
(2005) 10 PAT CK 0011
In the Patna High Court
Case No : CWJC No. 9484 of 2004

Kaushal Kishore Prasad Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 04-10-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (2005) 4 PLJR 528

Hon'ble Judges : Barin Ghosh, J

Bench : Single Bench

Advocate : M.S. Madhup Ratnesh Nandan Mishra, for the Appellant; Alamdar Hussain, Jitendra Singh and K.A. Pratap, for the Respondent

Judgement

Barin Ghosh, J.—In the writ petition the petitioner seeks a writ of mandamus commanding the Begusarai Municipality to have the construction made by the Respondent No. 4 removed insofar as the same has been made without or contrary to the sanction granted by the Municipality. The petitioner contends that the land adjacent to the west of the petitioner's house belongs to the Respondent No. 4 containing an area of about 8 Dhurs. It is the contention in the writ petition that the Respondent No. 4 has made construction on the plot of land belonging to him without leaving any space in between the land belonging to the petitioner and the land belonging to the Respondent No. 4. It has been stated that the Respondent No. 4 has opened big windows towards the house of the petitioner and those windows are opening on the land belonging to the petitioner. It has been stated that the Respondent No. 4 has left no space in between his construction and the land belonging to the petitioner while making the construction and that is in violation of Section 188 of the Bihar & Orissa Municipal Act, 1922 (in short, "the Act") and the byelaws framed thereunder. In the premises, the petitioner approached the respondent Municipality and requested it by a letter dated 10th June, 2004 to take appropriate action in accordance with law. The Municipality, it is claimed, treated the said letter of the petitioner as a complaint and initiated Municipality Case No. 631/2004. The

petitioner then applied for certified copy of the site map passed in favour of the Respondent No. 4 but the same was not furnished to the petitioner and at the same time no hearing was fixed of the said case. With this complaint the petitioner approached this Court by filing the present writ petition on 11th August, 2004.

2. On 26th April, 2005 the Respondent No. 4 filed a counter affidavit in the writ petition, in that he stated that he purchased the subject land and the same comprises of 7 Dhurs and 17 Dhurkis. It has been accepted that the petitioner is a boundary raiyat, and the petitioner has filed Title Suit No. 65/92 which is pending in the Court of Sub-Judge III, Begusarai. It has been stated that the land has been mutated in the name of the Respondent No. 4 and he applied for approval of the map for the purpose of construction of a house. He has also stated that the Municipality approved the map by Memo No. 1799 dated 27th December, 2003. A copy of the said approved map has been annexed to the said counter affidavit. From that it appears that thereby sanction was accorded to the Respondent No. 4 to make construction of Ground+2 Floors. In the approved map it was shown that in the Ground Floor, the petitioner would leave 10 feet in the front, 4 feet on the back and some land in both of the other sides. The map permitted construction of an open terrace on the back side of the first floor and that open terrace could be extended beyond the Ground Floor but upto two feet. The total area of the open terrace on the First Floor, as was permitted, was 15'3" x T. Therefore, the map directed that although the floor of the First Floor may be extended by two feet beyond the First Floor but by directing that the open terrace would be of 15'3" X 7"; it directed that the open space should start at least 5 feet behind the construction of the Ground Floor. For the Second Floor the area of the open space was reduced to 15'3" x 3'6", but the map directed to commence the open space from the same place where the open terrace commences in the First Floor. There is no dispute that in the back of this building constructed by the Respondent No. 4, the land of the petitioner and his house constructed thereon are situate.

3. In the said counter affidavit, the Respondent No. 4 has contended that the petitioner filed a proceeding u/s 144 of the Code of Criminal Procedure, which was dropped on 21st July, 2004. From the order dated 21st July, 2004, it appears that although the contention of the petitioner in the said proceeding was, amongst others, that the Respondent No. 4 was making an unauthorized construction but the real issue was encroachment by the Respondent No. 4 of One Dhur of land belonging to the petitioner. The Sub-Divisional Magistrate, Begusarai by the order dated 21st July, 2004 held that the petitioner has failed to produce necessary documents to demonstrate that the Respondent No. 4 has encroached upon any land belonging to the petitioner and accordingly dropped the proceedings. It does not appear that the Sub-Divisional Magistrate applied his mind in relation to the construction that was being made by the Respondent No. 4.

