

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.98 of 2016

IN

Civil Writ Jurisdiction Case No. 7726 of 2011

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Dhrub Prasad, son of Late Harihar Prasad, resident of Village - Karkach Madhopur, P.O.- Karkach Madhopur, P.S.- Barauli, District - Gopalganj at present resident of 4H/71, Bahadurpur Housing Colony, Bhootnath Road, P.S.- Agamkuan, District - Patna

.... Appellant/s

Versus

1. The State of Bihar through its Principal Secretary-cum-Commissioner, Urban Development Department, Government of Bihar, Patna
2. The Managing Director, Bihar State Housing Board, Patna
3. The Estate Officer, Bihar State Housing Board, Patna
4. The Executive Engineer, Division - I, Bihar State Housing Board, situated at Hanuman Nagar, Kankarbagh, Patna- 20
5. Bharat Petroleum Corporation Ltd., through its M.D. Pakari Sipara under Jakkanpur Police Station, Town & District of Patna.

.... Respondent/s

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Appearance :

For the Appellant	:	Mr. Navin Kumar, Advocate
For the State	:	Mr. Rajesh Singh, G.P.-16
For the Housing Board	:	Mr. Lalit Kishore, Sr. Advocate
For the BPCL	:	Mr. Madhuresh Prasad, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 16-05-2016

The present Letters Patent Appeal is directed against the judgment and order, dated 29.10.2015, passed, in C.W.J.C. No.7726 of 2011, whereby and whereunder the learned single Judge has dismissed the writ application, filed by the petitioner-appellant, seeking a writ, in the nature of *certiorari*, quashing Letter No.6844, dated 04.11.2010, issued by the Estate Officer,

Bihar State Housing Board, whereby the application of the appellant for grant of a 'No Objection Certificate' for opening a petrol pump on Commercial Plot No.DS-24/L, situated at Lohia Nagar, Kankarbagh, District-Patna, has been rejected.

2. The factual matrix of the case, which gave rise to the present writ application, out of which this appeal arises, is as follows :-

(i) By virtue of a Deed of Tripartite Lease, dated 25.08.2004, (Annexure-1), executed between the original allottee, namely, Bajarang Lal Bajaj, the petitioner, and the Housing Board, Plot No.DS-24/L at Lohia Nagar Housing Colony, Lohia Nagar, P.S.-Kankarbagh, District-Patna, the aforementioned plot came into the possession of the petitioner. The plot, namely, DS-24/L, was earmarked for office/shops/godowns.

(ii) The petitioner submitted a representation before the competent authority/officer of the Housing Board for granting a 'No Objection Certificate' for running a petrol pump over the land, in question.

(iii) The Managing Director of the Housing Board submitted a report recommending that permission for opening a petrol pump over Plot No.DS-24/L can be

given and, accordingly, after proper site verification and enquiry, the matter was processed in favour of the petitioner-appellant and the file was sent for calculation of extra cost plus compound interest accruable thereon.

(iv) The Housing Board has also granted 'No objection Certificate' for opening a petrol pump on Plot No.DS-7 and a petrol pump was running on the said plot, but the matter, with regard to grant of 'No Objection' to the petitioner, was kept, however, pending.

(v) In the meanwhile, the petitioner-appellant obtained 'No Objection Certificate' from the District Magistrate, Patna, for opening petrol pump and Bharat Petroleum Corporation Ltd. also proceeded to grant licence in favour of the petitioner-appellant for opening petrol pump and service station on the aforesaid commercial plot being No.DS-24/L.

(vi) Accordingly, the petitioner-appellant invested huge amount of money for establishing the petroleum storage tank in anticipation of grant of approval/'No Objection Certificate' from the Housing Board and he also commenced his business. However, to the utter shock and surprise of the petitioner-appellant, the Respondent-



Housing Board, vide order, dated 04.11.2010 (Annexure-9), issued under the signature of Estate Officer of the Housing Board, rejected the case of the petitioner-appellant for grant of 'No Objection Certificate'.

(vii) The petitioner-appellant, again, represented before the respondent authority seeking recall of the aforesaid refusal order, vide letter, dated 24.02.2011 (Annexure-11), but when no action was taken on the same, the petitioner-appellant has knocked at the doors of this Court for redressal of his grievance by way of a writ application under Article 226 of the Constitution of India.

