

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1100 of 2017

In

Civil Writ Jurisdiction Case No.17272 of 2016

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Divya Construction situated at Justice Mandal Path, New Punaichak, P.S.-
Shastrinagar, Distt- Patna, through its proprietor Sri Sanjay Kumar Mishra,
S/o Late Sarveshwar Mishra.

... ... Appellant/s

Versus

1. The Patna Municipal Corporation (PRDA dissolved), Mauryalok Complex, P.S.- Kotwali, Dak Bunglow Road, Distt.- Patna through its Municipal Commissioner.
2. The Municipal Commissioner, the Patna Municipal Corporation (PRDA dissolved), Mauryalok Complex, P.S.- Kotwali, Dak Bunglow Road, Distt.- Patna
3. The Vigilance officer, Patna Municipal Corporation (PRDA dissolved), Mauryalok Complex, P.S.- Kotwali, Dak Bunglow Road, Distt.- Patna.
4. The Executive Engineer, Nutan Rajdhani Pramandal (n) Patna Municipal Corporation (PRDA Dissolved) Mauryalok Complex, P.S.- Kotwali, Dak Bunglow Road, Distt.- Patna

... ... Respondent/s

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Bihar Municipal Act, 2007—Sections 315 and 317—penalty—condonation of deviation and levy—petitioner constructed an apartment after obtaining the plan sanctioned/passed from Authority—Authority found certain deviations from the Bye-laws—petitioner was directed by the authority to deposit condonation fee and penalty which was five times of amount of condonation fee—petitioner challenged the Order passed by the Authority—compounding fee is leviable under the Building Bye-laws imposable while

condoning the deviation in construction of building within permitted level, therefore, on conjoint reading of Sections 315 and 317 of the Act, 2007, the compounding fee and penalty under Section 315 of the Act 2007 shall be distinct, different and independent—learned Single Judge has rightly upheld the penalty imposed—so far as the challenge to the quantum of the amount of penalty is concerned, competent authority is authorized to levy the penalty up to Rs.10,00,000/-(Ten Lakh Rupees)—therefore, when the authority has discretion to levy/impose the penalty between Rs.1,00,000/- to Rs.10,00,000/-, the competent authority is required to exercise the discretion judiciously and apply the mind also on the quantum of amount of penalty—amount of penalty will depend upon the nature of deviation—competent authority has determined the amount of penalty of five times of compounding fee, it same shall be contrary to even first proviso to Section 315 of Act, 2007, first proviso to Section 315 of Act 2007, it is specifically provided that the owner or occupier or any person responsible for construction of a building or structure of permanent nature or commencement of construction in contravention, breach, or deviation of Building Bye-laws shall further be liable to pay a penalty of minimum of Rs. 1,00,000/- (One Lakh) which may extend up to Rs. 10,00,000/-(Ten Lakh) depending upon size of the building or structure and extent of deviation—if it is demonstrated that amount of penalty has been determined after due application of mind, and considering the size of the building or structure and extent of deviation, in that case, the Court will be justified in not interfering with the same, in exercise of powers under Article 226 of the Constitution of India—in present case it appears that mechanically and unilaterally five times penalty has been imposed by the Competent Authority—discretion has not been exercised judiciously and properly—penalty was determined met the ends of justice and the same be said to be a just penalty-- levying the penalty five times quashed and set aside—Appeal Succeeds in part levy of penalty confirmed—appeal partly allowed. **(Paras 6, 9.2, 10, 10.1 and 11)**

CWJC No. 17272 of 2016—**Modified.**

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Corporation (PRDA Dissolved) Mauryalok Complex, P.S.- Kotwali, Dak
Bunglow Road, Distt.- Patna

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Binod Kumar Sinha, Advocate
For the Respondent/s : Ms. Archana Palkar Khopde, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE**and****HONOURABLE DR. JUSTICE RAVI RANJAN****ORAL JUDGMENT****(Per: HONOURABLE THE CHIEF JUSTICE)****Date : 21-08-2018**

1. Feeling aggrieved and dissatisfied by the impugned
judgment and order passed by the learned Single Judge dated
17.7.2017 in C.W.J.C. No. 17272 of 2016, by which the learned
Single Judge has dismissed the said petition and has confirmed
the levy of penalty imposed while compounding the deviation of



the illegal construction, the original petitioner preferred the present Letters Patent Appeal.

2. The facts leading to the present Letters Patent Appeal in nutshell are as under:

2.1 That the appellant -original petitioner constructed an apartment after obtaining the plan sanctioned / passed from the Municipal Commissioner on 6.5.2013. However, thereafter some further construction was made which was found to be contrary to the bye-laws and, therefore, the certain deviations from the bye-laws were found.

