

(2005) 12 CAL CK 0022

In the Calcutta High Court

Case No : Writ Petition No's. 1155 (W) and 11637 (W) of 2005 and CAN No's. 6336 and 6337 of 2005

Acquet Trading Co. Pvt. Ltd. and Another

APPELLANT

Vs

State of West Bengal and Others
 Land Mark Plaza
Pvt. Ltd. and Others Vs Kolkata Metropolitan Development
Authority (KMDA) and Others

RESPONDENT

Date of Decision : 16-12-2005

Acts Referred:

Land Acquisition Act, 1894 — Section 3
West Bengal Municipal Act, 1993 — Section 193, 210
West Bengal Town and Country (Planning and Development) Act, 1979 — Section 134,
2(12), 2(15), 33, 45

Citation : (2006) 3 CHN 424

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Anindya Mitra, Debal Banerjee, Abhikit Mitra and A. Roy, Bharati Mutsuddi, for the Appellant; Partha Sarathi Basu, Fazlul Haque and Champak Ghosh for the Respondent Nos. 1 and 2, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—Both the writ petitions have similarity on fact and in law as the controversies therein raised and reliefs sought for are common and identical. In both the cases the petitioners are the promoters, developers and builders and they have acquired respective plots of land by the side of VIP Road now (Kazi Nazrul Islam Avenue). The petitioners in the first mentioned writ petition are concerned with premises Nos. 50/1,50/2,50/3,50/4, 50/5, Gollaghata Street, Kolkata - 700 048 situate within the jurisdiction of 24-Parganas (North). The petitioners in the second mentioned writ petition are concerned with 290/1, Canal Street, Kolkata. Both the aforesaid plots of land are situated within the South Dumdum Municipal area. The admitted fact on both the cases is that the petitioners acquired the lands and developed the same after having obtained permission from all concerned and, in fact, they have obtained sanction of the building plans originally for certain stories. There has been no

objection, no difficulty at any point of time. After sometime they decided to increase the stories of the building or to improve the building. So, they applied for revision of the building plan already sanctioned by the South Dumdum Municipal Authorities. In terms of the sanctioned plan already granted, both the petitioners constructed building floors at a certain level. Before sanction of the building plans the South Dumdum Municipal Authority duly realized a substantial amount on account of development of the area, and that area was developed by the municipal authority. Now the grievance of both the petitioners is that the municipal authority have sat tight over the matter and refused to grant any permission and/or sanction to revision of the building plans on the plea that in view of notification issued by the Kolkata Metropolitan Development Authority, the respondent No. 4, dated 24th October, 1997, no objection and /or permission is required from the Court to proceed for sanctioning the revised building plan. They are aggrieved by the above inaction and/or refusal of the municipal authority. The aforesaid two writ petitions have been filed for relief in a sense for getting sanction for the revision of the building plan and to deliver the same to enable the petitioners to construct the buildings. After the writ petitions have been filed directions were given for filing affidavit in both the matters. In one of the matters after affidavit-in-opposition¹ was filed the petitioner made an application for summary disposal of the matter on the basis of the statement and averment made by the respondents in the affidavit-in-opposition and also disclosure of the documents by the respondents annexed thereto. In another writ petition in spite of direction for filing affidavit-in-opposition was given, however, ultimately before or in course of hearing such affidavit was filed. The aforesaid two applications for summary disposal of the matters were also taken up.

2. For the sake of convenience the writ petitions as well as connected applications were taken up for hearing and for disposal of the same finally.

3. Mr. Anindya Mitra, with senior Advocates Mr. Debal Banerjee and Mr. Abhrajit Mitra appearing for both the writ petitioners contends that municipal authority has no jurisdiction to withhold sanction to the revision of the building plan on the plea of non-availability of permission from the KMDA. In the four corners of the West Bengal Municipal Act, 1993 and rules framed thereunder, there is no whisper for production of no objection certificate of KMDA. At the time of initial sanction to the building plan no such demand was made. In fact, Municipality has sanctioned to the revision of the building plan submitted on 31st March, 2004 in the case of Landmark. However, they are unable to deliver the said sanctioned building plan on the aforesaid plea. It has been held by this Court in case of Giridharilal Soni Vs. Municipal Commission, Calcutta Municipal Corporation and Others, that "No Objection Certificate" is neither a condition for granting of sanction of a plan nor absence of such "No Objection Certificate" is ground for refusing grant of sanction of a plan. In any event, the notification dated 3rd February, 1997 issued by the KMDA on which the municipal authority is relying is ineffective and invalid as the same has not been published in accordance with the provisions of the West Bengal Town and Country (Planning and Development)

