

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.33008 of 2014

Arising Out of PS.Case No. -213 Year- 2012 Thana -GOPALGANJ CITY District- GOPALGANJ

- =====
1. Satendra Kumar Tiwari
 2. Brij Mohan Tiwari , both 1&2 are - S/o - Ram Prasad Tiwari R/o vill- Keshav Nagar ,P.S. Gopalganj Dist- Gopalganj .

.... Petitioners

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Petitioner/s : Mr. Harendra Prasad

For the Opposite Party/s : Mr.Suresh Prasad Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

Date: 31-07-2017

This application has been filed by the petitioners under Section 482 of Cr.P.C. for quashing the order dated 21.09.2012 taking cognizance of offence under Section 353 of the Indian Penal Code and under Section 313 of Bihar Municipality Act, 2007 by Judicial Magistrate, 1st Class, Gopalganj in Gopalganj Town P.S. Case No.213/12.

2. A brief fact giving rise to the case is that Executive Officer of Nagar Parishad, Gopalganj, lodged a case against these petitioners alleging therein that they were constructing their house in Ward No.10 without procuring sanction of the map of the house by the concerned authority, the Executive Officer of Gopalganj Municipality, which is violation of Section 313 of the Bihar Municipal Act, 2007 (hereinafter to be referred to as the 'Act') a



cognizable offence, so requested to stop the construction of the house.

3. It is submitted by the learned counsel for the petitioners that the land over which construction is being made stands recorded in land records in the name of Ram Prasad Tiwari, father of the petitioner, who is still alive. He also refers to Annexure-3 rent receipt paid by the petitioners' father and house is being constructed after sanction given by the Municipal Authority. Sanction was granted on 31.01.2012 and refers Annexure-4 so factually it is not correct that any house was being constructed without sanction of the map, hence there is no violation of the provision under Section 313 of the Act. Further, notice as contained in Annexure-2 was issued by the Nagar Parishad, Gopalganj under Section 319 of the Act asking the petitioners to appear and give explanation with regard to undergoing construction without sanction of the map. The said notice was issued on 16.06.2012 and the F.I.R. of the present case was also lodged on the same day by the Executive Officer, Nagar Parishad, Gopalganj, by giving written information to the Officer –in-Charge, Town P.S. Gopalganj. So, in fact, no opportunity was given to the petitioners to submit their explanation under the provision of the Act. Further submission is that this Court by order dated 11.08.2014 had given directions to the learned A.P.P. to seek instruction for filing counter



affidavit but no instruction has been obtained so far and no counter affidavit has been filed controverting averments made in the quashing application.

4. The learned A.P.P. submits that he always sought instruction telephonically from the Executive Officer Nagar Parishad, Gopalganj but no instruction has been sent to him till date, however, he supports the impugned order.

5. It is apparent that by order dated 11.08.2014 this Court directed the learned A.P.P. to seek instruction but no counter affidavit has been filed till date. The stand of the petitioners is categorical that owner of the concerned land is their father, who is still alive and construction of the house was being done by him. Moreover, the Executive Officer of Municipality had already sanctioned the Map on 31.03.2012, despite that proceeding was initiated by lodging the F.I.R.

6. Section 319 of the Bihar Municipality Act reads as such:-

“319. No action to be taken without affording opportunity- (1) Chief Municipal Officer shall not pass any adverse order against the owner, occupier or any person responsible for construction of a building or structure of permanent nature in breach or violation of approved building construction plan or any breach or contravention of building bye-law or other parameters under this Act unless the person concerned has been afforded opportunity against such adverse order to be passed by the Chief Municipal Officer.
(2) Chief Municipal Officer shall not pass any adverse order against any registered Architect without affording opportunity of hearing to him.



(3) It shall be open to Chief Municipal Officer to pass an order stopping construction activity of a building or structure of permanent nature constructed in breach or contravention of approved construction plan or building bye- law and other parameters under this Act pending final decision by him.”

7. In view of the aforesaid provision, no final adverse order can be passed by the Chief Municipal Officer against the owner, occupier or any person responsible for construction of a building or structures of any permanent nature in breach of violation of approved plan of construction or doing any contravention of building bye- laws under the Act without giving prior opportunity to the concerned person to give explanation.

8. However, in the present case, adverse order has been passed against these petitioners without providing an opportunity to explain their stand. The same day explanation was called vide notice dated 16.06.2012 (Annexure-2) and the written information for lodging the case is also dated 16.06.2012. The owner of the land, on which construction was going, is father of the petitioners, who is still alive. The sale deed of the land is in the name of petitioners' father (Annexure-3).

9. The compliance of provision, contained in Section 319 of the Act is mandatory before passing any adverse order taking final decision against the owner, occupier or any person responsible for construction of a building or any permanent structure in violation of



approved building construction plan or in contravention of building bye-laws. In the present case, final decision without giving reasonable opportunity to petitioners to submit explanation, final decision has been taken holding therein of committing cognizable offence under Section 313 of the Act and F.I.R. was lodged which is contrary to law. Moreover, the entire fact narrated in the F.I.R. do not contain any ingredient of the offence under Section 353 of I.P.C. as there is no allegation of assault or use of criminal force to a public servant while executing his duty. The Magistrate has taken cognizance without applying judicial mind whether allegations do constitute *prima facie* such offence. So for the said reason, the entire criminal proceedings inclusive of cognizance order dated 21.09.2012 in connection with Gopalganj Town, P.S. Case No.213/12 pending in the court of learned C.J.M., Gopalganj, is hereby quashed.

10. The quashing application stands allowed.

(Arun Kumar, J.)

AnilKrSinha/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21.11.2017
Transmission Date	21.11.2017

