
(2012) 01 GAU CK 0099
In the Gauhati High Court
Case No : WP (C) No. 940 of 2011

Anurag Agarwal

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 3 GLT 163

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : B.C. Das, Mr. D.N. Bhattacharjee, Mr. S.K. Singh and Mr. U. Datta, for the Appellant; S. Bhattacharjee, Ms. M. Bhattacharjee, Ms. S. Nath, For Caveator and Mr. A. Ganguly, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J.—By this application under article 226 of the Constitution of India, the petitioner has challenged the legality and validity of the direction contained in the letter No. UDD(T)/284/2010/9 dtd. 29.12.2010 issued by the Under Secretary to the Government of Assam, Urban Development Department and addressed to the Chairman, Tezpur Development Authority, Tezpur (Annexure-5 to the writ petition) as well as the letter bearing No. TDA/BP/Mazgaon/2013/10/590 dtd. 05.01.2011 issued by the Chairman, Tezpur Development Authority and addressed to the petitioner (Annexure-4 to the writ petition). The petitioner is the owner and possessor of a plot of land measuring 2 bighas 3 kathas and 11 lechas covered by dag Nos. 967 and 3 of patta Nos. 14 and 433 of village- Mazgaon in the revenue district of Sonitpur (Assam). The said land is situated at Mission Chariali by the side of the National Highway (NH)37A.

2. The petitioner applied before the Tezpur Development Authority ("the Development Authority" hereafter) on 22.08.2008 seeking permission to construct a multistoried RCC building having 7 floors for a shopping mall and cinema complex on the aforesaid plot of land. By order dated 25.09.2008, the

Development Authority approved the said application alongwith the map submitted and granted permission for construction. The petitioner also obtained such permission from the Mazgaon Gaon Panchayat.

3. According to the petitioner, after obtaining the construction permission, he contacted various persons to raise necessary finances to construct the said multi-storied building. Finally, a company known as Satyam Krishna Infra-Project Private Limited, of which the petitioner is also a director, decided to construct the said building. After arranging the necessary finances, the construction work was started and within a span of 15 months, the outer construction of the building was completed.

4. Thereafter, the petitioner received a letter bearing No. TDA/BP/Mazgaon/2013/10/590 dtd. 05.01.2011 issued by the Chairman of the Development Authority. By the said letter, it was stated that the No Objection Certificate (NOC) for construction of the commercial complex (G + 7) issued to him on 25.09.2008 has been stayed until further order. The petitioner was asked to stop the construction of the said building immediately. Be it stated that copies of the aforesaid letter dated 05.01.2011 were marked to the Under Secretary to the Government of Assam, Urban Development Department and also to the Station Commander, Tezpur Military Station. Alongwith the said letter, a copy of a letter received from the said Under Secretary was also enclosed. The enclosed letter is one bearing No. UDD(T)284/2010/9 dtd. 29.12.2010 issued by the aforesaid Under Secretary and addressed to the Chairman of the Development Authority. By the said letter, it was stated that the permission granted on 25.09.2008 for construction of a high rise building by the petitioner is within the periphery of 500 meters of the Military Station at Tezpur. The Chairman of the Development Authority was informed that the said permission has been stayed until further order. A copy of the said letter was marked to the Station Commander, Tezpur Military Station.

5. The petitioner, who was directed to stop the construction of the building by the aforesaid letters, sought for certain information from the Development Authority through his counsel under the Right to Information Act, 2005 vide the letter dated 10.01.2011. Since in the Government letter dated 29.12.2010 there was a reference to a letter of the Development Authority bearing No. TDA/BP/Mazgaon/2013/494 dated 09.09.2010, a copy of the said letter was also sought for alongwith two other heads of information. The following were the information sought for :

(i) Copy of the office letter No. TDA/BP/Mazgaon/2013/494 dated 9.9.2010.

(ii) Any other correspondence between the army authorities and the Development Authority.

(iii) Copies of all office notes pertaining to the above matter.

6. The Development Authority furnished to the petitioner a copy of the minutes

of a civil military liaison meeting held on 17.05.2010 alongwith a copy of the forwarding letter dated 24.06.2010 issued by the Deputy Secretary to the Government of Assam, Revenue and Disaster Management (LR) Department addressed to the Deputy Commissioners of Kamrup (M) and Sonitpur districts of the State by which copies of the aforesaid minutes were forwarded for taking immediate necessary steps as per item No. (a) of the minutes.

7. From the minutes, it transpires that as many as 23 issues were discussed in that meeting and thereafter decisions were taken. As per item No. (a), the army authorities had raised the issue of construction of high rise buildings near the military stations at Narengi and Tezpur claiming to be in violation of the Works of Defence Act, 1903 and Classification of Defence Installations and Establishment and Instructions with regard thereto, Gazette of India dated 03.03.2007 and Gazette of India Extra Ordinary dated 30.06.2008. Among other things, it was insisted by the army authorities that no high rise building (more than 48 feet) should be permitted to be constructed within 500 meters from the perimeter of a military station without obtaining a NOC from the local military authorities. The decision that was taken on that issue is as follows:-

Decision

After discussion of the matter thoroughly, the Principal Secretary directed the GMC and GMDA authorities to make a note and issue necessary amendments in the by laws. Fresh applications seeking permission to construct high rise new houses be put on hold. All other township municipal corporations be sensitized accordingly. Necessary notification under Defence Act, 1903 to be done within three months by DC Kamrup (Metro).

The illegal settlement in the restricted area be removed as per procedure by the District authorities.

8. The petitioner through his counsel had also sought for the following information from the army authorities under the Right to Information Act, 2005 vide the letter dated 10.01.2011 :-

(i) Copies of letters and correspondences between the army and Government, authorities concerning the construction of multistoried building at Mission Chariali by the petitioner.

(ii) Grounds of objection for such construction.

9. On receipt of such request, the army authorities took a somewhat unusual step and vide the letter dated 24.01.2011 addressed to the petitioner's counsel, requested the counsel to submit document regarding proof of his Indian citizenship and the vakalatnama under which the counsel was authorized by the petitioner. The counsel furnished the above documents on 04.02.2011 and requested the army authority to provide the information sought for.

10. The petitioner also submitted a representation dated 17.01.2011 to the

Under Secretary to the Government of Assam, Urban Development Department stating that almost 80 percent of the construction works had been completed when the stop construction order was received. The petitioner stated that no notice was given to him prior to issuance of such order. The petitioner further stated that the army authorities never contacted him nor was he informed earlier of any objection raised by the army authorities. Stating that substantial investment has been made, the petitioner requested the said authority to withdraw the stay order as the project is of considerable tourist interest and will generate substantial employment opportunity and revenue. Similar prayer was also made before the Chairman of the Development Authority wherein the petitioner highlighted that stoppage of construction at this stage would result in a huge financial loss to him every day.

11. While no decision was taken on the said representation of the petitioner, on the other hand, the petitioner was again served with a letter dated 03.02.2011 issued by the Chairman of the Development Authority directing the petitioner to stop the construction immediately. The petitioner waited for a response from the Govt. but no such response was forthcoming. The army authority also did not furnish to the petitioner the information that was sought for.

12. It was at this stage that the petitioner came before this Court seeking the relief as indicated above.

13. This Court on 25.02.2011 while issuing notice, directed maintenance of status quo as regards the works in the building.

14. The army authority i.e., the Station Commander, Tezpur Military Station, respondent No. 4 in the writ petition, had entered appearance by filing a caveat. Subsequently, a counter affidavit was filled by the said respondent No. 4. In the counter affidavit, the respondent No. 4 has stated that concerned with the construction of high rise buildings within the periphery of 500 meters of the military stations at Narangi and Tezpur, the army authorities had taken up the matter with the Govt. of Assam in the civil military liaison meeting held on 17.05.2010. Pursuant thereto, the Govt. of Assam decided to make necessary amendments in the municipal laws to ensure that no high rise buildings (more than 48 feet) would be permitted to be constructed within 500 meters from the perimeter of the military station without obtaining NOC from the local military authorities. It was further decided by the Govt. of Assam to put on hold fresh applications seeking permission to construct highrise buildings within the above specified areas. In terms of the decision, the Deputy Secretary to the Govt. of Assam, Revenue and Disaster Management Department issued necessary instructions to the Deputy Commissioner, Sonitpur vide letter dated 24.06.2010, who in turn wrote to the Chairman of the Development Authority. According to the said respondent, having noticed that the petitioner had been constructing a highrise building of about 90ft. height near the Tezpur Military Station, he wrote to the Deputy Commissioner, Sonitpur vide his letter dated 24.08.2010 with a copy marked to the Chairman of the Development Authority requesting them to

limit the height of the construction upto a maximum of 48ft. The Chairman of the Development Authority in his letter dated 09.09.2010 informed the respondent No. 4 that the permission for construction of the building in question was granted on 25.09.2008 as per the Uniform Zoning Regulations, 2000 of the Town and Country Planning Department, Govt. of Assam. Stating that the decision taken in the civil military liaison meeting held on 17.05.2010 relating to grant of construction permission near the periphery of a military station would require amendment in the said regulation, the respondent No. 4 was informed that fresh application seeking permission to construct highrise buildings near the periphery of the Tezpur Military Station will be put on hold till such amendment is made. Aggrieved by the response of the Development Authority, the respondent No. 4 filed an appeal dated 07.10.2010 before the Secretary to the Govt. of Assam, Urban Development Department requesting amendment in the Uniform Zoning Regulations, 2000 at the earliest in view of the central legislations and the decision taken in the civil military liaison meeting held on 17.05.2010. During the intervening period, a prayer was made for staying further construction activities of the said building. Acting on the said appeal, the Departmental Secretary, who is the appellate authority, issued notice dated 29.12.2010 to the Chairman of the Development Authority and to the respondent No. 4 to appear before the appellate authority on 03.02.2011 for hearing of the appeal. According to the respondent No. 4, the appeal was taken up for hearing 03.02.2011 when the respondent No. 4 filed formal application before the appellate authority to implead the petitioner as a party respondent in the appeal. According to the respondent No. 4, the petitioner instead of participating in the hearing before the appellate authority, filed the present writ petition. The respondent No. 4 has complained that inspite of the status-quo order passed by this Court on 25.02.2011, the petitioner continued the construction activities in the building. Justifying the decision to stay further construction of the building in question, the respondent No. 4 seeks dismissal of the writ petition.

