

Sudha Devi and ors. Vs. State of Bihar and ors.

Sudha Devi and ors. Vs. State of Bihar and ors.

SooperKanoon Citation : sooperkanoon.com/138938

Court : Patna

Decided On : Sep-16-2002

Judge : Aftab Alam, J.

Appeal No. : C.W.J.C. No. 8466 of 2002 with C.W.J.C. Nos. 8447, 8510, 8542, 8651, 8667, 8696, 8750, 8690, 8896, 8

Appellant : Sudha Devi and ors.

Respondent : State of Bihar and ors.

Advocate for Pet/Ap. : Shri. M.P. Gupta

Disposition : Writ Petition Allowed

Judgement :

Aftab Alam, J.

1. The Patna Regional Development Authority (hereinafter the Authority) started its latest demolition drive at Frazer Road, running through the heart of Patna. Interestingly the demolition derive was launched, professedly, in pursuance of an order passed by this Court.

2. On 21.7.2002 a public notice issued by the Authority appeared in the Hindustan and the Times of India, two daily newspapers, one in Hindi and the other in English. As this notice forms the basis of the demolition campaign, it will be useful

to reproduce it in full. The notice loosely translated in English reads as follows:

In view of the order passed by the Hon'ble High Court on 17.7.2002 in CWJC No. 2290 of 1990 (Arun Kumar Mukherjee v. State of Bihar and Ors.) a thorough investigation of the parking places and set-backs in the buildings situate on both sides of Frazer Road shall be made by the Patna Regional Dev. Authority on 22.7.2002 from 10 in the forenoon to 5 in the after-noon. Hence, the owners of the buildings are requested to keep available at the site a copy of the map sanctioned by the Patna Improvement Trust/Patna Regional Dev. Authority/the Competent Authority in respect of the houses constructed by them, so that the inspection teams constituted at the level of the Authority may take measurements of the building and investigate the parking provisions and it may be ascertained whether or not in the buildings constructed by them arrangements have been made for adequate parking spaces. If the owners of the concerned buildings fail to make available a copy of the sanctioned map of their buildings at the time of inspection, it would be deemed by the Authority that the houses constructed by them are unauthorized and accordingly action shall be taken under the provisions contained in the current bye-laws to remove the illegal houses constructed by them. These may be treated as strict instructions.

3. It does not seem to have occurred to the Authority that the time of twenty four hours allowed by the notice was ridiculously short. The owner of a building may be out of station; he may be unwell or even Hospitalised. A building may be occupied by a tenant or tenants. The tenant may not even get a chance to inform the land-lord within twenty four hours; in case of several tenants each may think that it was the responsibility of the others to inform the land-lord. Any number of possibilities come to mind in which the owner of the building may not even be aware and the building may be deemed to be unauthorised and steps may be taken by the Authority for its removal. Further, the direction that the owners should remain in waiting at their respective buildings from ten to five also does not appear to this Court to be quite reasonable.

4. This notice appeared on a single day (21.7.2002) in two newspapers as stated above. And on the following day (22.7.2002) teams from the Authority descended

on different sites on Frazer Road where they not only marked structures, portions of buildings etc. which they believed to be unauthorised and which, according to them, was required to be forcibly demolished but in some cases actually carried out the demolitions. The special feature of this demolition drive was that it was totally action oriented and verbal; apart from the public notice issued in the news papers on 21.7.2002, there is not a word in writing. The structures, portions of buildings etc. were identified for demolition by putting some marks over them and even in cases where demolition was actually carried out, no order in writing was given to the owner/occupier of the building on the basis of which he could avail of the statutory remedy of appeal; no time was given either to seek the remedy of appeal provided under the law.

