), which requires plan to be sanctioned by a Government Architect is not tenable;

(vi) The submission that the Building Construction Corporation should be treated at par with the Bihar State Housing Board mentioned in Bye-Law 8(1)(A) for the purposes of exemption from taking permission thereunder cannot be accepted.

184. After having reached the conclusion as noted above Brother Vikash Jain, J. has held the construction of structure to be illegal *ab initio,* incapable of rectification. I fully endorse the aforementioned reasonings.

185. Brother Ashwani Kumar Singh, J. concurring with the view of Brother Vikash Jain, J., and upon noticing the Supreme Court decisions in ***Municipal Corporation of Greater Mumbai and Others v. M/S. Sunbeam High Tech Developers Pvt. Ltd.,*** reported in **(2019) 20 SCC 781** and ***Friends Colony Development Committee v. State of Orissa*** reported in **(2004) 8 SCC 733**, has reiterated the requirement of demolishing the entire structure.

186. Brother Amanullah, J., on the other hand, has concluded that the structure, at best, is an irregular structure and not an illegal structure. According to him, the violation of law in construction of the structure in question is not of such a

magnitude that the entire structure is required to be demolished since construction up to a height of 10 meters is lawful, subject to other conditions in the Act and the Bye-Laws. Brother Amanullah, J. has further noticed that many constructions within the proximity of and around the High Court may be required to be necessarily demolished if tested on the touchstone of the parameter of Clause 21 of the Bye-Laws. In case an order for demolition of the present structure is made, as all structures in terms of the alleged violation will have to be treated equally by this Court. Brother Amanullah, J. has referred to Bye-Law 17(1) of the Bye-Laws, which stipulates *post facto* sanction/approval of a construction, if the same is not found to be carried on according to the sanctioned plan or it is in violation of any provision of the Bye-law.

187. Evidently, thus there is unanimity of opinion apropos the question that the construction of the structure in dispute is contrary to law. Brother Amanullah, J. has supported his opinion with reference to Clause 76(3) of the Bye-Laws, which deals with compounding of an offence.

188. In the wake of the materials available on the record, which have been discussed at length in the judgments of Brother Vikash Jain, J. and Brother Amanullah, J. a question has

arisen as to whether the structure is *per se* illegal and, therefore, deserves to be demolished or, treating the same to be irregular, the respondents can be allowed to regularize the structure by bringing down height of the building to permissible limit of 10 meters.

189. Before addressing this core issue of, it would be useful to take note of certain aspects referred to and dealt with by Brother Amanullah, J.. By referring to this Court's order dated 01.03.2021 passed in Cr.W.J.C. No. 887 of 2013, Brother Amanullah, J., has noted that the scope of the Special Bench crystallized to four aspects mentioned in the said order, which have been quoted in the third paragraph of his judgment. After having noticed the aforesaid, Brother Amanullah, J., has recorded that the parameters of consideration have to remain strictly confined to the issues raised in the order dated 01.03.2021, as marked to this Bench by Hon'ble the Chief Justice in exercise of his administrative powers and accordingly he has held that the need for detailed examination of Waqf Act, 1995 and the connected enactments is obviated. Upon noticing various Supreme Court's decisions, Brother Amanullah, J., has opined at one stage that reference Court should not go beyond the scope of its reference. Further, noticing the Supreme Court's

decision in case of ***Aneesh Kumar V S v State of Kerala***, reported in **(2020) 7 SCC 301**, he has noticed permissible departure from the said rule, wherein it has been held that the questions/decisions rendered beyond the scope of reference can also be gone into where the same was essentially required for the reference to be answered. At the same time, he has noted that the case in hand is not a reference *stricto sensu*, still there was no reason not to apply the principles relating thereto, which serves as useful guide to both defining and exercising extraordinary writ jurisdiction.