15. The petitioner has filed rejoinder affidavit to the counter filed by the respondent No. 4. The petitioner has contended that the decision taken in the civil military liaison meeting held on 17.05.2010 cannot take the place of a proper gazette notification to put restriction either on the use of land or on the construction of any high rise building near a military establishment. The petitioner has asserted that unless there is compliance with the necessary formalities as envisaged in the Works of Defence Act, 1903, (briefly "the Defence Act" hereafter), no order preventing any ongoing construction in accordance with the lawful permission granted can be made. The petitioner has stated that in the absence of any gazette notification under the Defence Act imposing any restriction on the use of land or construction of high rise building near the Tezpur Military Station, there was no reason for the petitioner to seek NOC from the army authorities. The petitioner has stated that the decision taken in the meeting dated 17.05.2010 was only for future permission and the impugned direction could not have been issued without having a proper notification under the

Defence Act. Stating that he started the construction immediately after obtaining the permission, the petitioner has complained that the various correspondences between the army authorities, district administration and the Development Authority were all behind his back. He has stated that the outer structure of the building in question situated at Mission Chariali, a prominent business place on the side of NH 37, has almost been completed and that neither the army authorities nor the State Government have complied with the relevant provisions of the Defence Act before asking the petitioner to stop the construction. Stating that the State Government and the army authorities have not taken any step under the Defence Act till date, the petitioner has pointed out an instance of at least one factory building standing at a height of more than 60ft. on the other side of the National Highway opposite to the petitioner's construction. The petitioner has also stated that he did not receive any notice from the appellate authority in the appeal filed by the respondent No. 4.

16. The respondent No. 4 thereafter filed an additional counter affidavit reiterating the allegation of violation of the status-quo order of this Court dated 25.02.2011 by the petitioner, enclosing various correspondences in this regard.

17. The petitioner has filed his reply affidavit to the said additional counter affidavit filed by the respondent No. 4. The petitioner has reiterated his stand that after the status quo order dated 25.02.2011, he did not carry out any sort of construction works. He has stated that the bamboo and rented iron railings/structures which were erected for the purpose of the construction works on the exterior part of the building were removed as he was incurring hiring charges against the iron railings/structures and having regard to the status quo order, he decided to remove the same which took 3-4 days time. The petitioner has also stated that the real reason behind the objection raised by the army authorities against the construction of his building after completion of almost 100% of the super structure is the altercation which took place between some army officials including one Major D. Madame and the staff of his restaurant "K.F. Bar cum Restaurant" Mr. Nirupam Muklania sometime in April, 2010, which incident was infact enquired into by the army authorities on 29.04.2010. According to the petitioner, it was only after the said incident that the army authorities were after him. The construction of the building by the side of the National Highway was going on for about 15 months which was quite visible to the army authorities of the Tezpur Military Station. Asserting that the army authorities were fully aware of the construction, the petitioner has stated that they raised a general objection only in the meeting held on 17.05.2010 and specifically against the petitioner's construction on 24.08.2010 by approaching the Deputy Commissioner, Sonitpur, without complying with the legal requirements under the Defence Act. Regarding the appeal filed by the army authority, the petitioner has contended that the same is not an appeal as contemplated under the Assam Town and Country Planning Act, 1959. Even otherwise, such appeal cannot be termed as an effective alternative remedy. The petitioner has also denied the allegation of violation of the status-quo order of this Court, stating that construction activities

were stopped immediately on passing of the status quo order on 25.02.2011, further stating that such allegations were a diversionary move to deflect attention from the core issue. The petitioner has also given his response to the various correspondences annexed to the additional counter affidavit of the respondent No. 4.

18. The Union of India (respondent No. 3) has not filed any counter affidavit.

19. The Respondent No. 2 i.e. the Under Secretary to the Government of Assam in the Urban Development Department filed an affidavit on 22.11.2011. In the said affidavit, the respondent No. 2 has stated that on receipt of an appeal from the respondent No. 4, the Station Commander, Tezpur Military Station, regarding construction of a highrise multistoried building within the periphery of the Tezpur Military Station, the appellate authority decided to temporarily stay the permission granted by the Development Authority and that necessary instructions were given to the Development Authority in this regard for staying the construction of the building. The respondent No. 2 has further stated that the petitioner's representation dated 17.01.2011 was received by the Government after the stay order was passed by the appellate authority. Stating that the relevant records have been called for by the appellate authority from the Development Authority, the said respondent has stated that the petitioner has been impleaded in the appeal and he would be given opportunity to submit his grievances at the time of hearing. In paragraph-11 of the said counter affidavit, the said respondent No. 2 has stated that the Deputy Commissioner, Sonitpur was requested vide the departmental letter bearing No. 45/2011/50 dtd. 15.03.2011 to inform the Urban Development Department, Government of Assam as to whether any public notice has been issued under sub-section (2) of Section 3 of the Defence Act but no reply has been received. Referring to Section 43 of the Assam Town and Country Planning Act, 1959 (briefly "the state Act" hereafter), the respondent No. 2 has stated that the said section provides for the appellate authority to hear "all appeals" arising out of the provisions of the said Act and that the army authority has preferred an appeal before the appellate authority, which has stayed the permission granted till the disposal of the appeal. The Development Authority has communicated the said decision of the appellate authority to the petitioner.

20. The respondent No. 5 i.e. the Development Authority has also filed its affidavit. The respondent No. 5 has stated that the petitioner was granted permission to construct a G + 7 commercial building by the order dated 25.09.2008 as the plans and drawings submitted by the petitioner were found to be in accordance with the Uniform Zoning Regulations, 2000 as well as the provisions of the state Act. The respondent No. 5 has further stated that the Deputy Commissioner, Sonitpur had communicated to the said respondent the decision taken in the civil military liaison meeting held on 17.05.2010 and, accordingly, the said respondent immediately put on hold all fresh applications seeking permission to construct highrise buildings (more than 48 feet) in the"

periphery of the Tezpur Military Station till the proposed amendments in the Uniform Zoning Regulations were made. The said respondent further stated that having received the State Govt. letter dated 29.12.2010 communicating its decision to stay the permission granted, the respondent No. 2 issued the letter dated 05.01.2011 to the petitioner asking him to stop the construction of the building immediately. Justifying the stay order granted by the appellate authority, the respondent No. 2 has stated that all the documents sought for by the petitioner were provided to him. Admitting that till the order of stay dated 05.01.2011, no complaint of violation of the Master Plan or the Development Scheme or the Zoning Regulations was received against the petitioner, the respondent No. 2 has, however, asserted that it has the power to stay or stop the construction or even order demolition if the construction is found to be against any legal provision or against public health, safety and order or if the State Government directs it to do so. In the present case, the State Government having passed an order staying the permission granted to the petitioner, the respondent No. 5 could not be said to have acted beyond jurisdiction. In its affidavit, the respondent No. 5 has enclosed a letter dated 09.09.2010 addressed by the Chairman of the Development Authority to the Station Commander, Tezpur Military Station. In the said letter, the Chairman informed the Station Commander that the permission for construction was granted for the building in question as per the Uniform Zoning Regulations, 2000 of the Town and Country Planning Department, Government of Assam. It was stated therein that the decision taken in the civil military liaison meeting held on 17.05.2010 in connection with the construction permissions near the periphery of the military station requires amendments in the said regulations. The respondent No. 5 stated that once the amendments are made, such construction permissions will be granted as per the decision taken in the meeting. The respondent No. 4 was further informed that fresh applications seeking permission to construct highrise buildings near the periphery of Tezpur Military Station will be put on hold till the amendments are made in the regulation and that construction permission for highrise building in that area will be reviewed and action will be taken as per the amended regulation. However, the respondent No. 5 has admitted that the records available with it do not contain any notification or declaration under the Defence Act.

21. I have heard Mr. B.C. Das, learned Senior Counsel assisted by Mr. D.N. Bhattacharjya, learned counsel for the petitioner, Mr. S. Bhattacharjee, learned counsel for the respondent Nos. 3 and 4, Mr. J. Handique, learned Govt. Advocate, Assam for the respondent Nos. 1 and 2 and Mr. A. Ganguly, learned counsel for the respondent No. 5.

22. Mr. Das, the learned Senior Counsel submits that the petitioner had carried out the construction of the building in question only after obtaining the due permission from the Development Authority. Referring to the order of permission dated 25.09.2008, he submits that it is clear that such permission was granted for a G + 7 multistoried building and that the permission application alongwith

the map submitted in this regard were approved. Referring to the affidavit of the respondent No. 5, the learned Senior Counsel submits that the said permission was granted by the Development Authority as the plan and drawings submitted by the petitioner were found to be in accordance with the Uniform Zoning Regulations, 2000 as well as the provisions of the state Act. He further submits that there was no violation of any of the permission conditions or deviation from the approved plan and drawings or any violation of the above regulations and provisions of the state Act to warrant stopping of the lawful construction. Referring to the provisions of the Defence Act, the learned Senior Counsel submits that publication of a declaration in the official gazette u/s 3 of the said Act is the sine-quo-non to attract the other provisions of the Defence Act so as to restrain the petitioner from carrying out the construction on his own land. Elaborating on this aspect, Mr. Das submits that if the Central Govt. considers it necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any works of defence in order to ensure that such land may be kept free from buildings and other obstructions, a declaration is required to be made to that effect which should be published in the official gazette. The declaration should state the district and the place in which the land is situate alongwith a sketch plan of the land which should be displayed in public by the Collector. Contending that no such declaration under sub-section (2) of section 3 of the Defence Act has been published, the learned Senior Counsel submits that the objection to the petitioner's construction is without any legal basis. Referring to the various provisions of the state Act, Mr. Das submits that the appeal as provided in Section 42 of the said Act is limited only to matters relating to award of compensation and levy of betterment fees as provided under Sections 37 and 41 of the said Act. Pointing out the language of the said provision, the learned Sr. Counsel for the petitioner submits that as per Section 42 of the said Act, any person aggrieved by the decision of the Development Authority with regard to the award of compensation and betterment fees, may prefer an appeal to the appellate authority within 30 days of the award. He therefore submits that the respondent No. 4 i.e. the Station Commander of the Tezpur Military Station cannot be termed as "a person aggrieved" within the meaning of Section 42 of the Act and that the so-called appeal filed by the respondent No. 4 is not an appeal at all in the eye of law. Referring to the reply affidavit filed by the petitioner to the additional counter affidavit of the respondent No. 4, Mr. Das contends that the real reason behind the objection of the respondent No. 4 to the construction of the building is the fracas which took place in April, 2010 in the petitioner's restaurant "K.F. Bar cum Restaurant" between some army officials including one Major D. Madame and the staff of the restaurant, which infact led to an enquiry by the army authorities on 29.04.2010. He therefore submits that the impugned action of staying his lawful construction is devoid of any legal sanction and should be interfered with by this Court in an appropriate manner. In support of his submissions, he refers to and relies on the following decisions :

(i) Urban Improvement Trust, Udaipur Vs. Bheru Lal and Others, ,

(ii) Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Cock and Chem. Ltd. and Others, ,

(iii) Talson Real Estate Pvt. Ltd. Vs. State of Maharashtra and Others, .