4. It is the contention of the Respondent No. 4 in the counter affidavit that the original landlord had left 10 feet of land for public use. It has been contended that the Respondent No. 4 constructed the building leaving more than 15 feet of land from the existing road. It has not been stated that 4 feet of land was left by the Respondent No. 4 on the back side. It has been stated that other neighbours of the petitioner have constructed their house in the same fashion but the petitioner did not raise any objection as against them. It has been stated that the Respondent No. 4 has constructed the house in accordance with the approved map and accordingly the question of demolition of any part thereof does not arise. It has been stated that the Municipal Case No. 631/2004 has not been disposed of and the petitioner before disposal of the case by the Municipality approached this Court which is not permissible. It has been contended that in any event the petitioner could prefer an appeal u/s 373 of the Act but without exhausting such remedy has approached this Court and accordingly the writ petition should be dismissed.

5. A counter affidavit has also been filed on behalf of Respondent No. 3 wherein it has been stated that after due consideration of the application of the Respondent No. 4, a sanction for construction of a building was granted by the Municipality by approval of the plan/map of construction vide Memo No. 1799 dated 21st August, 2003. Thereupon on 5th June, 2004, the petitioner complained to the Municipality that the Respondent No. 4 has started construction in an illegal manner. On receipt of the complaint, the same was marked to the Junior Engineer, who then submitted a report on 10th June, 2004 indicating therein that on inspection it transpired that a building was being constructed leaving only three feet wide passage on the Southern side and, though the Respondent No. 4 represented that the construction is being made in accordance with the sanction, but he did not produce the sanction on being demanded. Thereafter on 16th June, 2004, the Respondent No. 4 was directed by the Municipality to stop construction of the building. By the said Memo, the local police was also requested to take appropriate steps in the matter. In response to the Memo dated 16th June, 2004, the Respondent No. 4 by a letter dated 17th June, 2004 requested the Municipality to allow him to complete the construction in terms of the sanction. Thereafter the Officers of the Municipality inspected the site on 3rd July, 2004 when it transpired that the building is being constructed without leaving the set-back in the back as well as in the front of the building, and that on the Eastern side i.e. on the back side of the building only 1'6" of land had been left, whereas on the Western side i.e. on the front side, only 3 feet vacant land had been left. In view of the said finding, on 5th July, 2004 another notice was issued to the Respondent No. 4 directing him to make the construction only in accordance with the approved plan/map failing which the Municipality would take appropriate legal action against the Respondent No. 4. It has been stated that there is no Municipal Case No. 631/2004 relating to the building in question as has been alleged by the petitioner. It has further been stated that there is no provision in the said Act for grant of certified copies of the

records of the Municipality especially to persons who are not parties in relation to a particular case. It was stated that appropriate steps have been taken by the Municipality against the Respondent No. 4 for illegal construction done by him and an undertaking was given in the counter affidavit to the effect that the Municipality will take all other appropriate and necessary action against the Respondent No. 4 in future and in particular to put a check on illegal construction in the Municipality in general.

5.1 On 3rd May, 2005, this Court considered the Writ Petition when it appeared that the Municipality had initiated a proceeding and passed a final order and issued a notice to the Respondent No. 4 to remove the offending construction within ten days of the notice. In such circumstances, the Court directed the Municipality to report back to the Court as to what has happened to the notice by which the Respondent No. 4 was asked to remove the offending construction. In terms thereof, the Municipality vide supplementary counter affidavit stated that the Respondent No. 4 has not removed the unauthorized part of the construction.

6. Although in the principal counter affidavit, the Municipality had indicated that it would take appropriate steps in future and although in the supplementary counter affidavit it was stated that the Respondent No. 4 has not removed the unauthorized construction but at the same time the Municipality did not take any step, and as such, this Court by an order dated 9th May, 2005 directed the Municipality to report the matter further. As a result, a further supplementary affidavit was filed wherein it was stated that on 11th May, 2005 the Municipality asked the Respondent No. 4 to demolish the illegal construction by 13th May, 2005 failing which the same would be demolished at the cost of the Respondent No. 4. Despite receipt of the said notice, no demolition was effected and thereupon on 13th May, 2005 it was decided to take steps to demolish the unauthorized construction and accordingly on 16th May, 2005 the Deputy Magistrate alongwith police force went to the construction site with a view to demolish the illegal construction but such demolition work could not be executed due to presence of violent mob which had gathered at the site in support of the Respondent No. 4. In such view of the matter, the Municipality prayed for two weeks further time for demolition of the illegal construction erected by the Respondent No. 4 after requisitioning additional police force.

