

(1989) 08 PAT CK 0032

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 6108 of 1987

Uma Shyam Parivar Trust, Quila House and Another

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 19-08-1989

Acts Referred:

Bihar Regional Development Authorities Act, 1981 — Section 37(2), 37(5), 37A, 38, 40

Citation : AIR 1990 Patna 174 : (1990) 1 PLJR 503

Hon'ble Judges : S.B. Sinha, J;P.S. Mishra, J

Bench : Division Bench

Advocate : Govind Das, Kanhaiya Kumar Singh, S.B.N. Singh and Abhay Kumar Singh, for the Appellant; Shrawan Kumar, Abha Singh, R.N. Prasad, Standing Counsel and Paras Nath Choudhary, Jr. Counsel to Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—This writ petition is directed against a notice dated the 16th Feb., 1987, issued by the respondent No. 2 and as contained in Annexure-5 to the writ application whereby and whereimder the petitioner was directed to stop construction work on plot No. 169P, Sheet No. 9, Circle No. 6, Ward No. II, of the Patna Municipal Corporation.

2. The facts of the case lie in a very narrow compass. The petitioner, who is the owner of the land in question, submitted a building plan for construction of a building thereon in terms of the provisions contained in Section 6(3) of the Bihar Regional Development Authority Act, 1975, hereinafter called and referred to for the sake of brevity as "the Act".

3. On or about the 29th August, 1986, the Deputy Director of respondent No. 2 authority asked the petitioners to produce within seven days the original deed because the projected portion of the land was allegedly hanging on the Road. By the said letter, a clarification was sought for with regard to the position so far as the width of the road is concerned. The said letter dt. the 29th Aug., 1986, is

contained in Annexure-1 5 to the writ application. The petitioner clarified the said position sought for in the aforementioned letter on the 20th September, 1986; the 23rd September, 1986; and the 1st October, 1986, and also produced the original deed which fact was sought to be confirmed by the petitioners by their letter dated the 21st Nov., 1986 (Annexure-1). In the said letter, the petitioner, inter alia, contended that the authorities of respondent No. 2 were satisfied with the clarifications given by the petitioner on the aforesaid dates. The respondent No. 2, in its counter-affidavit, has contended that, on the 29th November, 1986, a letter was issued to the petitioners for inspection of the building on the 1st December, 1986. The petitioners, however, deny receipt of any such letter and further deny and dispute that any inspection was held pursuant thereto. However, it is admitted that a spot inspection was held on the 31st December, 1986, where after, according to the petitioners they were assured by the authority of the respondent No. 2 that there would be no objection to the sanctioning of the plan. The aforementioned statements have been made in paras 7 and 8 of the writ application which have not been denied in the counter-affidavit.

4. On the 5th January, 1987, the petitioners again issued a letter to the respondent No. 2 alleging inter alia therein that, during the aforementioned site inspection held on the 31st December, 1986, no encroachment was found to have been made by the petitioners on the southern side of the road which was 40 ft. wide. The said letter is contained in Annexure-11 to the writ application,

5. On or about the 12th March, 1987, a notice under registered post was served on the petitioner purported to be u/s 37(5) of the said Act wherein, inter alia it was contended by the petitioners that, as four months had expired from the date of submission of the plan, it would be presumed that the sanction in respect thereof has been granted. As mentioned hereinbefore, as the plan was submitted on the 19th June, 1986, four months from the date of receipt had expired on the 20th December, 1986. The said letter dated the 12th March, 1987 (which is contained in Annexure-2 to the writ application) was allegedly received by the respondent No. 2 authority the 20th March, 1987.

6. The respondents, in their counter-affidavit, contended that they had issued a letter dated the 2nd April, 1987, wherein allegedly it was stated that the matter relating to the sanction of the plan had been sent to the Fire Officer for clarification and upon receipt thereof the same shall be considered.

7. The petitioners, however, deny and dispute receipt of any such letter. In support of their contention, the petitioners have annexed a copy of the letter addressed by the respondent No. 2 dated the 29th June, 1987 (Annexure-12) wherein it was admitted that the said purported letter dated the 2nd April, 1987, was wrongly addressed and, as such, returned unserved.

8. The petitioners, however, by a letter dated the 23rd April, 1987, served a second notice contending inter alia therein that the plan would be deemed to

have been sanctioned as nothing is heard from the Patna Regional Development Authority in spite of service of the notice dated the 12th March, 1987. The said notice dated the 23rd April, 1987, is contained in Annexure-3 to the writ application. The petitioners thereafter issued another notice to the respondent No. 2 authority on the 30th April, 1987, purported to be in terms of the Bye-laws No. 9.1 informing them that it would commence construction work with effect from the 11 th May, 1987. The said notice dated the 30th April, 1987, is contained in Annexure-4 to the writ application.

9. The respondents have contended that a letter was sent to the petitioners on the 27th May, 1987, informing them to the effect that site inspection would be held on the 3rd June, 1987. The petitioners, however, in their reply to the counter-affidavit, denied and disputed the receipt of any such letter and further contended that no site inspection to their knowledge was held on the 3rd June, 1987. On the 16th June, 1987, the officers of the respondent No. 2 lodged a complaint to the Vice-Chairman purported to be u/s 39 of the said Act alleging therein that the petitioners had started unauthorised construction thereon. According to the petitioners, no information was given by the respondent No. 2 about the said complaint but they came to know about the same on or about the 17th July, 1987, when the records were inspected. The Vice-Chairman purported to be acting on the basis of the aforementioned complaint initiated a case which was registered as Case No. 58 A/87 purported to be u/s 39(1) and Section 54(1) of the said Act allegedly on the ground that the construction of the building carried out by the petitioners was unauthorised, as no plan was sanctioned therefor. The petitioners by an ex parte order passed by the Vice-Chairman of the respondent No. 2 authority were restrained from making any construction. The petitioners have contended that no notice was served on them about the initiation of the aforementioned case nor any purported ex parte interim order was communicated to the petitioners. It appears that the respondents have not denied this assertion of the petitioners made in para 35 of the writ application in their counter-affidavit. .