3. I.A. No.364 of 2016 has been filed by the appellant-applicant seeking a direction from this Court to permit him to carry on the petroleum outlet business over Commercial Plot No.DS-24/L, which has been sealed by the Bihar State Housing Board (hereinafter referred to as 'the Housing Board'), pursuant to an order, dated 28.12.2015, whereby the appellant has been directed to vacate Plot No.DS-24/L; or else, the same will be sealed.

4. In the said interlocutory application, the appellant-applicant has submitted that the Housing Board had, in fact, already proceeded to seal the petroleum business of the appellant,



though it was having full knowledge regarding the pendency of the present Letters Patent Appeal. It is being submitted that the seizure of the disbursement unit by covering the same through plastic cover is highly risky as plastic is static charge material, it is highly inflammable and dangerous. It has been contended that plastic may cause fire, particularly, during day time, on account of sunlight and also otherwise.

5. Learned counsel for the appellant-applicant has, thus, submitted that the appellant be permitted to exhaust his petroleum tank inasmuch as the storage of petroleum product (motor spirit as well as high speed diesel) is very risky as the outlet/disbursing unit has been sealed. It is submitted that the appellant's request to postpone the seizure for a week has been ignored by the authorities, which has necessitated filing of the present interlocutory application.

6. In view of the nature of prayer made and also in view of the urgency of the matter, this interlocutory application is heard along with the appeal itself.

7. In view of the background of the aforementioned facts and circumstances, learned counsel for the petitioner-appellant has submitted that the action of the respondent-Housing Board, refusing to the grant of 'No Objection Certificate' for opening a



petrol pump, is illegal and arbitrary and is also discriminatory as the respondents have issued a 'No Objection Certificate' for setting up a petrol pump on a commercial plot in the same locality; whereas the petitioner, who fulfills all the necessary criteria for grant of 'No Objection Certificate', has been denied the same.

8. It is contended by learned counsel, appearing on behalf of the petitioner-appellant, that after the petitioner-appellant came in possession of Plot No.DS/24-L, situated at Lohia Nagar, Kankarbagh, Patna, by virtue of the Tripartite Deed of Agreement, dated 25.08.2004, the petitioner's son, being unemployed, submitted an application before the Housing Board, in the year 2005, for granting permission for setting up a petrol pump. The representation of the petitioner came to be processed by the order of the competent authority/officer of the respondent-Housing Board. By office order, dated 21.04.2005, addressed to the Managing Director (respondent No. 2), it was mentioned/recommended that there would be no technical difficulty to the Housing Board if permission was granted to Dhrub Prasad for opening a petroleum product retail shop (petrol pump). It has been submitted by the learned counsel for the petitioner-appellant that thereafter, a detailed report, under the signature of competent authority/officer of the respondent Board, was submitted, on



28.10.2005, to the Managing Director stating therein that permission can be granted for opening a petrol pump on the same condition/on the same rate, which has been paid by the allottee of Plot No.DS-7, a petrol pump, which was already running. Accordingly, the petitioner-appellant was required to submit an affidavit to the said effect so that calculation for the rate of compound interest can be made by the concerned authority for issuance of a direction to the Revenue Officer of the Board. Learned counsel for the appellant further contended that the then Managing Director of the Housing Board, upon perusal of the report, dated 21.04.2005, and the report, dated 28.10.2005, gave a direction, on 05.12.2005, in favour of the petitioner-appellant.

9. Learned counsel for the appellant further submits that the notings in the file of the appellant also indicated that certain consultations were made with the architect regarding the site and, after consultation with Bharat Petroleum Corporation. On 20.12.2005, a verification/enquiry report was submitted after detailed verification/enquiry of the site of the said Plot No.DS-24/L with the authorities of the Indian Oil Corporation. According to the appellant, his case was highly recommended by the competent authority of the Board, which came to the conclusion that the location of Plot No.DS-24/L was in the prime locality and



fulfilled all the conditions, which were necessary for opening a petrol pump. It was only thereafter that the matter proceeded in favour of the petitioner-appellant for calculation of the rate of interest, which would be proper and in tune with the costs raised for allotment of Plot No.DS-7. Thus, the records of the appellant's case was tagged with that of Plot No.DS-7 by office order, dated 01.06.2007. However, the Managing Director came to be transferred and the case of the petitioner-appellant for grant of 'NOC' drifted on account of the laches of the Housing Board.