7. Thereafter the Writ Petition was considered by this Court on 21st July, 2005 when apart from what has been stated above a few photographs were considered and therefrom it transpired that the Respondent No. 4 has extended the ground floor almost to the land of the petitioner, the gap between the ground floor of the construction made by the respondent No. 4 and the land belonging to the petitioner is less than two feet, the floors of the 1st and 2nd floors have been extended beyond the ground floor having hardly any gap between the construction and the land of the petitioner, the windows on the 1st and 2nd floors are opening on the land belonging to the petitioner, there is no open space (setback) on the 1st or the second floors and a third floor has been added

without any set-back and as such the following order was passed.

"Let this matter be listed as Item No. 1 two weeks hence when the private respondent shall inform this Court that he has complied with the request of the Nagar Parishad, Begusarai. In the event such request is not complied with, I shall have no other option but to send appropriate force to carry out the request made by the Nagar Parishad, Begusarai.

Let it be recorded that the Act does not authorise the Nagar Parishad to grant post facto sanction. In any event, no sanction either post facto or prospective can be given in violation of the law made by the Municipality. In such view of the matter, for all practical purposes, it must be deemed that no proceeding is pending before the Nagar Parishad for the purpose of bringing down the construction already made within the permissible limit prescribed by law.

After I had dictated the order, learned counsel for the private respondent has submitted that his client will demolish that part of the construction which is beyond permissible limit as provided in the byelaws and shall produce a plan showing the demolition work done by him.

Put up after two weeks, as part heard, in the same list."

8. The Respondent No. 4 preferred an appeal, being LPA No. 805/2005 (Kartik Lai vs. Kaushal Kishore Pd. Singh & Ors.), against the said order which was dismissed on 3rd August, 2005 for the reasons as under:-

"In this Letters Patent Appeal, the challenge is against the order of the learned Single Judge dated 21.7.2005 in CWJC No. 9484 of 2004, which was filed by the respondent No. 1-original petitioner seeking a direction for demolition of the illegal construction of the present appellant-original respondent No. 4, which, upon consideration and hearing of learned Counsel for the parties, came to be allowed by the learned Single Judge directing the appellant to demolish the illegal construction. Therefore, the original respondent No. 4 has now come up in this Letters Patent Appeal against the said order. At the admission stage itself, we have heard the Counsel appearing for the respective parties. We have considered the entire factual conspectus and the relevant documentary evidence produced in the petition including the photographs.

There is no dispute about the fact that the impugned construction of the appellant is not in consonance with the sanctioned plan. There is additional constructions without sanction. Therefore, the adjoining neighbour respondent No. 1 in this appeal-writ petitioner, whose rights are also effected because of the unauthorized constructions, resorted to the writ jurisdiction. During the pendency of the proceeding, the learned Single Judge found strong case for demolition and, therefore, he has passed the impugned interlocutory order directing the appellant to demolish the unauthorized portion of the constructions beyond the permissible limit and contrary to the sanctioned plan.

During course of the hearing, upon the pointed question, learned Counsel for the

Corporation informed the Court that there is no any provision under which the unauthorized construction or illegal erection could be regularized even on payment of compensation or penalty. One the illegal construction has been raised, apart from the fact that it has violated the rights of the neighbour, the author of the construction or the owner of the building cannot be permitted to enjoy unauthorized construction. We are, therefore, of the clear opinion from the facts that the interim order recorded by the learned Single Judge is based on the consideration of factual premise as well as admitted proposition that unauthorized additional constructions over and above the sanctioned plan has been made.

Let it be mentioned that ordinarily the Appellate Court would be at loathe to interfere in terms of the provision of Clause 10 of the Letters Patent Appeal against the interlocutory order unless it is shown to be illegal, totally perverse or against the settled proposition of law. There is no any such material or there is no such case even after careful consideration of the impugned order of the learned Single Judge and, more so, in the backdrop of the factual profile which are not in controversy. The Appellate Court service cannot be utilized and at the same time the extraordinary prerogative equitable and discretionary writ relief cannot be protected or extended for perpetration of any illegality or violation of the law. It is in this context, factually, as well as, legally, the Letters Patent Appeal against the interlocutory order of the learned Single Judge is without any substance and deserves to be dismissed at the admission stage.

Accordingly, this appeal shall stand dismissed with costs."

9. On 5th August, 2005 when the writ petition was taken up for further consideration it was reported that the Respondent No. 4 has not demolished any part of the illegal construction. This Court, therefore, by the order dated 5th August, 2005 granted seven more days" time to the Respondent No. 4 to discharge his obligations in accordance with the directions given by this Court on 21st July, 2005. Nothing was done and when the writ petition was taken up for hearing on 12th August, 2005, the learned counsel for the Respondent No. 4 did not appear. Accordingly the hearing of the writ petition was adjourned till 18th August, 2005 in order to give an opportunity to the Respondent No. 4 to present his case in the event his counsel does not appear. On 19th August, 2005 the Respondent No. 4 engaged a new set of lawyers and they wanted accommodation in order to argue the writ petition in an appropriate manner and prayed for two weeks" time. Such time was granted.

