

(2015) 05 PAT CK 0079
In the Patna High Court
Case No : CWJC No. 4625 of 2015

Niagree Builders & Developers Pvt. Ltd. and Others	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 18-05-2015

Acts Referred:

Bihar Municipal Act, 2007 — Section 313, 314, 315, 316, 316(3)
Constitution of India, 1950 — Article 226

Citation : (2015) 4 PLJR 366

Hon'ble Judges : Jyoti Saran, J.

Bench : Single Bench

Advocate : Sanjay Singh, for the Appellant; Amit Kumar Anand, for the Respondent

Final Decision : Allowed

Judgement

Jyoti Saran, J.—The petitioner is a builder-cum-developer and has entered into an agreement with the landowners for development of their property and construction of a Multi-storied building on a piece of land bearing Khesra No. 225, Sheet No. 63, Thana No. 139, Ward No. 6 in Mauza-Mohaerrampur presently Bhawarpokhar, Police Station-Pirbahore in the town and district of Patna. The petitioner by filing this writ petition under Article 226 of the Constitution of India has questioned the order dated 25.7.2014 passed by the Municipal Commissioner in Vigilance Case No. 51A of 2013 whereby the constructions of the third floor having been found in deviation of the sanctioned map and the municipal bye-laws that the same has been declared illegal requiring the petitioner to demolish the same. Some other irregularities as well has been found on the third floor as well as in the setbacks. The order passed by the Municipal Commissioner stands confirmed in the order dated 4.3.2015 by the Municipal Building Tribunal-II, Patna in Appeal Case No. 42 of 2015 and the petitioner being aggrieved is before this Court.

2. Mr. Sanjay Singh learned counsel has appeared for the petitioner while the

State is represented through State Counsel and the Municipal Corporation and its authorities are represented by Mr. Prasoon Sinha.

3. Shorn of unnecessary details, facts of the case in brief is that a development agreement was entered into between the petitioners and the landowners for construction of a Multi-storied building consisting of the basement, the ground floor plus three floors (hereinafter referred to as "B+G+3 floors"). Such agreement was executed on 21.11.2008. A Plan Case No. P-Bhawarpokhar/PCN-4-115/09 dated 10.6.2009 was sanctioned by the Patna Municipal Corporation for construction of the Multi-storied building consisting of "B+G+3 floors" up to a height of 10.95 meters. On 30.7.2013 the petitioners received a notice from the Officer-in-Charge, Pirbahore Police Station directing them to stop constructions on charge of violation of municipal laws. An inspection followed on 12.9.2013 by the authorities of the Corporation and when it was reported that the building had deviated from the sanctioned plan. A vigilance case followed bearing Vigilance Case No. 51A of 2013 and notice was served on the petitioners who appeared and placed their defence which was not accepted and the Municipal Commissioner, Patna vide order passed on 25.7.2014 in Vigilance Case No. 51A of 2013 declared the construction of third floor in excess of the permissible height, the extra staircase on the said floor in violation of the bye-laws and irregularities in the setbacks in the basement. By the same order the petitioner was directed to demolish these deviations; A copy of the order is placed at Annexure-1 to the writ petition. The petitioner being aggrieved filed statutory appeal before the Municipal Building Tribunal giving rise to Appeal Case No. 42 of 2014 and the Municipal Building Tribunal by order passed on 4.3.2015 affirmed the order of the Commissioner on the issue of height of the building, the rear setback in the basement and on the issue of staircase on the third floor and ordered for their demolition. The deviations in the side setbacks was, however permitted to be condoned as per the bye-laws.

4. Mr. Sanjay Singh learned counsel appearing on behalf of the petitioner submits that there is no contest on the issue that the building has been constructed as per the sanctioned plan in so far as the floors are concerned rather the dispute is that the height of each of the floors has got increased in the process of construction resulting in increase in the height of the building. Referring to the order of the Municipal Commissioner present at Annexure-1 it was submitted that there is no dispute that there is a 12 ft. road abutting the building. It is submitted that the sanctioned height of the building is 10.95 meters and its measurement from the ground level by the Municipal Authorities shows a height of 13.68 meters, i.e. a height increase of 2.73 meters. It was submitted that the measurement has been taken from the ground level of the road even when the level of the road is lower by 1.54 meters from the plinth level of the building but this difference has not been taken into account. He submits that the water proofing done on the roof has further increased the height by 0.14 meters but the same has not been considered.