5. In those circumstances, the first three writ petitions of this batch (CWJC Nos. 8466, 8447 and 8510 of 2002) were filed in this Court on 25.7.2002 with the petitioners making the grievance regarding the manner in which the Authority was carrying out the demolitions. The three writ petitions were taken up on 26.7.2002 when a copy of the order, dated 17.7.2002 passed in CWJC No. 2290 of 1930 Arun Mukherjee v. State of Bihar and Ors. was produced before the Court on the basis of and in compliance with which the Authority claimed to have launched the demolition drive. This Court found that in that order there was no sanction for the impugned actions of the Authority. On that date, therefore, this Court passed an order restraining the Authority from forcibly demolishing any portions of the houses/constructions owned/occupied by the petitioners in the three writ petitioners. In that order this Court also made the following observations:

It is seen above that the notice gives only 24 hours time to all the owners of houses en Frazer Road to taken out the sanctioned maps of their respective houses from wherever they might be lying and to remain present awaiting the visit of the inspection teams. The failure to comply with the direction would put the house/building in the category of unauthorised construction and hence, liable to demolition. Such a Draconian notice might have been issued by a Kangaroo Court and this Court wonders whether the course of action indicated in the notice can be called a civilized procedure in law. The-Court further fails to appreciate why the Authority may not achieve its objects following the provisions of the Regional Dev.

Authority Act, the Rules and the bye-laws framed thereunder. Under the statutory provisions the power given to the Authority cannot be said to be insufficient or inadequate by any means.

6. Nine more writ petitions came later which were made part of this batch and the order of stay passed in the 1st three cases was extended to the other cases as well.

7. On notice being issued the Authority filed a consolidated counter affidavit which was used in all the cases of the batch. In the counter affidavit filed by the Authority, it was stated that on Frazer Road, one of the main arterial roads of the town, many unauthorised constructions were made in areas which were shown in the sanctioned maps of the buildings as parking spaces or which were required to be kept open and vacant as buildings' set-backs. There were a number of constructions which were unauthorised and illegal for different other reasons; that it was necessary to remove and demolish those unauthorised structures, as directed by this Court, in order to ease the flow of traffic on that road and the Authority had started the demolition drive with that end in view.

8. In the counter affidavit, it was stated that the Authority had divided Frazer Road, length-wise, in three zones and it constituted three different teams for each of the three zones. The buildings standing on the two sides of the road were similarly classified under six categories which were described as follows:

- (i) Existence of the buildings shown in the municipal survey map held in the year, 1932-33;
- (ii) Buildings which have been constructed after obtaining sanction from the competent authority;
- (iii) Buildings which have been constructed in deviation from the sanction plan;
- (iv) Buildings which have been constructed after obtaining sanction the landholders have furnished undertaking on affidavits that they shall remove their old existing structures from the spot but in fact they have not acted upon;

(v) Buildings/structures which have neither been constructed after obtaining sanction nor building owners are ready or willing to obtain post factor sanction;

(vi) Structures of buildings so erected on either side of Frazer Road violating the Buildings bye-laws or creating obstruction in free flow of traffic.

9. Then those buildings were identified which fell in the first and the second categories. In respect of the building in the first category, namely, those buildings which were shown in the municipal survey map of 1932-33, it was stated in para 8 of the counter affidavit that the direction was given 'not to touch those buildings as far as they have been shown in the certified map.'

10. It can be shown without any difficulty that the classification made of buildings as indicated above bordered on naivety. In any event, the inspection teams going to the site did not follow the classification of buildings or the direction given to them which is evident from the fact that some of the cases of this batch come from buildings which are identified in the counter affidavit as falling under category I in respect of which the direction was not to touch those buildings.

11. After giving an outline of the general principles on which the operations proceeded the counter affidavit took up the cases of this batch, one by one, forgiving the Authority's comments on them.

12. With regard to six writ petitions in this batch (CWJC Nos. 8447, 8510, 8542, 8896, 8897 and 9297 of 2002) it was stated that those were filed by tenants in occupation of the buildings/structures and on the basis of a division bench decision of this Court in S K. Puri Boring Road Veyapar Sangh v. State of Bihar and Ors. 1995 (1) PUR 418, it was contended that the petitioners in those cases, being tenant, had no right to question or raise objections against the demolition of the structures/buildings by the Authority even without any notice or intimation to them. Having thus brushed aside the challenge by the tenants, the counter affidavit proceeded to take up the rest of the cases filed by the house owners and with respect to them, it was stated that the respective buildings/structures in question were unauthorised and therefore, liable to demolition; in some cases the constructions were made without any sanction by the competent authority and in

other cases the constructions were made in unauthorised places like parking spaces or set-backs or were made in violation of the regulatory bye-laws framed by the Authority.