190. I am in respectful disagreement with the said opinion of Brother Amanullah, J., for two main reasons.

191. Firstly, in order to duly appreciate the background in which the present proceeding in the nature of public interest litigation was registered on *suo motu* cognizance of the upcoming disputed structure in question having been taken by a five-Judge Bench of this Court, while hearing a matter referred to the said Bench (Cr.W.J.C. No. 887 of 2013), it would be useful to notice the order which was passed by this Bench on 01.03.2021, which reads as under :-

> *"Heard Mr. Jitendra Singh, learned senior advocate for the petitioner in Cr.W.J.C. No. 278 of 2013 who has*

assisted this Bench as an Amicus Curiae in the continued absence of advocate on record for the petitioners in Cr.W.J.C. Nos. 887 of 2013 and 899 of 2013, and Mr. Anjani Kumar, learned Additional Advocate General No.4 for the State. We have also heard Mr. Vinay Kirti Singh, learned Government Advocate No.2 for the State.

Hearing concluded.

Judgment reserved.

List under the heading "For Judgment" on 19th March, 2021 at 10:30 a.m.

Before we part with the present order being passed on the very first day when court proceedings are being conducted in the Centenary Building of the Patna High Court upon its recent inauguration on 27.02.2021, we are constrained to take judicial notice of a huge structure on the north side adjacent to the Centenary Building of the Patna High Court, which has come up during the COVID-19 Pandemic.

In order to ascertain the legitimacy of the building, we called upon the learned Registrar General and the Court Officer and inquired from them as to whether any information had been

given to the High Court prior to the erection of the building. We also inquired if they were aware whether the ongoing construction of the structure is being carried on after due approval of the map in accordance with law.

The learned Registrar General informed us that the District Magistrate and the Municipal Commissioner were called by him a few days ago and he enquired about the legitimacy of the structure. They could not offer any satisfactory reply at the time. However, the Municipal Commissioner expressed doubts that approval of the plan had been accorded for the ongoing construction.

In our opinion, the existence of the structure in such close proximity of the High Court building, apart from causing incessant disturbance in court proceedings, prima facie, poses serious security concerns for the Judges, lawyers, litigants, staff and security personnel alike.

In our opinion, the matter needs to be brought to the notice of Hon'ble The Chief Justice for taking it up on the judicial side to consider, inter alia, the following aspects:

(i) Who is constructing the

building, and at whose instance it is being constructed ?

(ii) Whether such person has right and title over the land on which the construction is being made ?

(iii) Whether the map of the building has been duly approved by the Patna Municipal Corporation and the construction is in accordance with the approved plan ?

(iv) What is the proposed use of the building ?

Let this matter be placed before Hon'ble the Chief Justice."

192. Pursuant to the aforesaid order, this *suo motu* public interest litigation came to be registered on 05.03.2021 and assigned to this Bench, under the orders of Hon'ble the Chief Justice. The observations made by this Court in the order dated 01.03.2021, referring to certain aspects, in my opinion, cannot be construed to be in the nature of framing of the issues or outlining the points for determination, for the purpose of adjudication in this case. Similarly, registration of the present public interest litigation, under the orders of Hon'ble the Chief Justice in the light of the observations made in the order dated 01.03.2021, cannot be construed to be a 'reference' made to this

Bench by Hon'ble the Chief Justice for answering the aforesaid four points/aspects mentioned in the said order dated 01.03.2021. The Court's concern was over the construction of a multi-storied building almost adjacent to the Centenary Building of the Patna High Court which had come up during COVID-19 Pandemic. I am, therefore, in respectful disagreement with the view of Brother Amanullah, J. that the jurisdiction of this Court is confined to the aspects noted in the said order dated 01.03.2021 and this Bench is required to answer the same in a manner as if they are questions of law referred to a Bench for returning its opinion.

193. Brother Amanullah, J. has noted certain facts in 13th paragraph of his Judgment as "undisputed facts" including the fact that the land in question is owned by Waqf Estate. In my respectful opinion, no such finding can be recorded in this regard by this Bench in the present writ proceeding of judicial review under Article 226 of the Constitution in the nature of Public Interest Litigation, on the basis of materials on record.