5. According to Mr. Singh if these two elements which add up to 1.68 meters is reduced from the height difference of 2.73 meters, there would only be a minor deviation of 1.05 meters and which is within condonable limits.

6. The arguments of Mr. Singh has been that the height of a building cannot be dependent upon a factor over which the developer has no control. With reference to an order of this Court dated 4.10.2007 passed in C.W.J.C. No. 2686 of 2003* (Anup Kumar vs. P.R.D.A. and Ors.) he submits that an identical issue came up for consideration and when by a Bench decision it was held that a height of a building cannot be a fluctuating concept and cannot be dependent upon an increase or decrease of the street abutting the building. Mr. Singh next referred to an office order dated 25.8.2000 to submit that a 20% deviation in the height of building has been permitted subject to the fulfillment of the requirement of the bye-laws. It is submitted that although the order of the Municipal Commissioner which stands affirmed by the Municipal Building Tribunal, rests on the orders of this court passed by this Court in the case of "Narendra Mishra" arising from C.W.J.C. No. 8152 of 2013? and the judgments of the Supreme Court but the case of the petitioner is clearly distinguishable from those cases inasmuch as whereas the judgments relied upon by the Municipal Corporation is in respect of the unscrupulous builders who have defiantly violated municipal laws with the sole object of profit making, there is no such instance in the case of the petitioners inasmuch as neither there is any charge of addition of floors on the petitioner nor the height of the building in any manner would benefit the developer. Referring to the judgment of the Division Bench in the case of Narendra Mishra vs. State (supra) he submits that in the said case the builder had constructed an additional floor on a narrow street having a width of 8 ft. and it is considering such circumstances that a direction was issued by the Division Bench on 10.5.2013 restraining construction of any apartment beyond 11 meters unless the road abutting the building is uniformly 20 ft. in width. Referring to the chart present in the order of the Municipal Commissioner, he submits that as per the own admission of the Municipal Commissioner, the road abutting the building is in between 3.60 to 3.68 meters and the petitioner has left a front setback of 4.24 meters to 4."5 meters which collectively is much more than 6 meters as required under the judgment or the bye-laws. He thus submits that despite everything existing for consideration of the case of the petitioner for condonation, mechanically the orders have been passed and if on this single aspect the petitioner's case would find support, the other irregularities would automatically be taken care of. He submits that the internal staircase may be an addition on the third floor but Clause 26.5(iii) of the bye-laws permits interior staircases and admittedly the construction does not exceed the permissible limit.

7. Replying to the issue of the setbacks, the construction in the basement and the ventilation of the floors, it was submitted that Clause 24.1.10.1 permits a basement to be used for parking purposes and further submits that although ventilation has been taken care of but any deficiency can be met by mechanical ventilation system and in any manner a non-availability of cuts has no nexus

with the floor area ratio. On the issue of expiry of the map it is submitted that Clause 8.1 of the bye-laws takes care of the position and where the vigilance case itself was initiated before the expiry of the plan which was sanctioned on 10.6.2009, no such issues can be raised for consideration on condonation.

8. Mr. Singh learned counsel concluding his arguments has submitted that considering the matter in totality, the issues raised require a reconsideration by the Municipal Authorities for condonation of the deviation which are in the nature of minor deviation.

9. The argument of Mr. Singh has been vehemently contested by Mr. Prasoon Sinha, appearing for the Corporation and who outrightly rejects his plea of reconsideration on grounds that the petitioner is one of the many unscrupulous builders who have defiantly challenged the authority of law. It was submitted that admittedly the building was sanctioned at a height of 10.95 meters and thus any increase therein would be an act of defiance and no amount of justification can condone such deviations. It was submitted that there is no two issues that the road abutting the building is less than 20 ft. and thus there was no occasion for the builder to go beyond 11 meters. Referring to the Division Bench order passed in the case of Narendra Mishra (supra), the relevant extract whereof finds quoted in the counter affidavit at paragraph 5(ii) it is submitted that the Division Bench is quite clear that unless the road in front is uniformly 20 ft., no such condonation would be permitted for a height beyond 11 meters. Referring to the judgment of the Supreme Court quoted in the order of the Municipal Commissioner he submits that the Courts have come down very heavily on the builders who have no respect for law and considering the mushrooming of the apartments in the town without abiding by the municipal laws, no indulgence should be granted to such builders.