2.2 That the appellant -original petitioner applied for condonation of said deviation under the provisions of relevant bye-laws as well as permitted under Section 317 of the Bihar Municipal Act, 2007 (hereinafter referred to as “ the Act 2007”).

2.3 That the appellant - original petitioner was served with a show cause notice on the calculation and condonation of fee for deviated portion. The original petitioner submitted the show cause on 28.4.2016.

2.4 That the Executive Engineer calculated the condonation fee for the deviated condonable portion as Rs. 1,29,317/-.



2.5 That thereafter by the impugned order, in the petition, dated 27.8.2016, the petitioner was directed to deposit Rs. 1,30,000/- towards the condonation fee and five times amount of condonation of as penalty.

2.6 That the petitioner filed a representation dated 20.7.2016 before the Municipal Commissioner and requested to waive the five times penalty imposed upon the petitioner of Rs. 6,46,585/- instead of Rs. 1,29,317/- i.e., the principal amount of the condonation fee. However, the same was not waived and hence after depositing the condonation fee of Rs. 1,30,000/-, the petitioner preferred the present petition before the learned Single Judge.

2.7 That the counsel for petitioner heavily relied upon the decision of the learned Single Judge in the case of **Arun Kumar Singh v. Patna Municipal Corporation and others** rendered in **C.W.J.C. No. 5393 of 2008** and submitted that once the condonation fee was levied and the deviation was condoned as the same was condonable under the bye-laws, thereafter, levy of penalty is beyond the jurisdiction of the authority under the law.

2.8 That by impugned judgment and order learned Single Judge dismissed the said petition relying upon Section 315 of the Act 2007. The learned Single Judge also did not interfere



with the quantum of amount of penalty, i.e., five times of compounding fee by observing that as the competent authority has jurisdiction to impose the penalty up to Rs. 10,00,000/-, but the quantum of amount cannot be gone into in judicial review as it is discretion of the authority.

2.9 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Single Judge dismissing the petition, the original petitioner preferred the present Letters Patent Appeal.

3. Mr. Binod Kumar Sinha, learned counsel appearing for the appellant - original petitioner has reiterated what was submitted before the learned Single Judge.

3.1 Mr. Sinha, learned counsel appearing for the appellant - original petitioner, has vehemently stated that in the facts and circumstances of the case, the learned Single Judge has materially erred in dismissing the petition and not interfering with the order impugned in the petition imposing the penalty as five times the amount of compounding fee.

3.2 It is further submitted by Mr. Sinha, learned counsel appearing for the appellant - original petitioner that as the deviations were found to be condonable under the Bihar Building Bye-laws and, thereafter, when the deviations were condoned on



imposing the compounding fee, thereafter, the Corporation has no authority to impose / levy the penalty.

3.3 It is further submitted by Mr. Sinha, learned counsel appearing for the appellant - original petitioner that even otherwise levy of penalty in spite of levying the compounding fee would tantamount to the double taxation and, therefore, the same is also not permissible.

3.4 It is further submitted by Mr. Sinha, learned counsel appearing for the appellant - original petitioner that once the fine /compounding fee has been levied while condoning the deviations which are found to be permitted condonation, thereafter, the Corporation has no authority or jurisdiction to levy the further penalty.

3.5 Mr. Sinha, learned counsel appearing for the appellant - original petitioner has submitted that the learned Single Judge has materially erred in not following and/or considering the decision of the learned Single Judge in the case of **Arun Kumar Singh (supra)** which, as such, was on the point.

3.6 Mr. Sinha, learned counsel appearing for the appellant - original petitioner has submitted that even otherwise the levy of penalty of Rs.6,46,585/- i.e., five times of compounding fee, in the facts and circumstances of the case is



most arbitrary and unreasonable. It is submitted that deviations were very minor and, therefore, levy of penalty of Rs.6,46,585/- is absolutely arbitrary.

3.7 Mr. Sinha, learned counsel appearing for the appellant - original petitioner has further submitted that assuming without admitting that the competent authority has authority to levy penalty, in that case also, the authority has discretion to levy the penalty between Rs.1,00,000/- to Rs.10,00,000/-. It is submitted, therefore, the cogent reasons are required to be given to impose the penalty of Rs.6,46,585/-. It is submitted that in the present case, the discretion is not exercised properly and judiciously. It is submitted that even the determination of the amount of penalty depends upon the deviations and the same cannot be unilaterally determined.

3.8 Making the above submission, it is requested to allow the present appeal and quash and set aside the impugned judgment and order passed by the learned Single Judge dismissing the appeal.

4. Present appeal is vehemently opposed by Ms. Archana Palkar Khopde, learned counsel appearing for the respondent – Corporation.