10. The petitioners have alleged that, on the 17th July, 1987, upon an enquiry made in this regard from the officers of the respondent No. 2, the petitioners came to learn about the initiation of the aforementioned case and further learnt that 17-7-87 itself was the date fixed for hearing. The petitioners thereafter, by a letter dated the 17th July, 1987, which is contained in Annexure-6 to the writ application, requested the respondent No. 2 to supply them with copies of the notice, orders and other papers in order to enable them to file show cause. The said request was accepted to and the respondent No. 2 was directed by the Vice-Chairman to give certified copies thereof. This fact has been admitted by the respondent No. 2 in para 5 of its counter-affidavit.

11. The petitioners thereafter on the next day, i.e. the 18th July, 1987, complained that, in spite of the order made by the Vice-Chairman, no papers had been made available to them. The said letter is contained in Annexure-7 to the

writ application. On the 25th July, 1987, the petitioners filed an application before the Vice-Chairman of the respondent No. 2 praying therein that the ex parte order be vacated whereupon 31-7-1987 was fixed for hearing on the said application.

12. The petitioners again by letter dated the 29th July, 1987, intimated the Vice-Chairman that certified copies asked for and directed to be furnished to the petitioners had not yet been made available to them but despite thereof the next date for hearing was fixed on 31-7-1987. According to the petitioners, on the 31st July, 1987, the case was not called out and the Bench Clerk of the Vice-Chairman of the respondent No. 2 authority allegedly informed the petitioners that on the certified copies asked for by them had not till then been furnished and so the case had not been listed for hearing. The petitioners on the aforementioned date filed an application before the Vice-Chairman that he should not take into consideration any matter in respect whereof no paper has been furnished to the petitioners. The Vice-Chairman thereafter fixed 1-8-1987 as the next date for hearing.

13. By an order dated the 1st August, 1987, the Vice-Chairman upon a reference to the objection to the Enquiry Officer of the respondent authority to the effect that as the claim of the petitioners belonged partly to the acquired land of the respondent No. 2 authority directed that a joint inspection be made and a joint measurement of the land be taken so that a joint report may be submitted by the parties.

14. It appears that a joint inspection was held and a joint measurement taken on the 10th August, 1987, The petitioners have alleged that in the course of inspection it was found that there had been no encroachment. According to the petitioners, one Shri B. K. Neyogi of respondent No. 2 authority was requested by them to prepare a draft of the joint report so that the same may be circulated to the parties for approval before submission thereof to the Vice-Chairman. The petitioners have annexed the report dated the 10th Aug., 1987, prepared by Shri M. L. Sahajpal wherein it was asserted as follows ;--

- (a) No encroachment was made by the petitioners;
- (b) F.A.R. has not been enforced in any case in the area;
- (c) Encroachment on the road has been made by Dr. Srinivas, another person.

The petitioners filed an application before the Vice-Chairman on the 30th August, 1987, incorporating the above facts. The petitioners, however, alleged that the aforementioned Shri B. K. Neyogi filed an ex parte report without the knowledge of the petitioners. On the 20th August, 1987, the petitioners filed an application that a copy of the ex parte report submitted by Shri B. K. Neyogi be furnished to them but the said request was not acceded to. The petitioners, therefore, filed an application to the Vice-Chairman drawing his attention to the aforementioned facts on the 21st August, 1987.

15. According to the respondents, as contained in para 8 of the counter-affidavit, it has been asserted that the petitioners did not appear before the Vice-Chairman of the respondent No. 2 authority on the 8th October, 1987, the 13th November, 1987, and the 28th November, 1987, which were the dates fixed in the aforementioned case but the petitioners denied and disputed the aforementioned facts asserting therein that no such dates has been fixed by the Vice-Chairman nor to the knowledge of the petitioners any intimation therefore was sent to them.

16. On the 27th August, 1987, the petitioners' counsel addressed a letter to Shri B. K. Neyogi and others asking them to send a draft of the inspection report to the Vice-Chairman. According to the petitioners, the said letter has not been replied to as yet. On the 29th August, 1987, one Shri O. P. Singh, Deputy Director of the respondent No. 2 authority, submitted a report of the joint inspection stating therein that no encroachment has been made by the petitioners. A reference to the said letter dt. the 29th August, 1988, has been given in para 13 of the supplementary affidavit. Thereafter the petitioners filed the aforementioned writ application.

17. This writ application was filed on the 22nd December, 1987. Thereafter the police officers by a letter dated the 4th January, 1988, submitted a report that no construction has been done by the petitioners. The respondent No. 2 in its counter-affidavit has stated that the letter dated the 5th January, 1988, was sent to the petitioners asking from them a copy of their title deeds. The petitioners have, however, denied and disputed receipt of any such letter.