10. Learned counsel for the appellant has further submitted that in view of the recommendation made by the Managing Director of the Housing Board, the appellant approached and got clearance for opening petrol pump on the aforesaid commercial plot from other authorities including Petroleum Company and the District Magistrate, etc. In anticipation of grant of 'No Objection Certificate' from the Housing Board, the petitioner-appellant invested a huge amount and proceeded to open the petrol pump on the aforesaid plot. The appellant also went on knocking at the doors of the Board for issuance of 'No Objection Certificate' for opening of petrol pump on his plot, but the same, finally, came to be refused by the Housing Board by issuance of Letter No.6844, dated 4.11.2010



(Annexure 9). It is submitted by the appellant that the impugned order, dated 4.11.2010, communicated vide Letter No.6844, dated 4.11.2010, referred to another letter, dated 17.10.2007, contained in Letter No.5101, stating therein that the appellant's case for grant of 'NOC' had already been rejected by the aforementioned letter and, as such, the subsequent application of the appellant, dated 19.7.2010, was considered and rejected. Thus, the permission to open a petrol pump, on commercial Plot No.DS-24/L, could not be issued in favour of the petitioner-appellant.

11. It was against the aforementioned letter that the petitioner-appellant preferred a Writ Application, bearing CWJC No.7726 of 2011. However, the writ application did not find favour with the Writ Court and, thus, the present intra Court Appeal.

12. Learned counsel, appearing on behalf of the appellant, has argued that the respondents have acted in a wholly arbitrary manner inasmuch as the appellant, having fulfilled all the criteria and being in possession of the 'No Objection Certificate' from the District Magistrate and the Bharat Petroleum Corporation, and also being in absolute possession of Plot No.DS-24/L, ought not to have been denied grant of 'No Objection Certificate' by the Housing Board. It is contended that keeping in view the fact that



Plot No.DS-24/L is for the purpose of shops and godowns only and the Managing Director of the Housing Board, having clearly recommended for grant of 'NOC' after calculation of extra costs and interests, the petitioner could not have been deprived of the 'NOC' to enable him to operate petrol pump. It was pleaded by the appellant that the decision, taken by the authorities regarding rejection of his representation filed at the Janata Darbar, vide Letter No.5101, dated 17.10.2007, was utterly wrong and the same was never communicated to the appellant. The document marked (Annexure B) only appears to be a draft for approval and the actual order has not been brought on the record. Thus, the contention of the Housing Board that the appellant attempted to open the petrol pump on the aforesaid land in spite of rejection of his prayer after investing huge amount is misconceived. The appellant had invested a huge amount only after the matter had moved in favour of the appellant and positive directions/report had been made by the then Managing Director. The only thing remained was calculation of costs and interests, but the same was kept in abeyance by the Revenue authorities in the Housing Board.

13. Learned counsel for the appellant has also submitted that in view of Clause 10 of the Lease Deed entered into by the Board, special provisions have been made to the effect that the

plot, in question, can be used for office, shops and godowns and the petrol pump comes under the definition of `Shop' as defined in Section 2(16) of the Bihar Shops and Establishment Act, 1953. For ready reference, Section 2(16) of the aforementioned Act is quoted hereunder:

“Shop means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers and includes an office, store-room, godown, warehouse and work place, whether in the same premises or elsewhere, used in connection with such sales or services, but does not include a restaurant, a residential hotel, eating house, theatre or other place of public amusement or entertainment.”

14. In the light of such definition of the `Shop', it is contended by the learned counsel for the appellant that the petrol pump also comes within the purview of the definition of `Shop' as services rendered at petrol pumps are in the nature of retail sales. It is the contention of the learned counsel for the appellant that the appellant's case, falling within the aforesaid ambit, makes him clearly entitled to grant of `NOC' and denial of the same by the Housing Board is wholly illegal and arbitrary. Moreover, learned counsel for the appellant has urged that such a denial of `NOC' to

the appellant was clearly discriminatory and violative of Articles 14 and 16 of the Constitution of India inasmuch as the respondent-Housing Board had granted 'No Objection' to a person for opening a petrol pump over Plot No.DS-7 in the same locality, but had denied the same to the appellant.

