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(1997) 09 MP CK 0111

In the Madhya Pradesh High Court

Case No : Writ Petition No. 330 of 1997 (J)

Smt. Janki Pandey — APPELLANT

Vs

State of M.P. and others — RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:
Madhya Pradesh Municipal Corporation Act, 1956 — Section 294, 323

Citation : (1998) 1 MPJR 274

Hon'ble Judges : S.K. Kulshreshtha, J

Bench : Single Bench

Advocate : R.P. Gupta, for the Appellant; S.N. Khare, Advocate and Mr. M. Singh, Advocate for State, for the Respondent

Judgement

S.K. Kulshreshtha, J.

This petition and the petitions bearing W.P. 467/97 (Nagendra Tiwari & ors. Vs. State of M.P. & ors.) W.P. No. 440/97 (Sanjcev Kumar Pandey Vs. State of M.P. & ors), W.P. No. 462/97 (Pradeep Kumar Naik Vs. State of M.P. & ors.) W.P. No. 465/97 (Sunderlal Kesarwani Vs. State of M.P. & ors.), W.P. No. 561/97 (Govind Prasad Sahu Vs. State of M.P. & ors). W.P. No. 767/97 (R.S. Agrawal Vs. State of M.P. & ors.) W.P. No. 784/97 (Smt. Rampyari Bai Vs. State of M.P. & ors.), W.P. No. 768/97 (V.M. Punsule & ors. Vs. State of M.P. & ors.), W.P. No. 789/97 (Niranjan Prasad Sahu Vs. State of M.P. & ors.), W.P. No. 793/97 (Kripa Chand Sahu Vs. State of M.P. & ors.) W.P. No. 794/97 (Ramcharan Sahu & another Vs. State of M.P. & ors.), W.P. No. 796/97 (Gulab Chand Sahu Vs. State of M.P. & ors), W.P. No. 797/97 (Purshottam Anant Paranjpe & ors. Vs. State of M.P. & ors.), W.P. No. 798/97 (Or. Surendra Bahre & another Vs. State of M.P. & ors.), W.P. No. 803 /97 (Indra Kumar Rai Vs. State of M.P. & ors.), W.P. 811/97 (Rajkumar Budhrani Vs. State of M.P. & ors.) & W.P. No. 716/97 (Lakhanlal Piper Sonia & anr. Vs. State of M.P. & ors.) have been filed against the driver of the respondents remove encroachments from the city especially in the area contiguous to the national highway No. 7. Since these petitions proceed on

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identical facts and grounds, they are being decided by this common order. However, for the purpose of this decision, the facts and grounds referred to in W.P. No. 330/97 are being taken into consideration. The ease of the petitioners, in brief, is that even though the construction of the petitioners is on private land and is neither an encroachment nor against any provisions of the Municipal Corporation Act, 1956, the respondents in their zeal to appease their superior officers and political bosses, in a team of administration and the personnel of the Jabalpur Municipal Corporation, undertook to clear the area along the National Highway No. 7 to widen the said road on the ground that the same had been encroached by construction affected on the two sides of the road. In the said drive against encroachment, the front portion of the house of the petitioners in W.P. No. 330/97 containing three shops was demolished while in W.P. No. 467/97, the boundary wall was demolished. The respondents could not succeed in demolishing other constructions as the petitioners in the other petitions rushed to the court and orders restraining the respondents was passed. The case of the petitioners is that the construction was in accordance with the law and by-laws of the Municipal Corporation and the plans duly sanctioned by it but still without any previous notice or intimation, the respondents suddenly came alongwith large contingent and demolished the same despite protest of the petitioners that the construction could not have been demolished: the same having been duly sanctioned. Learned counsel for the petitioners, in support of his submissions, has relied upon the sanctioned plan of which the copies have been placed on record as Annexure - A/1 & A/2.