18. By an order dated the 10th March, 1988, a Bench of this Court, while admitting this writ application, passed the following order:--

"At the time of final hearing apart from the question whether the plan in question shall be deemed to have been sanctioned in terms of Section 37(5) of the Act in the facts and circumstances of the present case, this Court should also consider whether in a case where Section 37(5) of the Act is applicable and a plan is deemed to have been sanctioned this Court should exercise its discretionary power under Articles 226 and 227 of the Constitution, although this Court is satisfied that the plan in question has been prepared in contravention of the Patna Planning Standards and Building Bye-laws, 1981."

19. Mr. Govind Das, learned Counsel appearing on behalf of the petitioners, submitted that, in terms of the provisions contained in Section 37(5) of the said Act and on the facts and in the circumstances of this case, the plan submitted by the petitioners would be deemed to have been sanctioned. According to the learned Counsel, if the presumption that the plan had been sanctioned could be raised in law by the petitioners, there was no bar for them in commencing the construction in accordance with the said plan. The learned Counsel submitted that, if the authorities found that any violation has been done by the petitioners in so far as they have been constructing the building not in accordance with the

said sanctioned plan, it was and would be open to the authorities to take action as against the petitioners in terms of Ss. 38 and 40 of the said Act.

20. Developing his argument Mr. Das submitted that the time fixed under the provisions of Section 37 of the Act is mandatory in nature and, if the authorities have refused to approve of the plan submitted by the petitioners within a period of four months from the date of its filing the same, the owner of the land may raise the presumption that such a plan has been sanctioned and thereafter in terms of Section 37(5) may issue a notice intimating the authority that the sanction shall be presumed if nothing contrary is received or notified in respect of the application within thirty days from the date of receipt of the notice. Mr. Das further submitted that, since the petitioners have complied with the requirements of Section 37(1) of the Act and furnished all the documents and other information as required by the authority and as the said plan was in consonance with the mandatory provisions of the building bye- laws and regulations, the authorities had no other option but to accord sanction in respect of such plan. According to Mr. Das, by reason of the provisions contained in Section 37 of the Act, the statutory authority, namely, the Vice-Chairman, is required to act within a period of four months from the date of receipt of a copy of the plan and the sanction could have been refused by the said authority only upon stating the reasons therefor.

21. According to Mr. Das, the only authority, who is required to act in terms of the provisions of the said Act, is the Vice-Chairman and nobody else. It was further contended by the learned Counsel that the time stipulated u/s 37 of the said Act is imperative in character, as non-disposal of the application for sanction of plan entails a consequence to the effect that the owner of the land may presume that such sanction has been granted. Mr. Das further contended that, in any event, the Vice-Chairman had absolutely no jurisdiction to pass the impugned order and as contained in Annexure-5 to the writ application, as, on the facts and in the circumstances of this case, Section 39 of the Act was not applicable in view of the fact that the petitioners commenced the construction on the basis of a deemed sanctioned plan and was not raising any construction without any sanction thereof.

Mr. Das has further contended that, in any event, the authorities in passing the impugned order failed to comply with the principles of natural justice, inasmuch as it proceeded to pass the order (a) without giving the petitioners a notice therefor; (b) without furnishing certified copies of the documents although directed to be done by the Vice-Chairman; (c) the authorities have considered the plan and the report submitted by the employees of the authority which were prepared at the back of the petitioners and even copies whereof were not furnished to them; and (d) hearing the case without giving any intimation about the dates fixed for the case.

22. Mr. Shrawan Kumar, learned Counsel appearing on behalf of the respondent No. 2 authority, on the other hand, submitted that, on the facts and in the

circumstances of this case, Section 37 of the Act will have no application, as, upon receipt of the plan, the respondent No. 2 authority sought for various documents and clarifications from the petitioners and, as the petitioners had, from time to time, been furnishing the said documents and other information sought for by the authority, the period of four months will be counted only from the date when all the information have been furnished by the petitioners and not before the same. The learned Counsel has contended that, as in the instant case even after receipt of the notice dated the 12th March, 1987, and the 23rd April, 1987, as contained in Annexures-2 and 3 of the writ application, certain information were sought for by the petitioners and furnished by them, Section 37(5) of the said Act will have no application in the instant case. In the alternative, it was submitted that the petitioners encroached the land and in any event, no plan can be sanctioned which is in contravention of the provisions of the said Act and the regulations and bye-laws framed thereunder and, as in view of Annexure-C to the counter-affidavit, it is evident that the petitioners have contravened the provisions of the said regulations, the respondent authority was justified in initiating a proceeding u/s 39 of the said Act as against the petitioners and pass the order directing them to stop construction by reason of Annexure-5 aforementioned.

The learned Counsel further contended that, in any event, as the petitioners have submitted a plan in violation of the mandatory provisions contained in the regulation with regard to F. A.R., the said plan being not in terms of the said regulation, no sanction could have been accorded in respect thereof u/s 37 of the said Act. The learned Counsel further contended that true it is that there had been conflicting reports submitted by the employees of the respondent No. 2 authority from time to time, and in that view of the matter only an inspection was made and a report as contained in Annex.-C to the counter-affidavit was submitted after the filing of the writ application wherefrom it would appear that the plan submitted by the petitioners was in violation of the said regulation and, therefore, the same could not have been sanctioned.

