

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12423 of 2019

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Reliance Jio Infocomm Ltd. A Company incorporated under the Companies Act, 1956 having its registered office at 101, Saffron, Near Centre Point, Panchwati 5 Rasta, Ambawadi, Ahmedabad- 380006, Gujarat, having its circle office at B.D. Complex, Rupaspur, Baily Road, Near Gola Road, Danapur, Patna Bihar Through its Authorized Signatory, Sh. Nand Kishore, male, age about 49 years S/o Late Jamadar Rai working as General Manager.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Urban Development and Housing, Government of Bihar, Patna.
2. Patna Municipal Corporation Maurya Lok Complex, Buddha Marg, Patna, Bihar- 800001.
3. The Municipal Commissioner Patna Municipal Corporation, Maurya Lok Complex, Buddha Marg, Patna, Bihar- 800001.
4. The Principal Secretary Department of Information Technology, Government of Bihar, 2nd Floor, Technology Bhawan, Vishweswaraiya Bhawan Campus, Bailey Road, Patna- 800015.
5. The Director General Department of Telecommunications, Ministry of Communications, Government of India, Sanchar Bhawan, 20 Ashoka Road, New Delhi- 110001.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Mrigank Mauli, Sr. Advocate Mr. Rajesh Ranjan, Advocate Mr. Ratnakar Pandey, Advocate
For the Respondent/s	:	Mr. Yogendra Pd. Sinha (AAG-7)
For the PMC	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Vipin Kumar Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJIV ROY
ORAL JUDGMENT

Date : 16-08-2023



This order be read in continuation of the order dated 25.07.2023.

2. The petitioner has challenged the letter nos. 4517 dated 08.04.2019 & 6853 dated 27.05.2019 passed by the Municipal Commissioner, Patna Municipal Corporation (henceforth for short 'the PMC') by which taking into account the fact that without any permission, for laying out optical fibers, 3060 poles were erected in Patna and as such, an order was passed under Section 429 read with Section 435 and 438 of the Bihar Municipal Act, 2007 (henceforth for short 'the Act') read with relevant sections of Indian Telegraph Act, 1885 with a further direction to the company to pay penalty of Rs. 1,21,80,000/- within a period of 15 days and to remove their installations and submit compliance report failing which the company will attract more penalty and action under section 399 of 'the Act'

3. The facts of the case has already been incorporated in the order dated 25.07.2023 and it is also clear that there was no answer from the learned Senior Counsel for the petitioner on query whether the mandatory 60 days period which the company ought to have waited for, was violated or not.

4. The matter then zeroed down to the issue



relating to application of Section 429 of ‘the Act’ read with Sections 435 and 438.

5. Section 429 of ‘the Act’ read as follows:

**“CHAPTER XLIII
Offences and Penalties**

429. Punishment for certain offences

Whoever-

(a) contravenes any provision of any of the Sections, sub-sections, clauses, provisos or any other provision of this Act, or

(b) fails to comply with any order lawfully given to him or any requisition lawfully made upon him under any of the said Sections, sub-sections, clauses, provisos or other provisions, shall be punishable-

(i) with fine which may extend to rupees five thousand, or with imprisonment which may extend to six months, or both:

(ii) in the case of continuing contravention or failure, with an additional fine which may extend to rupees one hundred for every day during which such contravention or failure continues after conviction for the first such contravention or failure subject to a maximum of rupees five thousand.

Comments & Case Laws

Construction of building defying



prohibitory order - Provisions prescribed under Sections 323 and 324 of the Act are public regulatory laws. They provide for the manner in which Municipal authorities or person aggrieved may proceed in case of any dispute relating to construction of any structure or building in contravention of any building bye-laws. There are various sections prescribed under different chapters of the Act which provides for specific punishment for a specific act of omission or commission. Sections 325 and 435 of the Act, both cannot be reconciled together. Punishment prescribed under Section 429 of Act cannot be imposed on a person who is found guilty of committing an offence punishable under Sections 325 or 435 of the Act. Provision prescribed under Section 429 of the Act is sweeping in nature and is too vague and, it is difficult to comprehend that punishment prescribed therein would be applicable to alleged contraventions under Sections 323 and 324 of the Act. Pratik Sinha vs. State of Bihar, 2016 (3) PLJR 274.