194. It is noteworthy that the stand which has been taken in the counter affidavit filed on behalf of Bihar Sunni Waqf Board has been noted in the judgment of Brother Vikash Jain, which reads as under :-

"…. It has been stated that one Hazrat Jalaluddin Shah, popularly known as Hazrat Shah Syed Peer Murad Rahmatullah Alaih, a leading personality of the reformist movement in the State of Bihar, died a Martyr and was buried in the Qabristan during the 18th Century in what was then Village Maholi with a Muslim dominated population. Various sections of society started paying homage to the said departed saint at his Dargah. The adjoining land of the Dargah began to be used by local Muslims for the purposes of Mosque, Eidgah, Khanqah, Dargah and Graveyard. Under the provisions of Bihar Tenancy Act, 1885, the land of Tauzi No. 34/197, Thana No. 06 of village Maholi was surveyed and Khatiyan was published in the year 1911, and the relevant lands were recorded as "Shamilat'' Musamat Bibi Wazirun Nisan Wagairah Neyaz Dargah. It is stated that the land of Khata No 48, Plot No. 194 was recorded as Qabristan and Dargah and was under possession of Musamat Shahidan and some other persons named therein. Other plots stood as follows –

Plot No.	Khata No.	Area
193	156	0.07 decimal
195	426	0.36 decimal
196	424	0.28 decimal
197	423	0.16 decimal
138	96	10 kathha

142	68	0.82 decimal
143	119	0.38 decimal

It was, therefore, claimed that the above properties were being used as Mosque, Eidgah, Khanqah, Peer Khana and Maqbara Graveyard since time immemorial and thus constitute 'Waqf by user' under the provisions of Section 2 (m) of the Bihar Waqf Act, 1947 ('the Bihar Act'). As such, a Waqf in the name of Dargah Hazrat Shah Jalal Shaheed adjacent to the Patna High Court came to be registered on 17.03.1953 as Waqf Estate No. 663 and managed by a Managing Committee under the supervision of the Waqf Board. The Circle Officer, Sadar, Patna by his memo No. 618 dated 29.03.2000, upon measurement and determination of Waqf Estate Plot No. 663, furnished details describing the land as Graveyard, Dargah."

195. It will be useful to refer, at this juncture, to an earlier order of this Court dated 03.05.2021 whereby the respondents were directed to deliver their respective records in original to this Court, which reads as under :-

"2. On 16.04.2021, this Court had directed, inter alia, the respondent nos. 3 to 5, 9, 10 and 13 to submit all the original records relating to the land and construction of the building. So far,

however, a few details have been received in a sealed cover from the Bihar State Sunni Waqf Board (respondent no. 13) in the office of the Registrar General. The documents have been scanned and circulated to us.

3. Learned counsel for the respondent nos. 3 to 5, 9 and 10 undertake that all the required original records shall be submitted in the office of the Registrar General within a few days' time.

4. Accordingly, time is granted up to Friday i.e. 7th May of 2021 for the said respondents to deliver the original records to the Registrar General, failing which adverse inference would be drawn against the defaulting respondents.

In case any documents are in a language other than English or Hindi, whether in whole or in part, English translations shall appropriately be furnished by the concerned respondents within further one week thereafter by 14th May of 2021, either in the form of hard copies or in soft copies."

196. Despite having made it clear that failure to deliver the original records would invite adverse inference, the Waqf Estate No. 663 has not delivered its records to the Court.

The Waqf Board has also not come forward with any such document or material to establish ‘permanent dedication’ or ‘Waqf by user’. Upon perusal of the records of the Waqf Board, I have not been able to identify any document in this behalf.

197. History may be reconstructed, to the extent relevant here, mainly from as few as two documents forming part of the records of the Waqf Board as supplied to this Court, namely, the Kramik Khatiyan of Mauza/Village Maholi, Pargana; Azimabad, Tauzi No. 34, Thana Phulwari, Thana No. 6 pertaining to Khata No. 48, Plot No. 194; and the Extract of the Register of Waqfs maintained under Section 37 of the Central Act.