15. In support of his contention that the petitioner-appellant's case fits within the definition of 'Shop', several decisions have been cited, which are as follows :-

- “1. AIR 1955 S.C., 62.
2. Labour and Industrial Cases, 1973, Part-1, Page-239.
3. AIR 1964 Madras, Page-131.
4. AIR 1972 SC, Page-1479.
5. AIR 1984(2) SC, Page-1700.
6. AIR 1963, Andhra Pradesh, Page-332.”

16. We may hasten to add that the definition of 'Shop' in Bihar Shops and Establishment Act, 1953, is of no relevance to in the present case inasmuch the Act deals with *any premises, where goods are sold, either by retail or wholesale or where services are rendered to customers and includes an office, store-room, godown, warehouse and work place, whether in the same premises or elsewhere, used in connection with such sales or services, but does not include a restaurant, a residential hotel, eating house, theatre*

or other place of public amusement or entertainment, and the definition of shop is given in the context of the legislation and not meant for universal application.

17. Learned counsel, appearing on behalf of the Housing Board, has seriously contested the appeal and vehemently opposed the arguments advanced by the appellant and has sought to justify the same. The grounds on which the actions of the Housing Board were justified are :

- (i) The Lease deed contains specific provision that the appellant would have to use the premises, in question, only for the purpose of office, shops and godowns and not for any other purpose;
- (ii) The Board shall comply with the guidelines in accordance with the provisions of the Bihar State Housing Board Act, 1982. As per Section 28(2) of the aforesaid Act, a clear definition has been carved out between the shops and fuel depots. Therefore, the Bihar State Housing Board Act does not include fuel depots in its criteria of shops;

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- (iii) Plot No.DS-7 was specifically marked for the purpose of petrol pump; whereas Plot No. DS-24/L (appellant's plot) was earmarked for shops, offices and godowns. In accordance with the aforementioned decision, the plot was auctioned and Plot No.DS.-7 was auctioned at a higher rate than Plot No.DS-24/L;
- (iv) Moreover, the mere recommendation of the Managing Director to the Revenue Division of the Housing Board to calculate the rate of interest and differential cost could not vest the appellant with the right to establish a petrol pump over the land without obtaining 'No Objection Certificate';
- (v) It was averred, on behalf of the Housing Board, that the then Managing Director had no power to convert the purposes of the aforesaid plot and the Board alone was competent to covert the usage of aforesaid plot. Mere recommendation by the



Managing Director does not confer any right on the petitioner-appellant and the recommendation as above could not be deemed to be a decision of the Board. As such, any action, taken by the appellant towards investment and setting up of petrol pump, could not vest a right in him for grant of 'No Objection Certificate'.

18. Repelling the arguments advanced by the appellant, the Housing Board has rejected the plea of the appellant stating that the recommendation of the Managing Director was alone not sufficient for change of user of land. The appellant was not entitled to embark on setting up of petrol pump only on such recommendation. The matter had to go through the Board of respondents before grant of any such permission to the appellant, which was also clearly indicated in the note, dated 28.10.2005. The recommendation of the Managing Director was subject to the note "Ansh (Ka)". Furthermore, the Estate Officer had clearly written that for the purpose of opening a petrol pump and after issuance of 'No Objection Certificate,' it was necessary to place the draft of the 'NOC' before the Members of the Board. Thus, it is clear that it was necessary to take the permission of the Board

for issuance of 'NOC' as the Managing Director alone could not proceed to act without the decision of the Board.

19. Having heard Mr. Navin Kumar, learned counsel for the appellant, Mr. Lalit Kishore, learned Senior Counsel, appearing on behalf of the respondent-Housing Board, and Mr. Madhuresh Prasad, learned counsel, appearing for Bharat Petroleum Corporation Ltd., and upon perusal of all the facts and circumstances of this case, this Court notices that Plot No. DS-24/L, situated at Lohia Nagar, Kankarbagh, District-Patna, was settled with the original lessee for use thereof only for office/shops/godowns purposes. This is fully endorsed from the Deed of Tripartite Lease (Annexure 1).

20. After considering all aspects of the matter, we, thus, come to the following conclusions:

(i) The appellant had applied for a 'No Objection Certificate' for starting a petrol pump at Plot No.DS-24/L, which was earmarked for shop/office/godown.

(ii) Though favourably considered by the Housing Board, the representation of the appellant for grant of 'No Objection Certificate' was, ultimately, rejected by the impugned order. However, an order, purported to have been passed, in this regard, against the appellant, in the year 2007, was never

communicated to him. The appellant, therefore, remained uninformed as regards the rejection of his request for 'No Objection certificate'.