23. Resisting the submissions advanced on behalf of the petitioner, Mr. S. Bhattacharjee, Id. Counsel for the respondent No. 4 refers to section 43 of the state Act and submits that the language of the said section particularly the expression "all appeals arising out of the provisions of this Act" makes it abundantly clear that an appeal can be filed relating to any matter under the Act. According to him, it is evident that the petitioner has an alternative remedy by way of an appeal under the provisions of the aforesaid Act. He submits that because of the availability of the appellate provision, which the petitioner has not availed, the writ petition is not maintainable. On the other hand, the learned Counsel submits that the appeal filed by the respondent No. 4 is maintainable and as a matter of fact, the petitioner had appeared before the appellate authority hearing the appeal of the respondent No. 4. Referring to the provisions of the Defence Act, Mr. Bhattacharjee, the learned Counsel for the respondent No. 4 submits that the petitioner or for that matter the Development Authority were aware of the restrictions imposed by section 7 thereof. He further submits that the height of the building is not mentioned in the building permission and therefore contends that the building permission was obtained by the petitioner by concealing the height of the building. He also submits that despite being aware of the fact that the construction is near the vicinity of the Tezpur Military Station, the Development Authority did not obtain any NOC from the defence authority. Justifying the stay on the construction of the petitioner's building, the learned Counsel for the respondent No. 4 submits that since the stay order was passed by the Development Authority, the petitioner could have challenged the same in appeal before the appellate authority. Another contention of Mr. Bhattacharjee is that the writ petition has been filed by Shri Anurag Agarwal in his individual capacity and not by the company called Satyam Krishna Project Private Limited which is carrying out the construction. Opposing the submission of Mr. Das that the objection by the respondent No. 4 to the construction of the petitioner's building is a fall out of the altercation which took place between some army officers and the staff of the petitioner's restaurant, Mr. Bhattacharjee submits that the said facts have not been pleaded in the writ petition and, therefore, the petitioner cannot rely on such submissions at the time of hearing. Finally, he submits that the writ petitioner has not approached this Court with clean hands. In support of this contention, the learned counsel submits that the petitioner obtained the building permission by not disclosing the height of the building; then he did not file appeal against the stop construction order; when the respondent No. 4 filed the appeal, the petitioner appeared before the appellate authority and lastly, the petitioner violated the status-quo order passed by this Court inasmuch as he continued with the construction thereafter. He therefore seeks dismissal of the writ petition. In support of his submissions, Mr. Bhattacharjee refers to and relies on the following decisions :

- (i) Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes,
- (ii) STATE OF U.P. and Another Vs. LABH CHAND.,
- (iii) State of Madhya Pradesh Vs. Nerbudda Valley Refrigerated Products Company Pvt. Ltd. and Others,
- (iv) CM No. 3683/2003(Delhi High Court): Traders Welfare Association Vs. Union of India & Ors.) decided on 28.05.2003.
- (v) W.P. No. 4271/2007 (Madhya Pradesh High Court) : Dr. G.S. Ahluwalia Vs. Union of India & Ors. decided on 13.08.2007.

24. Mr. Handique, learned Government Advocate, Assam in his submission refers to paragraphs 12 and 14 of the counter affidavit filed by the respondent No. 2. He has also produced the relevant record relating to the appellate proceedings of the appeal filed by the respondent No. 4.

25. Mr. A. Ganguli, learned Counsel for the respondent No. 5 in his submission refers to the letter dated 09.09.2010 issued by the Chairman of the Development Authority and addressed to the Station Commander, Tezpur Military Station and submits that the construction permission was granted as the petitioner fulfilled all the necessary conditions. He further submits that no complaints were received by the Development Authority regarding violation of any of the building conditions or approved drawings by the petitioner. According to him, on the date of permission i.e. on 25.09.2008, there was no notification u/s 3 of the Defence Act. He, however, submits that since there is a provision for appeal, the petitioner should move the appellate authority instead of invoking the writ jurisdiction of this Court.

26. In his reply, Mr. Das the learned Senior Counsel for the petitioner, while reiterating his earlier submissions, further submits that the right of appeal is a creature of the statute. According to him, it is section 42 of the state Act and not section 43 thereof which is the substantive provision dealing with appeal, that the right of appeal as provided u/s 42 is circumscribed by the contours of chapters VI and VII of the state Act and that Section 42 is a part of chapter VII. Mr. Das contends that the words "all appeals" appearing in Section 43 has to be understood in the context of Section 42. Therefore, there is no appellate provision in so far the petitioner is concerned. Alluding to the submission of Mr. Bhattacharjee that the petitioner could have filed an appeal before the appellate authority against the stop construction order of the Development Authority, Mr. Das submits that firstly, there is no appellate provision, and secondly, even assuming that there is an appellate provision, considering the fact that the stop construction order was passed by the Development Authority following the stay order passed by the appellate authority, the question of filing any appeal before the very same appellate authority does not arise. Regarding the objection raised by Mr. Bhattacharjee to the reference made to the altercation between some of the army officers and the staff of the petitioner's restaurant as those have not

been pleaded in the writ petition, Mr. Das contends that the same have been expressly stated in the rejoinder affidavit filed by the petitioner to the additional counter affidavit filed by the respondent No. 4 and, therefore, the respondent No. 4 had full prior knowledge about the above facts which have been relied upon by the petitioner in support of his challenge to the impugned order. In this regard, Mr. Das presses into service a decision of the Apex Court reported in Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Vs. State of Madras and Another, .

27. The rival submissions made at the bar with considerable force and passion have received the due and anxious consideration of the Court.

28. Since Mr. Bhattacharjee, the learned Counsel for the respondent No. 4 has argued and laid great stress on the availability of an alternative remedy in the form of an appeal under the state Act, which appears to be his principal argument, let us therefore examine the relevant provisions of the state Act.

29. The Assam Town and Country Planning Act, 1959 (earlier referred to as "the state Act") has, been enacted to provide for the development of the towns and country sides of the state of Assam. As per the statement of objects and reasons, the said Act has been enacted to deal with the problems of haphazard growth of the urban areas and to provide for the development of those areas on sound planning principles with the general object of securing proper sanitary conditions, to conserve and promote the public health, safety and general welfare of the people living therein.

30. Section 2(1) of the state Act defines the word "authority", which means the local or regional authority appointed by the state Government for the purpose of administering the said Act and means the municipal board in the case of municipal areas constituted under the Assam Municipal Act, 1956 or the development authority constituted u/s 8 of the state Act. Section 2(3) of the state Act defines "betterment fee", which means the fee prescribed in respect of an increase in the value of land resulting from the execution of a development scheme. "Development" and "Scheme" are defined separately in sub-sections (7) and (16) respectively of Section 2 of the state Act "Development" has been defined to mean the carrying out of building, engineering, mining or other operations in, on or over the land or making of any material change in the use of any buildings or of land subject to the exceptions mentioned in the proviso thereto. "Scheme" means a development scheme and includes a plan together with the descriptive matter if any relating to such a scheme.

31. Section 8A of the state Act provides for constitution of the development authority with jurisdiction over such area as may be specified. The development authority consists of various members, including a Chairman to be appointed by the state Government. Section 8D of the state Act lays down the functions and powers of the authority, which is basically to promote and secure the development of the area according to the master plan. Section 9 of the state Act

provides for preparation of the master plan, which is required to be approved by the State Government. After approval, such master plan is required to be published giving wide and sufficient publicity, inviting public opinion and objections. After consideration of all objections, suggestions and representations etc., the state Government shall have the plan finally prepared. Section 11 deals with the contents of the master plan which may include a general land use plan for residential, commercial, industrial, recreational and public and semi-public purposes, Zoning plan etc. As per section 13, after publication of the plan as adopted by the State Government, no person shall use any land or setup any new structure on any land covered within the area except with the permission of the authority on a written application submitted for that purpose. Such application is required to be accompanied by a plan showing the building to be constructed, the site and the position of the building to be erected etc. As per subsection (4) of section 13 of the state Act, the authority shall not refuse the permission except on the ground of contravention of proposals contained in the plan or the regulations. Unless the permission is refused within a period of one month from the receipt of the application, it shall be presumed that the permission has been given. Section 14 of the State Act empowers the State Government to review the master plan and to modify the same and the Zoning regulations from time to time.

32. u/s 30 of the state Act, if the authority determines at any stage that the layout or construction is not proceeding according to the sanctioned plan or is in violation of any provisions of the state Act, it shall serve a notice on the applicant requiring him to stay further execution until correction has been made in accordance with the approved plan. The authority also has the power to stop development u/s 30A of the state Act if any development is in contravention of the master plan or development scheme or without the permission, approval or sanction or is in contravention of any condition subject to which such permission, approval or sanction has been granted. The authority is also vested with the drastic power of demolition of a building u/s 30B of the state Act in addition to any prosecution that may be instituted thereunder.

33. Chapter VI of the state Act deals with acquisition of land which may be required for execution of a scheme. Chapter VII deals with payment of compensation and for levy of betterment fee. u/s 37, which falls under chapter VII, any person whose property is injuriously affected in value by the making of a scheme, is entitled to obtain compensation in respect thereof from the authority. As per Section 41, every property which has increased in value due to its inclusion within an area under a plan or a scheme or due to the execution of such scheme shall be charged with a betterment fee.

34. That brings us to Section 42 of the state Act. As per the said section, any person aggrieved by the decision of the authority with respect to matters of compensation and betterment fee, may appeal to the appellate authority within thirty days of the award. As per sub-section (2) of Section 42, if the" owner of

any property objects to the quantum of betterment fee as determined by the authority, he shall also state the amount which he thinks to be appropriate. Thereafter, he may within 30 days from the date of the determination of his objection or appeal becoming final, by written notice require the authority to acquire the property together with any building or other works that may exist thereon. The authority shall thereupon acquire the property. It may be noted that Section 42 is a part of chapter-VII, which as indicated above, deals with compensation and betterment fee.

