



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 8269 of 2022

Decided on: 29.11.2022

Kamal Dev

...Petitioner

Versus

State of H.P. & Ors.

...Respondents

Coram:

Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Hon'ble Mr. Justice Virender Singh, Judge.

Whether approved for reporting? ¹ Yes.

For the Petitioner : Mr. Rajeshwar Thakur, Advocate, for the petitioner.

For the Respondents : Nemo

Tarlok Singh Chauhan, Judge

The instant petition has been filed for grant of the following substantive relief:-

(i) That the notice issued by the respondent No. 3, dated 18.11.2020 Annexure P-2 may kindly be quashed and set aside.

2. The petitioner admits that he has encroached upon the forest land in Shimla town itself and has been served with the notice of eviction dated 18.11.2020.

¹ Whether reporters of the local papers may be allowed to see the judgment? yes

3. The sole ground on which the petitioner claims a right to squat over the municipal land is that he has been paying the property tax to the Municipal Corporation, Shimla.

4. We really wonder how the mere fact of paying municipal tax would create any kind of right in favour of the petitioner so as to entitle him to keep occupying the government land.

5. It cannot be denied that post-independence almost all the cities, big or small have seen an unplanned growth and the menace of illegal and unauthorized construction and encroachments have acquired monstrous proportions and everyone has been paying a heavy price for the same. In fact, it is on account of encroachments made on the road, there are frequent traffic congestion affecting the health of the road-users. The pedestrians and road-users are the worst victim of pollution which results in skin diseases of different types, asthma, allergy and even more dreaded disease like cancer.

6. At this stage, it will be apt to quote the observations made by the Hon'ble Supreme Court in ***Shanti Sports Club v. Union of India (2009) 15 SCC 705***:-

"74 In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorized constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price

for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorized constructions, the officers of the municipal and the other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realize that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has

to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorized constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc....”

(Emphasis supplied by us)

7. The menace of illegal and unauthorized construction coupled with the encroachments was judicially noticed by the Hon'ble Supreme Court in a decision in **Dipak Kumar Mukherjee versus Kolkata Municipal Corporation and others (2013) 5 SCC 336** in the following terms:-

“2. In the last four decades, the menace of illegal and unauthorized constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions as in K.Ramadas Shenoy v. Town Municipal Council, Udipi (1974) 2 SCC 506, Virender Gaur v. State of Haryana (1995) 2 SCC 577, Pleasant Stay Holtel v. Palani Hills Conservation Council (1995) 6 SCC 127, Cantonment Board, Jabalpur v. S.N.Awasthi 1995 Supp (4) SCC 595, Pratibha Coop Housing Society

Ltd. v. State of Maharashtra (1991) 3 SCC 341, G.N. Khajuria v. DDA (1995) 5 SCC 762, Manju Bhatia v. NDMC (1997) 6 SCC 370 M.I. Builders (P) Ltd. v. Radhey Shyam Sahu (1999) 6 SCC 464, Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733, Shanti Sports Club v. Union of India (2009) 15 SCC 705 and Priyanka Estates International (P) Ltd. v. State of Assam (2010) 2 SCC 27.”

“8. What needs to be emphasized is that illegal and unauthorized constructions of buildings and other structures not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorized constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to the poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorizedly constructed multi-storeyed structures raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.”

8. Yet, again this menace of encroachment, illegal construction etc. was again noticed by the Hon'ble Supreme Court in a recent decision in ***Esha Ekta Apartments Cooperative Housing Society Limited and others versus Municipal Corporation of Mumbai and others (2013) 5 SCC 357*** wherein it has been held as under:-

"1. In the last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc. have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise."

9. The Court is dealing with public property, wherein the public has interest and it is more than settled that private interest must yield to public interest. The petitioner even as per his admitted case is an encroacher and it is more than settled that right and title of the State cannot be permitted to be destroyed so as to give an upper hand to the encroachers, unauthorized occupants or land grabbers.

10. The Hon'ble Supreme Court in **Mandal Revenue Officer vs. Goundla Venkaiah and another (2010)2 SCC 461**, observed as under:

"47. In this context, it is necessary to remember that it is well nigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.

48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate Court

and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p.660, para 12)

"12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in *P. Lakshmi Reddy v. L. Lakshmi Reddy* adverted to the ordinary classical requirement - that it should be *nec vi, nec clam, nec precario* - that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

49. A somewhat similar view was expressed in *A.A. Gopalakrishnan v. Cochin Devaswom Board* 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under: (SCC p.486, para 10)

"10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees /archakas /shebaites /employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

11. Once it is found that the petitioner is a rank - encroacher, then obviously his illegal possession cannot be permitted to be continued, that too, under the order of the court, as it is the bounden duty of the court to ensure that such wrong doer is discouraged at every stage and not permitted to prolong the litigation.