198. It may be borne in mind that according to the Waqf Board’s Resolution No. 05 passed on 15.02.2018 (submitted in Urdu language), the construction was proposed on Khata No. 48, Plot No. 194 of Waqf Estate No. 663. The affidavit of the Waqf Board is merely to the effect that the concerned lands were recorded as “Shamilat” Musamat Bibi Wazirun Nisan wagairah Neyaz Dargah. “Shamilat” perhaps loosely translates as the joint ownership of undivided village land. A specific statement has been made that Khata No. 48, Plot No. 194 recorded as Qabristan and Dargah was under

possession of Musamat Shahidan and some other persons. No further details whatsoever have been offered in the said affidavit.

199. In the Kramik Khatiyan in respect of the land of Khata No. 48, Plot No. 194 published after Cadastral Survey in 1911, the land has been described as "Gair Mazarua Aam" (column 2) as Dargah (column 3). The nature of land is stated as Qabristan (column 5). The total area of the land is recorded as 1 acre 3 decimal (column 6), while the boundary of the land has not been mentioned (column 4). The shares over palm (taad) trees and khajoor (date) trees standing on the land have been detailed in respect of Musamat Shahidan and others (columns 7). Finally, the remarks column contains the entry "Kaayami" (columns 10), indicating that the said land had been settled.

200. On the other hand, Waqf Estate No. 663 is said to have been registered on 17.03.1953 on the basis of a requisition made during the same year by Syed Shah Asghar Hussain.

201. A perusal of the Register of Waqfs throws up a number of discrepancies and unreconciled facts. This document created more than 40 years after the Kramik Khatiyan was published, for the first time cryptically states "By way of Will to Dargah executed in 1909." Interestingly, there is no mention of

any Will in the Kramik Khatiyan published soon thereafter in 1911 by way of remarks (column 7), though there is description of possession over palm trees and date trees.

202. Most important of all, the crucial details relating to the date on which the Waqf came into existence (column 5), particulars of title deeds or other documents (column 7), the name and address of the person or mutawalli who registered and created the Waqf (origin of the Waqf with name and address of dedicator, if any) as required to be declared (column 8), details of the rule of succession to the office of mutawalli under the Waqf deed or by custom or by usage (column 12), have all been left blank. So also, columns 14 to 19 have been left blank.

203. Yet another dubious fact is that the measurement of the land shown as 1 acre 5 decimals conflicts with the Kramik Khatiyan in which the measurement is given as 1 acre 3 decimals, and is thus in excess by 2 decimals, creating considerable doubt.

204. The basic and foundational facts and documents are nowhere mentioned in the Kramik Khatiyan. For the first time, a claim has been sought to be made in the Register of Waqfs on the basis of a non-existing Will supposedly of 1909, without so much as mentioning the date thereof, the name of the

person who executed the Will, and whether the nature of the Will was oral or written.

205. It is further not ascertainable who was the mutawalli on the date of the Will, nor how the mutawalli mentioned in Column No. 11 of the Register of Waqfs succeeded from his predecessor in office, nor what was the rule of such succession under the alleged Will of 1909. None of these aspects finds mention in the next column, which is meant for these details.

206. There is a yawning void in the relevant facts between 1909 and 1953 which has not been filled with reference to any records, affidavits or submissions of the respondents. In other words, there is no whisper of the existence of a Will of 1909 whatsoever until the year 1953 when the idea appears to have innovatively been conceived for the first time during the registration of Waqf Estate No. 663 in the Register of Waqfs.

207. Interestingly, none of the affidavits filed on behalf of the respondents has made any reference to this Will. The records of the Waqf Board as submitted to this Court do not also bear a copy of the Will, much less the original, nor have these been produced before this Court.

208. Be that as it may, the stand of the Waqf Board in

paragraph 7 of its counter affidavit is that Waqf Estate No. 663 is a Waqf by user within the meaning of Section 2(m) of the Bihar Waqf Act 1947, by reason of its property being "*used for Masjid (Mosque), Eidgah, Dargah, Khankah, Makbara and Graveyard, Takia, Rauza and annual function of Urs is also celebrated by the people of all the community*." It is further stated that the Waqf is being managed by the managing committee under control and supervision of the competent authority such as the Majlis as per the provisions of and Bihar State Sunni Waqf Board after Waqf Act, 1954.