23. Mr. Das in reply to the aforementioned contention, submitted that the regulation with regard to the F. A.R. has not come into force. It was further submitted that the report as submitted by the authorities of the respondent No. 2 and as contained in Annexure-C to their counter-affidavit is not in conformity with the report submitted by the officers of the respondent No. 2 authority on earlier occasions. According to the learned Counsel, from a perusal of the said two reports, it would appear that there has been no violation of the provisions of the mandatory regulations and, in that view of the matter, there is no reason as to why the petitioner should not be permitted to continue with the construction of the building.

24. The questions, which, therefore, fall for consideration, are:--

(a) Whether the time limit fixed in Section 37(5) of the said Act is mandatory or directory in nature?

(b) Whether in any event of failure on the part of the respondent authority to notify any communication to the owner of the land contrary to the intention expressed in the notice issued by it within thirty days from the date thereof, the deemed sanction of the plan would be operative even if such a plan was in contravention of the mandatory provisions of the said Act and/or regulations and bye-laws framed thereunder?

25. Before proceeding further, it may be noticed that a final master plan under the Bihar Town Planning and Improvement Trusts Act, 1951, was published on the 26th September, 1967. Under the said Act, there was no provision for floor area ratio. In the year 1975, the Bihar Regional Development Authority Ordinance, was promulgated. The said Act was thereafter enacted to provide for development of various regions of the State of Bihar. Similar Ordinances were promulgated after the expiry of the previous Ordinance. Although the Bill was passed in the year 1974, the said Act received the assent of the President on the 23rd January, 1982, and published in the Bihar Gazette on the 25th January, 1982.

26. On or about the 18th May, 1982, the Bihar Planning Standards and Building Bye-laws, 1981 was framed under the provisions of Section 80(k) of the Bihar Regional Development Ordinance. Bye-laws 21.1 provides for floor area ratio. It appears that the notice inviting objection to the Floor Area Ratio was issued by the respondent authority on the 19th May, 1982. The said notice is contained in Annexure-13 to the writ application.

27. According to the petitioners, the regulation with regard to fixation of floor area ratio has not yet come into force; whereas, according to the respondent No. 2 authority, the said regulation has already come into force.

28. Before us, it was conceded that, except the alleged violation with regard to the floor area ratio, the plan submitted by the petitioners is not violative of any other mandatory provision of the said Act or the Building Bye-laws as referred to hereinbefore.

Chapter VI of the said Act provides for development of plan of building and control. In terms of the provisions contained in Section 30 of the said Act, an embargo has been put with regard to the development of land by the owner thereof except with the permission of the authority.

Section 31 provides for owner's obligation when dealing with lands as building sites.

Section 32 of the said Act provides for a lay out plan. Section 34 empowers the Vice-Chairman to order work to be carried out or to carry out such work himself in default of the owner. Section 35 of the said Act reads as follows:--

"No person shall erect or commence to erect any building, or make any addition or alteration to any building except with the previous sanction of the Vice-Chairman, and in accordance with the provisions of this Chapter and the

regulations made under this Act:

Provided that the Authority may make separate set of Regulations for different areas or different kinds of areas."

Section 36 of the said Act provides for application for sanction to erect building, etc. by giving a notice. When the sanction by giving a notice in writing by any owner of the land expressing his intention to erect building in terms of the provisions contained in Section 36 of the said Act is delivered, a duty is cast upon the Vice-Chairman either to sanction such plan or to reject the same.

29. In terms of the provisions of the said Act, the bye-laws have been framed known as Patna Planning Standards and Building Bye-laws, 1981. Bye-law No. 4 provides for a procedure as to how an application for development of building permit should be made in terms of the Bye-law 4.2, the person who intends to erect or re-erect any building is required to give an application in the prescribed form, Such form has been described in Appendix-A appended to the said Bye-laws, The person, who is required to file an application in the said form, is required to give a notice to the Vice-Chairman of the Patna Regional Development Authority forwarding therewith the Site plan, Building plan, Services plan, General Specifications, and is also required to furnish the names of the Licensed Architect/Engineer/Draftsman/Group Licence No. who will supervise the said erection and is further required to submit ownership title and receipt for payment of Development Permit Application Fee.

30. Section 37, which is material for the purpose of this case reads as follows :

"(1) The Vice-Chairman shall sanction the erection of a building or addition or alteration thereto if such erection of the building or addition or alteration thereto would not contravene any provision of this Act or any regulation made thereunder.

(2) If the proposed erection, alteration would be in contravention of any provision of this Act, or any regulation made in this behalf or under any other law, sanction of the plan shall be refused.

(3) The Vice-Chairman shall communicate the sanction to the person who has given the notice, and where he refuses the sanction he shall record a brief statement of his reasons for such refusal and communicate the refusal along with the reasons thereof to the person who has given the notice.

(4) The sanction or refusal as aforesaid shall be communicated in such manner as may be specified in the regulation made in this behalf.

(5) If at the expiration of a period of 4 months after application u/s 36 has been made to the Vice-Chairman, no order in writing has been made to the Vice-Chairman, no order in writing has been passed by the Vice-Chairman in this connection has been sent to the applicant, the applicant shall give a notice under registered post intimating that sanction shall be presumed if nothing to the

contrary is received or notified in respect of his application within 30 days from the date of receipt of the notice.

31. From a perusal of the aforementioned provision, it is, therefore, clear that, if the plan conforms to the requirement of the law, in such event the Vice-Chairman has no other option but to accord sanction so far as erection of the building or addition or alteration thereto is concerned. However, if the proposed addition, alteration contravenes any provision of the Act or regulation made in their behalf or under any other law sanction of such plan shall be refused.