Act, 1979. The said notification was not gazetted as required under the provision of the aforesaid Act. Moreover, he contends, the said notification dated 3rd February, 1997 is for amendment of the notification dated 6th April, 1995 by way of inclusion of VIP Road in the notification dated 6th April, 1985. The said notification of 6th April, 1985 is of limited duration i.e. pending preparation of development plan in respect of the concerned planning area. According to him, upon preparation and publication of the development plan the interim notification has ceased to be operative. Development plan in respect of the said area has admittedly been published as the same has, in fact, been prepared and sanctioned on 16th December, 1998. Each and every notification has to be gazetted u/s 2(15) of the West Bengal Town and Country (Planning and Development) Act, 1979. Therefore, the said notification is not effective. There cannot be any embargo for the municipal bodies to either sanction the revised building plan or deliver the same if it is sanctioned.

4. On behalf of the municipal authority, Smt. Bharati Mutsuddi, learned Counsel, contends that it is true that the petitioner made an application on 31st March, 2004 for sanctioning of a revised building plan for construction of three additional stories at the safe side. It is admitted position that the municipal authority has already sanctioned the building plan of the petitioner without obtaining concurrence from "the KMDA for constructing G+I building. She submits that, at present, in view of the said notification dated 24th October, 1997 the municipal authority expressed inability to grant sanction of the said revised plan for three additional stories without having prior concurrence of the Kolkata Metropolitan Development Authority for construction of building located within 500 meters of the said areas. Municipal authority, thus, is waiting for approval of the aforesaid body.

5. learned Counsel for the Kolkata Metropolitan Development Authority being the respondent No. 1 (in short KMDA) submits that it is the duty of the concerned municipal authority to examine as to whether clearance from the KMDA in terms of the West Bengal Town and Country (Planning and Development) Act, 1979 has been obtained or not. By the Act of 1979 KMDA is empowered to verify as to whether the proposed building plan submitted by any individual or body has duly followed the norms as per the said provisions of law. In other words, KMDA with its territorial planning jurisdiction as published in the Official Gazette would require such papers and documents for inspection and for clearance thereof after being satisfied as to the observance of the norms set forth under the relevant provisions being Sections 33 45 46 and 52 of the said Act. KMDA is under statutory obligation to examine that the building constructed or to be constructed do conform to all necessary norms in the said Act. No building plan can be sanctioned or even if it is sanctioned can be handed over unless the norms are fulfilled. As such the petitioners and each of them have to obtain clearance from KMDA. Past act or action of the municipal authority having allowed the constructed building upto a certain stories of not automatically legalize and regularize the infirmities already occurred under the said Act. KMDA is exercising

its statutory obligation under the said Act and nothing can restrain it from exercising its powers under the said Act in any manner whatsoever. The learned Counsel has drawn my attention to the Supreme Court judgment reported in Guruputrappa Mallappa Harkuni Vs. The Tahsildar and Others, in connection with this matter. By the latest circular of 1999 some more important roads have been included whereunder any construction within 500 meters from the central line of either side of these roads have been restricted subject to fulfilling the norms as have been set under the said notification. As such the action taken by the municipal authority is wholly justified and the writ petitioner must approach KMDA for obtaining clearance.

6. I have considered the contentions of the respective learned Counsels appearing for the parties. The issues involved in this matter are as follows :

(1) Whether the petitioners are required to obtain clearance from KMDA under the West Bengal Town and Country (Planning and Development) Act, 1979 even after having obtained previous sanctioned plan from the municipal authority.

(2) Whether municipal authority has jurisdiction to withhold any sanction of the building plan on the plea of obtaining clearance certificate or riot.

7. In these cases admittedly both the petitioners obtained sanctioned plan previously upto certain stories and they want to raise their building's height by constructing further stories.