209. Similarly, the Waqf Estate No. 663 in paragraph 17 of its counter affidavit, has also stated that "Fateha Khani of Hazrat Saiyed Shahid Peer Murad Shah Rahamtulla Allaih" are being done and Gul Poshi also are being done by Hindus and Muslims and all other sects having faith in the aforesaid Saint since time immemorial on the plots and annual Urs ceremony of the said Saint having been celebrated thereon since time immemorial irrespective of caste and creed …" It is therefore stated that the Waqf is a Waqf by user within the definitions of 3(i) of the Central Act as well as Section 2(m) of the Bihar Act.

210. I am mindful that the existence of a Waqf may be established if it can be shown to have existed continuously since

time immemorial for the purposes of religious worship by the Muslim community. In such cases, a Waqf may be inferred as existing even in the absence of a permanent dedication. Reference may be made to the recent judgment of a Constitution Bench of the Hon'ble Supreme Court in ***M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das, (2020) 1 SCC 1,*** extracts from which may be fruitfully noted here for ready reference –

> ***"1130.*** *In some cases, courts were faced with a situation where property was used as waqf property since time immemorial and it was not practical to seek formal proof in the form of a deed of declaration. A specific document of dedication may be unavailable after a long lapse of time but the use of the property for public religious or charitable purpose may have continued since time immemorial. Hence, despite the absence of an express deed of dedication, where the long use of the property as a site for public religious purpose is established by oral or documentary evidence, a court can recognise the existence of a waqf by user. The evidence of long use is treated as sufficient though there is no evidence of an express deed of dedication.*

> ***1134***. *Our jurisprudence recognises the principle of waqf by user even absent an express deed of dedication or declaration. Whether or not properties are waqf property by long use is a matter of evidence. The test is whether the property has been used for public religious worship by those professing the Islamic faith. The evidentiary threshold is high, in most cases requiring evidence of public worship at the property in question since time immemorial.*
>
> ***1138***. *... Given the radical alterations to the characteristics of ownership of the property consequent upon a recognition of a waqf by user, the evidentiary burden to prove a waqf by user is high. The pleadings in the plaint in Suit No. 4 are deficient. No particulars of the extent or nature of the use have been set out. A stray sentence in Para 2 of the plaint cannot sustain a case of waqf by user."*

211. Averments have been made in the affidavits of the Waqf Board and Waqf Estate No. 663 that the Waqf is a Waqf by user, but keeping in view the observations of the Hon'ble Supreme Court in M. Siddiq's case (supra), the evidentiary burden to prove a Waqf by user is high. Other than

mere averments in the affidavits, no material has been brought on record which establishes Waqf by user.

212. I am not inclined to go into the details of these aspects of the matter though they have a direct bearing on the question of legality of the construction on the land of Waqf Estate No. 663. These are questions of fact which can be decided only upon evidence being led by the concerned parties and may more appropriately be raised before a Court of competent jurisdiction, if the occasion so arises.

213. It is made clear that the above observations should in no way be construed as a finding on facts, nor have I touched upon the rights or title of any party with respect to the land of Waqf Estate No. 663, which would remain subject matters to be raised before the appropriate forum or court by any affected party, if so advised, to be decided without being influenced or prejudiced by the observations herein.

214. In the background of the aforesaid discussion I respectfully disagree with the opinion of Brother Amanullah J. that it is undisputed fact that the property in question is a waqf estate.

215. Further, Brother Amanullah, J., referring to Chapter IX of the Bye-laws, especially Bye-law No. 77 read

with Table 25 has opined that they take care of the present scenario even if it is assumed that the building was constructed in the absence of sanction from the competent authority. Further, referring to Bye-law No. 76(3), he has opined that even when a development has been undertaken without permission but within the framework of use and restrictions, the same can be compounded. Accordingly, even for the sake of argument, it is accepted that permission/sanction of Patna Municipal Corporation was indeed required, the map of the building can very well be submitted to Patna Municipal Corporation for *post-facto* approval, he has observed. On this point too I beg to differ with the view expressed by Brother Amanullah, J. for the reason that Clause-76 deals with compounding of any offence as is evident from the language of Clause 76(3).