32. In terms of Section 37(3), the Vice-Chairman, while refusing sanction of such plan, is required to record his reasons thereof. On this background, the provision of Section 37(5) has to be construed. Under the general law, the owner of the building is entitled to make erection in any manner he likes on the land owned by him. Such right of a citizen is sought to be restricted and/or regulated by reasons of the provisions of the said Act. The purpose for which such Act has been enacted can be gathered from the preamble thereof, i.e., for development of various region of the State according to the plan. There is no gainsaying that, by reason of such regulatory measures provided for in the said Act, the right of an individual to utilise his land in any manner he likes is restricted, although not totally prohibited.

33. Section 37(5) of the said Act provides that, if, upon expiration of the period of 4 months after the application u/s 36 has been made to the Vice-Chairman, no order in writing has been passed by him and no notice of the order passed by the Vice-Chairman in this connection has been sent to the applicant, the applicant has been enjoined with a liberty to serve a notice under registered post intimating that the sanction shall be presumed if nothing to the contrary is received or notified in respect of his application within 30 days from the date of receipt thereof.

34. From the phraseology used by the Legislature in enacting Section 37 of the said Act the intent and purport appears to be clear and unambiguous. The Legislature in its wisdom intended that the authority must act with promptitude. A person who intends to erect a building or make some addition or alteration to the existing building should ordinarily be permitted to do (so) if the plan submitted by him for sanction is in accordance with the provisions of the said Act and the regulation framed thereunder. If such a plan contravenes the mandatory requirement of the law or the regulation, the permission should be rejected. However, 4 months time had been granted to the authority to scrutinise the said plan or to make enquiries with regard to the title, etc., of the owner. Only in the event of failure on the part of the Vice-Chairman to refuse sanction of the plan the owner of the land has been conferred with a statutory right to issue a notice of 30 days intimating that the sanction shall be presumed if nothing is received or notified to the contrary in respect of his application. Thereafter, the Vice-Chairman may take necessary action with regard to the passing of an order either sanctioning the plan or refusing it within the aforementioned period of

thirty days.

35. Sub-section (5) of Section 37 of the said Act, therefore, authorises a person to raise a presumption that, if, after the receipt of the notice, the authority does not notify to the contrary meaning thereby refusing to accord sanction in terms of Section 37(2) of the said Act, he may proceed to erect or re-erect or make addition or alteration in the building as if the plan has been sanctioned. Thus, Section 37(5) raises a legal fiction as a result whereof the plan, although not expressly sanctioned, would be deemed to have been sanctioned.

36. It is, however, well known that, if a state of affairs is presumed in law to be real, then all consequences falling there from must ensue. In *East End Dwelling Co. Ltd. v. Finsbury Borough Council* 1952 AC 109, Lord Asquith at pages 132-33 stated the law in the following terms:--

"..... If you are bidden to treat an imaginary state of "affairs" as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

37. It is, therefore, clear that the public: authority, in terms of Section 37 of the said Act, is required to carry out a public duty within the stipulated time and on failure to do so within the said period, the consequences may follow depending upon the volition of the owner of the land and on fulfilment on the condition that if he serves thirty days" notice in writing in accordance with Section 37(5) of the said Act.

38. In *Sutherland, Statutory Construction*, 3rd Edition, Volume 3, at page 111, it is stated as follows:--

"As a corollary of the rule outlined above the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

Reference in this connection may also be made to Article 269 at page 535 of *Crawford's Statutory Construction* wherein the learned Author has stated the law in the following term:--

"As a general rule, a statute which specifies a time for the performance of an official duty will be construed as directory so far as the time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure. But there are various exceptions. For instance, the language may be such that the performance of the Act within or at the specified time, is imperative. As a result, if the statute contains prohibitive or negative words relating to the time within which the act is to be performed, it will be considered

mandatory. Furthermore, a statute may even make time the essence of the official act. In such a case, the requirement as to the time of performance is also mandatory. Moreover, the consequences of failing to perform the official act within or at the designated time, may be considered, as indicative of the legislative intention. Even the nature of the act is entitled to consideration.

Furthermore, it may be asserted as a general rule, that where a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not as a limitation of the exercise of the power after the time named, or unless from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplating that the act had better not be performed at all than be performed at any other time than that named."

39. Craies in his Statute Law, 7th Edition page 62 states the law in the following terms:--

"When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute but those which are not essential and may be disregarded without invalidating the thing to be done are called directory."

It is also well known canon of the principles of construction of statute that while considering the statute, the intention of the Legislature shall be carefully attended to.

40. As indicated hereinbefore, Chapter VI of the said Act puts an embargo on the enjoyment of a right of an owner of the land. Such regulatory measure, which is restrictive in nature, therefore, must be construed strictly. As indicated hereinbefore, the intention of the Legislature in legislating Section 37(5) of the said Act is clear, inasmuch as thereby the Legislature had intended that the authorities must act with promptitude. The law has, however, taken care of the fact that a person may not reap the benefit or serious consequences of a deemed sanction and, therefore, it has provided therein that prior to the commencement of erection or re-erection or alteration or addition in the building a notice under registered post has to be served and one has to wait for a period of at least one month from the date of receipt of such notice.

41. The Vice-Chairman, who is a statutory functionary, thus, upon receipt of such notice, is required to decide the matter one way or the other, and, upon his failure to do so, the consequences shall follow meaning thereby the owner of the land would be in law entitled to commence erection, re-erection or addition or alteration to the building. Thus, the provision of Section 37(5) of the said Act must be held to be mandatory in nature.

