

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4625 of 2021

1. Kameshwar Prasad Srivastava Son of Late Ram Bilash Prasad Srivastava Resident of - The Laxmi Heritage Apartment, Mohalla- Anandpuri, P.S.- S.K. Puri, District- Patna
2. Ajay Kumar Son of Late Surendra Nath Verma Resident of - The Laxmi Heritage Apartment, Mohalla- Anandpuri, P.S.- S.K. Puri, District- Patna
3. Dipak Kumar Son of Late Bishwanath Prasad Resident of - The Laxmi Heritage Apartment, Mohalla- Anandpuri, P.S.- S.K. Puri, District- Patna
4. Smt. Rita Srivastava Wife of Bhuneshwar Sahay Resident of - The Laxmi Heritage Apartment, Mohalla- Anandpuri, P.S.- S.K. Puri, District- Patna

... .. Petitioner/s

Versus

1. The State of Bihar Through the Principal Secretary, Urban Development and Housing Department, Bihar- Patna
2. The Patna Municipal Corporation Through the Municipal Commissioner, Maurya Lok, Patna
3. The Municipal Commissioner, Patna Municipal Corporation Patna
4. The Vigilance Officer, Patna Regional Development Authority (Dissolved), Patna Municipal Corp. Maurya Lok, Patna
5. The Assistant Engineer, Vigilance Section PRDA (Dissolved), Patna Municipal Corporation Patna
6. S.B. Singh Flat No- 302, B Block, Laxmi Heritage Apartment, Anandpuri, P.S.- S.K. Puri, Patna- 800028.
7. Rakesh Kumar Flat No- 203, A Block, Laxmi Heritage Apartment, Anandpuri, P.S.- S.K. Puri, Patna- 800028.
8. Gangadhar Prasad Singh Flat No- 202, A Block, Laxmi Heritage Apartment, Anandpuri, P.S.- S.K. Puri, Patna- 800028.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Prashant Kashyap, Adv
For the State	:	Mr. Jai Ram Singh, Adv
For the PMC	:	Mr. Bindhyachal Singh, Sr. Adv with Mr. Ram Binod Singh, Adv

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE MADHURESH PRASAD)

Date : 09-05-2022

The petitioners are residents of one apartment building



named the Laxmi Heritage Apartment. Certain flat owners made a complaint alleging that the petitioners have covered the area lying below the projection from the ceiling of their apartment with iron grill which is projecting outside the building line and has been made habitable.

The complaint led to lodging of Vigilance Case No. 25B/2011 instituted under Section 36 of the Bihar Regional Development Authority Act 1981 (for short '1981 Act') read with Section 313 of the Bihar Municipal Act 2007 (for short '2007 Act'). The Engineer In-charge of the concerned locality was directed to make an inspection. He submitted a report which stated that ten flat owners including the instant petitioners have committed the violation as alleged by the complainant. Notice was then issued to the ten flat owners, including the petitioners.

It is the petitioners' case that they were never served with notice regarding the vigilance case. The order dated 04.08.2011 passed by the Municipal Commissioner in Vigilance Case No. 25B/2011, on the other hand, records that notice was issued to all the ten flat owners. The Municipal Commissioner has recorded that none of the noticees have appeared either personally or through counsel. Having recorded this situation,



which is disputed by the petitioners, the Municipal Commissioner has proceeded to record a finding that the allegation made by the complainant is correct. He has ordered for removal of the alleged illegal construction under Section 54(1) of the 1981 Act read with Section 315 of the 2007 Act.

Petitioners assailed the order dated 04.08.2011 before the Municipal Building Tribunal (for short 'Tribunal') in Appeal Nos. 25/2011 and 27/2011 filed under Section 323(1) of the 2007 Act. The Tribunal rejected the petitioners' plea regarding non-service of notice in the vigilance case proceedings. Relying on the lower court records, the Tribunal has recorded a finding that notice was sent to the petitioners and was duly served upon them, still they chose to remain absent and did not appear in the vigilance case. The Tribunal has, thus, dismissed the appeal vide judgment dated 30.07.2012 affirming the order dated 04.08.2011 passed by the Municipal Commissioner.

