

**(1996) 03 AHC CK 0110**

**Allahabad High Court**

**Case No:** C.M.W.P. No. 17493 of 1985

Sushil Kumar Pandeya and  
Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

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**Date of Decision:** March 11, 1996

**Hon'ble Judges:** Ravi S. Dhavan, J; A.B. Srivastava, J

**Bench:** Division Bench

**Advocate:** S.N. Singh and R.N. Singh, for the Appellant;

**Final Decision:** Dismissed

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### **Judgement**

Ravi S. Dhawan, J.

This is a petition from the city of Varanasi by which the four Petitioners seek a prerogative writ from the High Court

that the constructions which they have added on the plot which they alleged is owned by them ought not to be demolished by the Varanasi

Development Authority (hereinafter referred to as the Development Authority). This matter has been pending at the High Court for eleventh years

and though notice was issued, the Development Authority has elected not to file a counter-affidavit. The court is not inclined to grant any further

time to the Development Authority to bring a return as a reply to the writ petition into court alter the case has been pending for more than a

decade. The reason by the Development Authority may not have filed a counter-affidavit perhaps may be clear from the issues which are contained

in the writ petition.

2. The Petitioners seek a rule of mandamus that certain constructions which they have made, admittedly without any authorisation, be protected

from being demolished. The issue is not the rule of mandamus being made absolute, in fact, it is otherwise whether the action of the Respondents is such which may be certified by a writ of certiorari to be correct or incorrect. A mandamus issued on a prerogative writ only aids a writ for better understanding consequential to a writ of certiorari.

3. The petition does not append all the documents which the Petitioners may possess and this is clear from the record of the writ petition itself. Of the counter-affidavit which may not be forthcoming from the Development Authority, the Court cannot rule out the possibility of a collusion between the Development Authority and the Petitioners which is becoming apparent. In matters of urban planning with the all illegalities which are committed to disrupt planned development of towns and cities, the Development Authority takes the posture to ignore these disruptions as if to let the sleeping dog lie. Not to forget that time does not keep still to review the past.

4. The constructions which have been made are in a locality known as Tallabagh in Varanasi. Annexure 1 to the writ petition dated 18 April, 1972, is a letter which was received by the father of the Petitioners. This letter, apparently, had been written at the stage when the Petitioners' father may have applied for consideration of a certain construction plan. The Development Authority responded to say that there may be some reservations in sanctioning the plans, as submitted, as the area in question is under a development plan for the trijunction of the roads in the vicinity of the Sanskrit Vishwavidyalay (Sanskrit University). Annexure 2, dated 1 July, 1972, is a letter by the City Engineer (General), Nagar Mahapalika, Varanasi, inviting the Petitioners' father for discussions on considering the plans and the contemplated survey of the area for the purpose of purchase of the property by the Nagar Mahapalika from the Petitioner's father. This itself implies that at one stage the Nagar Mahapalika (City Corporation) was considering purchase of the land, as it was bordering a public road for the public purpose of widening the road itself. Annexure 3 to the writ petition affirms this aspect as a letter written from the Assistant Engineer, Nagar Mahapalika, dated 26 June, 1973. This letter says that should the Petitioners' father be ready for surrendering the land adjoining the road, in that case, the City Corporation would consider sanctioning the map for

the building which the Petitioners' father had intended to construct, but not near the road. Annexure 4 to the writ petition is a letter which is

addressed by the Nagar Mahapalika to the Petitioners' father. It is dated 19 November, 1973. It points out four reasons why the map, in context,

cannot be sanctioned. These aspects are : (a) the distance of the proposed constructions from the centre of the road (Nadesar-Lahurabir Road)

has not been shown in the plan; (b) the size of the six shops are too small and there is sufficient space available at the back, should the shops need

to be constructed; (c) whereas an open space of 30 ought to have been left as open towards the sky, in the map under consideration only 12 has

been left (the figures the Court is given to understand represent feet and the expression "open sky" refers to space as set back); and (d) unless the

area shown in yellow is not adhered to strictly by leaving 40 feet as conforming use of the road in front, the map cannot be considered for sanction.

5. It appears that despite the advise, warning or caution given to the Petitioners' father by the letter of the City Corporation, dated 19 November,

1973, (Annexure 4 to the writ petition), the present Petitioners, the progenies, proceeded with the constructions and this circumstance is witnessed

by a letter dated 10 November, 1983 (Annexure 5 to the writ petition). One aspect needs to be noticed that the correspondence which had

engaged the Petitioners' father prior to 1973, the U.P. Urban Planning and Development Act, 1973, had not been enacted and it is for this reason

that the dialogue was between the Petitioners' father and the Nagar Mahapalika (City Corporation). Consequently, as the Act came into effect in

the year 1973, the notice was received by the Petitioners from the Varanasi Vikas Pradhikaran (Varanasi Development Authority).