42. Mr. Shrawan Kumar, however, submitted that the petitioners in view of the fact that they have taken part in the enquiries conducted by the authority upon receipt of the notice u/s 37(5) of the said Act must be deemed to have waived their right. The learned counsel has also placed strong reliance upon a decision of the Delhi High Court reported in AIR 1982 Delhi 557 (sic). In my opinion, the submission of the learned counsel is not correct. In terms of the provisions of the said Act, the owner of the building is not required to perform any duty. He, of course, in order to obtain sanction, is required to furnish necessary information if any when sought for by the authority. There is nothing on the record to show that the petitioners are guilty of any delay or laches or they have not supplied any information or furnished any particular although the same had been asked for from them by the respondent No. 2. In fact, from the conspectus of events as narrated hereinbefore, it would be absolutely clear that the petitioners had all along been acting reasonably and had been furnishing all the information as and when the same was sought for from them. From the facts as available on the records of the case, I have no doubt in my mind that in the instant case the respondent No. 2 has not taken steps with promptitude; as a matter of fact its officers have shown utter negligence in discharge of their public duties.

43. It further appears that the petitioners at some stage have been harassed for no fault of theirs. Further, Section 37 (5) of the said Act as such does not create any right which is capable of being waived. A person has a right to erect a building on his own land subject of course to the compliance of the building regulation. The statute merely provides for certain consequences once the authority fails to perform his statutory duty within the time limit fixed by the Legislature. In this view of the matter, in my opinion, the question of petitioners waiving any right does not and cannot arise.

44. The reliance placed by the learned counsel in Raghbir Singh and Others Vs. Municipal Corporation of Delhi and Another, is also misplaced. In that case, the application for sanction of plan was not submitted in accordance with law and in such a situation it was held by the Division Bench that, if the application itself for sanction of the plan was itself not in term of the statute the question of a deemed sanction on the basis of such application does not arise. Such is not the case here. In the instant case, the respondent No. 2 authority has not denied that the application filed by the petitioners was in the prescribed form and it contained all the necessary particulars. The petitioners had also shown the original title deed and the petitioners had also participated in the joint inspection and the joint measurement.

45. In this view of the matter, it must be held that the petitioners were entitled as a matter of right to commence erection of the building and to proceed therewith as if the plan has been sanctioned. However, that does not solve the legal problem in its entirety. In view of section 37(1) of the said Act, a plan will have to be sanctioned if the same conforms to the provisions of the regulations. It, therefore, logically follows that, in the event the plan is violative of any

mandatory provisions of the said Act or regulation framed thereunder, no sanction could have been granted. However, in the instant case, nothing has been pointed out to us except the fact that the petitioners have contravened the bye-laws relating to the floor area ratio, which aspect of the matter will be dealt with separately.

46. However, even in a case where the owner of the land proceeds to erect the building on the basis of a plan which is deemed to have been sanctioned, the authority is not without any remedy if it is found that such a sanction was accorded under misrepresentation, in terms of section 38 of the said Act, which reads as follows :--

"If at any time after the sanction to erection of any building or addition or alteration thereto has been accorded, the Vice-Chairman is satisfied that such sanction was accorded in consequence of any material misrepresentation or fraudulent statement contained in the notice given or information furnished u/s 37 he may, by order in writing and for reasons to be recorded, cancel such sanction and erection of any building or addition or alteration thereto shall be deemed to have been done without such sanction :

Provided that before making any such order the Vice Chairman shall give reasonable opportunity to the person affected to explain as to why such order should not be made."

47. If misrepresentation or fraudulent statement was made in the application for grant of sanction of building plan, a deemed sanction which has been procured on the basis of such material misrepresentation or fraudulent statement contained in the notice or information furnished u/s 37 of the said Act is also to be liable to be cancelled. The Vice-Chairman has also the power to require the owner of the land to alter the work in terms of section 40 of the said Act which reads as follows:--

"(1) The Vice-Chairman may at any time during the erection of or addition or alteration to any building or at any time within six months after the submission of the completion certificate as required under regulation framed for the purpose by a written notice specify any matter in respect of which such erection or execution is without or contrary to the sanction referred to in Section 37 or is in contravention of any condition of such sanction or any of the provisions of this Act or any regulation made thereunder and require the person who gave the notice u/s 36 or the owner of such building or work either:-

(a) to make such alterations as may be specified in the said notice with the object of bringing the building or work in conformity with the said sanction, condition or provisions, or

(b) to show cause why such alterations should not be made, within a period stated in the notice.

(2) If the person or the owner does not show cause as aforesaid he shall be

bound to make the alterations specified in the notice.

(3) If the person or the owner shows cause as aforesaid the Vice-Chairman shall by an order either cancel the notice issued under Sub-section (1) or confirm the same subject to such modifications as he thinks fit."

48. It, therefore, is clear that even after a plan is deemed to have been sanctioned the authorities are not without power to require the owner of the land to comply with the provisions of the Act and act in accordance therewith if a cause, therefore, is found to exist.

49. In the instant case, however, a proceeding has been initiated as against the petitioner u/s 39 of the said Act allegedly on the ground that he has started construction without obtaining any sanction of the plan.

50. In view of the findings made hereinbefore, it is clear that, as the building plan submitted by the petitioners will be deemed to have been sanctioned in terms of Section 37(5) of the said Act, the proceeding u/s 39 of the said Act was not maintainable in view of the fact that the petitioners commenced erection of the building in accordance with the said deemed sanction plan.