Learned counsel for the petitioners has invited attention to the certificate issued by the Patwari (Annexure - 8/1) by which it was stated that as per the map, the width of the road in front of the house was 80 feet and the learned counsel has, on the strength of this certificate, contended that is prima facie established that there was no encroachment causing any construction of the road. Learned counsel has further referred to order dt. 4.12.1997 (Annexure - C) passed in W.P. No. 3994/1995 (Pradeep Kumar & anr. Vs. Municipal Corporation & ors.) by which in an earlier petition, the respondents were restrained from demolishing any house, building or other construction which did not constitute encroachment on any public street or project over any such area. Reference has also been made to similar orders Annexure - C, D & E and photograph has also been placed on record to show that extent of demolition. Learned counsel, therefore, contends that this menacing action of the respondents of demolishing the construction of the petitioners was not only illegal but also high-handed and motivated to appease their bosses leaving the law abiding public apprehensive about it safety.

Learned counsel for the respondents No. 2 Corporation relied upon the return filed in W.P. 1 No. 561/97 which has been adopted in other cases and pointed out that a public notice Annexure - R-2/2 was duly issued informing the general public to remove structures which were on public street. Attention has been invited to section 323 of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as the ''Act'') in support of the contention that the Corporation has

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due authority to remove encroachment from any street or any open place vested in the Corporation, without notice. Learned counsel has also referred to section 294 of the Act, to point out that only the building plans but also site plans required an approval and there was nothing on record to indicate that the site plan of the petitioners had been approved. Learned counsel has, however, submitted that no structure on any private land was demolished and a concerted action was taken under the aegis of the Collector only to cooperate with the team of persons appointed by him to make the city clean and free form the menace of encroachment. According to the learned counsel, these encroachments were potential traffic hazard requiring immediate removal.

The State and its officials have also filed a Return. Learned Govt. Advocate has invited attention to Annexure - R/1, a decision taken in pursuance of the instruction of the Government for special drive to remove the encroachments. The National Highway was duly demarcated and public notice was given about the same, requiring the public to remove the structure from the Government land. Reference has also been made to the show cause notices issued, of which a notice Annexure - R/5 illustrative of the said fact has been placed on record. Learned counsel submits that in a large number of cases, the public had voluntarily removed the structures which constituted encroachment. Learned counsel for the respondents have denied that any structure was demolished on any private land.

Since reference has been made to sections 323 & 307 of the Act empowering the Corporation to demolish the encroachment and also to remove such structures which are on private land, after following the procedure provided u/s 307, the two provisions are reproduced hereunder:-

S.307: Power to require removal or alternation of work not in conformity with byelaws or any scheme or any other requirement-

(1) If any building is erected or re-erected in contravention of any town planning scheme mentioned u/s 291 or of any building byelaws made u/s 427, the Commissioner without prejudice to his right to take proceedings for a fine in respect of the contravention, may by notice require the owner either to pull down or remove the work, or, if he so elects, to effect such alteration therein as may be necessary to make it comply with the said scheme or byelaws.

(2) If a building is erected or re-erected-

(a) without any sanction as required by section 293 (1), or

(b) when sanction has been refused, or

(c) in contravention of the terms of any sanction granted, or

(d) when sanction has lapsed u/s 300, the Commissioner, unless he deems it necessary to take proceedings in respect of such building or work u/s 294, shall -

(a) by written notice, required the person who is erecting such building or

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executing such work or has erected such building or executed such work on or before such day as shall be specified in such notice, by a statement in writing subscribed by him or by an agent duly authorised by him in that behalf and addressed to the Commissioner, to show sufficient cause why such building or work shall not be removed altered or pulled down, or

(b) shall required the said person on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

(3) If such person shall fail to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the person.

(4) If the plans are approved by the Commissioner and the approval is communicated to the person intending to build the house if the plans arc rejected by the Commissioner but no notice of their rejection is given to person intending to build the house within the prescribed period it shall not be open to the Commissioner to give a notice under sub-sections (1) & (2) on the ground that building is erected or re-erected in contravention of any scheme or byelaws or any other requirement under this chapter.