4.1 Learned counsel appearing for the Corporation has heavily relied upon Sections 315 and 317 of the Act 2007 and has submitted that the levy of penalty is distinct than the compounding fee/fine. She has heavily relied upon second proviso to Section 315 of the Act 2007 and has submitted that as per the second proviso, the penalty imposed under Section 315 of the Act 2007 shall be in addition to any other fine under this Act including fine for compounding as may be provided under Building Bye-Laws. It is submitted, therefore, the levy of penalty imposable under Section 315 of the Act 2007 is absolutely in accordance with law and the same cannot be said to be without authority under the law. It is submitted, therefore, that learned Single Judge has not committed any error in dismissing the petition and confirming the levy of penalty.

5. Now so far as the decision of the learned Single Judge **Arun Kumar Singh (supra)** relied upon by learned counsel appearing on behalf of the appellant is concerned, it is vehemently submitted that the said decision shall not be applicable in the case on hand, as the decision of learned Single Judge is with respect to fine and not the penalty imposable under Section 315 of the Act 2007.



6. Now so far as the submission made on behalf of the appellant on quantum of penalty of Rs.6,46,585/- i.e., five times of the compounding fee is concerned, it is submitted that under Section 315 of the Act 2007, the penalty can be up to Rs.10,00,000/-. It is submitted, therefore, when the ceiling of penalty is up to Rs.10,00,000/-, imposing the penalty of Rs.6,46,585/- in the present case cannot be said to be either illegal or contrary to the provision of the statute. It is submitted that, as such, to have the uniformity, the competent authority has taken the decision to levy the penalty up to five times of the compounding fee. It is submitted, therefore, as rightly observed by the learned Single Judge the quantum of the amount cannot be gone into in judicial review as it is the discretion of the authority and, more particularly, the authority is empowered to levy the penalty up to Rs.10,00,000/-

7. Making the above submissions and relying upon Section 315 of the Act 2007, it is requested to dismiss the present appeal.

8. Heard learned counsel appearing for the respective parties at length.

9. At the outset, it is required to be noted that the appellant – original petitioner challenged the order passed by the



competent authority levying/imposing the penalty which shall be over and above the compounding fee. The appellant – original petitioner also challenged the quantum of the levy of penalty, i.e., five times of the compounding fee.

9.1 It is the case of the original petitioner that once the deviations are condoned which are permissible under the bye-laws and the compounding fee is levied, thereafter, the levy of penalty, over and above the compounding fee would be illegal and without authority. However, the aforesaid has no substance. Considering provisions of Sections 315 and 317 of the Act 2007, levy of compounding fee, while condoning the deviation, levied under the bye-laws and / or under Section 317 of the Act 2007 and the levy of penalty under Section 315 of the Act 2007 would be distinct and different. At this stage, Section 315 of the Act 2007 is required to be referred and considered which reads as under:-

“315. Construction of building in contravention of building bye-law:- Any building or structure of permanent nature which has been constructed or construction has commenced in contravention or breach or deviation of building bye-law shall be liable to be demolished, notwithstanding that it may have been approved by a registered Architect.

Provided further that the owner or occupier or any person responsible for construction of a building or



structure of permanent nature or commencement of construction in contravention, breach, or deviation of building bye-law shall further be liable to pay a penalty of minimum of Rupees one lac, which may extend up to Rupees 10 lacs depending upon size of the building or structure and extent of deviation.

Provided further that the penalty under this Section shall be in addition to any other fine provided under this Act including fine for compounding as may be provided under building bye-law.”

9.2 Considering second proviso to Section 315 of the Act 2007, the penalty under Section 315 of the Act 2007 shall be in addition to any other fine provided under the Act 2007 including the fine for compounding as may be provided under the Building Bye-laws. Section 317 of the Act 2007 permits a condonation of the deviation in construction of building within permitted level, however, subject to realising of such fine or penalty as is provided under the Act 2007 or Rule and Regulation as the case may be. The compounding fee is leviable under the Building Bye-laws imposable while condoning the deviation in construction of building within permitted level. Therefore, on conjoint reading of Sections 315 and 317 of the Act 2007, the compounding fee and the penalty under Section 315 of the Act 2007 shall be distinct, different and independent. At the cost of



repetition, it is observed that even considering second proviso to Section 315 of the Act 2007, the penalty under Section 315 of the Act 2007 shall be in addition to any other fine provided under the Act 2007 including the fine for compounding as may be provided under Building Bye-laws which shall include even the compounding fee. Under the circumstances, imposition of penalty in the present case cannot be said to be illegal or without authority under the law, as contended on behalf of the appellant - original petitioner. Therefore, challenge to the levy of penalty fails. Learned Single Judge has rightly upheld the penalty imposed.