10. Referring to the judgment of the Tribunal he submits that whatever was permissible stands condoned in the order of the Tribunal and the petitioner is not entitled to any further concession. It is submitted that the petitioner has failed to show that the street abutting the building was uniformly 20 ft. throughout and merely leaving out some spaces in front would not come to the aid of the petitioners. He thus submits that the order passed by the Commissioner as it stands modified by the Tribunal are after appreciation of the statutory provisions and the law laid down by the Courts and requires no interference and consequently the writ petition is fit to be dismissed.

11. Mr. Sinha has supplemented his arguments by filing written arguments which responds to the arguments made by Mr. Singh in the following manner:--

(a) The office order No. 171 dated 25.8.2000 has no force of law;

(b) The case of the petitioner would be guided by the observations of this Court as found in the order dated 10.5.2013 and the subsequent order dated 2.7.2013 passed in the case of Narendra Mishra (supra) as well as in the judgment of the Supreme Court reported in Royal Paradise Hotel (P) Ltd. Vs. State of Haryana

and Others, and Priyanka Estates International Pvt. Ltd. and Others Vs. State of Assam and Others, ;

(c) No building of a height more than 11 meters can be permitted on a road less than 20 ft. wide;

(d) The height of the building in terms of Clause 2.12 of the bye-laws has to be measured from the ground level of the street abutting the building;

(e) The defiance is deliberate and is with a motive to gain profit;

(f) The office order No. 94 of 2002 dated 13.6.2002 has not been addressed upon; and

(g) Even if the arguments are accepted on its face value yet by granting 20% deviation it would not benefit the petitioner since a 20% deviation on the sanctioned height of 10.95 meters would mean an additional 2.19 meters which would come to $10.95 + 2.19 = 13.14$ meters but the actual height is measured at 13.68 which is yet in excess by 0.54 meters. In the circumstances, the entire third floor is to be demolished.

12. I have heard learned counsel for the parties and I have perused the records.

13. On analysis of the rival arguments the three issues which comes up for consideration are; whether:--

(a) The height of the building is within a condonation limit;

(b) The internal staircase on the third floor flat can be condoned; and

(c) The setback in the basement can be condoned.

14. The issues as it stands presently is noted hereinabove and requires no further reiteration. In fact, in my opinion, the entire issues which arise in the present proceedings revolves around the issue of height. It is thus to be seen whether the case of the petitioner requires a reconsideration on the issue of condonation in the height of the building in the light of the arguments advanced by the parties.

15. Chapter XXXVI of the Bihar Municipal Act, 2007 deals with the issue of building as well as the procedure to be followed for its construction.

16. Section 313 prohibits a construction of any building without obtaining a sanction which is to be granted under Section 314 thereof, upon submission of a building plan duly certified by an Architect registered under the Architects Act, 1972.

17. Section 316 further enables a registered Architect to submit the detail of the construction plan along with the approval granted by him before the Chief Municipal Officer of the Municipality. The Chief Municipal Officer may inquire and satisfy himself as to whether the construction plan confirms to the building bye-

law and other parameters required under the Act. In case, it is found to be in contravention of the bye-laws, the Chief Municipal Officer has been empowered under Section 316(3) to order for stoppage of construction and for initiating proceeding against the owner, occupier or the person responsible for such construction as also against the registered Architect. Section 315 of the Act makes any such building which is constructed in contravention or breach or defiance of building bye-laws, liable to demolition even if it has been approved by a registered Architect and the same provisions also provides for imposition of penalty which may extend up to Rs. 10 lacs.

18. Section 317 is an important provision which vests the Chief Municipal Officer with a power to condone deviations in such of the buildings which though deviate from the sanctioned map but are found to be within the permitted limits of deviation.

19. Section 318 is again an important provision which casts an obligation upon the registered Architect concerned, as well as on the Chief Municipal Officer to cause an inspection of the building under construction so as to satisfy themselves that they are being constructed within the sanctioned plan.