13. In course of hearing of these writ petitioners, Counsel after Counsel appearing for the different petitioners in this batch of cases submitted that some of the buildings coming under the threat of demolition were very old and were constructed at a time when there were no rules or bye-laws regulating construction of buildings in Patna, The Counsel for the petitioners tried to show to this Court that their respective buildings/portions of building, other structures facing the threat of demolition did not violate any regulatory provisions and even in case there were any violations those were very old, beyond the purview of the current law and in any event those were within the condonable limits.

14. On the other hand, Mr. H.S. Himkar, learned Counsel appearing for the Authority made a spirited argument justifying and defending the action of the Authority. Mr. Himkar submitted that half of the writ petitions of this batch were liable to be dismissed on the threshold as those were filed by tenants and, according to him, tenants in any case had no right to be heard in this matter, as decided by a bench of this Court in S.K. Puri Boring Road Veyapari Sangh (supra). As regards the remaining writ petitions filed by the house owners Mr. Himkar submitted that in each of those cases the structure/building/portion of the building was constructed in violation of the regulatory bye-laws and in some cases even without obtaining sanction from the competent authority. Mr. Himkar further submitted that the residents of Frazer Road, including the petitioners before this Court did not deserve any indulgence from the Authority or from this Court because they had not cared even to obtain a post facto sanction for their constructions from the Authority despite repeated notices issued in that regard in pursuance of the earlier directions given by this Court.

15. Mr. Himkar made long and strenuous submissions, backed by some painstaking research. He presented before the Court a brief outline of the development of the regulatory provisions regarding construction of buildings in Patna and traced out the legislative history on the subject. He presented before

me provisions from (i) Local Self Government Act, 1885, (ii) Patna Administration Act, 1915, (iii) Bengal Municipal Act, 1884, (iv) Bihar & Orissa Municipal Act, 1922, (v) Building Bye-laws of the Patna Municipality, 1935, framed under Section 195 of the Bihar & Orissa Municipal Act, (vi) Bihar Restriction of Uses of Land Act, 1948 and the rules framed there-under, (vii) Bihar Town Planning and Improvement Trust Act, 1951 and finally the current legislation in force, namely, (viii) the Bihar Regional Development Authorities Act, 1981. Mr. Himkar contended that contrary to the common mis-conception and the submissions being advanced on behalf of the petitioners, regulatory provisions regarding construction of buildings had come into force in Patna, albeit in an embryonic stage as early as in 1948, if not in 1935.

16. Though I appreciate the research made by Mr. Himkar and the amount of work put in by him in this case, it is evident to me that his submissions are not quite germane to the main issue arising in this case. The issue in this case is not whether the structures/buildings/portions of the buildings facing the threat of demolition by the Authority were constructed in violation of the substantive provisions of the regulatory bye-laws. But the issue is whether there is any sanction in law for the manner and the way in which the authority proposed to remove/demolish the structures etc. which it believed to be unauthorised.

17. The question of means and ends may be an arguable and debateable issue in philosophy, ethics or in politics but not in law. In law apart from the object or the end, the procedure followed by a statutory body for the realisation of the object must also be duly sanctioned by the statute. No object howsoever laudable and commendable can justify following a procedure for its realisation which is not sanctioned by law. The Authority is a creature of the statute, namely, the Bihar Regional Dev. Authorities Act. It has a legal obligation to perform certain functions specified in the Act; but those functions must be performed in the manner laid down in the Act. All its action must, therefore, conform to the provisions of the Act and it is not free to act beyond the parameters of the statute and in a manner not sanctioned by the statute.

18. For the Authority the only source of power to pass an order of demolition of building and to carry out the forcible demolition on the basis of such an order is

contained in Section 54 of the Act which is as follows:

(54) Order of demolition of building.- (1) Where any development or erection of building has been commenced or is being carried on or has been completed in contravention of the Regional Plan, Master Plan or Zonal Development Plan or without the permission, approval or sanction referred to in Sections 35, 36, 37 or in contravention of any conditions subject to which such permission, approval or sanction has been granted, any officer of the Authority empowered by it in this behalf may, in addition to prosecution that may be instituted under this Act, make an order briefly stating the reasons, therefore, directing that such erection or development work shall be removed by demolition, filling or otherwise by the owner thereof or by the person at whose instance the erection or development work has been commenced or is being carried out or has been completed within a period of thirty days from the date on which a copy of the order of removal has been delivered to the owner or that person, as may be specified in the order, and on his failure to comply with the order, any officer of the Authority may remove or cause to be removed the erection or development work and the expenses of such removal shall be recovered from the owner or the person at whose instance the erection or development was commenced or was being carried out or was composed, as arrears of land revenue;

Provided that no such order shall be made unless the owner or the person concerned has been given a reasonable opportunity to show cause why the order should not be made.

