

(1976) 02 PAT CK 0016

In the Patna High Court

Case No : Civil Writ Jur. Case No. 605 of 1976

Bishwanath Prasad

APPELLANT

Vs

The Municipal Board

RESPONDENT

Date of Decision : 12-02-1976

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 196, 197, 198, 201

Citation : AIR 1976 Patna 226 : (1976) 9 PLJR 499

Hon'ble Judges : Shambhu Prasad Singh, J; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : Sachchidanand Jha and P.N. Jha, for the Appellant; J.N.P. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Nagendra Prasad Singh, J.—This is an application on behalf of the petitioner under Articles 226 and 227 of the Constitution for quashing an order dated the 29th May, 1970, passed by the learned Magistrate, Chapra in purported exercise of powers conferred upon him by Section 198 of the Bihar and Orissa Municipal Act, 1922 (hereinafter referred to as "the said Act"), a copy of the said order is Annexure 2 to the writ application.

2. According to the petitioner, he received a notice under Sections 187 and 196 of the said Act from the Chapra Municipality under the signature of the Special Officer of the said Municipality directing the petitioner to remove re-inforced concrete slabs which the petitioner had put over the drain of the Municipality. It is alleged that after having received the said notice the petitioner filed an application before the respondent Special Officer of the said Municipality saying that the said construction had been made in accordance with the plan which had been approved by the Municipal authorities concerned. It is further the case of the petitioner that later a report was submitted on behalf of the said Municipality before the aforesaid Magistrate, on the basis whereof the learned Magistrate took cognizance under Sections 187 and 198 of the said Act on the

26th July, 1969 and transferred the said case to his file for disposal. I have not been able to appreciate as to what the learned Magistrate meant by saying that he has taken cognizance under Sections 187 and 198 of the said Act". The report on the basis of which the aforesaid case was registered was not for prosecution of the petitioner, but it was only for an order for removal of the encroachment in accordance with the provisions of Sections 187 and 198 of the said Act. A copy of the application filed on behalf of the Municipality is Annexure 1 to the writ application.

3. It appears that a notice was issued by the learned Magistrate to the petitioner to show cause as to why the encroachment should not be removed and in pursuance of the said notice the petitioner appeared and filed his show cause. The said show cause is not annexed to the writ application, but it is on the records of the case. In the said show cause the petitioner asserted that practically there was no drain by the side of the house of the petitioner and that he was constructing his house in accordance with plan which was duly approved by the Municipality in the year 1954 and as such there was no encroachment as alleged. Along with the said show cause the petitioner also annexed the plan of the house which is said to have been approved by the Municipal Board of the said Municipality. The learned Magistrate, however, by the impugned order observed that as a notice under Sections 196 and 197 of the said Act had already been issued to the petitioner asking him to remove the encroachment in question and to stop the casting of slab over the Municipal drain and as the petitioner had failed to comply with the said direction, he was ordering the petitioner to remove the said encroachment in exercise of the powers conferred upon him by Section 198 of the said Act. The learned Magistrate has further directed that in case the order was not carried on by the 15th June, 1970, then it will be open to the Municipality concerned to get the encroachment removed and the cost for such removal shall be recovered from the petitioner in accordance with Section 199 of the said Act.

4. Learned counsel appearing for the petitioner has submitted that the learned Magistrate while passing the impugned order has not at all considered the show cause filed on behalf of the petitioner. In my opinion, there is substance in the contention of the learned counsel. While passing the impugned order it was obligatory on the learned Magistrate to consider the show cause filed on behalf of the petitioner. If on consideration of the show cause and the materials produced on behalf of the petitioner the learned Magistrate was of the opinion that the assertion of encroachment, as made on behalf of the Municipality was correct, he would have been perfectly justified in passing the impugned order. Unfortunately, he has not recorded any such finding. The learned counsel appearing for the Special Officer, Chapra Municipality has however, submitted that the learned Magistrate was not enjoined by the provisions of the said Act to issue any notice to the petitioner before passing an order in this connection. He has drawn our attention to the provisions of Sections 196, 197 and 198 of the said Act. Section 196 authorises the Commissioners of a Municipality "to issue a notice requiring

any person to remove any building which he may have built, or any wall, fence, rail, post or other obstruction or encroachment which he may have erected, in or on any house, gully, public drain, aqueduct, water-course or ghat or any property vested in the Commissioners". Similarly the Commissioners may in exercise of the powers u/s 197 by issuing notice require the owner or occupier of any house to remove or alter any projection, obstruction or encroachment erected or placed against or in front of such house, if the same overhangs the road or juts into or in any way projects or if it encroaches into or upon any public drain. Section 198 which is relevant for the purpose of the present case is as follows :--

"198. If the person on whom a notice has been issued u/s 196, or Section 197 fails to comply with the requisition within eight days of the receipt of the same,

Or if where a notice has been posted up under Sub-section (2) of Section 196, the building, wall, fence, rail, post or other obstruction or encroachment is not removed within eight days of the posting up of the notice,

the Magistrate may on the application of the Commissioners, order that the obstruction, encroachment or projection be removed, or that the projection be altered, and thereupon the Commissioners may, notwithstanding anything contained in Sections 359 to 363, remove such obstruction, encroachment, or projection or alter such projection."