(5) Nothing in this section shall affect the right of the Corporation or any other person to apply to the District Court for an injunction for the removal or alteration of any building on the ground that it contravenes any provisions of this Act or the byelaws made thereunder, but if the building is one in respect of which plans have been deposited and the plans have been passed by the Commissioner, or notice that they have been rejected has not been given within the prescribed period after the deposit thereof, and if the work has been executed in accordance with the plans, the District Court on granting an injunction shall have power to order the Corporation to pay to the owner of the work such compensation as the District Court thinks just, but before making any such order the District Court cause the Commissioner if not a party to be joined as a party to the proceeding.

S.323 : Streets not be opened or broken up and building materials not be deposited therein without permission - (1) Except in such cases as the Government may be general or special order exempt from the operation of this section, no person shall, except with the permission of the Commissioner and in accordance with such terms and conditions, including payment of rent or otherwise, as the Commissioner any impose either generally or in each special case -

(a) open break up, displace, take up or make any alteration in or cause any injury to the soil or payment, or any wall, fence, post, chain or other material or thing forming part of any street or in any open space vested in the Corporation; or

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(b) deposit any building material in any street or in any open space vested in the Corporation; or

(c) set up in any street or in any open space vested in the Corporation any scaffold or any temporary erection for the purpose of any work whatever, or any post, bars rails, boards or other things by way of enclosures, for the purposes of making mortar or depositing bricks, lime rubbish or other materials.

(2) Any permission granted under clause (b) or (c) of such-section (1) shall be terminable at the discretion of the Commissioner or his giving not less than twenty-four hour''s written notice of the termination thereof to the person to whom such permission was granted.

(3) The Commissioner may without notice -

(a) cause the soil or payment or any wall, fence, post, channel or other material forming part of the street to be restored to the condition it was in before any opening or breaking up or displacement, or alteration or damage made or done without the permission of the authority specified in subsection (1);

(b) cause to be removed any building materials, any scaffold or any temporary erection, or any posts, bars, rails, boards or other things by way of enclosures, which have been deposited or set up in any street or in any open space vested in the Corporation without any permission of the authority specified in sub-section (1), or which, having been deposited or set up with such permission, have not been removed within the period specified in the notice issued under sub-section (2) and recover the costs of such restoration or removal from the offender.

The provisions of the Corporation Act are to be understood in the context of the law declared by the Apex Court on the subject. While dealing with the question of removal of encroachment by the Municipality in the case of Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan and others, , it was observed that the Corporation should always be vigilant and should not allow encroachment of the payment and footpaths and as soon as such encroachments are noticed, it should forthwith take steps to have them removed and should not allow them to settle down for a long time. In the present case, it has not been demonstrated by respondents that the structures said to constitute encroachment were of any recent origin. As a matter of fact, sanctioned plans referred to by the petitioner date back to late sixties or early seventies which repeals any presumption of the construction being recent as preposterous. It will, therefore, have to be assumed that the constructions were quite old and assuming that there was any reason for the respondent/corporation to harbour an impression that these constructions constituted encroachment and deserved to be removed, the corporation itself has not been vigilant in taking the action in time.

Where the Corporation itself allows settlement of encroachers for a long time for which the reasons are not far to seek, the Corporation cannot later on be permitted to invoke its power of removal u/s 323 of the without following the

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principles of natural justice which require at-least a short notice and summary inquiry. In Ahmedabad Municipal Corporation case (supra) it was observed by the Supreme Court that:-