12. The very object and purpose of encroaching upon the National Highway land by raising dhaba thereupon by the petitioner is only to make a quick buck by illegal means and the same be not permissible at any costs.

13. State is ordinarily rated as virtuous litigant and it goes without saying that the property recorded in government khata is the property of the public at large and, therefore, cannot be jeopardized by an individual or handful of people. The Court while dealing with a dispute involving public property should be at guard against any fraud, collusion and concoction militating against the fair play of justice jeopardizing the interest of the State.

14. In ***M.I.Builders Pvt. Ltd. versus Radhey Shyam Sahu and others (1999) 6 SCC 464***, the Hon'ble Supreme Court in unequivocal terms held that no consideration should be shown to the builder or any other person where construction is unauthorized and it was further held that this dicta is now almost bordering the rule of law. It was further held that the Courts cannot exercise discretion which encourages illegality and perpetuates any illegality. Unauthorized construction, if it is illegal cannot be compounded and has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Further, it was held that the Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders solely on their personal predilections and peculiar dispositions. Judicial discretion

whenever it is required to be exercised has to be in accordance with law and set legal principles.

15. We may, at this stage, take notice of a fairly recent judgment of the Hon'ble Supreme Court in ***Supertech Limited vs. Emerald Court Owner Resident Welfare Association & Ors. 2021 (10) SCC 1***, relating to the unauthorised construction raised by the petitioner therein beyond two storeyed sanctioned plan.

16. It shall be apt to reproduce the relevant observations, which read as under:-

159. The rampant increase in unauthorized constructions across urban areas, particularly in metropolitan cities where soaring values of land place a premium on dubious dealings has been noticed in several decisions of this Court. This state of affairs has often come to pass in no small a measure because of the collusion between developers and planning authorities.

160. From commencement to completion, the process of construction by developers is regulated within the framework of law. The regulatory framework encompasses all stages of construction, including allocation of land, sanctioning of the plan for construction, regulation of the structural integrity of the structures under construction, obtaining clearances from different departments (fire, garden, sewage, etc.), and the issuance of occupation and completion certificates. While the availability of housing stock, especially in metropolitan cities, is necessary to accommodate the constant influx of people, it has to be balanced with two crucial considerations - the protection

of the environment and the well-being and safety of those who occupy these constructions. The regulation of the entire process is intended to ensure that constructions which will have a severe negative environmental impact are not sanctioned. Hence, when these regulations are brazenly violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Hence, illegal construction has to be dealt with strictly to ensure compliance with the rule of law.

161. The judgments of this Court spanning the last four decades emphasize the duty of planning bodies, while sanctioning building plans and enforcing building regulations and bye-laws to conform to the norms by which they are governed. A breach by the planning authority of its obligation to ensure compliance with building regulations is actionable at the instance of residents whose rights are infringed by the violation of law. Their quality of life is directly affected by the failure of the planning authority to enforce compliance. Unfortunately, the diverse and unseen group of flat buyers suffers the impact of the unholy nexus between builders and planners. Their quality of life is affected the most. Yet, confronted with the economic might of developers and the might of legal authority wielded by planning bodies, the few who raise their voices have to pursue a long and expensive battle for rights with little certainty of outcomes. As this case demonstrates, they are denied access to information and are victims of misinformation. Hence, the law must step in to protect their legitimate concerns.

162. In *K. Ramadas Shenoy v. Chief Officer, Town Municipal Council Udipi* (1974) 2 SCC 506, Chief Justice A.N. Ray speaking for a two judge Bench of this Court observed that the municipality functions for public benefit and when it “acts in excess of the powers conferred by the Act or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess”. This Court also held:

“27...The right to build on his own land is a right incidental to the ownership of that land. Within the Municipality the exercise of that right has been regulated in the interest of the community residing within the limits of the Municipal Committee. If under pretence of any authority which the law does give to the Municipality it goes beyond the line of its authority, and infringes or violates the rights of others, it becomes like all other individuals amenable to the jurisdiction of the courts. If sanction is given to build by contravening a bye-law the jurisdiction of the courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye-laws made by that authority is illegal and inoperative. (See *Yabbicom v. King* [(1899) 1 QB 444]).”