Another development, in the meantime, which is considered relevant for ascertaining the legality of the order dated 30.07.2012 passed by the Tribunal, is the fact that one writ petition was filed by one Santosh Prakash (another apartment owner), who is not a party to the instant proceedings, assailing the order dated 04.08.2011 passed by the Municipal



Commissioner in the vigilance case. The writ petition was numbered as CWJC No. 19207/2011. On 13.03.2012, a Bench of this Court stayed the order dated 04.08.2011 passed by the Municipal Commissioner in the vigilance case. The writ petition ultimately stood dismissed due to non appearance on 10.09.2018. In view of the order dated 13.03.2012 passed in the CWJC No. 19207/2011 staying the order dated 04.08.2011, which fact is not disputed, whether it was open to the Tribunal to proceed to consider the legality of the order dated 04.08.2011 in the two appeals No. 25/2011 and 27/2011, is also an issue which arises for consideration in the instant case.

The immediate cause of action for filing the instant writ petition is a notice dated 21.12.2020 issued by the Municipal Commissioner to the instant petitioners and six other flat owners asking them to explain within 15 days why for non-compliance of the order dated 04.08.2011 passed in Vigilance Case No. 25B/2011 and the order dated 30.07.2012 by the Tribunal, affirming the order dated 04.08.2011, the illegal structure erected by them be not demolished.

The writ petition has been filed seeking quashing of the three orders taken note of above, being order dated 04.08.2011 passed in Vigilance Case No. 25B/2011, order dated 30.07.2012



passed in Appeal Nos. 25/2011 and 27/2011 as well as the notice dated 21.12.2020.

It is the petitioners' case that the threatened demolition based on the three impugned orders is legally unsustainable for the reason that the order of the Municipal Commissioner in the vigilance case was without any notice to the petitioners. Being violative of the Principle of Natural Justice, the order is legally unsustainable. It is also their case that the alleged illegal erection cannot be said to be a construction in violation of the Bihar Building Bye-laws in view of the stipulation under Clause 4.5 of the Patna Planning Standards and Building bye-laws, 1981 (hereinafter referred as 'Building bye-laws), as approved on 15.10.1993. It is also submitted by learned counsel for the petitioners that impugned actions have been precipitated based on extraneous considerations which are obvious from the fact that without even waiting for conclusion of writ proceedings arising out of CWJC No. 19207/2011 filed by another flat owner, wherein order dated 04.08.2011 passed by the Municipal Commissioner in the vigilance case has been stayed, the Tribunal in hot haste has proceeded to affirm the order dated 04.08.2011, in the two Appeals bearing Appeal Nos. 25/2011 and 27/2011, wherein the petitioners had challenged the order



dated 04.08.2011.

Counter-affidavits have been filed on behalf of the respondents. The case of the respondents is that notice was issued to the petitioners and other six affected flat owners in respect of alleged illegal construction. They chose not to appear, and thereafter Vigilance Case No. 25B/2011 was instituted against the petitioners and after hearing the members of the complainant and based on an alleged report of the Engineer In-charge of the concerned locality, the Municipal Commissioner concluded that the petitioners have deliberately violated the rules and norms under the Building Bye-laws by making the illegal construction of iron grill beyond the building line. Accordingly, the same was ordered to be removed.

The two appeals preferred by the petitioners and other flat owners, namely, Appeal Nos. 25/2011 and 27/2011, were dismissed by a common order on 30.07.2012. The petitioners have chosen not to assail the common order passed in appeal by the Tribunal. Having done so, now they cannot be permitted to assail the order dated 21.12.2020 passed by the Municipal Commissioner, which is only a notice for ensuring compliance with the order dated 04.08.2011 passed in vigilance case, and order dated 30.07.2012 by the Tribunal, on the petitioners'



appeal. There is no plausible explanation as to why the petitioners have approached this court after inordinate delay when for about ten years prior thereto they elected not to assail either the order dated 04.08.2011 or the order dated 30.07.2012 passed by the Tribunal in the appeals.