51. Mr. Shravvan Kumar, however, submitted that the petitioners have been constructing in violation of the plan submitted which is deemed to have been sanctioned. As in the instant case, this Court is not called upon to decide such question, I refrain myself from expressing any opinion with regard thereto. However, the law in this regard appears to be clear. If an owner of the land constructs a building which is not in accordance with the sanctioned plan, the respondent No. 2 authority would be at liberty to take such action against the petitioner in accordance with law. This position of law has also not been disputed by Mr. Das, learned counsel appearing on behalf of the petitioners. It is, therefore, made clear that, if the petitioners have been making any construction in violation of the plan which is deemed to have been sanctioned, the respondent No. 2 authority and/ or the Vice-Chairman shall be at liberty to take such action as against them as is permissible in law.

52. The question now, therefore, arises for consideration as to whether the petitioners have contravened any mandatory provision of the Act or bye-laws while submitting the plan.

The petitioners have annexed a copy of the report dated the 10th September, 1987, submitted before respondent No. 2 authority by Shri M. L. Sahajpal, its one of the Assistant Engineers. The said report is contained in Annexure-21 to the supplementary affidavit.

The said report appears to be a detailed one and therein the measurement of the land in question as also other relevant measurements have been mentioned. In the said report, it has further been mentioned that the petitioners had fulfilled all the necessary requirements of law and the State Fire Officer had also no objection to the grant of sanction of the plan. In the said report no violation has

been pointed out. It has been stated therein that an encroachment on the road has been made by one Dr. Srinivas and a case is pending against him in the office.

53. The respondents, however, has relied upon a purported report of Shri Rajendra Paswan which is contained in Annexure-C to the supplementary counter-affidavit filed on behalf of the respondent No. 2. In the said report, it has been mentioned that, at the time of taking measurement, Shri B. K. Neyogi, Executive Engineer, Shri M. L. Sahajpal, Assistant Engineer, and Shri Radhey Prasad Singh, Junior Engineer, were also present. In this report, it has been mentioned that the petitioners have allegedly taken possession of the land to the extent of 2.4 metre width belonging to the authority. In this report, it has been mentioned that, in the western side of the building under construction, the petitioners have left a set back of 3.89 metres only whereas, they ought to have left 6 metres of land on the western side of the southern part of the building. It further appears from the said report that the petitioners have constructed an unauthorised shed towards the northern side of the land. It has further been mentioned that on the northern front they left to the extent of 1.42 metres on the western side and 1.14 metres on the eastern side which was not in accordance with law, as they ought to have left 1.5 metres of the land on both sides.

In the said report, certain other defects have been pointed out. So far as F.A.R. is concerned, it has been mentioned therein that F.A.R. in respect of the land in question ought to have been 3; whereas, in the plan submitted by the petitioners, F.A.R. has been shown as 4.77.

54. Mr. Shrawan Kumar, when questioned, admitted that, except the violation in the floor area ratio, there is no other violation shown in the plan. In the report submitted by Mr. Sahajpal, as contained in Annexure-21 to the supplementary affidavit, as noticed hereinbefore, it has been clearly stated that one Dr. Srinivas has encroached the land. Thus, if the petitioner has not made any encroachment and the alleged encroachment made by Shrinivas to, the extent of 3 ft. 4 inches is added to the western side of the southern front of the building in question, it may be found that the petitioners have left sufficient set back in the front portion of the building in question. It further appears from the report of Shri Sahajpal (Annexure-21) that the road in front of the petitioners' house was merely 36 ft. 8 inches as against 40 ft. Thus, there was an encroachment on the road to the extent by 3 ft. 4 inches only. It does not appear as to how the said set back has been found short to the extent of 3.8 metres on 2-12-1981 (Anne. C), i.e., after the filing of the writ application. The said report was submitted by Shri Rajendra Paswan.

55. So far as the bye-law relating to the floor area ratio is concerned, it appears from the report submitted by Shri Sahajpal that the same had not been given effect to by the respondent No. 2 authority which would be evident from the following:--

"F.A.R. 7649 M2-1361.48 (less for parking space) Net area 6287.52 M2 Area of the plot 1376.80 M2 i.e. $6287.52 = 4.566 \times 1376.80$

The applicant submitted plan on 19-6-86 and till that date the F.A.R. had not been enforced and applied to in any case. Therefore, F.A.R. as above is permissible in this case as well as done in all other cases."

56. As noticed hereinbefore, there appears to be some controversy as to whether the bye-laws with regard to the F.A.R. has come into force. According to the learned counsel for the petitioners, an objection from the public with regard to the said regulation was called for, as is evident from Annexure-13 to the writ application and the objection if any, have not been finally disposed as yet. Mr. Shrawan Kumar however states that the said bye-laws have come into force as back as in the year 1981 itself. Bye-laws 21.1, deals with Flood Area Ratio. It appears from the Table 4 appended thereto that Floor Area Ratio is to be dependant upon the density of population etc: and the same, thus, was to be different in different areas as shown in the master plan. Where there is no master plan available, the authority is required to decide floor area ratio for different areas in consultation with the Chief Town Planning Officer. The floor area ratio also depends upon the nature of the area earmarked in the master plan.

57. A note has been appended to the aforementioned bye-laws No. 21.1, being note No. 3 therein wherefrom the population density of the city will appear which reads as follows:--

"Note 3 -- Population density for the city Patna has been adopted as 75 to 200 persons per acre but pending approval by the State Government, the density of 100 to 250 persons per acre adopted by the Authority shall remain applicable."