(2) Any person aggrieved by an order under Sub-section (1) may appeal to a Tribunal constituted under this Act against that order within thirty days from the date thereof; and the Tribunal may after hearing the parties to the appeal either allow or dismiss the appeal or reverse or vary the order or any part thereof.

(3) The decision of the Tribunal on the appeal and subject only such decision the order under Sub-section (1) shall be final and conclusive.

(4) The provisions of this section shall be in addition to and not in derogation of any other provisions relating to demolition of buildings contained in any other law

for the time being in force.

(emphasis added)

19. It is undeniable that the impugned action of the Authority does not conform to the provisions of Section 54 of the Act. The Authority did not give the owner or the person concerned a reasonable opportunity to show cause why the order of demolition should not be made. The Authority did not pass an order in writing under Sub-section (1) of Section 54 and did not allow to the person concerned a period of thirty days to take the order in appeal.

20. A 'reasonable opportunity to show cause¹ which is expressly made the sine qua non of an order of removal/demolition under Section 54(i) of the Act would naturally include a proper notice to the concerned person. Section 67 of the Act lays down the manner in which the service of notice has to be effected. Section 67 is as follows:

(67) Service of notice, etc. - Every notice, order or other document required by this Act or any rule or regulation made thereunder shall be signed by the Secretary of the authority with its common seal and shall be deemed to have been duly served upon the party or parties concerned if the service has been effected in any one of the following manners:

(i) By personal service.

(ii) By registered post.

(iii) By affixing it at the house or the principal place of business of the party concerned as the case may be.

(iv) By publication in one prominent Hindi and one English daily news-paper published within the area of the authority in their two consecutive issues:

Provided that-

(a) in case the party to be served is a registered company, a firm of partnership, a body corporate, a local authority, a society or other body, it shall be served upon

the principal officer of the said firm or organisation as determined by the Secretary of the Authority in his discretion and it shall then be deemed to have been duly served on each director, partner or member of the said firm or organisation;

(b) in case the party to served is a minor or a lunatic it shall be served upon his guardian as determined by the Secretary of the Authority in his discretion;

(c) the manner of service mentioned either in Sub-clause (iii) or Sub-clause (iv) above shall be resorted to only after attempt at service either under Sub-clause (i) or Sub-clause (ii) has failed.

21. No notice under Section 67 was given to the petitioners or for that matter to any one else.

22. Mr. Himkar submitted that though a notice might not have been issued and served upon the petitioners as provided under Section 67 of the Act, a public notice would be equally good and would equally serve the purpose of giving a reasonable opportunity to show cause.

23. It is difficult to accept the submission. In its nature a proceeding under Section 54 of the Act is directed against an individual owner/occupier of the building and normally, therefore, a proceeding under Section 54 of the Act can only be initiated on the basis of a notice addressed to the concerned individual owner/occupier. And it is difficult for me to envisage a situation where a public notice can be said to be an effective substitute for an individual notice to the person concerned. But in this case even the statutory provision for issuance of a public notice (for other matters, and not for a proceeding under Section 54 of the Act) was not properly complied with. Section 68 of the Act provides for issuance of public notice which reads as follows:

(68) Public notice to be in writing signed by the Secretary and sealed and widely published in the locality by affixing copies and by beat of drum by publishing in local English and Hindi daily newspapers. - Every public notice given under this Act shall be in writing under the signature of the Secretary of the Authority with its common seal and shall be caused to be widely known in the locality affected

thereby affixing copies thereof at conspicuous public places within the said locality and by publishing the same by beat of drum as also h, one prominent local English and one Hindi daily newspaper in their three consecutive issues.

(emphasis added)

24. Section 68 requires the publication of the notice in three consecutive issues of the news papers. In this case the notice was published on a single day (21.7.2002). The section also requires affixing copies of the notice at conspicuous places within the locality and publishing the same by beat of drum. Admittedly, none of these requirements were fulfilled. Hence, the action of the Authority was not even in conformity with the provisions of Section 68 of the Act.