Apart from delay and laches, the respondents have also urged that installation of iron grill was not an internal alteration of the flat. It being an external alteration, could have been done only after obtaining prior permission of the competent authority as contemplated under Section 314 of the 2007 Act. They have also placed on record a notice dated 31.05.2011 purported to have been issued in the vigilance case to all the petitioners.

A reply of petitioner No. 1, to the said notice, has also been placed on record. The same is dated 10.06.2011. In his reply, the petitioner No. 1 has denied erecting any unauthorised construction.

From perusal of the notice dated 31.05.2011, a copy of which has been enclosed as Annexure-A to the second supplementary counter-affidavit filed on behalf of the respondent Nos. 2,3,4 and 5, this Court finds that the name and address of the flat owners have been mentioned on the notice format and the date fixed (10.06.2011) has been mentioned. The



notice is under Section 36 of the 1981 Act read with Section 313 of 2007 Act containing a performatory allegation that the unauthorised construction is being undertaken by the noticees. It does not specify that there is any allegation regarding covering by iron grill of the projection beyond the building line. The petitioner no. 1, therefore, in his response, has stated that no illegal construction has been undertaken. The notice does not specify the nature of illegality alleged by the complainant, which was being enquired in the vigilance case and for which notice had been issued. Even this response of the petitioner No. 1 which has been placed on the record by the respondents themselves in the counter affidavit has not been considered by the Municipal Commissioner in the impugned order dated 04.08.2011 passed in the vigilance case.

The specific assertion of the petitioners, in the instant writ proceedings, that after the notice dated 31.05.2011, no intimation or notice regarding vigilance case was sent to the petitioners, also remains undisputed.

Coming to the merits of the allegations levelled against the petitioners that they have covered the roof projection by a grill beyond the building line, this court would consider it useful to take note of certain provisions contained in the Building Bye-



laws which were in vogue at the time when the allegation had been levelled.

Clause 2.13 of the Building Bye-laws defines the building line which reads as follows;

*“2.13. **Building Line.**- The line upto which the plinth of a building adjoining a street or an extension of a street or on a future street may lawfully extend. It includes the lines prescribed in the Patna Master plan or specially indicated in any scheme or layout plan or in these Bye-laws.”*

Having taken note of the provision regarding building line, what remains to be seen is, whether prior permission is required to be obtained for fixing grill on the area within the roof projection. In this connection Clause 4.5 of the Bye-laws is relevant, which reads as follows;

“4.5. No application and building permit is necessary for the following alterations which do not otherwise, violate any provisions regarding general building requirements, structural and fire safety requirements of the bye-laws.

(a) Providing or closing of a window or door or ventilator not opening towards other's property;



- (b) Providing intercommunication doors;*
- (c) Providing partition;*
- (d) Gardening;*
- (e) White washing;*
- (f) Painting;*
- (g) Plastering and patch work;*
- (h) Re-flooring; and*
- (i) Construction of sunshades over windows, doors
and other openings on one's own land"*

It is the specific case of the petitioners that the iron grills were fixed for their protection and safety within the area lying below the roof projection of their flat. It is nobody's case that the iron grill has been affixed beyond the existing roof projection. Thus even as per allegation, the grill at best encloses an existing roof projection of the building's own land. Such fixing of grills on the existing roof projection cannot be said to be a construction of building or any structure of permanent nature or any additional alteration or modification of an existing building as contemplated in Section 313 of 2007 Act. That being so, the prohibition prescribed under Section 313 would not be applicable to the fixing of grills on the existing projections in the petitioners' apartment building. The fixing of grills on the



existing projections is covered by Clause 4.5 (i) of the Building bye-laws, which has been taken note of above. There is no allegation that the petitioners, in any way extended the existing roof projection beyond the building line/plinth of the building. Affixing of grills on the existing projections without any extension/modification of the plinth cannot be said to be a construction within the meaning of Section 313 of the Act 2007 which reads as follows;

“313. Prohibition of construction without sanction.—No person shall construct, or commence to construct, any building or any structure of a permanent nature or execute any of the work relating to construction of building including addition, alteration or modification of an existing building in any municipal area, save and except in accordance with building bye-law.”