6. Further in 2019, the section 435 of ‘the Act’ as it then was (when the order was passed) read as follows:

“435. Encroachment on streets.

No person shall cause any encroachment or obstruction on any municipal property such as



a street or footpath or park without specific permission of an officer of the Municipality duly authorized to grant such permission. Any person causing such encroachment or obstruction on any municipal property as aforesaid shall, on conviction, be punishable with fine which may extend to one thousand rupees.

Comments & Case law

Construction of building defying prohibitory order- In absence of any other definition given under the Act, word "offence" under the Act shall have same meaning as given under Section 40 of IPC, wherein definition of word "offence" has been given in three parts. Sections 323 and 324 of Act provide for demolition, stoppage, alteration and sealing of work not in accordance with sanction of building plan and set out specific procedure for the same including provisions for appeal to the Municipal Building Tribunal against order of Chief Municipal Officer. In view of definition of "offence" as defined under IPC and considering infraction of law as described under Sections 323 and 324 of Municipal Act, infraction cannot be termed as an offence. *Pratik Sinha vs. State of Bihar, 2016 (3) PLJR 274.*

Removal of encroachment.



Authorities while passing administrative orders involving civil consequence have to act in consonance with principles of natural justice. Once Magistrate issued notice to petitioners to show cause and petitioner did file show cause, he should have also considered materials produced on behalf of petitioners in support of his case that he had not made any unauthorised encroachment and constructions which he had made were in accordance with plan approved by Municipal authorities. Bishwanath Prasad vs. Municipal Board, Chapra, 1977 BLJR 256.”

7. It is further necessary to incorporate Section 438 of ‘the Act’ also which read as follows:

438. Offences by companies. - (1) *Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render



any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - *For the purposes of this Section,-*

(a) "Company" means a body corporate, and includes a firm or other association of individuals, and

(b) "Director", in relation to a firm, means a partner in the firm."

8. The case of the learned Senior Counsel for the petitioner-company has that it has no jurisdiction to pass



an order under Section 429 of 'the Act' which is in the exclusive domain of the Magistrate.

9. According to him, the section 429 of 'the Act' comes under Chapter XLIII which deals with the offences and penalties and Section 429 (b)

(i) clearly speaks about fine which extend to Rs. 5,000/-

(ii) or with imprisonment which extend to six months or both.

10. According to him, the fine and the imprisonment are intertwined *inasmuch* as the authority dealing with this section has the power either to impose fine or to pass an order for imprisonment or both. As such, this power has to be exercised only by a Magistrate authorized for the said purpose and the Municipal Commissioner, of 'the PMC' had no authority to pass the same.

11. It is his further case that even the section 435 of 'the Act', as it then was, speaks that any person causing encroachment or obstruction on any municipal property, on conviction will be punishable with fine which may extend to Rs. 1000/-. He as such submits that the word conviction has been used and as such it could be used only in accordance



with law for which the Municipal Commissioner is not authorized.

12. Learned Senior Counsel has straightway taken this Court to an order of Patna High Court in the case of **Pratik Sinha vs. The State of Bihar & Ors.** reported in **2016 (4) PLJR 274**. He wanted the Court to take note of paragraph nos. 20 and 21 of the said order which read as follows:

“20. The word "offence" has not been defined under the Act.

21. Thus, in absence of any other definition given under the Act, the word "offence" under the Act shall have the same meaning as given under Section 40 of the IPC, wherein the definition of the word “offence, has been given in three parts. In the first part, an act or a series of acts, or an illegal omission or series of illegal omissions which is made punishable by the IPC is an "offence". In the second part, some chapters and sections have been specifically mentioned in which the word "offence" denotes a thing which the IPC or any "Special law" or "Local law punishable. In the third part, certain sections of the IPC have been mentioned wherein the word "offence" means the same thing punishable under the "Special law" or "Local law" with



a minimum period of six months with or without fine.”