8. From the records I do not find the municipal authority has found that there is any infraction of any of the provisions of the West Bengal Municipal Act or rules to refuse sanction. The grounds on which the sanction may be refused by the municipal authority have been laid down u/s 210 of the West Bengal Municipal Act, 1993 which is set out hereunder:

210. Grounds on which sanction may be refused.—The sanction of a building plan may be refused on any of the following grounds:

(a) that the approval of the building site has not been obtained as required under the provisions of this Act and the rules and the regulations made thereunder;

(b) that the ground plan, elevation, Section or specification would contravene any of the provisions of this Act or the rules or the regulations made thereunder or of any other law for the time being in force;

(c) that the application with building plan does not contain the necessary particulars and has not been prepared in the manner as required under the rules and the regulations made in this behalf;

(d) that any information or document required by the Board of Councillors in this behalf has not been duly furnished, and, in the cases requiring a lay-out plan u/s 193, such lay-out plan has not been sanctioned as required under this Act;

(e) that the building or the work would be an encroachment of Government land

or land vested in the Municipality;

(f) that for the use of the building for non-residential purposes, if any, a licence for permission has not been obtained for such use as required under the provisions of this Act or any other law for the time being in force:

Provided that a provisional sanction may be given in this regard for erection or re-erection of a building which may be confirmed by final sanction upon production of necessary licence or permission from the Municipality or the Government or the appropriate statutory body, as the case may be.

9. Apart from the aforesaid Section there is no provision under the West Bengal Municipal Act to withhold or refuse sanction. It seems to me that the municipal authority has withheld the sanction and/or delivery of sanction of revised building plan after being granted on the grounds of Section 210(b) or (f) with reference to the provisions of the West Bengal Town and Country (Planning and Development) Act, 1979. Section 46 of the West Bengal Town and Country (Planning and Development) Act, 1979 (hereinafter referred to Act of 1979) provides for permission for development. Section 46 of this Act is set out hereunder:

46. Permission for development.?(1) Any person or body (excluding a department of the Central or the State Government or any local authority) intending to carry out any development on any land shall make an application in writing to the planning authority or development authority for permission in such form and containing such particulars and accompanied by such documents and plans as may be prescribed.

(2) On such application having been duly made, and on payment of the development charge as may be assessed under Chapter IX,?

(a) the planning authority or the development authority may pass an order,?

(i) granting permission unconditionally; or

(ii) granting permission subject to such conditions as it may think fit or;

(iii) refusing permission.

(b) without prejudice to the generality of Clause (a) of this sub-Section the concerned authority may impose conditions?

(i) to the effect that the permission granted is only for a limited period and that after the expiry of that period, the land shall be restored to its previous condition or the use of the land permitted shall be discontinued;

(ii) for regulating the development or use of any other land under the control of the applicant or for the carrying out of works on any such land as may appear to the authority expedient for the purpose of the permitted development.

(3) (i)The concerned authority in dealing with the applications for permission

shall have regard to?

- (a) the provisions of the development plan, if it has come into operation; and
- (b) any other material consideration.

(ii) The provision of sub-Section (1) shall not apply to applications under sub-Section (5).

(4) When permission is granted to conditions or is refused, the grounds of imposing such conditions or such refusal shall be recorded in the order and the order shall be communicated to the applicant.

(5) In the case of a department of the Central or the State Government or any local authority (where the local authority is not also the development authority) intending to carry out any development other than operational constructions (which shall always be outside the purview of the planning or development authority), on any land, the concerned department or authority, as the case may be, shall notify in writing to the development authority of its intention to do so, giving full particulars thereof and accompanied by such documents and plans as may be directed by the State Government from time to time, at least, one month prior to the undertaking of such development.

(6) Where the concerned authority raises any objection in respect of the conformity of the proposed development either to any development plan under preparation, or to any of the building bye-laws in force at the time, or due to any other material consideration under sub-Section (7), the department or the authority, as the case may be, shall?

(a) either make necessary modifications in the proposals for development to meet the objections, or

(b) submit the proposals for development together with the objections raised by the concerned authority to the State Government for decision.

When proposals and objections have been submitted, no development shall be undertaken until the State Government has finally decided on the matter.

(7) The State Government on receipt of the proposals for development together with the concerned authority, shall either approve the proposals with or without modifications or direct the concerned authority to make such modifications in the proposals as it considers necessary in the circumstances.

10. At the same time under the provisions of Section 46 of the said Act there has been prohibition against any development without the permission in writing.