25. Apart from Section 54 of the Act, no other provision of the Statute was brought to my notice that might confer upon the Authority the power to carry out any forcible demolition of structures/buildings/portions of buildings.

26. At his stage, this judgment should have, logically, come to the close. But the Authority insists that it acted in pursuance of the direction given by this writ Court, vide order dated 17.7.2002 passed in C.W.J.C. No. 2290 of 1990 Arun Kumar Mukherjee v. State. It is, therefore, to be seen how far the action of the Authority can be said to be in conformity with the order of this Court.

On 17.7.2002 a bench of this Court passed an order in C.W.J.C. No. 2290 of 1990 Arun Kumar Mukherjee v. State of Bihar and Ors. on a number of issues, such as, Chiraiya Tand Bridge, Mithapur Bus Stand, Transport Nagar, Removal of Khatahs etc. At the end of that order the following observations/directions were recorded, under the heading:

Regarding Removal of Construction From Parking Places

During the course of argument, it was contended that many persons have made multi-strayed buildings and unauthorised construction at the places, which, according to the map, have been left for parking.

The authorities have assured that they will take immediate steps to remove the constructions from the parking places or unauthorised places. They further assured that they will start to remove such constructions from the Frazer Road itself. They also assured that they will proceed with the matter within four days from today.

Put up this matter for consideration on 24.7.2002.

Let a copy of this order be handed over to the learned A.A.G. II, Shri M.P. Gupta, learned Counsel for the petitioner and Mr. H.S. Himkar, learned Counsel for the P.R.D.A.

(emphasis added)

28. In this order, I completely fail to see any direction for the Authority to act in the manner as it did or any sanction for the authority to act in a manner not provided for under the Act.

29. It may be noted here that in the counter affidavit the Authority has sought to justify its action completely and totally on the basis of the order, dated 17.7.2002 which is quoted above, In this regard, in paras 3, 4 and 5 of the counter affidavit it is stated as follows:

(3) That on 17.7.2002, C.W.J.C. No. 2290 of 1990 Arun Kumar Mukherjee v. The State of Bihar and Ors. was listed on the daily cause list under the heading 'For Orders' before the Division Bench comprising of the Hon'ble Mr. Justice Nagendra Rai and Hon'ble Mr. Justice R.S. Gaig.

(4) That it is pertinent to mention here that it is well known that action taken by the Authority is being monitored by the aforesaid Division Bench of this Hon'ble Court. In such a situation, on 17.7.2002 a large number of members of the Bar have raised their grievances that they have to face a lot of difficulties in parking their vehicles on Frazer Road right from Patna Railway Junction Round about to Maurya Clark Hotel Roundabout. The deponent, District Magistrate, Patna, Senior Superintendent of Police, Patna and the Superintendent of Police (Traffic) were present in the Court. Since the grievances raised by the learned Members of the

Bar were found sustainable in the eye of law and justified, the Hon'ble Court has been pleased to direct the Authority to proceed within four days from the date of the order for removal of unauthorised structures particularly structures made on parking spaces on Frazer Road in first step. Accordingly commitment was made by the Authority before the Hon'ble Court that unauthorised structures particularly on the parking spaces shall be removed in first step and also those structures which would be found impediment in free flow of traffic shall be removed forthwith, as per directions/guidelines given earlier by this Hon'ble Court.

(5) That in compliance of the orders passed by the Hon'ble Court and further in order to ensure the commitment made on behalf of the Authority, the Authority issued a public notice in the daily newspaper, dated 21.7.2002 mentioning therein that for identifying unauthorised structures particularly structures erected on the parking spaces and the structures creating obstruction in free flow of traffic.

30. The statements made in the counter affidavit seem to be at variance with the order passed by this Court on two basic issues, In the Counter affidavit, it is stated that 'for removal of unauthorised structures Particularly structures made on parking spaces on Frazer Road', the direction was given by the Court. On the other hand, the order of the Court clearly records that with regard to removal of constructions from the parking places or other unauthorised places the assurance came from the authorities.