10. On 24th August, 2005 the Respondent No. 4 filed Civil Review No. 161/2005 seeking to review the order dated 21st July, 2005. On the same date i.e. on 24th August, 2005, Smt. Nirmala Devi, wife of the Respondent No. 4, filed Civil Review No. 162/2005 seeking to review the order dated 21st July, 2005. Subsequent thereto adjournment of the hearing of the writ petition was granted on 1 st July, 2005 with the direction to place the review applications, as mentioned above. Same direction was once again given on 9th September, 2005

and thereupon on 16th September, 2005, the learned counsel for the petitioners in the Civil Review applications were permitted to remove the defects as pointed out by the office.

11. The writ petition and the review applications were thereupon heard when the learned counsel appearing on behalf of the Respondent No. 4 and his wife submitted that the order dated 21st July, 2005 is incapable of being implemented for the Municipality has not made any byelaws, and accordingly the Respondent No. 4 is seeking to review the said order. He further submitted that the wife of the Respondent No. 4 is the 50 per cent owner of the property in question and inasmuch as the said order dated 21st July, 2005 directs affectation of her right in the property, without hearing her, she has filed the review application.

12. The order dated 21st July, 2005, as was passed by this Court, having been affirmed by the Appeal Court stood merged with the order of the Appeal Court, and accordingly, if any review application is to be filed, the same can be filed against the order of the Appeal Court dated 3rd August, 2005 and before the Division Bench. The learned counsel for the Respondent No. 4 and his wife cited a large number of judgments of the Hon''ble Supreme Court for the proposition that when the Hon''ble Supreme Court has rejected Special Leave Petition, the order of the High Court has not merged with the order of the Hon''ble Supreme Court rejecting the application for special leave. Those judgments have no application whatsoever in the instant case inasmuch as in the instant case there was no question of grant of special leave by the Division Bench of this High Court. The Division Bench entertained the Appeal, went into the merits thereof and dismissed the Appeal. The order of this Court, therefore, stood merged with the order of the Division Bench, and accordingly in law, it is not permissible for this Court to review its order. It is not permissible because if a learned Single Judge alters an order already affirmed by the Division Bench, there will be no discipline of administration of justice by a High Court.

13. Be that as it may, I have taken into account the assertions put forward in the review applications as defence to the writ petition before passing a final order thereon. It was submitted by the learned counsel for the Respondent No. 4 and his wife that inasmuch as the wife of the Respondent No. 4 is 50 per cent owner of the property in question, a writ petition of this nature is not maintainable without impleading her as a party thereto. As would be evidenced from the title deed pertaining to the land in question, the wife of the Respondent No. 4 is half owner thereof. However, the sanction for construction has been obtained by the Respondent No. 4 alone and not jointly by him and his wife. In the original counter affidavit filed in the writ petition, it is the specific case of the Respondent No. 4 that he made, the construction. Although in the review application of the wife of the Respondent No. 4 it has been asserted that she is also having equal share, ownership of the building in question but there is no assertion that the building in question was being constructed by her. In terms of the provisions contained in the Act, the person desiring to construct is required to give notice

whereupon the Municipality may refuse to sanction any work, of which a notice has been given, or may sanction the same absolutely or subject to conditions. The person, who constructs without such notice or without the sanction or deemed sanction, is liable to be fined. At the same time, the Municipality is entitled to direct demolition of illegal construction and though such direction can be issued to the owner or occupier, the same can also be issued to the person making such illegal construction. In such view of the matter, even in the absence of the wife of the Respondent No. 4, the present writ petition is maintainable.

14. It is the contention of the Respondent No. 4 that inasmuch as no byelaws have yet been made, which fact has been admitted by the learned counsel for the Municipality, there is no question of making any stipulation in the sanction and, in fact, sanction or no sanction, makes no difference at all. It was, therefore, submitted that whether the Respondent No. 4 should leave 4 feet of space on the back side or one foot instead, cannot be stipulated in the sanction, and even if stipulated, the same cannot be enforced. By referring to Section 375 of the Act, it was submitted that inasmuch as six months have expired from the date of construction, which is said to be illegal, the Respondent No. 4 cannot be prosecuted u/s 192 of the Act, and thus the Municipality cannot direct demolition of the illegal construction in terms of Section 193 of the Act.