13. He further took this Court to paragraph- 30 of the case cited by him which read as follows :

“30. The fallacy in the argument of the counsel appearing for Respondents No. 5 & 6 can further be demonstrated from looking at the issues from another perspective. The argument preferred by the counsel of the PMC is based on the premise that Section 429 covers the entire spectrum of violation/contravention of the provisions of the Act and that Sections 323 and 324 is with regard to violation by the builder of the norms prescribed by Municipal Act. To the contrary, the said two sections are about empowerment of the Chief Municipal Officer with regard- as to how and to the extent he can stop further infraction of the norms of the Municipal Bye-laws and the remedy that a person aggrieved may have against the order of the Chief Municipal Officer. If there can be any contravention of the said section or its sub-sections, it can be by Municipal Authorities alone and not by a builder”.



14. He lastly drew the attention of this Court to paragraph -31 to point out that in terms of section 429, the criminal justice system can be moved only with the permission of the competent Magistrate.

15. Paragraph 31 of the order read as follows:

“31. This Court is of the further opinion that if the alleged offence is about mere disobedience of the orders then the only punishment that has been prescribed is 6 months of imprisonment or fine or both and thus, in terms of CrPC is a non- cognizable offence for which no FIR can be instituted and the criminal justice machinery can be moved only with the permission of the competent Magistrate”.

16. He as such submits that the Municipal Commissioner has no authority to pass such order and according to learned Senior Counsel:

(i) he could have approached the Designated Officer in terms of chapter – V of the Gazette Notification dated 15.11.2016 issued by the Ministry of Communication, Govt. of India, New Delhi which deals with the dispute resolution and/or

(ii) alternatively, he could have approached the Magistrate duly authorized for the said purpose.



17. Thus according to him, the order in question has to go.

18. Mr. Bindhyachal Singh, learned Senior Counsel representing 'the PMC' and defending the order has taken this Court to Section 2 of 'the Act' which deals with the definition.

19. He has further drawn attention of this Court to Section section 2(21) which deals with the Chief Municipal Officer and read as follows:

2(21) "Chief Municipal Officer" means-

- (i) in relation a Municipal Corporation, the Municipal Commissioner; and*
- (ii) in relation to a Municipal Council or Nagar Panchayat, the Municipal Executive Officer: "*

20. He further took this Court to section 2(62) of 'the Act' which defines Municipal Magistrate and read as follows:

2(62) "Municipal Magistrate" means the Municipal Magistrate appointed under Section 398"

21. This Court perused Section 398 of 'the Act' which defines the Municipal Magistrate and read as follows:



398. Municipal Magistrate.- (1) *The State Government may, in consultation with the High Court of the State, designate one or more Judicial Magistrates for the trial of offences against-*

(a) this Act, and

(b) the Rules and the Regulations made thereunder, and may prescribe the time within which, and the place at which, such Judicial Magistrate or Judicial Magistrates shall sit for such trial of offences.

(2) Every such Judicial Magistrate shall exercise all other powers, and discharge all other functions, of a Magistrate as provided in this Act.

(3) Every Judicial Magistrate appointed under sub-section (1) shall be called Municipal Magistrate.

(4) Each Municipal Magistrate shall have jurisdiction over such municipal area or areas as may be specified by the State Government by notification.

(5) The procedure in the court of a Municipal Magistrate shall, except where otherwise specifically provided in this Act, be in accordance with the provisions of the Code of Criminal Procedure, 1973.

22. This Court further deems it appropriate to



incorporate section 399 of 'the Act' which deals with certain offences to be cognizable:

399. Certain offences to be cognizable.- *The offences mentioned in Section 313, Section 323, Section 324, Section 370 and Section 435 shall be cognizable within the meaning of the Code of Criminal Procedure, 1973.*

23. Learned Senior Counsel for 'the PMC' thereafter took this Court to Section 126(c) of 'the Act' which deals with the internal revenues of the Municipality which read as follows:

"126 (c) fees and fines levied for performances of regulatory and other statutory functions."

24. Similarly, he took this Court to Section 127(l) of 'the Act' which deals with power to levy taxes on communication towers and related structure/Discantennas.