From the provisions of the aforesaid Section 198 it appears that after a notice in accordance with Section 196 or Section 197 is served and the person on whom such notice is served fails to comply with the requisition made therein, then on an application being made by the Commissioners to the Magistrate concerned, the Magistrate may pass an order directing the person concerned to remove the obstruction, encroachment, or projection, as the case may be. The learned counsel appearing for the respondent has submitted that there is nothing in Sections 196, 197 or in Section 198 from which it can be inferred that it is obligatory on the part of the Commissioners or the Magistrate concerned to issue a show cause notice to the person on whom the aforesaid notice has been issued asking him to remove the encroachment in question. According to the learned counsel once the Commissioners are satisfied on the basis of the materials in their possession, it is open to them to ask the person who has made the encroachment to remove the same and failing which an application can be filed before the Magistrate for exercise of the powers u/s 198 for a direction on the person who is said to have encroached or made an unauthorised construction, to remove such objectionable portion of the construction. In my opinion, it is difficult to accept the contention raised on behalf of the respondent. If the said contention is accepted, it has to be held that at no stage the person who is disputing the correctness of the assertion made on behalf of the Commissioners is to get an opportunity to show that he has not made any encroachment on any part of the Municipal land. Although the sections in question do not say in so many words, yet in my opinion, the requirement to show cause is implicit in those sections specially u/s 108. The Magistrate has to issue notice to the person

against whom he proposes to pass an order under that section and in case any show cause is filed in pursuance of the said notice, it is incumbent on the Magistrate concerned to hear the parties in question and to record a finding on the issue. This requirement has to be fulfilled, otherwise a person aggrieved can legitimately urge that such orders are illegal having been passed in breach of the principles of natural justice.

5. This aspect of the matter was considered by Lord Selborne in *Spackman v. Plumstead, District Board of Work* (1885) 10 AC 229 and at page 240 it was observed-

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law."

Again in the case of *Local Government Board v. Arlidge* (1915) AC 120 it was observed by the House of Lords.-

"When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same." Further in the case of *Ramnath Prasad Vs. The Collector of Darbhanga and Others*, a Bench of this Court had to consider whether the Collector had to give an opportunity to the person concerned before cancelling or suspending a licence under the Bihar and Orissa Excise Act In that connection it was observed:-- "Section 42 therefore grants power to the Collector or the prescribed authority to cancel or suspend a licence. But the statute does not prescribe what is the procedure that the Collector has to adopt before passing final order. In a case of this description when the statute is silent what procedure will the law imply? Even if the statute is silent there is an obvious implication that some form of enquiry must be made, for the section requires the Collector to satisfy himself that there has been a breach of the conditions of the licence by the holder or any of his servant. The Collector is bound as a matter of principle to give a fair opportunity to the licensee of presenting his case. The Collector is under a duty to hear the matter in a judicial spirit for the question at issue is a matter of proprietary or professional right of an individual. The Collector should for instance give a fair opportunity to the licensee to meet a relevant statement made to his prejudice."

6. It is well known that authorities while passing administrative orders involving civil consequences have to act in consonance with the principles of natural justice. In the case of State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, ; A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, it was pointed out by the Supreme Court that administrative orders involving civil consequences have to be passed only after observing the principles" of natural justice. If such principles are to be observed in cases of administrative orders, it is difficult to conceive as to how the said requirement is not to be read in Section 198 of the said Act. In view of Section 201 of the said Act any proceeding before the Magistrate concerned shall be deemed to be a judicial proceeding and the order passed, if any, will be a judicial order, In my opinion, the learned Magistrate rightly gave show cause notice to the petitioner. Once he had issued notice to the petitioner to show cause and the petitioner did file the show cause, he should have also considered the materials produced on behalf of the petitioner in support of his case, that he had not made any unauthorised encroachment and the constructions which he had made were in accordance with the plan approved by the Municipal authorities. Under the circumstances, I am left with no option, but to hold that the order of the learned Magistrate directing the petitioner to remove the encroachment is liable to be set aside.

7. In the result, the application is allowed and the order dated the 29th May, 1970 is set aside. The learned Magistrate is directed to fix an early date and then to hear the petitioner and to pass an order in accordance with law in light of observations made above. There will be no order as to costs.

Shambhu Prasad Singh, J.

8. I agree.