

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.18211 of 2017

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1. M/s Asterisk Home Pvt. Ltd through it's one of the Directors namely Sri Santosh Kumar Sinha having its registered office at A/338, A.G. Colony, P.O. - Ashiana Nagar, P.S. - Shastri Nagar, Patna - 800025, Bihar.
 2. Santosh Kumar Sinha son of Late Kaushal Kishore Prasad residing at A/338, A.G. Colony, P.O. - Ashiana Nagar, P.S. - Shastri Nagar, Patna - 800025, Bihar.

.... Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Department of Town Planning and Urban Development, Government of Bihar, Patna.
2. The Patna Municipal Corporation through it's Commissioner cum Chief Executive Officer, Maurya Lok Building, Frazer Road, Patna.
3. The Municipal Commissioner, Patna Municipal Corporation, Maurya Lok, Patna.

.... Respondents

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Appearance :

For the Petitioners : Mr. Gajendra Pratap Singh, Advocate
For the State : Mr. Ravish Chandra, AC to SC-6
For the PMC : Mr. Bindhyachal Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 06-03-2018

Heard learned counsel for the petitioners, learned counsel for the State and learned counsel for the Patna Municipal Corporation.

2. In the instant writ petition, the petitioners have challenged the order dated 12.04.2014 passed by Municipal



Commissioner, Patna in Vigilance Case No. 219(A)/2013 by which the petitioners have been directed not to make any construction over and above the second floor.

3. The facts of the case are not disputed rather they stand admitted. Petitioner No. 1 is a private limited company incorporated under the Indian Companies Act, 1956 and petitioner no. 2 is one of its directors. The company is engaged in development of property and construction of multi-storeyed building. It entered into an agreement with the land owner for construction of a multi-storeyed building over a piece of land measuring 3 kathas and 6 dhurs in the vicinity of Jhunjhun Mahal, Yarpur, Patna. It applied for sanction of building plan, which was sanctioned by the respondents for construction of building consisting of Ground +3 floors upto a height of 10.99 metres vide Plan Case No.19721/35/R-04-25/9-11-11/PMC. Initially, an order was passed by the Inspector of Police-cum-Officer-in-Charge of Gardanibagh Police Station to stop construction of apartment and multi-storeyed building, as it was constructed at a place where lane was less than 20 feet. The order passed by the Inspector of Police was challenged by the petitioners before this Court vide CWJC No.23845 of 2013. A Bench of this Court, vide order dated 10.12.2013, allowed the writ petition holding the order passed by the Inspector of Police-cum-Officer-in-Charge of Gardanibagh Police Station as unconstitutional, illegal and



unwarranted. The order passed by the learned Single Judge in CWJC No.23845 of 2013 was challenged by the Patna Municipal Corporation before the Division Bench of this Court vide Letters Patent Appeal No. 774 of 2014, but the same was dismissed on 02.08.2014 for non-compliance of the order passed by the Division Bench whereby the Municipal Corporation was directed to take steps for service of notice upon respondent nos. 1 and 2.

4. When the petitioners resumed construction, they were again issued notice by the Vigilance Officer of the Patna Municipal Corporation asking them stop construction on account of certain deviations in construction of the building.

5. Being aggrieved, the petitioners filed a contempt petition before this Court vide MJC No.485 of 2014 for initiating contempt proceeding. After hearing the parties, the said MJC No. 485 of 2014 was disposed of holding therein that in exercise of statutory power, an inspection having been done on 21.12.2013 and certain alleged deviations having been found and proceeding having been formally initiated, this would necessitate the petitioners in participating in those proceedings in accordance with law. While disposing of the MJC, the court observed :

“The Municipal Commissioner (Town Commissioner), now being in seisin of the matter and the construction having already been stopped firstly unauthorizedly for six months and now for



almost four months must take up the matter and dispose it off on merits in accordance with law. I would point out at this juncture that in view of Section 317 of the Bihar Municipal Act, 2007, the Town Commissioner cannot order demolition if deviations are within permissible limit i.e. condonable deviations, for which fine and penalty as prescribed may be realized. In view of the delay in the matter, it would be advisable for the Town Commissioner to conclude the proceedings within a period of three months from today.”