P.9:- The Constitution does not put an absolute embargo on the deprivation of life or personal liberty but such a deprivation must be according to the procedure, in the given circumstances, fair and reasonable. To become, fair, just and reasonable it would not be enough that the procedure prescribed in law is a formality. It must be pragmatic and realistic one to meet the given fact situation. No inflexible rule of hearing and due application of mind can be insisted upon in every or all cases. Each case depends upon its own backdrop. The removal of encroachment needs urgent action. But in this behalf what requires to be done by the competent authority is to ensure constant vigil on encroachment of the public places. Sooner the encroachment is removed when sighted, better would be the facilities or convenience for passing or re-passing of the pedestrians on the payments or footpaths facilitating free flow of regulated traffic on the road or use of public places. On the contrary, the longer the delay, the greater will be the danger of permitting the encroachers claiming semblance of right to obstruct removal of the encroachment. If the encroachment is of a recent origin the need to follow the procedure of principle of natural justice could be obviated in that no one has a right to encroach upon the public property and claim the procedure of opportunity of hearing which would be a tedious and time can summing process leading to putting a premium for high handed and unauthorised acts of encroachment and unlawful squatting. On the other hand, if the Corporation allows settlement of encroachers for a long time for reasons best known to them, and reasons are not far to seek, then necessarily a modious of reasonable notice for removal, any two weeks or 10 days, and personal service on the encroachers or substituted service by fixing notice on the property is necessary. If the encroachment is not removed within the specified time, the competent authority would be at liberty to have it removed. That would meet the fairness of procedure and principle of giving opportunity to remove the encroachment voluntarily by the encroachers, on their resistance, necessarily appropriate and reasonable force can be used to have the encroachment removed. Thus considered, we hold that the action taken by the appellant corporation is not violative of the principle of natural justice.

In the present case, since the structures said to be encroachments over public land were not of any recent origin, a personal notice to the person concerned was in dispensable and though it is stated that public notice was given and individual notices were also issued, proof of service of the notice on the petitioners is totally absent. There is noting to indicate that such notices were served on the petitioner and reasonable opportunity was given to them to show cause against the proposed action. The petitioner have, therefore, rightly branded the action of the respondent Corporation as arbitrary and capricious. The respondents should have been wary especially in the light of the orders earlier issued by this court such an Annexure - C, D & E before proceeding to

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initiate any demolition.

The petitioners are seeking a mandamus against the respondents to restrain them for demolishing the building or any part of the building as also compensation for the damage already caused by the respondents. In a writ petition, where the facts are disputed with regard to the structures building being on private land or on the land belonging to the respondents, the respondents cannot be restrained from proceeding in accordance with law, as without evidence it cannot be decided that in fact the construction is on private land. Even in case of construction on private land which is not as per the sanction as required or is without sanction, the respondents are empowered to take action in accordance with section 307 of the Act and therefore, the respondents cannot be restrained form proceeding in accordance with law if in fact the condition for taking action exists. However, as held in the Ahmedabad Municipal Corporation''s case (supra), the respondents cannot be permitted to proceed to demolish old structures without a notice personally served on the owner, occupant and giving reasonable opportunity to show cause against the proposed action. Accordingly, the respondents are directed to first issue notice to the petitioners giving them reasonable time and opportunity to show cause against the proposed action, in case the respondents propose to demolish the structures in accordance with section 323 of the Act. This by no means should be construed as a general direction even in cases of structures of recent origin but in all cases, where the Corporation itself is guilty of omission to take action immediately, the respondents are required to follow the procedure as laid down in the case of Ahmedabad Municipal Corporation case (supra).

The petitioners have also claimed compensation without quantifying the amount of damages. The respondents have disputed demolition of any structure on private land and have also raised a plea in their defence that in a large number of cases, after the demarcation of the road when the public was made to realize that their structures, projections etc. constituted encroachment liable to be removed u/s 323 of the Act. they volunteered to remove their structures. This aspect also, therefore, cannot be decided in a writ petition under Article 226 as it would required evidence and the parties should be left to resort to the normal remedy of seeking compensation. Under these circumstances, and especially when no specific claim with regard to the damages, apart from general claim, has been made in these petitions, no relief can be granted to the petitioners with regard to their claim for compensation. The petitioners, shall, however, be free to take recourse to such remedy as is available under the law.

The petitions/are thus, disposed of with the above direction to the respondents. The respondents, however, on account of the action of proceeding in undue haste and not following the law as laid down in the Ahmedabad Municipal Corporation''s case (supra), deserve to be saddled with costs of these petitions quantified at Rs. 1000/- in each case, which the respondents shall pay to the petitioners or deposit within two months from the date of this order.

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