

Radhey Shyam Vs State of U.P. and Others

Court: Allahabad High Court

Date of Decision: Dec. 9, 1987

Acts Referred: Constitution of India, 1950 " Article 226

Uttar Pradesh (Regulation of Building Operations) Act, 1958 " Section 10, 10(1), 12, 12(2), 41

Citation: (1988) 1 AWC 639

Hon'ble Judges: A.N. Dikshita, J

Bench: Single Bench

Advocate: R.N. Singh, for the Appellant;

Final Decision: Allowed

Judgement

A.N. Dikshita, J.

By means of this petition under Article 226 of the Constitution of India the petitioner has prayed for issuing a writ of

certiorari for quashing the order dated 16-9-71 passed by the Prescribed Authority, Regulated Area, Nagar Mahapalika, Varanasi (hereinafter

referred to as the Prescribed Authority), the order dated 15-6-1976 passed by the Commissioner, Varanasi Division/Chairman, Controlling

Authority, Regulated Area, Nagar Mahapalika, Varanasi (hereinafter referred to as the Controlling Authority) and the order dated 16-7-76 passed

by the State Government marked as Annexure I, II and VI respectively to the writ petition.

2. In brief the controversy relates to a projection in premises No. D-15/53, Faridpur Varanasi. On an inspection by the Prescribed Authority it

was found that certain constructions had been raised by the petitioner without necessary sanction or obtaining approval of the Prescribed

Authority. A notice as contemplated u/s 10 of the Regulation of Building Operation Act (hereinafter referred to as the Act) was issued to the

petitioner on 28-8-70 requiring him to show cause as to why the impugned constructions be not demolished. A reply to the show cause notice was

submitted by the petitioner claiming that whatever constructions are found to be unauthorised or illegal may be compounded. The petitioner

categorically submitted in. the show cause notice that the projection which is the subject matter of the controversy in this writ petition was in

existence from before. However, the Prescribed Authority not being satisfied with the explanation to show cause notice passed an order on 17-1-

71 calling upon the petitioner to remove the projection within 3 days. As regards other constructions which were alleged to be unauthorised and

illegal the Prescribed¹ Authority agreed for their being compounded.

3. Aggrieved by the order dated 17-9-71 the petitioner preferred an appeal to the Controlling Authority but the same was dismissed on 15-6-76

while holding that the projection mentioned in the order of the Prescribed Authority was newly erected and that such projection towards the road

has created obstruction and must not be permitted particularly when it abuts the road.

4. Consequent to the dismissal of the appeal the petitioner preferred a revision to the State Government within the meaning of Section 41 Sub-

clause (3) of the Act. The revision was also dismissed on 7-3-77 on the ground that the encroachment is on the road of the Nagar Mahapalika and

shall not be compounded.

5. The case of the petitioner is that House No. B-15/53, Mohalla Faridpur, Varanasi city was constructed in the year 1946 by Sri Nityanand Rai,

the vendor of the petitioner after getting the plan duly sanctioned by the Municipal Board, Varanasi which was in existence at the time. Certain

repairs consequent to the purchase were carried by the petitioner and in view of the need for a room it was constructed on the 3rd storey. The

petitioner received a notice under the provisions of the Act of 1958 for removing the projection which is in the nature of a verandah over the

Chabutara. The duly sanctioned map of the Municipal Board was filed before the Prescribed Authority who still maintained in the order of the

demolition that the projection is on road, it is further stated on behalf of the petitioner that the quinquennial assessment of the period 1961-67

shows the existence of a verandah as back as 1961. It is also set out in the petition that there was no evidence that the verandah or the projection

had been newly constructed and the exparte report of the inspector was totally incorrect as it was not based on any material. In view of the orders

of the authorities mentioned above the petitioner has approached this Court under Article 226 of the Constitution of India for quashing such orders.

6. A counter-affidavit repudiating the averments in the writ petition has been filed. A rejoinder-affidavit has also been filed. The case of the

Respondents is that the constructions on the ground-floor, first-floor and second-floor has been raised without necessary sanction or permission of

the authorities. In paragraph 6 of the counter-affidavit it has been mentioned that projection is over the road of Nagar Mahapalika hence the same

cannot be compounded. It has also been alleged that the plan submitted by the petitioner before the Prescribed Authority was not a sanctioned

plan and as such could not be relied upon.