6. After disposal of the contempt petition, Municipal Commissioner, vide impugned order dated 12.04.2014, directed the petitioners not to construct over and above second floor mainly on the ground that if the third floor would be constructed, it will exceed the sanctioned height of 10.99 metre by 0.44 metre.

7. Let it be noted that against the impugned order dated 12.01.2014 passed by the Municipal Commissioner, Patna, the petitioner had filed an appeal vide Appeal No. 22 of 2014 on 2nd May, 2014 before the Municipal Building Tribunal, Patna. After filing of the appeal, the case was kept pending for sufficiently long period and, in the meantime, the Chairman of the Municipal Building Tribunal was transferred and, thereafter, the Tribunal became non-functional. It was in this situation, the petitioner filed the present writ petition before this Court on 8th December, 2017 contending that if



the statutory tribunal has become non-functional, this Court may always exercise its extra-ordinary original jurisdiction under Article 226 of the Constitution of India and take action in the matter. The writ petition having been entertained by this Court, the respondent Patna Municipal Corporation filed its counter-affidavit and contested the matter. After hearing the parties on different dates, vide order dated 29.01.2018, this Court directed respondent nos. 2 and 3 to ensure that measurement of the height of the first floor as also the height of the existing structure of the building in question be taken on 6th February, 2018 in presence of the petitioner no. 2 or the representative of the company. The respondent nos. 2 and 3 were also required to file an affidavit in this regard with regard to measurement taken on 6th February, 2018.

8. In compliance with the order passed by this Court on 29.01.2018 after holding measurement, respondent nos. 2 and 3 filed their supplementary counter-affidavit. In the said supplementary counter-affidavit in para-9 respondent nos. 2 and 3 have stated as under :-

“9. Vide order dated 29.01.2018, this Hon’ble Court directed remeasurement in presence of the petitioner. Then the technical team visited at the building in question and found that up to 2nd floor building has been constructed, remeasured the height of the building from the



plinth and found that upto 2nd floor height of the building is 9.01 meter and there is deviation from the sanction map. After construction of 3rd floor even if height of 3rd floor will be constructed within permissible limit (2.42 meter), then the total height of the building will be 11.43 meter which will exceed the permissible limit by 0.44 meter.”

9. The respondents have also annexed a copy of report along with sketch map of the measurement of the building taken by the technical team of the Patna Municipal Corporation. A perusal of the report would show that the statements made in para-9 of the supplementary counter-affidavit are not in consonance with the report and sketch map submitted by the technical team which had measured the structure of the building in question. The report and the sketch map would clearly show that the height of the building was measured from the ground level-cum-road-level upto second floor which came to 9.01 metre and not from the plinth level to second floor as stated in para-9 of the supplementary counter-affidavit. The report would further show that if third floor is constructed, its height from the ground floor would be 11.43 metre, which will be 0.44 metre more than the sanctioned height of the building, i.e. 10.99 metre.

10. Mr. Bindhyachal Singh, learned counsel for the Patna



Municipal Corporation submitted that recently Chairman of the Tribunal has been appointed and the Municipal Building Tribunal, Patna has become functional. He submitted that since the petitioners have already filed statutory appeal before the Tribunal, it would be proper to remand the matter to the Municipal Building Tribunal for adjudication. He submitted that the measurement taken by the technical team of the corporation would make it clear that upto second floor height of the building is 9.01 metre and there is deviation from the sanctioned map. He submitted that on construction of third floor even if the height would be kept within the permissible limit of 2.42 metre, the total height of the building will be 11.43 metre which will exceed the permissible limit by 0.44 metre. On query, he admitted that from the sketch map prepared by the technical team it would appear that the building was measured from the ground level-cum-road level.

11. On the other hand, Mr. Gajendra Pratap Singh, learned counsel for the petitioners submitted that it is true that the petitioners have preferred an appeal as against the impugned order passed by the Municipal Commissioner, Patna on 2nd May, 2014. However, the same remained pending for sufficiently long time and, in the meantime, the Chairman of the Municipal Building Tribunal was transferred and the Tribunal became non-functional. He submitted that once the Tribunal became non-functional, the petitioner could



not have been left remediless and in that circumstance, they preferred this writ petition, which has been heard by this Court on several occasions and now the entire facts, which are not disputed, are before this Court and, at this stage, asking the petitioners to approach the Municipal Building Tribunal, which is still not fully functional, as the Chairman of the Municipal Building Tribunal has yet not joined, would simply amount to pushing the petitioners to a stage of uncertainty and causing irreparable loss to them. He submitted that the measurement taken pursuant to the order of this Court goes to suggest that there is difference of 0.68 metre of height between the ground level-cum-road level and plinth level and deviation of 0.44 metre found by the respondents is because the measurement of height has been taken from the road level.