35. Chapter-VIII of the state Act deals with the appointment of appellate authority, duties of the appellate authority, procedure to be adopted by the appellate authority etc. and consist of Sections 42 to 47. As per section 43, the state Government shall appoint an appellate authority to hear all appeals arising out of the provisions of the state Act, whose decision shall be final. He must have the qualification of a District Judge or that of a member of the Assam Board of Revenue. As per Section 44, the appellate authority is to hear and decide appeals against the orders of the authority as well as to decide and hear appeals in respect of such other matters and exercise such other powers as may be entrusted to and conferred upon it by the state Government in accordance with the provisions of the state Act. All such appeals are required to be filed within a month from the date of the order appealed against, with the appellate authority having the power to condone the delay, if any, in filing such appeal for sufficient reasons.

36. From a brief survey of the state Act, it is seen that the same has been enacted to provide for a planned development of the towns and country sides of the state. Whether the state Act has achieved its avowed objective after 50 years of its existence is however a debatable question which we may not venture to address in the present proceeding. The Tezpur Development Authority (earlier referred to as "the Development Authority") is a creature of the state Act. As noticed above, the preparation and publication of the master plan and zoning regulations as provided in chapter III of the state Act entails a transparent procedure where anyone in the locality may submit his opinion, suggestions or objections. The State Government has the power to review and modify the master plan and zoning regulations from time to time in tune with the changing requirements. If a construction is not proceeding according to the sanctioned plan or is in violation of any provision of the state Act, the authority (in the present case the Development Authority) has the power to stop the construction till the necessary corrections are made. The authority also has the power to demolish a construction in addition to any prosecution that may be instituted under the state Act, if the same is carried out in contravention of the master plan or development scheme or without the permission, approval or sanction as required or in contravention of any condition subject to which such permission, approval or sanction had been granted.

37. Under the state Act, the state Government is vested with the power to

acquire land on the representation of the authority if such acquisition is considered necessary. In the case of acquisition of land and computation and payment of compensation therefor, the provisions of the Land Acquisition Act, 1894 shall be applicable. As already noticed, chapter VII of the state Act provides for payment of compensation and levy of betterment fee. Any person whose property is injuriously affected in value by the making of a scheme is entitled to obtain compensation in respect thereof from the authority. On the other hand, every property which has increased in value due to its inclusion within an area under a plan or a scheme or due to the execution of such schemes shall be charged with a betterment fee. A person who is aggrieved by the decision of the authority with respect to matters of compensation and betterment fee, may appeal to the appellate authority within thirty days of the award.

38. The state Act also provides for the appointment of an appellate authority having the qualification as noticed above, who shall be appointed by the State Government to hear "all appeals arising out of the provisions of this Act". The appellate authority shall hear and decide appeals against the orders of the authority, whose decision shall be final. It has also the power to hear and decide appeals in respect of such other matters and exercise such other powers as may be entrusted to and conferred upon it by the state Government in accordance with the provisions of the state Act.

39. A careful reading of the two sections i.e., Sections 42 and 43 of the state Act would reveal that there is no contradiction between the two provisions. The language of section 42 is clear, unambiguous and specific; it says that any person who is aggrieved by a decision of the authority with respect to matters of compensation and betterment fee, may appeal before the appellate authority against such an award. On the other hand, Section 43 provides that the appellate authority is "to hear all appeals arising out of the provisions of this Act". The expression "to hear all appeals arising out of the provisions of this Act" would include within its fold any appeal filed against any order passed by the authority under the provisions of the state Act. It would include an appeal filed against an award of compensation or against a decision of the authority levying a betterment fee. This is further clarified by the language of section 44 which says that the appellate authority shall hear and decide appeals against the orders of the authority.

40. The argument of Mr. Das, the teamed Senior Counsel for the petitioner, that the provision of appeal under the state Act should be confined to matters of compensation and betterment fee as provided in Section 42, which finds place in chapter VII dealing with payment of compensation and levy of betterment fee, therefore the right of appeal under the state Act is circumscribed by chapter VII and that the expression "to hear all appeals arising out of the provisions of this Act" has to be understood in the context of section 42 of the state Act, gives a very narrow restricted interpretation to the appellate provision. If the said submission/interpretation is accepted, it will lead to a situation where an appeal

can be filed only against an award of compensation or against the levy of a betterment fee, leaving out persons who may be aggrieved by various orders passed or steps taken under the provisions of the state Act without any statutory remedy. Such a construction would be inconsistent and incompatible with the scheme of the state Act, more so when there are drastic provisions like stopping constructions or demolition of any construction. To say that against an order of demolition of a building or against a stop construction order, an aggrieved person will have no statutory remedy by way of an appeal would be an absurd reading of the provisions of the state Act. As pointed out above, there is no contradiction between the provisions of sections 42 and 43 of the state Act in as much as an appeal can be filed against any order of the authority passed under the provisions of the Act, including against an award of compensation or against a levy of betterment fee. Therefore, I hold that against a stop construction order of the authority, an appeal lies before the appellate authority under the state Act. So the contention of the petitioner that there is no appellate provision under the state Act against the stop construction order passed by the Development Authority cannot be accepted and is accordingly rejected.

41. Having held that an appeal lies against the stop construction order passed by the Development Authority, let us now turn to the facts of the present case. A few questions arise for consideration at this stage viz.,

(1) Whether the respondent No. 4 i.e., the Station Commander, Tezpur Military Station has the right to file appeal under the state Act against the building permission granted to the petitioner by the Development Authority?

(2) Whether the appeal dated 07.10.2010 filed by the respondent No. 4 is an appeal at all in the eye of law ?

(3) Whether such an appellate proceeding would offer an adequate and efficacious alternative remedy to the petitioner ?

(4) Whether non-filing of any appeal by the petitioner against the stop construction order dated 05.01.2011 would be fatal to his cause as espoused in the present proceeding ?

42. In so far the first question is concerned, the answer can be found in the language of Sections 43 and 44 of the state Act itself. As already noticed, the appellate authority is to hear all appeals arising out of the provisions of the state Act and it has the duty and power to hear and decide any appeal against an order of the authority. Building permission granted or a NOC issued by the authority for construction of a building would be an order of the authority within the meaning of section 44(1) (a) of the state Act. As such, an appeal filed against such a building permission or NOC would be an appeal arising out of the provisions of the state Act. Any person who is aggrieved by such a building permission or NOC would be entitled to file an appeal against it. Evidently, the respondent No. 4 is aggrieved by the building permission granted to the petitioner, for the reasons already indicated. Therefore, the respondent No. 4 has

the right to file an appeal under the state Act against the building permission granted to the petitioner by the Development Authority.

43. Before deliberating on the second question i.e., whether the appeal dated 07.10.2010 filed by the respondent No. 4 is an appeal at all in the eye of law, let us examine once again the relevant provisions relating to the appellate authority. As per subsection (2) of Section 43 of the state Act, a person having the qualification of a District Judge or having the qualification to become a member of the Assam Board of Revenue constituted under the Assam Board of Revenue Act, 1962 can be appointed as the appellate authority. As per Section 3(3) of the Assam Board of Revenue Act, 1962, a member of the Assam Board of Revenue shall either be a person who, in the opinion of the state Government, is by reason of his wide administrative or judicial experience fit to be such a member or a person who is qualified to be appointed as a Judge of a High Court. Thus a person to be appointed as an appellate authority must have the high qualification as indicated above. An appeal is required to be filed within a period of one month from the date of the order appealed against, with the appellate authority having the power to condone any delay in filing such appeal. The procedure of working of the appellate authority is prescribed in section 45 of the state Act whereunder it has all the powers of the Civil Court for the purpose of taking evidence and for enforcing the attendance of witnesses etc. It also has the power to impose costs. Every party to an appellate proceeding shall be entitled to appear either in person or by his recognized agent and the appellate authority must conduct its proceedings in tune with the principles of natural justice, giving hearing to the interested persons. It has the power to call for the relevant record and/or report. As per sub-section (1) of Section 43, the decision of the appellate authority is final.

44. Considering the nature, scope and ambit of the appellate powers, which involves an adjudicatory process, the high qualification required of the appellate authority, which has to be that a District Judge or of a member of the Assam Board of Revenue (which includes a person qualified to be appointed as a Judge of a High Court) and the finality attached to the orders of the appellate authority, I am of the view that the appellate proceedings have all the trappings of a quasi-judicial proceeding. Therefore, I have no hesitation to hold that the proceedings before the appellate authority are quasi-judicial in nature and the appellate authority exercises quasi-judicial powers.

45. Having said so, let us now have a look at the records of the appellate proceeding produced by the learned Government Advocate. The records so produced contain two files. The first file is numbered File No. UDD(T) 284/2010. This file contains 12 pages of note sheet and 66 pages, including the appeal dated 07.10.2010 filed by the respondent No. 4. The second file is numbered File No. UDD(T) 45/2011. It contains 10 pages of note sheet and 73 pages, including copies of the writ petition and the affidavit-in-opposition filed by the respondent No. 2. It also contains 5 loose papers, including a document marked as "X". The

said document (marked as "X") is a notification bearing No. UDD(T) 190/2008/94 dated 14.06.2010 issued by the Principal Secretary to the Government of Assam, Urban Development Department. The relevant portion of the said notification is quoted hereunder:

GOVERNMENT OF ASSAM URBAN DEVELOPMENT (T) DEPARTMENT DISPUR :::
GUWAHATI-6 ORDERS BY THE GOVERNOR NOTIFICATION

Dated, Dispur the 14th June, 2010

No. UDD(T) 190/2008/94: In continuation of this Department's Notification No. UDD(T) 41/2006/Pt.II/4 dtd. 26.08.2009 and in exercise of Powers Conferred u/s 43(1) (2) of Chapter VIII of the Assam Town & Country Planning Act, 1959 (as amended), the Governor of Assam is pleased to appoint J. Chakraborty, IAS, Member of the Assam Board of Revenue & Additional Secretary to the Govt. of Assam, Urban Development Department, Assam, as the Appellate Authority to hear all appeals arising out of the provisions of the said Act for the State of Assam with immediate effect till Shri M.U. Ahmed, IAS, Secretary to the Govt. of Assam, Urban Development Department, Assam resumes his duty after availing the Earned Leave.

Sd/- (Shri Saraswati Prasad, IAS) Principal Secretary to the Govt. of Assam
Urban Development Department Memo No. UDD(T) 190/2008/94-A, Dated
Dispur the 14th June, 2010

46. From a perusal of the said notification dated 14.06.2010, it is seen that Shri M.U. Ahmed, IAS, Secretary to the Government of Assam, Urban Development Department is the appellate authority under the state Act and during the period of his earned leave, Shri J. Chakraborty, IAS, Member, Assam Board of Revenue and Additional Secretary to the Government of Assam, Urban Development Department was appointed as the appellate authority.