31. Apart from this and regardless of the question whether the direction was given by the Court or the assurance came from the authorities, there is absolutely nothing to suggest that the Court gave any sanction to the Authority to act in a completely lawless manner for the removal of the unauthorised constructions. All that the Court said was, 'they further assured that they will start to remove such constructions from the Frazer Road itself. They also assured that they will proceed with the matter within four days from today.'

32. I fail to see in this observation even a hint that the Authority was free not to follow the procedure prescribed by the law and to act in a manner as it pleases.

It is further stated in the counter affidavit that 'on 17.7.2002 a large number of members of the bar have raised their grievances that they have to face a lot of difficulty in parking their vehicles on Frazer Road right from the Patna Railway Junction roundabout to Maurya Klark hotel roundabout.... Since the grievances raised by the learned members of the bar were found sustainable in the eye of law and justified the Hon'ble Court has been pleased to direct the Authority to proceed within four days from the date of the order for removal of unauthorised structures....

33. If it is meant to suggest that lawyers, as a group, have a privileged position before this Court, it is both incorrect and uncharitable to this Court. Before this Court there are no privileged or under-privileged groups. Before this Court, all are equal.

34. On the basis of the discussions made above, I have no hesitation in holding that the impugned action of the Authority in proceeding with its demolition drive on the basis of the public notice issued in the news papers on 21.7.2002 does not have a sanction either under the Act or in the order passed by this Court. The Authority was, therefore, plainly acting beyond its powers and legal authority and must be restrained from carrying any demolitions in pursuance of the public notice issued in the two newspapers of 21.7.2002.

35. Before concluding this matter, I would like to observe that the problem of encroachments and unauthorised constructions in this town cannot be effectively resolved in this knee-jerk fashion. And it must be realised that the Authority itself is responsible to a very large extent for this problem. This town has grown and expanded in the most haphazard and unplanned manner. In the period of over fifty years after independence only three housing colonies were set up in a planned manner by the Government or Governmental agencies; Rajendra Nagar was set up by the Patna Improvement Trust. S.K. Nagar by the Housing Board and S.K. Puri again by the Improvement Trust. All other housing colonies/apartments were made by private individuals, Co-operative Societies or Companies. The private enterprise is mostly guided by profit motive and cares little for norms of safety or town planning etc.

36. The Patna Regional Dev. Authority was established in September, 1974 under an Ordinance. What is the score card of the Authority during the 28 years of its existence. It has not set up a single housing colony. It has of course built its own office and has constructed a market complex around it. It is indeed a nice market complex from the standards of this town but that was about twenty years ago. During the past twenty years, it has not taken up a single development project in town.

37. Now, simply because the Authority failed to develop the town and help in its planned growth and expansion, life did not come to a stand still; an entire generation was born after the Authority was established in 1974 and migration from the rural areas to the capital town continues unchecked. The growing population needs living space. If the Authority does not provide it and if the Authority does not set up housing colonies and market places, people would construct houses in the midst of agricultural fields and for want of planned market places, shops and stores would mushroom on pavements and other public places. This is exactly what has been happening in this town for the past many years. And after those houses are built up and shops/stores come up then the Authority follows them, some times after five or ten years with demolition schemes and demolition orders.

38. No one likes to live in cramped or claustrophobic conditions. If people live in unauthorised structures and try to earn their livelihood from shops, stalls and Gumties constructed unauthorisedly, they do so because they are compelled to do so and they have no other options. It is not the intent of this Court to suggest that unauthorised structures should be accepted or regularised or constructions made in violation of the regulatory bye-laws should be condoned. Unauthorised constructions and encroachments must be dealt with sternly, though by strictly following the procedure established by law. But the real and lasting solution for problem of encroachments and unauthorised constructions lies only in setting up new colonies, market areas and in developing satellite town. By taking up the periodical demolition drives the Authority at best deals with the problem superficially because people uprooted from one place are bound to find shelter and squat at some other places where they would once again make unauthorised

structures in due time.

39. It is high time that the Authority should pause in its demolition drives and take a deep and honest look at itself to see how far it has lived up to the object for which it was formed by the government as provided in Section 11 of the Act.

40. I recommend that the Authority should ponder over this matter and should take up the development of the town and its planned growth and expansion in right earnest.

41. In the result, these writ petitions are allowed. The Authority is restrained from carrying on any forcible demolition on the basis of the public notice issued in the newspapers on 21.7.2002.

42. There shall be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com