(iii) The appellant had applied for, and on being granted permission to set up a petrol pump over the aforesaid land by the District Magistrate, and the Bharat Petroleum Corporation Ltd. having granted the said 'No Objection Certificates', the appellant has invested huge amount for setting up the petrol pump.

(iv) The rejection of the representation of the appellant by the Housing Board on the premise that the land, in question, was earmarked for a shop and not for a petrol pump and, as such, the 'NOC' cannot be granted in his favour, is, thus, arbitrary and untenable in the eyes of law.

(v) So far as the sealing for the petrol pump is concerned, we notice that the respondent-Housing Board has sealed the premises and petrol pump of the appellant, though the lease agreement does not entitle the Housing Board to do so when the licence to run the petrol pump has been granted by the District Magistrate and Bharat Petroleum Corporation Ltd. This act of the respondents, in placing the petrol pump under seal, especially, when the District Magistrate has issued 'NOC', appears to be in

excess of the jurisdiction vested in the Housing Board.

(vi) The appropriate situation would be to forward the rejection order to the District Magistrate for further action in the case of the appellant so as to initiate appropriate proceedings against him for cancellation/revocation of the licence granted by the Bharat Petroleum Corporation Ltd.

21. We, however, agree with the cause assigned by the appellant for such an action has been explained by them stating that they had made an application for grant of 'No Objection Certificate', which was considered favourably and the Managing Director of the Housing Board recommended in his favour for grant of 'No Objection Certificate' subject to the only condition that the petitioner-appellant would have to make good the differential amount of costs and compound interests payable thereon, as have been deposited by the owner of Plot No.DS-7, which was a plot carved out for establishing a petrol pump.

22. On consideration, we also find ourselves in agreement with the learned counsel for the appellant's submission that in view of such recommendation, the appellant had also taken an 'NOC' from the District Magistrate, Patna, and the Petroleum Company and had, thus, proceeded to establish the petrol pump after investing a huge amount. Thus, they contended that the



action of the respondents in not granting the 'NOC' is wholly illegal and arbitrary and was also violative of Articles 14 and 16 of the Constitution of India inasmuch as another similarly situated plot owner has been granted the 'NOC', but the same was denied to the appellant. However, we hold that the respondents' action in rejecting the prayer of the appellant for grant of the 'NOC' on premises, which is not tenable in law, was, thus, arbitrary and fit to be set aside.

23. We have observed that the appellant's case was kept pending after favourable consideration of the representation, for a considerable length of time, during which period, the appellant was granted licence by the Petroleum Company and also the District Magistrate to further his project by setting up the petrol pump. In view of the aforementioned facts and circumstances, we find and hold that the impugned order, rejecting the 'NOC' to the appellant, is based on misappreciation of fact and law. It is, accordingly, set aside

24. The petrol pump was functioning on Plot No.DS-24/L and while the appellant was holding a valid licence, the respondent-Housing Board could not have sealed the premises inasmuch as no such power stands vested in the Board.

25. We, therefore, direct that the Managing



Director, Bihar State Housing Board shall take steps immediately for removing the seal affixed by it over the petrol pump of the appellant inasmuch as the petrol, being highly combustible material, is lying uncared for in the petrol pump in question. We further make it clear that it would be open for the Housing Board to approach the District Magistrate concerned for cancellation of licence in accordance with law, but until the time the licence is cancelled, it would be too dangerous to allow the highly inflammable substance to remain stored at the petrol pump in question.

26. I.A. No.364 of 2016, thus, stands allowed to the extent that the Housing Board shall break the seal of the petrol pump immediately and may apply to the District Magistrate for cancellation of the licence in accordance with law. In the meanwhile, however, since the appellant holds the requisite licence, he must be allowed to dispose of the deposited/stored petrol from his petrol pump. We also make it clear that the appellant shall not, until clearance is given by the District Magistrate, obtain further petrol and/or bring further petrol to his petrol pump and sell the same.

27. With the aforementioned observations and directions, this Letters Patent Appeal is, thus, allowed to the

extent indicated above.

(Anjana Mishra, J)

I. A. Ansari, ACJ: I agree.

(I. A. Ansari, ACJ)

PNM

AFR/NAFR	NAFR
CAV DATE	15.03.2016
Uploading Date	16.05.2016
Transmission Date	