216. Coming now to the core issue as to whether the construction of the structure is *per se* illegal requiring its demolition, I fully endorse the views expressed by Brother Ashwani Kumar Singh, J. and Brother Vikash Jain J. In my opinion, Section 315 of the Bihar Municipal Act, 2007 is complete answer to this situation which requires that any building or construction of permanent nature which has been constructed in contravention of or breach or deviation of

building bye-law shall be liable to be demolished, notwithstanding that it may have been approved by a competent authority.

217. The said provision carves out no exception. It is noted that Section 314 of the Municipal Act prohibits any person from constructing any building or structure of permanent nature or executing any work relating to construction of building or undertaking any alteration, addition or modification of an existing building, unless the building plan is approved by a competent authority to be designated under rules and bye-laws framed by the Government. The first proviso to Section 314 states that no Architect shall sanction any building plan unless it is in conformity with building Bye-law framed by the State Government. The second proviso makes any registered Architect, Builder and the approving authority liable to be prosecuted and pay fine or undergo sentence to imprisonment for a period which may extend to one year or both, in case, a building plan is found to be in contravention or deviation of building bye-laws, in addition to any other action that may be taken under the Act. It is evincible that construction etc. of building in breach of Section 314 of the Act has two consequences. Firstly, it has penal consequence in the nature of

offence which can be compounded in accordance with Clause 76(3) of the bye-laws. Secondly, by virtue of provision under Section 315, such building shall be liable to be demolished.

218. In the background of the above noted statutory provisions, it is to be examined whether erection of structure in the question without any valid sanction plan can be termed as illegal or irregular. It is to be kept in mind that something, which is forbidden by law, is illegal. An act, which is not authorised by law, is illegal and the state of not being legally authorised is an illegality. (See Black's Law Dictionary 8th Edition).

219. An action throwing statutory rules to the winds would render the same illegal, whereas irregularity presupposes substantial compliance with the Rules. [See **(2007)1 SCC 257** (***State of U.P. and others vs. Deshraj***, Paragraph 10)]

220. At this stage I am reminded of the view remarkably expressed by Brother Amanullah, J. in judgment dated 12.04.2021 rendered in Cr.W.J.C. No. 887 of 2013 (***Bablu vs. State of Bihar and others***) wherein, concurring with the majority opinion in the said case, taking note of the oft cited decisions rendered in the cases of ***Taylor v Taylor,* (1875) LR 1 Ch D 426** and ***Nazir Ahmed v King Emperor*, AIR 1936 PC 253 (2)**, held as under :-

177. It is no longer *res integra* that when a thing is to be done in a particular manner, it must be done in that manner or not at all. This rule emanated in ***Taylor v Taylor,* (1875) LR 1 Ch D 426** and has since then been followed consistently. In ***Nazir Ahmed v King Emperor*, AIR 1936 PC 253 (2)**, it was held that *'...where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all...'*

178. In ***State v Sanjeev Nanda*, AIR 2012 SC 3104**, the Hon'ble Supreme Court reiterated that it is '*a settled principle of law that if something is required to be done in a particular manner, then that has to be done only in that way or not, at all.*'

179. In ***Mackinnon Mackenzie and Company Limited v Mackinnon Employees Union*, 2015 SCC OnLine SC 160**, the Hon'ble Supreme Court again stated:

'*43. It would be appropriate for us to refer to the* ***decision of this Court in Babu Verghese v. Bar Council of Kerala [(1999) 3 SCC 422]****, to show* ***that if the manner of doing a particular act is prescribed under any statute, and the same is not followed, then the action suffers from nullity in the eye of the law****, the relevant paragraphs of the above said*

case are extracted hereunder: (SCC pp. 432-33, paras 31-32)