20. Clause 10.2 of the Modified building bye-laws provides for condonation of minor deviations in terms of the provisions of the Appendix-L.

21. Clause 8 of the bye-laws provides that a sanction is to remain valid up to three years and which can be revalidated for a further period of two years upon payment of revalidation fee. In case, the building is not completed within five years then the owner has to apply for a fresh building/development permit.

22. Clause 2.12 of the Modified Building bye-laws inter alia provides that the height of any building with flat roof, would be the vertical distance from the center line of the adjoining street, to the highest point of the building adjacent to the street. It further provides that architectural features having no other function shall be excluded for the purpose of taking heights.

23. Clause 2.74 defines street to include any form of passage which has continued uninterruptedly for a period of one year and Clause 2.75 defines street level to mean the officially established elevation or grade of the central line of the street upon which the plot fronts and in case there is no officially established grade then the existing grade of the street at its mid point. In case of slopping street, the street level would be on the central line at the mid point of the frontage.

24. Bye-law 19 provides for minimum size and requirement of plot and Note 11 thereof provides that no building beyond 11 meters can be constructed on a land abutting a street of less than 6 meters width and even such permission can be granted if the owner of the plot leaves such portion of the plot to make up for the deficit of 6 meters width.

25. Two orders issued on the subject would also be relevant for the purpose and

which are Order No. 171 dated 25.8.2000 which provides for condonation of height of the building to the extent of 20% subject to fulfillment of other parameters of the bye-laws and order No. 94/02 dated 13.6.2002 which provides that only building up to 11 meters in height would be allowed in the areas mentioned therein.

26. My discussion above gives a birds eye view of the scheme of the Act and the bye-laws as regarding the obligations on the part of the builders as well as the extent to which a deviation can be permitted. The case of the petitioner though admittedly is a case of deviation from the sanctioned plan but whether deviations noted would relegate him to the category of violators who have defiantly constructed an extra floor in expectation of a post facto sanction, would be a matter of adjudication. In the present case admittedly a Multi-storied building consisting of "B+G+3 floors" was sanctioned at a height of 10.95 meters i.e. within 11 meters height even when the Corporation was conscious that the street abutting such building had only 12 feet width. Apparently, the sanction has been granted considering the front setback left by the petitioner to make up for the deficient width of the road. It is also not disputed rather is eloquent from the chart present in the order of the Municipal Commissioner that the width of the road and the front setback of the petitioner collectively exceed 6 meters and thus fully comply with Clause 19.4 of the bye-laws.

27. The orders impugned reflect an increase in height of the building by 2.73 meters which practically means that the entire third floor comes in for demolition. The conclusion drawn by the statutory authorities is on the basis of measurement stated to have been conducted from the ground level of the street abutting the building. According to the petitioner the level of the road abutting the building is lower by 1.54 meters and thus for a pragmatic approach either this deficit be adjusted in the height of the building or the height of the building itself be measured from the ground level of the building since apparently the street abutting the plot is below the level of the plot. The argument advanced on behalf of the petitioners has not found favour with the respondents primarily in the backdrop of the statutory provisions of Clause 2.12 of the bye-laws which provides for a measurement from the central line of the adjoining street, be it at any level. In my opinion this approach is on a rather misconceived appreciation of the municipal laws. To judge a height of a building on the basis of the level of the street without having regard to the fact whether its level is in tune with the statutory prescriptions, is a mechanical application of the statutory provisions. From the tenor of the orders impugned what I find is that Clause 2.12 of the bye-laws are being mechanically applied by the statutory authorities to come to a conclusion regarding the height of the building when in my opinion Clause 2.12 is not to be mechanically applied rather its application has to be made in conjunction with Clause 2.75 which defines a level of the street to mean the officially established elevation or grade of the central line of the street upon which a plot fronts and it is only where there is no official prescription that the existing level is to be taken at its mid point.