This Court held that an unregulated construction materially affects the right of enjoyment of property by persons residing in a residential area, and hence, it is the duty of the municipal authority to ensure that the area is not adversely affected by unauthorized construction.

163. These principles were re-affirmed by a two judge Bench in *Dr G.N. Khajuria v. Delhi Development Authority*

(1995) 5 SCC 762 where this Court held that it was not open to the Delhi Development Authority to carve out a space, which was meant for a park for a nursery school. Justice BL Hansaria, speaking for the Court, observed:

“10. Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorised constructions are demolished on the force of the order of courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This, however, seldom happens. Secondly, to take care of the injustice completely, the officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined (*sic*), retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite.”

164. *In Friends Colony Development Committee v. State of Orissa* 32, this Court dealt with a case where the builder had exceeded the permissible construction under the sanctioned plan and had constructed an additional

floor on the building, which was unauthorized. Chief Justice RC Lahoti, speaking for a two judge Bench, observed:

“24. Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.”

Noting that the private interest of land owners stands subordinate to the public good while enforcing building and municipal regulations, the Court issued a caution against the tendency to compound violations of building regulations:

“25...The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that

as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.”

165. *In Priyanka Estates International (P) Ltd. v. State of Assam* (2010) 2 SCC 27, Justice Deepak Verma, speaking for a two judge Bench, observed:

“55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder.”

The Court lamented that the earlier decisions on the subject had not resulted in enhancing compliance by developers with building regulations. Further, the Court noted that if unauthorized constructions were allowed to stand or are “given a seal of approval by Court”, it was

bound to affect the public at large. It also noted that the jurisdiction and power of Courts to indemnify citizens who are affected by an unauthorized construction erected by a developer could be utilized to compensate ordinary citizens.

166. *In Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai (2013) 5 SCC 357, Justice GS Singhvi, writing for a two judge Bench, reiterated the earlier decisions on this subject and observed:*

“8. At the outset, we would like to observe that by rejecting the prayer for regularisation of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the appellate authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed by them have given a hope to the law-abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it.”

167. *The Court further observed that an unauthorized construction destroys the concept of planned development, and places an unbearable burden on basic amenities provided by public authorities. The Court held that it was imperative for the public authority to not only demolish such constructions but also to impose a penalty on the wrongdoers involved. This lament of this Court, over the brazen violation of building regulations by developers acting in collusion with planning bodies, was brought to the fore-front when the Court prefaced its judgment with the following observations:*

“1. In the last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc. have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise.”

168. Finally, the Court also observed that no case has been made out for directing the municipal corporation to regularize a construction which has been made in violation of the sanctioned plan and cautioned against doing so. In that context, it held:

“56...We would like to reiterate that no authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The courts are also expected to refrain from exercising equitable jurisdiction for regularisation of illegal and unauthorised constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas.”

169. These concerns have been reiterated in the more recent decisions of this Court in [Kerala State Coastal Zone Management Authority v. State of Kerala](#) (2019) 7 SCC 248, [Kerala State Coastal Zone Management Authority v.](#)

Maradu Municipality (2021) 16 SCC 822, and Bikram Chatterji v. Union of India (2019) 19 SCC 161.

170. In the present case, once this Court has determined that the sanctioned plan for Apex and Ceyane (T-16 and T-17) breached the NBR 2006, NBR 2010, NBC 2005, UP 1975 Act and the UP Apartments Act 2010, it becomes its duty to take stock of the violations committed by the appellant in collusion with NOIDA. The appellant has raised false pleas and attempted to mislead this Court, while the officials of NOIDA have not acted bona fide in the discharge of their duties. The appellant has stooped to the point of producing a fabricated sanctioned plan. Therefore, we confirm the directions of the High Court including the order of demolition and for sanctioning prosecution under Section 49 of the UPUD Act, as incorporated by Section 12 of the UPIAD Act 1976, against the officials of the appellant and the officers of NOIDA for violations of the UPIAD Act 1976 and UP Apartments Act 2010.

17. The petitioner, after raising unauthorised construction, that too, by encroaching upon the forest land cannot approach this Court for protecting either his illegal occupation or his unauthorised construction. The unauthorised construction raised has not only to be demolished but even the land upon which the said construction has been raised has to be evicted and thereafter handed over to the municipal authorities.

18. Even this would have been a fit case where heavy costs ought to have been imposed but for the fact that we have not issued notice of the petition, we refrain from doing so.

19. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

(Tarlok Singh Chauhan)
Judge

(Virender Singh)
Judge

29th November, 2022
(sanjeev)

High Court