58. Nothing has been pointed out before Us as to on what basis in the report dated the 2nd December, 1981, submitted by Shri Rajendra Paswan, floor area ratio has been calculated as 3 in respect of the land in question.

From the Appendix J. appended to the said bye-laws, it appears that floor area ratio value is to be fixed with regard to the residential building business commercial mercantile buildings in the following term:--

"J-1 Residential Building The F.A.R. values for residential building for different area of the city depending upon the gross density shall be as per density"map and Table-4."

"J-2 Business and Mercantile (Commercial) Buildings for different commercial/business zones of city shall be as given in Table-26."

59. However, as mentioned hereinbefore, a notice was issued in respect of the aforementioned regulation by the State of Bihar which has been published in the Bihar Gazette on the 19th May, 1982, inviting objections from the general public with regard to the determination of floor area ratio. It is further evident from the letter dated the 3rd July, 1986 (Annexure-14) addressed by the Vice-Chairman of

respondent No. 2 authority to the Secretary, Urban Development Department, from a perusal whereof it appears that the matter relating to fixation of floor area ratio was still under consideration of the State Government. In the said letter, it was clearly stated that it is necessary to bring in at least some regulations immediately, which clearly go to show that no final decision has yet been taken by the State Government.

60. From what has been stated hereinbefore also, it is evident that a decision with regard to floor area ratio in different localities is to be taken with reference to the several factors, including density of population. The respondent No. 2 has not clarified the said matter in its counter-affidavit, although as noticed hereinbefore the same was specifically raised by the petitioners.

61. In absence of sufficient materials on records, it is difficult to come to a definite conclusion as to whether the regulation relating to floor area ratio has yet come into force or not. We are, therefore, not deciding the said question finally and at present we merely observe that it is just possible that the said regulation is yet to receive final approval of the State and/or has not yet been given effect to. In the event, however, it is found that the said regulation come into force, it would be open to the respondent No. 2 to take recourse to the provisions contained in sections 38 and 40 of the said Act.

62. As noticed hereinbefore, at the time of admission this Court directed that, at the time of final hearing of this writ application, apart from the question, as to whether the plan in question shall be deemed to have been sanctioned in terms of Section 37(5) of the said Act, this Court will also consider whether in a case where Section 37(5) is applicable and the plan is deemed to have been sanctioned this Court should exercise its discretional power under Articles 226 and 227 of the Constitution of India, although this Court was satisfied that the plan in question had been prepared in contravention of the Patna Planning Standards and Building Bye-laws, 1981. In my opinion, this question does not arise in this writ application, inasmuch as, the respondents have not been able to show that the petitioners' plan was in contravention of the mandatory provision of the aforementioned bye-laws.

63. However, there cannot be any doubt that the plan cannot be sanctioned which is against the mandatory provisions of the master plan and, in this view of the matter, there cannot be any deemed sanction of plan which would be in contravention of the provisions of the Act and/or mandatory provisions of the bye-laws. In other words, if a plan cannot be sanctioned by the authorities, in terms of Section 37(1) of the Act, no plan can be deemed to have been sanctioned even if the same was in violation of the mandatory provisions of the Act and the building bye-laws framed therein. Further, in any event, in case of misrepresentation or fraud as envisaged u/s 38 of the said Act, such a deemed plan may also be cancelled. The Vice-Chairman of the respondent No. 2 authority in appropriate cases will also have the power to take recourse to the provisions contained in Section 40 of the said Act.

64. Even assuming that the contention of the learned counsel for the respondent No. 2 is correct, it will be evident from the following dates that the petitioners have served notice u/s 37(5) of the Act upon the expiry of four months from the date of the joint inspection dated the 19th June, 1986, the application for sanction of the plan was filed, the plan, therefore, ought to have been sanctioned by the 19th October, 1986. The joint inspection was held on the 31st December, 1986. The first notice u/s 37(5) was served on the 12th March, 1987, vide Annexure-2. Even if four months had not expired from the date of the joint inspection, i.e., the 31st December, 1986, the petitioner served another notice on the 23rd April, 1987. There is, thus, no doubt that four months had expired from the said date and, thus, the petitioners became entitled to serve a notice u/s 37(5) of the said Act. The second notice served by the petitioners, even assuming that the argument of the learned counsel for the respondent No. 2 is correct, therefore, will be deemed to be valid.

65. Taking into consideration all the questions involved in the matter, it is held as follows: --

(a) The plan submitted by the petitioners will be deemed to have been sanctioned on the facts and in the circumstances of this case in terms of Section 37(5) of the said Act;

(b) Initiation of the proceeding as against the petitioners being case No. 58A/87 was made on a wrong presumption that the petitioners commenced erection of the building on the basis of a deemed sanction plan;

(c) If the authorities find that the petitioners have been constructing the building in violation of the said plan, it would be open to the authorities to take such action as against the petitioners as is permissible in law;

(d) As, admittedly, there is a dispute as to whether the petitioners have made any encroachment on the road belonging to the authority or not or such encroachment has been made by one Dr. Srinivas, it cannot be definitely held that the petitioners have made any encroachment in respect of the land in question. The same will depend on the ultimate decision of the question as to whether the petitioners have made such encroachment or not.

66. In the result, this writ application is allowed to the extent as indicated hereinbefore. In the circumstances of this case, there will, however, be no order as to costs.

P.S. Mishra, J.

67. I agree.