47. The records indicate that no separate file for the appeal has been maintained by the appellate authority. The appeal has been processed through the departmental hierarchy and there is also no separate set up of the appellate authority. The appeal has been dealt with by the department officials like any other departmental matter. It is seen that the appeal of the respondent No. 4 dated 07.10.2010 was received in the department on 25.10.2010. Now let us have a look at the contents of the said appeal, which is reproduced hereunder :

Tel :2241

Station Headquarters Tezpur PIN-901213 07 Oct 2010

363/1/Q(PC)

The Honourable Appellate Authority,

The Secretary

Urban Development Department Govt. of Assam

Dispur Guwahati-6

Construction of high rise Multistorey Building in the vicinity of KF Restaurant, Mission Chariali. Tezpur. Distt. Sonitpur near the periphery of Military Station. Tezpur by Sh. Anurag Agarwal

1. References :-

(a) Deputy Secretary Revenue and D.M. Deptt. letter No. RLA 216/2010/12 dt. 24 Jun 2010.

(b) Office of Deputy Commissioner, Sonitpur, Tezpur (DCP Cell) letter No. SPD/Misc/203/2009/796 dt 19 Jul 2010 addressed to the Chairman, Tezpur Development Authority, Sonitpur (copy enclosed for ready reference).

(c) Station Headquarters, Tezpur letter No. 363/1/Q (PC) dt 24 Aug 2010 (Copy enclosed for ready reference).

(d) Tezpur Development Authority letter No. TDA/BD/MAZGAON/2013/11/494 dt 09 Sep 2010 (copy enclosed for ready reference)

MOST RESPECTFULLY SHOWETH:-

2. Vide letter under reference cited at Para 1(b) above, the Office of the Deputy Commissioner, Sonitpur, Tezpur had written to the Chairman, Tezpur Development Authority informing that high rise buildings cannot be allowed to be constructed near the periphery of Military Station, Tezpur in violation of Indian works of Defence Act, 1903 and Classification of Defence Installation and Establishment, Gazette of India, Extra Ordinary (SO 1589) dt 30 Jun 2008. It was specifically mentioned that "No high rise building (more than 48 feet) is permitted to be constructed within 500 meters from the periphery of Military Station without obtaining NOC from local Military authorities". Hence, Tezpur Development Authority was requested by the Office of Deputy Commissioner, Tezpur to look into the matter and not to allow construction of high rise buildings within 500 meters from periphery of Military Station, Tezpur.

3. That the Station Commander, Tezpur, accordingly, brought the matter of construction of a high rise building adjacent to KF Restaurant at Mission Chariali, Tezpur to the notice of Tezpur Development Authority (by Sh. Anurag Aggarwal) vide their letter No. 363/1/Q (PC) dt 24 Aug 2010. Presently, the said building has reached almost double the permissible height and further construction activity is going on at full swing. Such a high rise building undoubtedly would be a security threat to defence installations located in the vicinity. The army authorities had therefore, expressed their concern for the ongoing construction activity.

4. That the Chairman, Tezpur Development Authority vide their communication dt. 09 Sep 2010 had brought out that permission for construction of the said building was granted as per Uniform Zoning Regulation, 2000 of Town and Country Planning Department, a govt. of Assam vide Memo No. TDA/B6/

Mazgaon/941/08 dt 25 Sep 2008 and that the construction permission would be reviewed only after the necessary amendments in the said regulations are carried out in accordance with the decision taken in civil military liaison conference held on 17 May 2010.

5. That it is respectfully submitted that by the time the amendments in the State Govt. regulations take effect, the construction work of the said high rise building would be over, rendering the present correspondence on the subject infructuous.

6. That it is further submitted that State Govt. regulations/instructions may not supplant the provisions of the Central Act and statutory orders published in Govt. of India, Gazette (SO 1589). It is therefore, requested that amendments in the Uniform Zoning Regulations, 2000 may be incorporated at the earliest in view of the Central legislations and decision taken in the civil military liaison conference held on 17th May 2010.

7. In the premises aforesaid, it is most respectfully prayed that during the intervening period, in the interest of justice and security of defence installations, the Honourable Appellate Authority may be pleased to pass interim orders for staying further construction activities of the said building.

Sd/- illegible (PN Chaudhari) Brig Stn Cdr, Tezpur Military Station

48. As could be seen from the above, the said appeal is basically in the form of a petition/representation addressed to the appellate authority. Though a grievance is made against the construction of the petitioner, the order granting the building permission/NOC dated 25.09.2008 is not impugned in the appeal. Even the party likely to be affected by the outcome of the appeal i.e., the petitioner, has not been made a party to the appeal. Infact, there is no party in the appeal, neither any appellant nor any respondent, though the appeal involves an adjudicatory process and serious consequences may visit the affected party depending upon the outcome of the appeal. The request made in the said petition is to make amendments in the Uniform Zoning Regulations, 2000 to incorporate the decision taken in the civil military liason meeting held on 17.05.2010 and during the intervening period, to stay further construction activities of the said building.

49. As indicated above, the said appeal was received in the department on 25.10.2010. The first note is dated 06.11.2010, addressed to the Under Secretary. The said note makes an interesting reading. In the middle part of the note, it is stated that no high rise building (more than 48 feet) is permitted to be constructed within 500 meters from the periphery of the military station without obtaining NOC from the local military authorities. It also states that the said building has reached almost double the permissible height and that further construction activity is going on at full swing. It is not understood as to how and on what basis the author of the said note had made the said comment in his note. What was the basis, legal or otherwise, to say that no high rise building (more than 48 feet) is permitted to be constructed within 500 meters from the periphery of a military station without obtaining NOC from the local military

authorities? What was the basis on which it was commented that the said building has reached almost double the permissible height and that construction is going on at full swing? Did he have any report before him or was it on the basis of his personal knowledge? Interestingly, there is no mention about the building permission dated 25.09.2008 granted by the Development Authority. He had simply reproduced the averments made in the appeal and thereby sought to give an impression that the building is being constructed in an unauthorized manner without any permission.

50. The note of the Under Secretary dated 08.11.2010 addressed to the Principal Secretary makes still more interesting reading. He writes that an amendment of the Uniform Zoning Regulations, 2000 will have to be done to check construction of high rise buildings near the periphery of the military station. He further observes that interim order, if considered necessary, may be issued banning further construction till the amendment is made. There is no mention either of the building permission granted or of the appellate authority. Infact, the note was put up before the Principal Secretary to issue the interim order banning further construction.

51. Luckily at this stage, the Principal Secretary comes into the picture. He puts up a margin note dated 08.11.2010 saying that the decision is to be taken by the appellate authority. Thereafter, there is a note dated 20.11.2010 to wait for the joining of the Secretary, the appellate authority. On 25.11.2010, there is a note that Shri M. Ahmed, Secretary was likely to join on 4th December and that till then they should wait. The note of 26.11.2010 says that the appeal be put up immediately on resumption of duties by the appellate authority.

52. All this while, the officials of the Urban Development Department dealing with the appeal were completely silent about the notification dated 14.06.2010 as referred to above whereby Shri J. Chakraborty, IAS, member of the Assam Board of Revenue was appointed as the appellate authority during the period of absence of Shri M.U. Ahmed. Instead of placing the appeal before the appellate authority then holding office, the departmental officials dealing with the appeal for some unexplained reason decided to wait for Shri M.U. Ahmed.

53. On 27.12.2010, Shri M.U. Ahmed as the appellate authority passes the following order :-

Appeal admitted. TDA's action is stayed until further order. Please issue notice to all concerned informing the interim decision and for hearing, fixing the date on 03.02.2010 (sic) at 3PM in the appellate authority's office chamber.

54. The above order reflects a most mechanical approach and non-application of mind on the part of the appellate authority. He did not examine whether the appeal was in form, against which order the appeal was filed, whether the appeal was maintainable or the justification for granting stay. At this stage, let us once again go back to the appeal of the respondent No. 4 dated 07.10.2010. If the appeal is against the building permission granted to the petitioner, the same is

dated 25.09.2008 (one of the prayer made in the appeal is to stay further construction of the building). As per section 44(2) of the state Act, the appeal should have been filed within a month from the date of the order appealed against. In case of any delay in filing the appeal, the appellate authority has the power to condone the delay for sufficient reasons. In this case, the appeal should have been filed within a month from 25.09.2008. As it was filed on 25.10.2010 (the date of receipt of the appeal in the department), there is a delay of more than two years in filing the appeal. Not to speak of filing a separate application for condonation of delay, there is not even a single statement in the appeal explaining the delay or a prayer made seeking the condonation of delay in filing the appeal. The appellate authority did not examine this aspect of the matter at all, rather he completely overlooked it. Without condoning the delay, the appeal could not have been admitted straight away. Another disturbing aspect is that without examining as to whether the affected party has been made a party to the appeal and without putting the affected party, the party whose building construction had been stayed i.e., the petitioner, on notice and without hearing him, the appellate authority passed the stay order. It is not that the appellate authority does not have the power to pass an ex-parte interim order. The appellate authority certainly has the power to pass interim orders without waiting for the appearance of the affected party in an appropriate case. But in the instant case, the sequence of events clearly belly the urgency or necessity for passing such an interim order without putting the affected party on notice. As noticed above, the appeal is dated 07.10.2010, it was filed on 25.10.2010 and the stay was granted on the very first day when the appeal was admitted on 27.12.2010. The order of the appellate authority dated 27.12.2010 does not indicate as to whether the appellant or his agent had appeared before the appellate authority and pressed for a stay order. In any case, the order dated 27.12.2010 is a non-speaking order without giving any reasons for passing the stay order, that too on the first day itself without hearing the affected party. Interestingly, the portion of the appellate order dealing with the stay reads as follows:- "TDA's action is stayed", without elaborating or stating which or what action of the TDA (Tezpur Development Authority) has been stayed.