25. Learned Senior Counsel wanted the Court to also go through section 129(b) which deals with the issue of municipal licenses for various non-residential uses of lands and buildings as also section 129(c) (vi) which deals with such other activities which requires a license or permission under the provision of this Act.



26. According to him, an amendment took place vide Bihar Municipal (amendment) Act, 2021 and referred to amendment in section 435 of Bihar Act 11, 2007 with specific reference to Clause-3 which read as follows:

435. *Encroachment on streets.* *No person shall cause any encroachment or obstruction on any municipal property such as a street or footpath or park without specific permission of an officer of the Municipality duly authorized to grant such permission. Any person causing such encroachment or obstruction on any municipal property as aforesaid shall, on conviction, be punishable with fine which may extend to one thousand rupees.*

27. At this stage, learned Senior counsel for the petitioner pointed out that the order in question is of 2019 and as such, the amendment that took place in 2021 is not applicable in this particular case.

28. The sum and substance of the argument of learned Senior Counsel for 'the PMC' is that the Municipal Commissioner has not passed any order for imprisonment and as such, he was well within his power to impose fine upon the petitioner-company in the light of the aforesaid provisions as narrated/submitted by him.



29. According to him, when this Court has come to the conclusion that there was violation on the part of the petitioner-company, in view of the fact that a decision has been taken by the Municipal Commissioner under Section 429 of 'the Act' with the only direction to pay the fine, the same need not be interfered with.

30. It is his further submission that in absence of any order of imprisonment, it would be futile to stretch the matter further to decide whether the Municipal Commissioner was within his domain to pass the said order or not.

31. To the question put by the Court on when the section 429 of 'the Act' defines fine or imprisonment or both and are intertwined and as such whether the Municipal Commissioner could have instead referred the matter to the Magistrate duly authorized for the aforesaid purpose or not, the answer was evasive.

32. To another question as to whether the Municipal Commissioner could have taken the route of approaching the Authorized Officer as earlier pointed out by a learned Central Government Counsel (in line with Chapter – V of the Gazette notification of the Ministry of



Communication, Government of India dated 15.11.2016), it was the submission of the learned Senior counsel that once the Court has come to a conclusion that there has been violation by the petitioner-company, it should not harp on the said section of 'the Act' that has been used by the Municipal Commissioner while passing the order in question.

33. Learned Central Government Counsel on the other hand submits that either of the parties could have moved before the Authorized Officer, the Principal Secretary as per the notification dated 19.06.2017 issued by the Ministry of Communication, Govt. of India, New Delhi to resolve the dispute, which they failed to do.

34. Having gone through the rival submissions put forward by the parties; this Court finds force in the submission advanced by the learned Senior Counsel for the petitioner. It would be appropriate to go through the order passed by the Municipal Commissioner of 'the PMC in its letter no. 4517 dated 08.04.2019 (Annexure-9 to the petition).

35. The order starts with the following two lines

[u/s 429 read with sections 435 and 438 of the Bihar Municipal Act, 2007 and read with the relevant sections of the Indian Telegraph Act, 1885]"



36. Further paragraph nos. 5 and 6 needs to be quoted herein below:

“5. As it is apparent from the record that Reliance Jio Infocomm Limited has not only violated the provisions of the Indian Telegraph Act 1885 but also contravened the provisions of the Bihar Municipal Act, 2007 in general and the section 435 in particular, the company is liable for penalty under the provisions of Chapter-XLIII of the Act. Section 435, offences under which is cognisable within the meaning of the Code of Criminal Procedure, 1973 under section 399, stipulates that

"No person shall cause any encroachment or obstruction on any municipal property such as a street or footpath or park without specific permission of an officer of the Municipality duly authorized to grant such permission. Any person causing such encroachment or obstruction on any municipal property as aforesaid shall, on conviction, be punishable with fine which may extend to one thousand rupees."

Further, the offence made by the company is also covered under Section



429 which provides that: Whoever.