"31. ***It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all.*** *The origin of this rule is traceable to the decision in Taylor v. Taylor [(1875) LR 1 Ch D 426] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372: (1936) 44 LW 583: AIR 1936 PC 253 (2)] who stated as under: (Nazir Ahmad case [(1935-36) 63 IA 372: (1936) 44 LW 583: AIR 1936 PC 253 (2)], IA pp. 381-82)*

*'...****where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.****'*

32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh [AIR 1954 SC 322: 1954 Cri LJ 910: 1954 SCR 1098] and again in Deep Chand v. State of Rajasthan [AIR 1961 SC 1527: (1961) 2 Cri LJ 705: (1962) 1 SCR 662]. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh [AIR 1964 SC 358: (1964) 1 Cri LJ 263 (2): (1964) 1 SCWR 57] and the rule laid down in Nazir Ahmad case [(1935-36) 63 IA 372: (1936) 44 LW 583: AIR 1936 PC 253 (2)] was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law.""

(underlining in original; emphasis supplied)

> *180. What emerges from the aforesaid, is that insistence on following procedure as prescribed by a statute is not just a safeguard in favour of individual rights and liberties, but is also meant as an effective restriction and restraint on executive excesses. When faced with a situation where there is a doubt, even if miniscule, we should ordinarily insist on strict adherence and compliance with the provisions concerned."*

221. It has been consistently held by the Supreme Court and this Court that if a thing is to be done in a particular manner, it should be done in that manner alone or not at all.

222. I have no hesitation, at this stage, in recording a finding that the State Government of Bihar could not bring to our notice any material to show that there is any Government Architect in the State of Bihar.

223. It is disturbing to note that when this matter was taken up for the first time on 15.03.2021, Mr. Lalit Kishore, learned Advocate General, Bihar, justifying the construction of the structure in question had taken specific plea that no permission was required from Patna Municipal Corporation for construction of the building in question as the same was being constructed by the Minority Welfare Department, Government of Bihar, through Building Construction Corporation on a property belonging to Bihar State Sunni Waqf Board, relying on the provision under Bye-law 8(1)(A) of the Building Bye-laws,

2014. It transpired during course of hearing of the present case that none of the functionaries of the State, Patna Municipal Corporation or Bihar Building Construction Corporation ever addressed the statutory requirement under Bye-law 21 of the Bye-laws. When the said provision was pointed out by the Bench, the respondents were unanimous about their profound ignorance of the same. It is difficult for this Court to form an opinion, either way, as to whether the concerned respondents were in fact ignorant of Clause 21 of the Bye-laws or they feigned ignorance before this Court just to justify their *bonafide*. In both circumstances, such action/ inaction on the part of the concerned officials deserves to be deprecated in strong terms, which I do. If the brazen illegality crept in because of ignorance of the said provision, which is of significant nature, it is a reflection on their capacity to administer. If the same was deliberate defiance of the said provision, throwing to the winds the said statutory provision, despite knowing it, the same verges on malice in law.

224. Colossal loss of the public exchequer because of palpable illegality committed by the respondents in permitting a completely illegal structure over a land adjacent to High Court Building has been taken note of by Brother Ashwani Kumar

Singh, J., Brother Vikash Jain, J. I find it difficult to accept that each and every functionary of the State, Municipal Corporation and Bihar Building Construction Corporation shut their eyes and permitted the structure come up during the period of lock down at a central place of the city of Patna, ignorantly. The chance of their tacit approval to the illegal construction of the said building cannot be ruled out. It is noteworthy that till date there is no validly sanctioned map of the structure, by a competent authority in accordance with law. For this reason also, apart from other reasons as discussed by Brother Vikash Jain J., the disputed construction is completely illegal and not irregular. In such circumstance, in addition to the various directions which have been issued in the judgments written by Brother Ashwani Kumar Singh, J. and Brother Vikash Jain, J., I would make a request to the State Government of Bihar to consider constitution of an Inquiry Commission under the Commission of Enquiry Act, 1952, to enquire into the conduct of various authorities or the individuals responsible for ensuring and permitting illegal construction of the disputed structure in question. It is, however, made clear that I am not issuing such direction to the State Government and leaving it to its discretion to take a decision in public interest in this regard.