55. If, on the other hand, the appeal is for seeking amendment in the Uniform Zoning Regulations, 2000, then in that case, it is not against an order of the authority as stated in section 44(1) (a) of the state Act. As noticed in the earlier part of this judgment, preparation of the master plan and zoning regulations are dealt with in part III of the state Act and it is a transparent procedure. Any one of the concerned locality can file objections, suggestions and representations in respect of such plan and regulations. It is not understood as to what prevented the army authorities of the Tezpur Military Station to put forward their views regarding construction activities in the vicinity of the Tezpur Military Station before the Uniform Zoning Regulations, 2000 was finalized. It only shows that the respondent No. 4 was not at all vigilant in this regard. Even at this stage, if the respondent No. 4 has any grievance against the aforesaid regulations and

wants any amendment thereof, he can certainly move the state Government u/s 14 of the state Act whereunder the state Government has the power to review and modify the master plan and the zoning regulations. Instead of doing that, the respondent No. 4 has filed the appeal. As noted above, u/s 44(1)(a) of the state Act, the appeal has to be against an order of the authority. A conjoint reading of Section 43 (1) of the state Act, which provides for appointment of an appellate authority to hear all appeals arising out of the provisions of the said Act, and Section 44(1)(a) thereof, which provides that the appellate authority shall hear and decide appeals against the orders of the authority, makes it abundantly clear that the expression "to hear all appeals arising out of the provisions of this Act" as appearing in Section 43(1) would mean appeals arising out of orders passed by the authority under the provisions of the state Act. Moreover, considering the scheme of the state Act, particularly Sections 9 to 14 (dealing with the master plan and zoning regulations) vis-a-vis Sections 43 and 44 (dealing with the sweep of the powers of the appellate authority), it can safely be said that amendment of the master plan or the zoning regulation is not a matter of adjudication before the appellate authority.

56. Coming back to the conduct of the departmental officials in dealing with the appeal and that of the appellate authority, it is seen from the record that hearing of the appeal was fixed on 03.02.2011 and for this, notice dated 29.12.2010 was issued by the Under Secretary of the Department to the Chairman of the Development Authority and the Station Commander, Tezpur Military Station. No notice was issued to the petitioner although the stay order had adversely affected him. As per the note dated 21.01.2011, the Chairman of the Development Authority had ordered the petitioner to stop the construction, following which the petitioner requested to withdraw the stay order. By subsequent notes, the same was directed to be put up on the date of hearing on 03.02.2011. It may be stated that after the stay order was passed by the appellate authority, the Under Secretary of the Department informed the Chairman of the Development Authority about the same vide the letter dated 29.12.2010 following which the Chairman issued the stop construction order vide the letter dated 05.01.2011.

57. Perhaps realizing the gross impropriety of what was going on, the lawyers for the respondent No. 4 put in their appearance before the appellate authority on 03.02.2011 by filing their power and also an application for impleadment of the petitioner in the appeal. In the said application, the respondent No. 4/appellant stated that the petitioner "who has obtained the impugned NOC is a necessary party in the present appeal". As such, a prayer was made before the appellate authority to implead the petitioner in the appeal as a respondent. From that application it is clear that it is the NOC issued to the petitioner by the Development Authority which is impugned in the appeal. Therefore, as already adverted to hereinabove, the appeal being directed against the NOC dated 25.09.2008 is clearly time barred and without condoning the delay, the appeal could not have been admitted and the stay order passed.

58. There is another aspect to this matter. Under sections 30 and 30A of the state Act, if the authority finds that a construction is not proceeding according to the sanctioned plan or is in violation of any of the provisions of the state Act or is in contravention of the master plan or the development scheme or without the permission, approval or sanction or is in contravention of any condition subject to which such permission, approval or sanction has been granted, the authority can stop/stay the construction. Under the state Act, it is only under such circumstances that a construction can be stayed/stopped. It is nobody's case that the petitioner's construction has contravened any of the above. Infact, the Development Authority i.e., the respondent No. 5 has admitted in its affidavit that the plans and drawings submitted by the petitioner were found to be in accordance with the Uniform Zoning Regulations, 2000 as well as the provisions of the state Act and that till the order of stay dated 05.01.2011, no complaint of violation of the master plan or the development scheme or the zoning regulations was received against the petitioner. Therefore, there was no justification for passing the stay order. As such, the stay order passed by the appellate authority is wholly without jurisdiction.

59. Therefore, for all the aforesaid reasons, I am of the view that the appeal dated 07.10.2010 filed by the respondent No. 4 is not an appeal in accordance with law and the appellate authority could not have passed the order dated 27.12.2010 in the manner it has been passed. Accordingly, the order dated 27.12.2010 passed by the appellate authority is hereby declared null and void.

60. Going back to the record, on 3.2.2011, the appellate authority deferred the hearing and directed issuance of notice to the petitioner on the prayer of the respondent No. 4 to implead him. Thereafter, WT message dated 16.02.2011 was issued by the Under Secretary of the Department to the Chairman of the Development Authority with information to the Deputy Commissioner, Sonitpur and the Assistant Director of Town and Country Planning, Tezpur about fixation of the hearing on 16.03.2011 at 11:30 am. A copy of the said WT message was marked to the petitioner. On 16.03.2011, the appellate authority noted that no formal notice was served on the petitioner. Accordingly, formal notice was directed to be issued to the petitioner. In view of the filing of the writ petition by the petitioner in the meanwhile, the hearing was deferred to 30.06.2011. On 30.06.2011, the hearing of the appeal was kept pending till the disposal of the writ petition.

61. In the second file i.e. file No. UDD(T) 45/2011 dealing with the writ petition, on receipt of Court notice by the department, the appellate authority puts up a note on 10.03.2011 to prepare the parawise comments. His subsequent note dated 11.03.2011 makes an interesting reading. It is quoted as under :-

We may call for a report from the DC Sonitpur regarding notification i.e., whether any public notice was issued by the Collector under sub-section 2 of Section 3 of Works of Defence Act, 1903 showing the area falling within 500 meters from the boundary of Defence Station Tezpur. We may request Govt. Advocate to seek

time for 3 (three) months.

62. This note reflects very poorly on the appellate authority. He had already passed a stay order on the appeal on 27.12.2010 without ascertaining anything. And now on 11.03.2011 on receipt of the court notice, he wanted a report from the Deputy Commissioner as to whether any public notice was issued u/s 3(2) of the Defence Act. Following the above note, he himself wrote a letter to the Deputy Commissioner on 15.03.2011, the contents of which is quoted hereunder :

High Court matter

Urgent

GOVERNMENT OF ASSAM

URBAN DEVELOPMENT (T) DEPARTMENT

DISPUR::GUWAHATI-6

No. UDD(T) 45/2011/50

Dated Dispur the 15th March, 2011

From: M.U. Ahmed, IAS,

Secretary to the Govt. of Assam, Urban Development Department.

To : The Deputy Commissioner, Sonitpur

Sub: W.P.(C) No. 940/2011

Sri Anurag Agarwal -Vs- State of Assam & others

Sir,

I am directed to refer to the above and to request you to let this Department know whether any public notice was issued under Sub-Section 2 of Section 3 of works of Defence Act, 1903 showing the area falling within 500 metres from the boundary of Defence Station, Tezpur. If so, the copy of the said notification may please be furnished to this Department enabling the Department to prepare the counter Affidavit in connection with the above mentioned case.

This may be treated as urgent

Yours faithfully Sd/- illegible 15.03.2011 Secretary to the Govt. of Assam, Urban Development Department

63. On that day, the appellate authority also wrote to the Senior Government Advocate, Assam requesting extension of time for submission of parawise comment, stating that to file the counter affidavit, the Department is required to collect some information from the Deputy Commissioner, Sonitpur and other agencies (Page 51 of the record)

64. This is not all. On 25.03.2011, the army authorities of Tezpur Military Station wrote a letter to the Development Authority complaining that the construction of the building was still going on. Copies of the said letter were marked to various authorities, including to Mr. M. Ahmed, IAS, Secretary to the Government of Assam, Urban Development Department, who is the appellate authority, "for necessary direction at your end please". This is not how the appellate authority should be approached. This only shows that even to the appellant (respondent No. 4) there was no distinction/difference in the discharge of his administrative duties and his duties as the appellate authority by the Secretary to the Government of Assam, Urban Development Department.

65. From the above, it is quite evident that the appellate authority has not conducted himself in a manner that is required of a quasi-judicial authority. He has not maintained the necessary detachment which is required to be maintained by an appellate authority. On the contrary, he has completely identified himself with the department. It is apparent from a perusal of the record and from the deliberations made above that the appellate authority has failed to act in an independent, fair, impartial and judicious manner. Being the appellate authority, he ought to have recused himself from taking up the same matter on the administrative side. As the old saying goes, justice must not only be done, it must be seen to be done. The public perception of fairness and impartiality in the appellate proceeding is of utmost importance, otherwise people will lose faith in the efficacy of the appellate provision. Another aspect needs to be mentioned at this stage. The appellate authority is not required to defend himself his decisions passed in the appeals before him if a challenge is made in the Court, unless of course motives are attributed to him. He is adjudicating a dispute between the parties in appeal before him. Therefore, he is not a party to the lis. His decision as an appellate authority is to be defended by the department or by the party in whose appeal or in whose favour the decision is given.

66. In view of the state of affairs regarding the appellate authority as indicated above and considering the high qualification that the appellate authority must possess i.e., he must have the qualification to be appointed as a District Judge or as a member of the Assam Board of Revenue (in which case, one of the qualifications is that he must be qualified to be appointed as a Judge of a High Court), the state Government in the Urban Development Department should take immediate steps to have a proper and a separate set up for the appellate authority, insulated and detached from the administrative works of the department. Files relating to appeals should not be dealt with/handled by the departmental officials in the same manner like a file dealing with administrative matters. Such a step is considered necessary to instill public confidence in the efficacy, fairness and impartiality of the appellate authority as an adequate and effective alternative remedy.

67. In view of the finding arrived at that the appeal dated 07.10.2010 filed by the respondent No. 4 is not an appeal in accordance with law, no further

deliberation is required to answer the third question i.e., whether the appellate proceeding at the instance of the respondent No. 4 would offer an adequate and efficacious alternative remedy to the petitioner. The answer is consequential to the aforesaid finding and is in the negative. To be more specific, I hold and declare that the appellate proceeding at the instance of the respondent No. 4 is not an adequate and efficacious alternative remedy for the petitioner.

68. That brings us to the last question i.e., whether the non-filing of any appeal by the petitioner against the stop construction order of the Development Authority dated 05.01.2011 would act as a bar for invoking the writ jurisdiction of this Court. As noticed above, the stop construction order of the Development Authority dated 05.01.2011 is a consequential order. It was issued following the stay order passed by the appellate authority on 27.12.2010 which was informed to the Chairman of the Development Authority by the Under Secretary of the Department vide his letter No. UDD(T) 284/2010/9 dated 29.12.2010. The stay order being that of the appellate authority, there was no point or question of filing appeal against the order of the Development Authority dated 05.01.2011 before the very same appellate authority. The appellate authority could not have heard an appeal against his own order. Therefore, there was no effective alternative remedy as such available to the petitioner. In any case, the rule of exhaustion of remedies is only a rule of caution. The power to issue prerogative writs under article 226 of the Constitution is plenary in nature and the existence of an alternative statutory remedy is no bar to the exercise of such power. It is only a self imposed restriction.