(a) contravenes any provision of any of the sections, sub-sections, clauses, provisos or any other provision of this Act, or

(b) fails to comply with any order lawfully given to him or any requisition lawfully made upon him under any of the said sections, sub-sections, clauses, provisos or other provisions, shall be punishable-

(i) with fine which may extend to rupees five thousand, or with imprisonment which may extend to six months, or both:

(ii) in the case of a continuing contravention or failure, with an additional fine which may extend to rupees one hundred for every day during which such contravention or failure continues after conviction for the first such contravention or failure subject to a to a maximum of rupees five thousand.

6. The report of Additional Municipal Commissioner (Enforcement) dated 05.04.2019 mentions a total installation of 3060 poles within the jurisdiction of Patna Municipal Corporation. Accordingly, the company is table for a penalty of INR 1000 per pole,



treating installation of a pole as an occurrence of offence, and thus for a total penalty of INR 30,60,000. The company is also liable for a penalty for the continuing contravention for 30 days since the date of the notice that is 07.03.2019 under section 429 of the Act. This attracts the penalty of INR 100 per day per pole for 30 days resulting in a penalty sum of INR 91,80,000. Hence, the company is directed to pay the total penalty sum of INR 1.21,80,000 within fifteen days of the service of this order. Also, the company is directed to immediately remove their installations and submit a compliance report to the authority failing which will attract more penalty and also action under the provisions of section 399 of the Act. Also, the directors of the company Reliance Jio Infocomm Limited- shall explain under section 438 of the Act that why a separate penal proceeding should not be initiated against them for violating the provisions of the Act”.

37. A perusal of the aforesaid order demolishes the submissions put forward by the learned Senior Counsel for ‘the PMC’ that there may be error in the use of section which can be ignored. The Municipal Commissioner



specifically incorporated in paragraph-5 the chapter XLIII of 'the Act' which deals with the offences and penalties and has incorporated the entire section 429 of 'the said Act'. This clearly shows that he was fully conscious of the fact that he is passing an order under Section 429 of 'the Act'. Whether he had the power to do so; in the words of learned Senior Counsel for the petitioner which the Court is also in agreement; he did not had such power.

38. This gets enforced by the case cited by the learned Senior Counsel for the petitioner in **Pratik Sinha (supra)** in which paragraph nos. 30 and 31 clearly deal with the section 429 of 'the Act' which hold that when the punishment that has been described is six months of imprisonment or fine or both, the criminal justice machinery can be moved only with the permission of the competent Magistrate.

39. Learned Senior Counsel for 'the PMC' himself took this Court to section 2 (62) which speaks about the Municipal Magistrate to be appointed under Section 398 and we have already dealt with section 398 and in that background, the Municipal Commissioner ought to have referred the matter to the Municipal Magistrate for needful.



40. To cut short the matter, the Municipal Commissioner of 'the PMC' could have filed complaint before the Magistrate authorized for the said purpose for an appropriate action which was not done.

41. Admittedly, the Municipal Commissioner had another option of approaching the Authorized Officer in line with the Gazette notification dated 15.11.2016 issued by the Ministry of Communication, Govt. of India, New Delhi.

42. Having gone through the facts of the case, the rival submissions put forward by the respective counsels and the case cited by the learned Senior counsel for the petitioner of **Pratik Sinha (supra)**; this Court holds that the Municipal Commissioner of 'the PMC' was not authorized to pass an order under Section 429 read with section 435 and 438 of the Bihar Municipal Act, 2007 and as such, the orders in question i.e. the letter no. 4517 dated 08.04.2019 and 6853 dated 27.05.2019 issued by him have to go.

43. Accordingly ordered.

44. The letter no. 4517 dated 08.04.2019 (Annexure-9) and letter no. 6853 dated 27.05.2019 (Annexure-12) passed by the Municipal Commissioner, Patna Municipal Corporation stand quashed.



45. ‘The PMC’ is free to take fresh steps against the petitioner-Company in accordance with law for the alleged violations so made by it.

46. The writ petition stands disposed of with the aforesaid observations.

(Rajiv Roy, J)

Jagdish/-

AFR/NAFR	AFR
CAV DATE	08.08.2023
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Transmission Date	