225. Brother Amanullah, J., in his judgment has expressed his reservations over the direction issued in the judgment written by Brother Vikash Jain, J., to the effect that no structure can be constructed within 200 meters of boundary wall of the High Court without information to the Registrar General of this Court as according to him, the same would amount to legislation by the Court, which is a domain covered by the legislative enactment specifically Bye-law No. 21. In my opinion, the direction of such nature has aptly been issued in the wake of the admitted fact that the respondents have been found to have acted in total breach of the statutory prescription under Bye-Law 21. The said direction does not amount to legislation, rather it is a *mandamus* issued to ensure strict compliance of the statutory provision under Bye-law 21 of the Bye-laws, which has been noticed by this Court to have been utterly breached by the respondents.

226. With the discussions, as noted above, I record my concurrence with the views expressed by Brother Ashwani Kumar Singh, J. and Brother Vikash Jain, J. I respectfully disagree with the opinions to the contrary, as recorded by Brother Amanullah, J., to the extent as noticed above.

227. I record my deep sense of appreciation for the

assistance rendered by learned counsel representing the parties, especially Mr. Rajendra Narayan, learned Senior Counsel as the *Amicus Curiae* assisted by Mr. Harsh Singh, Mr. Lalit Kishore, learned Advocate General , Mr. P.K. Shahi, learned Senior Counsel, Mr. Tej Bahadur Singh, learned Senior Counsel, Mr. Khurshid Alam, learned counsel, Mr. Prasoon Sinha, learned counsel and other counsel, who have assisted them. All of them have assisted this Court with utmost professional devotion and dispassion. Their assistance has been very valuable in making me appreciate the issues involved and reach a definite conclusion.

(Chakradhari Sharan Singh, J.)

Per Rajendra Kumar Mishra, J:

228. It was my privilege going through the judgments written by Brother Ashwani Kumar Singh, J., Brother Vikash Jain, J., Brother Ahsanuddin Amanullah, J. and Brother Chakradhari Sharan Singh, J. I fully concur with the views expressed, directions issued and the observations made by Brother Ashwani Kumar Singh, J., Brother Vikash Jain, J. and Brother Chakradhari Sharan Singh, J., and I respectfully differ with the views of Brother Ahsanuddin Amanullah, J. to the extent they are conflicting.

229. Facts of the case have been elaborately unfolded and legal positions threadbare discussed in the judgements authored by my esteemed Brothers, which are not required to be repeated.

230. I, however, deem it fit to add here that in the aforesaid judgments, reference has been made and emphasis has been laid on the distance between the boundary wall of the High Court and the disputed structure, for applying Bye-Law 21 of the Building Bye-Laws. I take, at this stage, judicial notice of the fact that the gap between the boundary wall of the High Court and its new Centenary Building is hardly 8 metres and thus the gap between the disputed structure and the Centenary building comes to a mere 15 metres or even less. Further, map of the disputed building suggests that a septic tank is proposed to be constructed abutting the boundary wall of the High Court. Such structure, in such close proximity of the High Court for the purpose as disclosed in the pleadings of the respondents, in my considered opinion, is not safe for smooth functioning of the Court, which is the highest seat of the State's Judiciary. This, in my opinion, is an additional reason why the entire structure must be demolished.

(Rajendra Kumar Mishra, J.)

231. It is our common view that the disputed

structure has been constructed in violation of statutory Bye-law 21 of the Bihar Building Bye-laws, 2014.

232. Further, all the opinions expressed, observations made and directions contained in the respective judgements of Ashwani Kumar Singh, J., Vikash Jain, J., Rajendra Kumar Mishra, J. and Chakradhari Sharan Singh, J. shall be treated as those of each of them and shall together operate as the majority judgement.

233. Accordingly, the respondents are directed to give effect to and comply with all the directions as contained in the majority judgement.

(Ashwani Kumar Singh, J.)

(Vikash Jain, J)

(Rajendra Kumar Mishra, J.)

(Chakradhari Sharan Singh, J.)

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