Having regard to the provisions relied upon by the petitioners which have been taken note of above, this Court is convinced that affixing of grills on the existing projections from the roof, that also for the purpose of safety and protection, cannot be said to be a construction within the meaning of Section 313 of the 2007 Act. The court would also find that there is not even a whisper in the entire records before this



Court that the petitioners have in any way added, extended, or materially altered the plinth area. There being no such allegation, it cannot be concluded by any stretch of imagination that as per clause 2.13 of the Building Bye-laws, as taken note of hereinabove, the building line has in any manner been violated.

The allegation of the respondents regarding the writ petition suffering from delay and laches has been taken note of only to be rejected. It is not disputed by the respondent authorities in the various affidavits filed by them that the order dated 04.08.2011 passed in the Vigilance Case No. 25B/2011 was stayed by order dated 13.03.2012 passed in CWJC No. 19207/2011. The same remained stayed till 10.09.2018, on which date the writ petition stood dismissed due to non-appearance by counsel for the petitioner. The petitioner of that writ proceedings is also one of the flat owners like the instant petitioners, though he is not a party to the instant proceedings. The stand of the petitioners that they did not consider any urgency to assail the order dated 04.08.2011 on account of stay of the order in a writ proceeding by one of the flat owners who resides in the same apartment building, appears to be a natural and legally sustainable stand. It is also worth noting that it is



only after the writ petition was dismissed for default that the authorities also have awoken from slumber and issued the notice dated 21.12.2020 threatening the petitioners with demolition of the alleged illegal construction.

This Court, at this juncture, would take judicial notice of the fact that the order dated 04.08.2011 passed in the vigilance case was stayed on account of order dated 13.03.2014 passed in CWJC No. 19207/2011 and remained stayed till 10.09.2018, when the writ petition stood dismissed for default in appearance of the counsel for the petitioner. Still the Tribunal has proceeded to pass the final order dated 30.07.2012 dismissing the petitioners' appeal and affirming the order dated 04.08.2011. What has prompted the Municipal Building Tribunal to proceed with the appeal and consider the merits of the order dated 04.08.2011, by overreaching the process of the Court in CWJC No. 19207/2011 is intriguing, to say the least.

It is obvious from the records that the authorities themselves were aware of the stay order operating, and therefore eight years after the order passed by the Municipal Building Tribunal, the impugned notice dated 21.12.2020 had been issued. This notice provided a fresh cause of action to the petitioner. In the opinion of this court, there is no delay and



laches in view of the aforesaid discussion.

The Court, in view of the forgoing consideration and discussion, is convinced that the impugned order dated 04.08.2011 passed in Vigilance Case No. 25B/2011 is legally unsustainable. The same is hereby quashed. The order dated 30.07.2012 in Appeal Nos. 25/2011 and 27/2011 affirming the order dated 04.08.2011 also must collapse, and are hereby quashed. In view of quashing of these two order, authorities have no basis for proceeding further in the matter pursuant to notice dated 21.12.2020 issued by the Municipal Commissioner. The same is also quashed.

The writ petition stands allowed in the above terms.

(Madhuresh Prasad, J)

I agree
Chakradhari Sharan Singh, J:

(Chakradhari Sharan Singh, J)

SUMIT/-

AFR/NAFR	NAFR
CAV DATE	05.05.2022
Uploading Date	10.05.2022
Transmission Date	