28. These stipulations make it eloquent that the law makers were not oblivious of a situation that a level of a street is a variable factor and thus a height of the building cannot be a fluctuating concept, to be decided according to the level of the street. In fact within the town and district of Patna itself there are streets which over the period of years have gone higher than plinth level of the existing buildings in the area while there are other streets which fall below the official prescription. It is perhaps taking note of such situation that a Bench of this court while delivering order in the case of Anup Kumar (supra) has observed as follows:--

"Next the only other dispute is with regard to height of building. As per sanctioned plan (Annexure-3) the height of the building from plinth is 11 metres. Allegedly on measurement it was found to be 12.05 metres. The petitioner has stated that the measurement as taken is from the ground level and not from the plinth level. Keeping in view the various local conditions the plinth level was above the ground level. The sanctioned map also shows the measurement from plinth but the plinth is shown as ground level also. In fact, the plinth has been made above the ground level for obvious reason as is common everywhere. If that is taken into account, a measurement was made from plinth it would be floor level, in question. The height does not exceed 11 metres. The building height is to be determined from its plinth level i.e. ground level for finished construction.

Taking any view otherwise would be that the height of the building would reduce each time the road is constructed on top of the road. The height between plinth and the road level reducing with every new layer of the road if height of building is to be determined from road level and not from plinth level. Each time the height of the building would reduce. Height of building cannot be a fluctuating concept but a fixed concept and therefore the correct measurement would be from the plinth and if that is taken into account, there does not appear to be any deviation muchless a deviation of which cognizance can be taken."

(Emphasis is mine)

29. Mr. Prasoon Sinha is not correct in his submission that the measurement of a height of the building by following Clause 2.12 of the bye-laws would be sacrosanct. In my opinion, this is not the correct legal position for then there was no requirement of Clause 2.75. The provisions of Clause 2.12 of the bye-laws stands qualified by Clause 2.75 of the bye-laws and cannot be mechanically applied. Thus until there is a finding of fact by the statutory authorities vested with powers of adjudication that the street level of the street abutting the plot in question is in tune with the official prescription/grade, it cannot be a correct measurement and as correctly observed in the order of Anup Kumar (supra) in such circumstances the height of building cannot be a fluctuating concept. In my opinion, since Clause 2.12 of the bye-laws is entirely dependent upon Clause 2.75 of the bye-laws hence until such time that the streets within the township and across the state confirm to the officially established elevation or grade, it

would only be prudent to have a pragmatic approach to the issue and as a rule of universal application the height of a building be measured from its plinth level and the sanction of maps in so far as a height of building is concerned, has to be on the basis of the measurement from the plinth level and not the street level. In fact, any other application of law would result in an absurd situation where the height of a building is put to mercy of the authorities connected with road construction. As for example in between two buildings having the same height of 11 meters from plinth level whereas one would be considered satisfying the requirements if it is abutting a street whose ground level is higher than the plinth level while the other abutting a street whose ground level falls below the plinth level would be held deviated from the sanctioned plan because the street level falls below the plinth area. This certainly is neither the legal intendment nor is it the prescription of law.

30. Law cannot be applied in a manner to create a class within a class. A building height of 11 meters has to be accorded identical treatment, be it situated abutting a street higher than its plinth level or even where the level of the street is lower than the plinth level. The statutory authorities have to apply themselves to this myriad problem since the level of a street is not within the jurisdiction of the builder rather it depends upon the pleasure of the local bodies or the State Government in its Road Construction Department.

31. Having given the anxious consideration to the issue of height I am of the considered opinion that until the local bodies including the State can achieve the official prescription as regarding the level of the road and maintain such level at all times, the height of a proposed building abutting such road cannot be faulted on this account and if the height of the building from its plinth level falls with the sanctioned level or within the permitted level of deviation, this would satisfy the statutory requirements and there would be no reason to order for its demolitions. My opinion should in no manner be construed to give a premium to builders to add additional floors rather I would clarify here that these conclusions are in respect of such building(s) who have confirmed to the floors so approved under a sanctioned plan but have deviated in its height within permissible limits.

32. In so far as the case in hand is concerned, it is the specific case of the petitioner in paragraph 14 of the writ petition that the existing road is lower by 1.54 meters from the ground level of the building. It is also mentioned that 0.14 meters of increase in height is on account of water proofing in the roof and if this difference is taken out from the alleged height increase, the resultant deviation is only 1.05 meters which is less than 10% of the sanctioned height. This specific averment goes unresponded.