12. It has been rightly pleaded on behalf of the petitioners that a deviation of 0.44 metre in height of the first floor recorded in spot verification report conducted by the respondents first on 21.12.2013 and then on 07.02.2018 is because of the fact that the measurement was taken from ground level of the road and not from the plinth level, which is lower by more than 0.44 metre. There is force in the submission that if the measurement is taken from plinth level, there would be difference of height in the first floor of the building. As a matter of fact, the measurement taken pursuant to the direction of the Court, vide order dated 29.01.2018 by respondent



Patna Municipal Corporation completely settles the dispute between the parties. Sketch map appended with the report goes to suggest that there is difference of 0.68 metre of height between ground level-cum- road level and the plinth level. The sketch map further goes to suggest that from the plinth level the height of the roof level of second floor is 8.33 metre only and from the ground level to second floor roof level, the height is 9.01 metre.

13. Thus, if the measurement of the height of the building in question is taken from plinth level, there is absolutely no deviation in the height of the existing structure of the building in question. The height cannot be dependent on the circumstances over which the builder has no control. In the architecture, a plinth is the base or platform upon which a column or structure rests. A plinth is normally constructed just above the ground level and immediately after the foundation. However, it is often seen that the ground level-cum-road level increases as a result of road repairing from time to time. Such increase in road height often above the plinth causes immense difficulties to public at large. While repairing roads the contractors or the executing agencies seldom make effort to remove the old construction and instead make repairs and reconstruction on the pre-existing structure. It leads to rise in height of road level, often above the plinth level of existing houses. Such artificial rise cannot be made basis for obstructing construction as per sanctioned build



plan.

14. In **Anup Kumar vs. PRDA & Ors [2008 (1) PLJR 183]**, in more or less similar circumstance while allowing the writ petition, this Court observed as under :-

“... the height of the building would reduce each time, the road is constructed on top of the road. The height between plinth and the road level reducing with every new layer of the road if height of building is to be determined from road level and not from plinth level. Each time the height of the building would reduce. Height of building cannot be a fluctuating concept but a fixed concept and therefore, the correct measurement would be from the plinth and if that is taken into account, there does not appear to be any deviation muchless a deviation of which cognizance can be taken. It is well established that law does not take notice of minimal deviations on the principle of “de minimis”. Here the deviation was, in fact, of only 0.80 metre in height and that too because the height was measured from ground level and not plinth level.”

15. Having considered the facts of the present case and the judgment of this Court in **Anup Kumar’s** case (supra), I find that there is absolutely no deviation in respect of height of the building of the petitioners in question.

16. So far as the plea taken on behalf of the respondents to



remand the matter back to the Municipal Building Tribunal is concerned, this Court is of the opinion that asking the petitioner to approach the Municipal Building Tribunal at this belated stage after the writ petition has been entertained and parties have exchanged their affidavits and pursuant to the order passed by this Court report of the technical team of the respondent Corporation has been submitted would serve no useful purpose. Such an exercise would not be in the interest of the parties. Moreover, the bar of alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court. It is well settled principle of law that when a statutory tribunal has been created and is non-functional, this Court can always exercise its extra-ordinary original jurisdiction under Article 226 of the Constitution of India and take action in the matter. It is also well established that once the court has entertained the writ petition and the parties have argued at length, exchanged their affidavits and the case rests on undisputed facts, asking the petitioners to go back to the Tribunal after it became functional would not be proper.

17. Furthermore, in the present case, even though it is accepted that a notification has been made regarding appointment of the Chairman of the Municipal Building Tribunal, but till date the Chairman has not joined and, thus, the Tribunal is still not functional. In such circumstances, I do not think it proper to remand



the matter back.

18. For the reasons discussed above, the impugned order dated order dated 12.04.2014 passed by Municipal Commissioner, Patna in Vigilance Case No. 219(A)/2013 is set aside. The writ petition is allowed. The respondents are restrained from interfering with the ongoing construction of the building upto the third floor.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	03.04.2018
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