15. It would be seen from Section 186 of the Act that it is mandatory upon the person seeking to erect a new building to give a notice in respect thereof to the Municipality. Section 188 of the Act authorizes the Municipality either to refuse to sanction the proposed work of erection of a new building as notified to it or to grant such sanction either absolutely or subject to, amongst others, a written direction requiring the set-back of the building or part of a building to the regular line of the road prescribed u/s 173, or, in default of any regular line prescribed under that Section to the line of frontage of any neighbouring building or buildings. In the event, within one month after the receipt of the valid notice u/s 186 the Municipality fails to communicate to the person either refusal or grant of sanction, there shall be a deemed sanction of the proposed work. In the instant case, the proposed work, it is not the contention of the Respondent No. 4, was anything other than prescribed in the sanctioned plan or map. The Respondent No. 4 was granted a sanction to work as was proposed by him. In law, therefore, the Respondent No. 4 became entitled to construct only to the extent as he had proposed and permitted by grant of the sanction. He could not, without proposing to work in a different manner, erect a building different than as was proposed by him and permitted by the sanction. Whether byelaws have been made or not, in the instant case, is of no effect at all. It may be possible that in the event the Respondent No. 4 had proposed something else, he may not have been accorded the sanction. In view of the mandate contained in Section 186 of the Act, it is obligatory on the person intending to erect a new building to give a notice in regard thereto and to obtain a sanction or a deemed sanction thereof in accordance with Section 188 of the Act.

16. The Municipality requested the Respondent No. 4 to remove only that part of the building erected by the Respondent No. 4 which is beyond the proposal given by the Respondent No. 4 and sanctioned by the Municipality. By the order dated 21st July, 2005 which has been affirmed by the Division Bench, by its order dated 3rd August, 2005, this Court only directed the Respondent No. 4 to comply with the said request of the Municipality. The Court also made it clear that in the event the Respondent No. 4 does not comply with such request of the Municipality, the Court will have no other option but to send appropriate force to carry out the request made by the Municipality. Inasmuch as there is no provision in the Act for a post facto sanction, that was recorded in the order dated 21st July, 2005, and accordingly it was made clear that no proceeding is pending before the Municipality for the purpose of bringing the construction already made within the permissible limit prescribed by law. Those observations of this Court contained in the order dated 21st July, 2005 were affirmed by the Division Bench by its order dated 3rd August, 2005. After the order dated 21st July, 2005, to the extent as above, was passed it was submitted by the Respondent No. 4 through his counsel that he would demolish that part of the construction which is beyond permissible limit as provided in the byelaws and shall produce a plan showing the demolition work done by him. This was the volition of the Respondent No. 4 and not a direction of the Court. The Respondent No. 4 at that stage thought that, may be in terms of the byelaws, he would not be required to demolish the structure in order to bring it within the permissible limit prescribed by the byelaws, and accordingly made such submission. Now on the basis thereof, the Respondent No. 4 is seeking to take advantage, for there is no byelaws. This is a reprehensible conduct on the part of the Respondent No. 4.

17. Although the Respondent No. 4 has acted in a manner unwarranted and has made construction contrary to the proposal given by him to the Municipality and accepted by it, and is accordingly liable, in law, to remove that part of the construction, which was not proposed by him and sanctioned by the Municipality, and despite notice issued by the municipality and orders passed by this Court and affirmed by the Appeal Court, he has not taken any step to remove the same and when an attempt was made by the Municipality to discharge its statutory obligation of removing the offended structure, with the muscle men the Respondent No. 4 chased away the Officers of the Municipality, but still then, although it appears that the Respondent No. 4 believes in jungle raj, being a Constitutional Court of a Nation ruled by law, I once again direct the Respondent No. 4 to remove that part of the construction which had not been authorized or sanctioned within 18th October, 2005 with a direction upon the respondent Municipality to have the building of the Respondent No. 4 inspected on 19th October, 2005 to ascertain whether the offending part of the building has been removed by the Respondent No. 4 or not, and if not, to remove the same on 20th October, 2005. The Superintendent of Police, Begusarai is directed to provide adequate armed force to the Officers of the Municipality on 19th October,

2005 and on 20th October, 2005 for the purpose of carrying out the directions as above. In the event the demolition work is required to be continued even after 20th October, 2005, such work will continue and the Superintendent of Police will continue to provide appropriate assistance in the like manner to the Officers of the Municipality. This disposes of the writ petition. There shall be no order as to costs.