33. It is not in dispute that the building in question is in conformity with the sanctioned map in so far as the floors are concerned and there is no charge against the petitioners of addition of floors. All that the petitioner is being charged with is that in the process, the building height has increased. Now according to respondents the increase is 2.73 meters from the street level but

according to the petitioner it is 1.05 from the plinth level. The specific statement of the petitioners that the street level is lower than the ground level of the apartment by 1.54 meters goes uncontested. In the circumstances the provisions of Section 317 of "the Act" read with Clause 10.2 of the bye-laws and Appendix-L thereof as well as the office order dated 25.8.2000 fully supports the case advanced on behalf of the petitioners specially in the background where the specific averments of the petitioner that the level of the street abutting the building is lower by 1.54 meters goes uncontested and Clause 2.12 of the bye-laws has to be read in conjunction with Clause 2.75 thereof for its proper application.

34. In my opinion, the petitioner has made out a case for intervention. Although there has been a deviation by the petitioners but their prayer cannot be rejected either on the observations of this court in case of Narendra Mishra (supra) or the judgments relied upon by Mr. Sinha. In each of the cases so relied upon by Mr. Prasoon Sinha, it was a clear case of open challenge to the statutory body and a brazen defiance to municipal laws. The builder in these cases had either made construction of additional floors or had not responded to the notices rather had defiantly gone ahead for making constructions despite notices being issued by the civic body. Whereas in the case of Royal Paradise Hotel (supra) the constructions were made defiantly in a "controlled areas" and the notices were not responded to by the builder, in the case of Priyanka Estate (supra) the builder had made additional constructions. The case of the petitioners does not fall within the category of such extreme defiance for there is no such allegation against the petitioners. A height increase in each of the floors has definitely resulted in a deviation in the height of each of the floors and a resultant increase in total height of the building but in my opinion, neither such deviation can be termed as an act of open defiance nor can it be held to be a deliberate act with profit making motive rather is in the nature of minor deviations falling within condonable limits. In fact according to the written arguments filed on behalf of the respondents also the height of the building even if measured from the street level, would only result in an excess of 54 centimeters. In my opinion, a penalty of demolition of an entire sanctioned floor for such miniscule deviation would be a travesty of justice. There is a clear distinction between a bona fide deviation falling within permissible limits of condonation and an apparent act of defiance which is backed with selfish motives. The distinction is very clear and it is for the statutory authorities to appreciate such distinction.

35. The issue of height of the building in question thus in my opinion, requires a reconsideration in the backdrop of my observation made hereinabove.

36. This would bring this Court to the issues of construction of the staircase on the third floor, the issue of extended basement and the issue of side setbacks. Whereas the Tribunal has found the side setbacks condonable and has also noted the stand of the petitioner regarding the extended rear setback but in so far as the issue of staircase is concerned even though the Tribunal has noted that the

flat has been constructed in a lesser area but merely since the staircase has resulted in an extra construction which is not sanctioned that an order of demolition is passed.

37. Clause 26.5(iii) of the bye-laws permits an internal staircase and in view of the stand taken by the petitioner himself on the issue of rear setbacks in the basement as well as the condonation permitted by the Tribunal in so far as side setbacks is concerned, in my opinion the issue of staircase in the backdrop that it is permissible under the bye-law and there has been no excess construction as admitted by the Tribunal, would also require a reconsideration.

38. In the circumstances, discussed this Court while modifying the conclusions drawn by the Tribunal on the issue of the height of the building as well as the stair case on third floor would require a reconsideration of the matter by the Municipal Commissioner and enabling him to do so the matter is remanded back with liberty to the petitioners to take appropriate steps for filing appropriate application for condonation of the deviation with the aid of a revised sanction plan and which should be considered and disposed of on its own merits in accordance with law and after opportunity of hearing to the petitioner by the Municipal Commissioner. An expeditious disposal preferably within three months from the date of receipt/production of a copy of this order would be appreciable. The petitioner shall abide by his stand taken before the Tribunal regarding the removal of the rear setback and would appear before the Municipal Commissioner with his prayer for condonation of the deviations in height, the side setbacks and the staircase on/or before 1.6.2015 and whereafter the Municipal Commissioner shall proceed in the matter and dispose of the same in the manner stipulated hereinabove.

39. The orders impugned stands modified to that extent. The writ petition is allowed.

*Reported in Anup Kumar Vs. PRDA and Others,

?Reported in Narendra Mishra Vs. The State of Bihar and Others,