11. Accordingly, the writ petitioner (Landmark Plaza) made an application to the respondent No. 1 for obtaining necessary permission. Pursuant to this application the respondent No. 1, authority has proposed to entertain and consider such application. Petitioners have duly furnished to the same. Upon reading of the provision of Section 210 of the West Bengal Municipal Act and Section 45 of the

1979 Act it appears to me that there is no connection and/or interlinking with the provision of 1979 Act. Act of 1979 does not provide for any elevation, Section or specification. It prohibits any kind of development work without prior permission. It is, thus, clear that in absence of any permission of the authorities under 1979 Act the municipal authority cannot withhold sanction of any building plan, under the provision of West Bengal Municipal Act, 1993. In my view the municipal authority has to proceed strictly with regard to the sanction of building plan whether original or revised under the provision of the said Act. So, according to me as rightly submitted by Mr. Mitra, the municipal authority cannot withhold the permission of aforesaid 1979 Act on the plea of alleged contravention of provision of 1979 Act.

12. Therefore, municipal authority is bound to sanction the building plan and to hand over "the same to the petitioners. If there is any contravention of the 1979 Act appropriate legal steps can be taken under the provision of the said Act and they cannot proceed taking recourse to any provision of any other Act. Both the two Acts are separate and operative in the different fields.

13. As such the petitioners cannot be allowed to develop meaning thereby construct building in accordance with the revised plan until the petitioners obtained necessary permission under the 1979 Act.

14. Sections 52 53 54 and 55 of 1979 Act provide the measure and/or steps to be taken in case of unauthorized development works viz. if it is undertaken without permission of the said authority.

15. It is contended that the authorities under 1979 Act has no jurisdiction to interfere with the construction works of the petitioners. I am unable to accept the contention of Mr. Mitra both on law and fact. The petitioner has applied and submitted necessary papers and documents for obtaining necessary permission and thereby submitted to the jurisdiction of authority, respondent No. 1. It is said that subsequent notification extending VIP Road is not applicable in this case as it was not published under the law in the Gazette Notification and it cannot be applied in case of the revised building plan. I think this argument has no force as publication of Gazette Notification on the facts and circumstances of this case is immaterial because the object of the same is to make the public known about the applicability of certain rules or provision.

The petitioner has come to know about the same and acted upon accordingly. So, the petitioner is estopped from taking plea as above. As far as the question of applicability in case of revised building plan is concerned the language of Section 45 is very clear. The meaning and definition of the word "development" is also clear. It provides as follows :

Definition of development is : with its grammatical variations means carrying out of building engineering, mining or other operations in or over or under land or the making of any material change of any building or land or in the use of any building or land and includes division of any land.

16. Again the definition of the word "land" has been specified in Section 2(12) of the 1979 Act. It says that land has same meaning as in Land Acquisition Act, 1894 and shall include land covered by water; so definition of land has been borrowed from some other Act. The definition of land mentioned in Section 3(a) of the Land Acquisition Act, 1894 which includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.

17. Therefore, in my view, land with structure is also included within the definition of land in the 1979 Act also. As such I hold that permission of construction of the building in this case is required.

18. However, u/s 134 of the 1979 Act this power is granting permission to be exercised upon delegation by the municipal authority. By notification dated 6th April, 1985 this power was conferred upon the concerned municipal authority on certain conditions. Therefore, indirectly, the municipal authority could grant permission under the said Act also. Logically, grant of permission by the municipal authority together with sanction of building plan under municipal law could be deemed to be permission under 1979 Act also.

19. By subsequent notification dated 3rd February, 1997 the aforesaid power has been slightly curbed. By this subsequent notification some other roads including VIP Road have also been included. In this case, the permission of the Municipal Authority is not the permission under the Act, 1979. By this subsequent notification concurrence of the respondent No. 1 is necessary.

20. Therefore, I direct the municipal authority to write for formal concurrence of the respondent No. 1. The respondent No. 1 in this case shall consider for granting concurrence. This authority shall take the note of the fact that municipal authority had already granted permission and the area has been developed in accordance with law after making construction of the building As such, there cannot be any difficulty or embargo to grant concurrence. All these points are to be dealt with by the appellate authority as mentioned in the 1979 Act constituted u/s 7 of the said Act. The exercise of granting concurrence shall be considered within a period of six weeks from the date of communication of this order.