10. However, so far as the challenge to the quantum of the amount of penalty in the present case of Rs.6,46,585/-, i.e., five times of compounding fee is concerned, it is true that the competent authority is authorized to levy the penalty up to Rs.10,00,000/-. However, the competent authority has discretion to levy the penalty between Rs.1,00,000/- to Rs.10,00,000/-. Therefore, when the authority has discretion to levy/impose the penalty between Rs.1,00,000/- to Rs.10,00,000/-, the competent authority is required to exercise the discretion judiciously and apply the mind also on the quantum of amount of penalty. Amount of penalty will depend upon the nature of deviation. If the deviations in construction of building as may be within permitted



level are gross, it may warrant a higher amount of penalty. However, there cannot be uniform levy of penalty as applied in the present case. It is the case on behalf of the respondent – Corporation that to have the uniformity in imposing the amount of penalty, the competent authority has determined the amount of penalty of five times of compounding fee. The same shall be contrary to even first proviso to Section 315 of the Act 2007. In the first proviso to Section 315 of the Act 2007, it is specifically provided that the owner or occupier or any person responsible for construction of a building or structure of permanent nature or commencement of construction in contravention, breach, or deviation of Building Bye-Law shall further be liable to pay a penalty of minimum of Rs. 1,00,000/- which may extend up to Rs. 10,00,000/- depending upon size of the building or structure and extent of deviation. Therefore, while determining the amount of penalty even as per first proviso to Section 315 of the Act 2007, the same would depend upon the size of the building or structure and extent of deviation. Therefore, while determining the amount of penalty, there must be an application of mind with respect to the size of the building or structure and extent of deviation. The amount of penalty may vary from the size of the building or structure and extent of deviation. The amount of penalty may not



be determined unilaterally irrespective of the size of the building or structure and extent of deviation. Therefore, when determining of the amount of penalty is found to be arbitrary and / or it suffers from non-application of mind, the Court may in exercise of powers, under Article 226 of the Constitution of India, interfere with the same and may even remand the matter to the appropriate authority or even to the competent authority to determine the amount of penalty depending upon the size or structure and extent of deviation. If it is demonstrated that amount of penalty has been determined after due application of mind, and considering the size of the building or structure and extent of deviation, in that case, the Court will be justified in not interfering with the same, in exercise of powers under Article 226 of the Constitution of India.

10.1 In the present case, considering the order impugned before learned Single Judge, levying the penalty to the extent of Rs.6,46,585/-, i.e., five times compounding fee is concerned, it appears that while imposing the penalty the relevant aspect, namely, the size of the building or structure and extent of deviation has not been considered at all. Nothing is on record that the determination of the penalty of Rs.6,46,585/- was after due application of mind and considering the size of the building or structure and extent of deviation. It appears that mechanically and



unilaterally five times penalty has been imposed. Thus, it appears that the discretion has not been exercised judiciously and properly. Therefore, as such, the matter is required to be remanded to the appropriate authority to determine the amount of penalty afresh and to determine the amount of the penalty considering the size of the building or structure and extent of deviation. However, considering the deviation which is reflected from the order impugned before the learned Single Judge, instead of remanding the matter to the appropriate authority for fresh determination, we are of the opinion in the facts and circumstances of the case, if the penalty is determined to Rs.1,30,000/-, it will meet the ends of justice and the same can be said to be a just penalty. To the aforesaid extent, the impugned judgment and order passed by the learned Single Judge is required to be interfered with and the order levying the penalty of Rs.6,46,585/- is required to be quashed and set aside to the extent determining the penalty of Rs.1,30,000/- instead of Rs.6,46,585/-, as determined by the competent authority.

11. In view of the above and for the reasons stated above, the present Appeal Succeeds in PART. Impugned levy of penalty is hereby confirmed. Consequently, the impugned order and judgment confirming the penalty is hereby confirmed. However, the impugned judgment and order passed by the learned Single



Judge confirming the penalty determined as Rs.6,46,585/- is hereby quashed and set aside and is hereby modified to the extent determining the quantum of amount of Rs.1,30,000/- instead of Rs.6,46,585/-, as determined by the competent authority which shall be paid by the appellant - original petitioner with the Corporation within a period of four weeks from today. It is made clear that we have determined the amount of Rs.1,30,000/- in the facts and circumstances and looking to the deviation and it is observed that the competent authority would have authority to levy the penalty up to Rs.10,00,000/-. However, determination of penalty would depend upon the size of the building or structure and extent of deviation. The present Appeal is Partly Allowed to the aforesaid extent. No costs.

(Mukesh R. Shah, CJ)

(Dr. Ravi Ranjan, J)

Spd/- Sanjay/

AFR/NAFR	AFR
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