7. Heard counsel for the parties.

8. Learned Counsel for the petitioner has submitted that the Respondents misappreciated the facts and manifestly erred in law inasmuch as the plan

related to the period 1946 when Nagar Mahapalika was not in existence. Further the Respondents misconstrued that the projection is on the road.

The other constructions of the petitioner though unauthorised are sought to be compounded. A perusal of the order of the Controlling Authority

reveals that the projection towards the road has created obstruction and must not be permitted particularly when that abuts the road- In the

counter-affidavit it is stated in para 6 reproduced above that the projection is over the road of Nagar Mahapalika hence the same cannot be

compounded.

9. Learned Counsel for the petitioner during hearing produced two photographs of the building which were filed as annexures to the supplementary

affidavit. Learned Standing Counsel submitted that he has not to file any counter-affidavit. The scheme underlying the Act is that once an area has

been declared to be a regulated area any erection or re-erection or substantial change in any building is to take place in accordance with the.

regulations made under the Act and that too after obtaining the permission of the Prescribed Authority and in the event of any construction being

made without obtaining permission, or in derogation of the conditions mentioned in such condition suitable action has to be taken by the authorities,

Section 10(1) of the Act runs thus;

10. (1) Where the erection or re-erection on or material change in any building has been commenced or is being carried on or has been completed

in contravention of any regulation made under this Act or without the permission referred to in Section 6 or in contravention of any condition

subject to which such permission has been granted, the Prescribed Authority may, without prejudice to the provision of Section 9 make an order

directing that such erection, re-erection or material change it shall be demolished by the owner thereof within such period not exceeding two

months as may be specified in the order, and on the failure of the owner to comply with the order the Prescribed Authority may itself through the

local authority concerned or through such other agency as it thinks fit cause the erection, re-erection or material change to be demolished and the

expenses of such demolition shall be recoverable from the owner in the same manner as an arrears of land revenue. Provided that no such order

shall be made unless the owner has been given an opportunity of being heard.

It is thus clear that Section 10 of the Act provides that when an erection or re-erection of a building is carried out in contravention of the Regulation

or without or in contravention of the conditions of the permission, the Prescribed Authority may make an order directing such erection or re-

erection to be demolished.

10. Section 12(2) of the Act provides that the Prescribed Authority By and if required by the Controlling Authority shall compound any offence

punishable under the the Act on such terms inclusive of the payment of sum of money by way of compounding fee. The powers u/s 12 as well as

u/s 10 are distinct with each other. However, it is well-settled that both u/s 12 and Section 10 of the Act certain amount of discretion has been

given to the authorities. Such a discretion has to be exercised in the light of the subject of the enactment. The Prescribed Authority as well as the

Controlling Authority and the State Government have failed to exercise discretion so as to achieve the intent of the Legislation. Reasons have been

set forth by the authorities concerned which are at variance with each other. There is no iota of evidence that such projections towards the road

had created obstructions and particularly when it abuts, the road. This view of the Controlling authority is untenable in view of the evidence on

record. Likewise the State Government in the absence of any cogent evidence came to the conclusion that the illegal constructions are on the road

of Nagar Mahapalika and as such cannot be compounded.

11. During the bearing no cogent reason has been given repelling the contention of the petitioner that the projection was not in existence earlier in

the teeth of the plan that was placed before the Respondents. A perusal of the photograph clearly indicates that neither the projection abuts the

road nor does it cause any obstruction. Adjacent houses also bear similar projection but whether any action has been taken against them is not

revealing.

12. In view of the above the petition deserves to succeed and the impugned orders are liable to be quashed.

13. In the result the petition is allowed and the orders dated 16-9-71, 15-6-76 and 16-7-76 passed by the Prescribed Authority, Commissioner,

Varanasi Division/Chairman, Controlling Authority, Regulated Area and the State Government respectively are hereby quashed. Costs are made

easy.