6. The notice of 10 November, 1983 (Annexure 5 to the writ petition) specifically outlines the area which the Petitioners occupied by

constructions, admittedly without any authorisation. It is the case of the Petitioners that these constructions be condoned and compounded by

levying a penalty. But under the law only that can be compounded which may be without authorisation, but could be permitted. On the other hand,

permission to build certain buildings can neither be granted nor compounded, if law itself prohibits construction of them. Conforming uses of land

are to be protected and the violation of these laws is an illegality which is incurable. The Supreme Court had made this very clear in a decision *Shri*

*K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, .*

7. The aspect of planning a public street and by the rule of law regulating and maintaining it includes the power in the municipality to regulate the

line of buildings or setting back the buildings to the regular line of a street. Street alignment and the obligation of the law to set back the building is a

well recognised concept in urban planning sufficiently provided for in Chapter XII of the U.P. Nagar Mahapalika Adhiniyam, 1959, and under

Chapter VII of the U.P. Municipalities Act, 1916.

8. On record, it is now becoming very clear that the Petitioners, apparently, were tempted to capitalise on land adjacent to a public road which

they have occupied to make a commercial venture out of it, whether the permission for making the constructions was forthcoming or not. The area

was under a development plan on a trijunction near the Sanskrit University. The Nagar Mahapalika, prior to the 1973 Act, had already expressed

it on record if the Petitioners would be willing to sell, the land could form part of the scheme for road widening.

9. The Petitioners' father and the Nagar Mahapalika were engaged in these negotiations. The Petitioners defeated the purpose of good intentioned

public planning by constructing shops aside a public road. Thus, the plan which was made for the public benefit for widening a public road

remained frustrated. In a city like Varanasi, the road, apparently, remains choked most of the times, except when traffic comes to a still when the

city sleeps. The Petitioners and others like him were frustrating and bogging down development plans and preventing an otherwise tedious

exercise, in Varanasi, of widening public roads. The issue is not so much whether the Petitioner ought to have sold this plot to the Nagar

Mahapalika as this would still remain a subject of a dialogue between the Petitioners and the Development Authority. But, of any construction

activity which the Petitioners took to frustrate a plan of road widening, the Petitioners were violating the conforming use of land and this is an

illegality which cannot be cured. Even if the Varanasi Development Authority had wanted to compound the constructions, they are prevented by law from doing so. The building which the Petitioners have put up are those which the law will not condone and the question of compounding such illegal constructions does not arise.

10. In the circumstances, the Petitioners would be well advised that as they have violated the law by putting up constructions without any authorisation, they have taken the law in their hands and indulged in illegality. The Petitioners have had no respect for the city where they live nor the law which governs it and its development plans. Public roads cannot be constructed, narrowed, choked and bottle-necks created with constructions within the proximity of sidewalks of public streets. *State of Uttar Pradesh Vs. Ata Mohd., ; Sanjay Mishra Vs. Nagar Palika, Etawah, and Vijai Kumar Gupta and Others Vs. Zila Parishad, Shahjahanpur and Another, .* Those who own properties adjacent and parallel to public road and streets cannot demolish the demarcations between the public streets and their properties. This is the line of street alignment. On one side is the public road, the public drain inclusive. On the other side is the protected setback which may be someone's property but on this setback nothing can be built. This is an area on which the law does not permit a building to be made. The law neither condones nor suffers constructions on these setback protected areas next to the roads. Setback, by its very connotation means to leave aside without stepping upon. Should anyone make the mistake to step into this area, the law will ensure that such person vacates occupation of these protected areas failing which the occupation will be removed.

11. Of the land which the Petitioners claim is theirs, it will be still open to them to enter into whatever negotiation they may have with the local administration for the purpose of road widening or keep it for them, but respecting the conforming use, unless it is used for a public purpose for executing the plan for road widening in accordance with law.

12. Thus, the Petitioners shall remove the offending constructions within a period of six months from today. Should the Petitioners not remove

these constructions themselves, then, the Varanasi Development Authority assisted by the District Magistrate, Varanasi, shall demolish them.

13. In the circumstances, the only relief which the Petitioners receive is to retain the land in question in the light of the observations given by the

Court, as above. For the rest, the petition fails.

The petition is dismissed.

There will be no order on costs.