69. At this stage, let us examine the three decisions cited by Mr. Bhattacharjee, the learned counsel for the respondent No. 4 in support of his submissions regarding alternative remedy. In *Thansingh Nathmal (supra)*, the petitioners had moved the High Court praying for writs of certiorari or other appropriate writs for quashing orders relating to assessment of sales-tax and for prohibiting the Superintendent of Taxes and other officers from taking action in enforcement of the said orders. In that case, the provisions of the Assam Sales Tax Act, 1947 came up for consideration. The Apex Court noted that the said Act provided for a hierarchy of appellate and taxing tribunals, that the scheme evolved by the Legislature for determination of tax liability was that all questions of fact were to be decided by the taxing authorities and on questions of law arising out of the decision of the taxing authorities, the opinion of the High Court could be obtained. It was in that context that the Apex Court observed in paragraph 7 as under :-

The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that

jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be by passed, and will leave the party applying to it to seek resort to the machinery so set up.

70. There is no dispute to the proposition laid down in the above case. It is a well settled proposition. However, the facts in the Thansingh Nathmal's case and those in the present case are completely different. As already noted above, in the present case, the Development Authority passed the stop construction order on the basis of the stay order passed by the appellate authority on the appeal filed by the respondent No. 4. Therefore, there was no question of the petitioner filing appeal before the very same appellate authority.

71. In the case of *State of UP Vs. Labh Chand* (supra), the High Court had refused to entertain the first writ petition challenging the order of compulsory retirement of the petitioner in the exercise of its discretionary jurisdiction under Article 226 of the Constitution as it was of the view that the petitioner had an alternative statutory remedy for redressal of his grievance. Notwithstanding that, a second writ petition was filed by the same petitioner before the same High Court challenging the very same order of his compulsory retirement. It was in that context that the Apex Court held the second writ petition to be not maintainable.

72. Finally, in the case of *State of Madhya Pradesh Vs. Nerbudda Valley Refrigerated Products Company Private Ltd.* (supra), the primary authority had rejected the petitioner's application for grant of NOC to raise constructions on the leased land after changing the land use from industrial to commercial purpose. The High Court interfered with the rejection order and also directed the said authority to personally appear before the Court to explain his "misconduct". Noting that u/s 18 of the relevant Act the writ petitioner had a statutory alternative remedy by way of an appeal before the Collector, the Apex Court interfered with the decision of the High Court.

73. In both the above cases, the factual positions are completely different from that of the present case.

74. Therefore, the above decisions relied upon by Mr. Bhattacharjee do not come to the aid of the respondent No. 4 in any manner.

75. Coming to the provisions of the Works of Defence Act, 1903 (earlier referred to as the "Defence Act"), which is a pre-independence legislation, it was enacted to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of works of defence in order that such land may be kept free from buildings and other obstructions and for determining the amount of compensation to be made on account of such imposition.

76. As per section 2(b) of the Defence Act, the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the imposition of restrictions upon the use and enjoyment of land under the Defence Act; a person having an interest in an easement affecting the land shall also be deemed to be a person interested in the land.

77. Part-II of the Defence Act comprising Sections 3 to 17 deals with imposition of restrictions. Section 3, which is the core of the said Act, provides for making of a declaration that restriction will be imposed on a particular land, and for publication of such declaration. As per sub-section (1) of Section 3, whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, it shall make a declaration to the effect that such land may be kept free from buildings and other obstructions. Such a declaration shall be made under the signature of a Secretary to the Central Government or such other officers as may be authorised. Under sub-section 2, such a declaration stating the district or other territorial division in which the land is situate and other particulars of the land shall be published in the official gazette and thereafter, the Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality. Once such declaration is made, it shall be conclusive proof that it is necessary to keep the land free from buildings and other obstructions.

78. After such a declaration is notified, u/s 4 an authorised officer of the Central Government may enter upon such land, cause survey and do all other acts necessary to ascertain whether any and what restrictions should be imposed on the use and enjoyment of the land. For carrying out such activities, damages are to be paid by the authorised officers and in case of any dispute, reference has to be made to the Collector or other Chief Revenue Officer. Under section-6 of the Defence Act, once a declaration has been made and public notice thereof has been given u/s 3, it shall be lawful for such officer as the Central Government may by general or special order authorise in this behalf, to enter and demolish any building or other construction and generally to level and clear the said land and do all such acts for levelling and clearing the same as he may deem necessary or proper. Under sub-section (3) of Section 6, in case of emergency, the Central Government may by notification in the official gazette declare that all or any of the powers conferred by sub-section (1) may be exercised at any time

within 6 months after publication of the notice referred to in section 3(2) and such powers may be exercised accordingly.

79. As per Section 7 of the Defence Act, from and after the publication of the notice mentioned in Section 3(2), restrictions as mentioned in the said section may be imposed by the Central Government. Such restrictions may include as per clause (a), no variation on the ground level or restriction on the construction, erection, alteration etc. of any building, wall etc. otherwise than with the written approval of the General Officer Commanding of the district and on such conditions as he may prescribe within an outer boundary extending upto a distance of two thousand yards from the crest of the outer parapet of the defence work. As per clause (b), within a second boundary which may extend to a distance of one thousand yards from the crest of the outer parapet of the defence work, in addition to the restrictions enumerated in clause (a), certain other restrictions will apply, such as, no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding of the district and on such conditions as he may prescribe. As per clause (c), within a third boundary which may extend to a distance of five hundred yards from the crest of the outer parapet of the defence work, in addition to the restrictions enumerated in clauses (a) and (b), an additional limitation will apply i.e., no building or other construction on the surface and no excavation, building or other construction below the surface shall be maintained or erected; provided that with the written approval of the Commanding Officer and on such conditions as he may prescribe, a building or other construction on the surface may be maintained and open railings and dry brush wood fences may be exempted from this prohibition. As per Section 8, after the publication of the declaration, the Collector shall cause the land to be marked out and measured and shall also prepare a register and a detailed plan showing accurately every building, tree and other obstruction. u/s 9, at any time before the expiration of 18 months from the publication of the declaration referred to in Section 3 or such other period not exceeding 3 years from the said publication as the Central Government may by notification in the official gazette direct in this behalf, the Collector shall cause public notice to be given at convenient places on or near the land stating the effect of the said declaration and inviting claims for compensation. Section 12 deals with enquiry and award by the Collector.

80. Part-III of the Defence Act consisting of Sections 18 to 28 deals with reference to Court and the procedure to be followed. Section-18 of the Defence Act, which is similar to the related provision under the Land Acquisition Act, 1894, provides that any person interested who has not accepted the award may by written application require that the matter be referred by the Collector for the determination of the Court regarding his objection to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation amongst the persons interested.

81. Part-IV of the Defence Act deals with apportionment of compensation whereas part-V deals with payment of compensation. Part-VI of the Defence Act deals with miscellaneous matters. As per Section 43, which is in part-VI, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceeding under the Defence Act.

82. From a survey of the Defence Act, it is evident that section 3 thereof is the core of the said enactment. As already noticed above, whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any defence work or of any site intended to be used or to be acquired for such use, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect. Such declaration shall state the location and other particulars of the land and should be published in the official gazette. The Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality. The said declaration shall be conclusive proof that it is necessary to keep the land free from buildings and other obstructions.

83. The making of a declaration u/s 3(1), the publication of the same in the official gazette and giving public notice thereof under sub-section (2) of Section 3 are the first steps in the application of the provisions of the Defence Act. Going by the language of Section 3, such a declaration has to be area specific. It cannot be a general declaration. It has to specify the area where the restrictions are sought to be imposed. The rational behind the making of a declaration, the publication of the same in the official gazette and to give public notice thereof is quite obvious. The central Government must indicate and the concerned people must know that restrictions would be imposed on the use and enjoyment of land in a particular area on the ground of being in the vicinity of any defence work. The right to property may no longer be a fundamental right but it is still a valuable constitutional and legal right. The restrictions u/s 7 of the Defence Act would have the effect of abridging such valuable rights of the affected people. Therefore, they are to be put on previous notice. Such a provision has to be given a strict interpretation and would partake a mandatory character. Therefore, the conditions prescribed in Sections 3(1) and (2) of the Defence Act are mandatory conditions. The fulfillment of the requirements under sub-sections (1) and (2) of Section 3 is the condition precedent for invoking the other provisions of the Defence Act. As argued by the Senior Counsel for the petitioner, it is the sine-qua-non for application of the other provisions of the Defence Act. Only after such a declaration is made, published and public notice given thereof, the restrictions mentioned u/s 7 of the Defence Act would come into force and not otherwise.

84. In the instant case, no such declaration as published in the official gazette u/s 3 of the Defence Act has been placed before the Court. The affidavits of the respondent No. 4, who has relied so heavily on the restrictions mentioned u/s 7 of the Defence Act, are silent in this regard. From the record it is seen that the

appellate authority is unaware of the issuance of such a declaration/notice in respect of the Tezpur Military Station and had infact called for a report in this regard. That was on 15.3.2011. This is also reflected in paragraph 11 of the affidavit of the respondent No. 2. Till the date of judgment, no such declaration/notice could be placed before the Court. But the respondent No. 5 in paragraph 13 of its affidavit has clearly stated that the records available with it do not contain any notification or declaration under the Defence Act. On the other hand, the petitioner has emphatically stated in his writ petition and reiterated in his rejoinder affidavit that no such declaration u/s 3 of the Defence Act has been made and published in the official gazette regarding the land covering the petitioner's construction and no public notice of such declaration was given in the locality. The assertion of the petitioner could not be dislodged by the respondents by producing the relevant gazette notification or the public notice. On the other hand, such assertion of the petitioner has been admitted by the respondent No. 5. The records produced also do not contain any such notification. The Classification of Defence Installations and Establishment and Instructions with regard thereto, as found in the record, do not contain any such declaration and is of no help to the respondent No. 4. Therefore, I am of the view that no declaration, publication of such declaration in the official gazette or public notice of such declaration u/s 3 of the Defence Act has been made imposing any restriction on the use and enjoyment of the land on which the building of the petitioner is being constructed. In the absence thereof, no restriction u/s 7 of the Defence Act can be imposed on the land belonging to the petitioner over which the construction is being carried out. Therefore, the objection raised by the respondent No. 4 to the construction of the petitioner is without any legal basis. In any case, there is no absolute prohibition on construction within 500 yards from the crest of the outer parapet of the defence work. Even in a case where a declaration is made, published and notified u/s 3 of the Defence Act, construction or a building in the land covered by such declaration may still be maintained with the written approval of the Commanding Officer and on such conditions as he may prescribe. On the other hand, once a declaration is made in accordance with Section 3 of the Defence Act, it would be open for the officers authorised in this behalf to take action u/s 6 thereof even in respect of existing buildings, provided the procedure prescribed under the said Act is followed and compensation as provided thereunder is paid. Even in the civil military liason meeting held on 17.05.2010, only three decisions were taken i.e., to direct the GMC (Guwahati Municipal Corporation) and GMDA (Guwahati Metropolitan Development Authority) to make necessary amendments in the bye-laws, to sensitise the other municipal bodies and to put on hold fresh applications seeking construction permission. The deliberations of that meeting therefore cannot be used to stop the lawful construction of the petitioner. It is interesting to note that the respondent No. 4 has not moved the Central Government for taking necessary steps u/s 3 of the Defence Act. The fact that the Central Government (respondent No. 3) has not filed any affidavit is quite significant.

85. Let us now examine the decisions cited by Mr. Das, the learned senior counsel for the petitioner. In the case of Urban Improvement Trust (supra), the Apex Court was dealing with a matter relating to issuance of notification u/s 4 of the Land Acquisition Act, 1894. After referring to the relevant ingredients of Section 4(1) of the said Act, the Apex Court held that for the purpose of acquiring land, publication of the notification u/s 4(1) in the official gazette is mandatory and that if the decision taken by the Government to acquire the land is not notified in the official gazette, the said decision will be of no effect.

86. In the case of Chairman, Indore Vikas Pradhikaran (supra), the interpretation of the provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyan came up for consideration. The said Act makes provisions for the planned development of the urban and other areas in the state of Madhya Pradesh like the state Act in the present case. In the context of that case, the Apex Court held as under :-

57. The Act being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or a statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right to property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be reasonable ones. (See Balram Kumawat v. Union of India 5; Krishi Utpadan Mandi Samiti v. Pilibhit Pantnagar Beej Ltd. 6 and Union of India v. West Coast Paper Mills Ltd. 7) The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation.

58. Expropriatory legislation, as is well-known, must be given a strict construction.

87. In the case of Talson Real Estate (supra), where also the validity of the land acquisition proceedings under the Land Acquisition Act, 1894 was under challenge, the Apex Court explained the rationale behind the mandatory provision of the publication of the notification u/s 4 of the said Act. In paragraph 15 of the said judgment, the Apex Court observed that the essential requirements of publication of primary notification u/s 4 of the Act is to indicate the intention of the appropriate Government that the land in any locality is likely to be needed for any public purpose and for achieving that purpose, a notification to that effect shall be published in the official gazette and in two daily newspapers circulating in that locality and the Collector shall call public notices of the substance of such notification to be given at convenient places in the said locality.

88. The ratio of the above decisions clearly support the view taken that the requirement of Section 3 of the Defence Act are mandatory and non-compliance

thereof would render all action taken thereunder a nullity.

89. Regarding the contention of the respondent No. 4 that the writ petition has been filed by the petitioner in his individual capacity and not by the company called Satyam Krishna Private Limited, the said argument is to be noted only to be rejected. The NOC for construction of the building is in the name of the petitioner and the building is being constructed on his land. The company is only executing the construction of the building. The stay order of the appellate authority and the consequential stop construction order of the Development Authority has adversely affected the rights of the petitioner. It is the petitioner who is the person aggrieved and has, therefore, rightly instituted the challenge.

90. On the objection of the respondent No. 4 that the petitioner cannot rely on the plea that the belated objection raised by the respondent No. 4 to the construction of the petitioner's building is a fall out of an altercation which took place between some army officers and the staff of the petitioner's restaurant as that plea has not been taken in the writ petition, it can only be said that the writ petition is not being decided on the basis of the said plea. But even then, it can be pointed out that the petitioner has expressly taken this plea in his rejoinder affidavit filed against the additional counter affidavit of the respondent No. 4, thereby giving sufficient notice in advance to the said respondent, who cannot therefore claim to have been taken by surprise. The Apex Court in the case of Sri-la-Sri Subramana Desika Gnanasambanda (supra) has held that all that is required is that the respondents should have notice of the ground which is being argued before the Court and should not be taken by surprise. Therefore, the aforesaid argument of the respondent No. 4 deserves rejection and is accordingly rejected.

91. That brings us to the last argument of the respondent No. 4 that the petitioner has not approached this Court with clean hands and, therefore, this Court should decline to grant any relief to the petitioner. As noted in the earlier part of this judgment, the respondent No. 4 has highlighted four reasons/grounds for the said submission viz., (1) the petitioner had obtained the building permission without disclosing the height of the building, (2) he did not file appeal against the stop construction order, (3) he appeared before the appellate authority in the appeal filed by the respondent No. 4, and (4) he violated the status-quo order passed by this Court. Regarding the first ground i.e., the petitioner had obtained the building permission without disclosing the height of the building, it can only be said that the NOC is very clear. The permission has been granted for construction of a G + 7 building. In the said permission, there is no provision for mentioning the height of the building. When it is clearly mentioned that the permission is for construction of a G + 7 multi-storied building, it cannot be said that the petitioner obtained the building permission by concealing the height of the building. Moreover, this is not the allegation or complaint even of the authority which gave the permission i.e., the respondent No. 5. The second ground i.e., non-filing of appeal by the petitioner, has already

been dealt with in the earlier part of this judgment. In any case, just because the petitioner did not file the appeal, it cannot be said that he has not come before this Court with clean hands. Regarding the third ground, it has already been held that the appeal filed by the respondent No. 4 is not an appeal in accordance with law. Therefore, appearance or non-appearance in such an appellate proceeding is of no legal consequence. In any case, putting in an appearance in such an appeal cannot debar the petitioner from approaching the writ court and instituting a legal challenge to the stop construction order. The other allegation of violation of the status-quo order of this Court by the petitioner is being dealt with separately in the related contempt case filed by the respondent No. 4 i.e., Contempt Case (C) No. 148/2011. Therefore, the submission of the respondent No. 4 that the petitioner has not approached this Court with clean hands is devoid of any substance and is hereby rejected.

92. The learned counsel for the respondent No. 4 had referred to two other decisions, which I do not find to be applicable at all to the facts of the present case. In the case of Traders Welfare Association (*supra*), a traders association had filed a public interest litigation (PIL) in the Delhi High Court with the grievance that some roads near the Delhi cantonment area were closed by the authority thereby affecting their business. The Delhi High Court examined the relevant map and the record produced and found that those roads were not completely closed but only after checking and inquiry, persons were allowed to move. Observing that such action was taken to safeguard the defence installations, the Delhi High Court declined to entertain the said PIL. The other case is also a PIL filed by an individual before the Madhya Pradesh High Court alleging that the Ridge Road of Jabalpur had been closed by the army personnel for use of the said road by the public. However, it was pointed out by the respondents therein that on the basis of intelligence reports and in order to ensure security of the army personnel, random checks were being carried out by the army personnel with the help of civil administration; it was further stated that the said road was not actually closed and civilians were allowed to use the road subject to some checking for the purposes of security. Observing that carrying out of some security check by the army or other civilian personnel at the road did not violate any fundamental right or other rights of the public, the Madhya Pradesh High Court declined to interfere in the matter.

93. The difference in the factual matrix of those two cases and that of the present case are quite visible and glaring. It is not understood as to how the said two decisions can come to the aid of the respondent No. 4.

94. The above discussion leads us to the one and only conclusion that the impugned orders of stay/stop construction of the petitioner's building are illegal, being without jurisdiction and are liable to be set aside and quashed.

95. While allowing the writ petition, I may sum up the conclusions as under:-

(1) Under the state Act, the provision of appeal is not only confined to award of

compensation or levy of betterment fee. Appeals can be filed against any order of the authority.

(2) Against a stop construction order of the authority, an appeal lies to the appellate authority under the state Act.

(3) The appellate proceeding under the state Act are quasi-judicial in nature and the appellate authority exercises quasi-judicial powers.

(4) The respondent No. 4 i.e., the Station Commander, Tezpur Military Station is entitled to file an appeal under the state Act before the appellate authority against the building permission granted to the petitioner by the Development authority.

(5) However, for the reasons indicated, the appeal dated 07.10.2010 filed by the respondent No. 4 is not an appeal in accordance with law and the appellate authority could not have passed the order dated 27.12.2010 in the manner it has been passed. The appellate order dated 27.12.2010 is declared null and void.

(6) The appellate authority has failed to act in an independent, fair, impartial and judicious manner that is required of a quasi-judicial authority.

(7) The state Government should take immediate steps to have a proper and a separate set up for the appellate authority, insulated and detached from the administrative works of the department.

(8) Making of a declaration u/s 3(1) of the Defence Act, the publication of the same in the official gazette and giving public notice thereof u/s 3(2) of the said Act are mandatory requirements and is the sine-qua-non for the application of the other provisions of the Defence Act. Only after such a declaration is made, published and public notice given thereof, the restrictions mentioned u/s 7 of the Defence Act would come into force and not otherwise.

(9) No declaration, publication of such declaration in the official gazette or public notice of such declaration u/s 3 of the Defence Act has been made imposing any restriction on the use and enjoyment of the land on which the building of the petitioner is being constructed. In the absence thereof, no restriction u/s 7 of the Defence Act can be imposed on the land belonging to the petitioner over which the construction of the building in question is being carried out.

96. In the result, the writ petition is allowed. The order dated 27.12.2010 passed by the appellate authority is declared null and void. The direction contained in the letter No. UDD(T)/284/2010/9 dated 29.12.2010 issued by the Under Secretary to the Government of Assam, Urban Development Department (Annexure-5 to the writ petition), the letter bearing No. TDA/BP/Mazgaon/2013/10/590 dated 05.01.2011 issued by the Chairman, Tezpur Development Authority (Annexure-4 to the writ petition) and all consequential and related directions are hereby set aside and quashed. The status-quo order passed on 25.2.2011 stands vacated. However, there will be no order as to cost.