

(1998) 12 CAL CK 0006
In the Calcutta High Court
Case No : Writ Petition No. 4261 of 1997

Bhupal Chandra Chanda

APPELLANT

Vs

Chairman, Panihati Municipality and Others

RESPONDENT

Date of Decision : 18-12-1998

Acts Referred:

Bengal Municipal Act, 1932 — Section 330
Bengal Municipal Rules, 1932 — Rule 39

Citation : AIR 1999 Cal 110 : 1 CWN 565

Hon'ble Judges : Satya Brata Sinha, J

Bench : Single Bench

Advocate : Alok Kumar Ghosh and Rama Prasad Mukherjee, for the Appellant; Samar Datta and Dilip Kumar De, (for Nos. 1 and 2) and S.D. Bhunia and Tapas Kumar Bhattacharya, (for No. 5), for the Respondent

Final Decision : Allowed

Judgement

Satya Brata Sinha, J.—In this application, the petitioner has inter alia, prayed for issuance of a Writ of or in the nature of Mandamus directing the respondents to set aside an order dated 29-11 -96 passed by the Chairman of the respondent municipality, which is in the following terms :

"1. The staircase may be allowed up to the floor of 2nd floor and this part may be covered with a roof-slab in continuation of the roof slab of 2nd floor. The staircase above the floor of the 2nd floor, already constructed by you, will have to be dismantled. As the load has been reduced in the staircase there will be no chance of damage in the staircase part.

2. The deviation in the staircase part from the sanctioned plan is minor in nature and it will not materially affect the ventilation. Hence, I allow this minor deviation in exercising my powers to relax the municipal rules in this respect."

2. This writ petition has a chequered history. The petitioner allegedly constructed his residential house at premises No. F-5, School Road, Sedepur, consisting of

one storeyed building; The private respondent completed the structure of new staircase and other structures at his premises to a height of more than their two storeyed building and upon protest as regards unsoundness of the structure by the petitioner, construction was stopped by the private respondent in July 1989. A written representation was made by the petitioner to the municipal authorities pointing out to them that the respondent allegedly had violated the building rules framed under the Bengal Municipal Act. Notice had been issued by the municipal authorities in terms of Section 333 of the Bengal Municipal Act, directing the private respondent to stop all further constructions and not to make any construction in deviation of the sanctioned plan. Constructions had been stopped pursuant thereto by the respondent. However, the petitioner made several representations in the months of November and December 1989; and January 1990 asking the respondent municipality to demolish the said structure. Further representations were made on 26-2-90 and 11-5-90. The petitioner also filed all documents in support of his statement. Another representation was made on 22-8-90. The respondent No. 1, by a letter dated 3-9-90 fixed the date of hearing in the matter on 28-8-90 in his chamber. A writ application was filed by the petitioner, which was marked as C.O. No. 14031 (W) of 1990 and U.C. Banerjee, J. (as His Lordship then was) by an order dated 19-9-91 disposed of the said writ application, inter alia, directing the municipal authorities to consider the whole matter afresh without taking recourse to external aid of any of the parties and to deal with the matter in accordance with law and upon affording an opportunity of hearing to both the parties. The said order is contained in annexure "F" to the writ application. Pursuant to the said order, an enquiry was made by a Engineer who was an employee of the municipality, relying on or on the basis whereof an order was passed by the Chairman on 25-4-92. Questioning the legality or validity of the said order, another writ application was filed in May 1992 which was marked as C.O. No. 6169 (W) of 1992. R. Pal, J., by a detailed judgment, which is contained in annexure "I" to the writ application considered the same and, inter alia, held :

"Even otherwise the decision was to be taken by the Municipal Authorities themselves. In this case the Chairman appears to have not applied his mind independently to the issue and has merely acted as a rubber stamp to the views of the Engineer, in any event the Engineer's report in so far as it relates to the illegality of the construction cannot be supported either legally or logically. It has been rightly contended by the writ petitioner that the issue to be decided was not any alleged deviation by the petitioner but the deviation or illegality committed by the private respondents in raising the construction in question. The petitioner has vehemently denied that there was any illegality or deviation as far as he was concerned and indeed he has never been charged by the authorities or by the private respondents with that. Assuming that the petitioner had deviated in making the construction on his plot, this cannot in any way justify the deviation or the illegality in the private respondent's construction. It was incumbent on the authorities to have addressed their mind to the legality of the private

respondent's construction alone and to test the same against the provisions of the Act and Rules as well as the plan sanctioned for such construction. As observed by the Supreme Court in *A.R. Antulay Vs. R.S. Nayak and Another*, an allegation of legal infraction must be investigated in accordance with law and procedure established. Public confidence in public administration should not be eroded. One wrong cannot be remedied by another wrong.

It was for the Chairman, after giving the parties a copy of the report of the Engineer to call them for a hearing and then decide the matter. In not making available a copy of the report to the petitioner prior to the taking of the decision, the Chairman must be held to have acted in violation of the principles of "natural justice."

3. The learned Judge further held that the Chairman ought to have given a copy of the report of the Engineer and heard the parties in compliance of the principles of natural justice. As regards contention raised on behalf of the respondent regarding applicability of Section 330 and Rule 39 of Schedule VI of the Bengal Municipal Act, the learned Judge, inter alia, held that the Chairman had not passed any order relaxing the provision of the rule. It was, however, held :

"The power of relaxation, in any event, is one which has to be exercised bona fide giving reasons therefore.

The learned Judge also held :

"For example if the infraction is of a minor nature or has not in any way affected the sanitation or ventilation and the amenities of the building in question and other adjoining premises (vide para 5 of the report). The Chairman has not come to any finding regarding the deviation nor whether such deviation is relaxable in the circumstances of the case."

4. After the aforementioned order was passed, by an order dated 7-9-95 as contained in annexure "J" to the writ application, the Chairman of the municipality directed the respondents to demolish part of the building which did not conform to the plan sanctioned by the municipality, and pursuant thereto, the said demolition was carried out. However, questioning the said order, the private respondent filed a writ application in this court, which was marked as C.O. 17471 (W) of 1995. Chatterjee, J. by an order dated 11-9-96 quoted from the decision of R. Pal, J. and disposed of the writ application directing :

"The matter is remitted back to the Chairman for re-hearing and/or reconsideration of the above disputes in accordance with the judgment delivered by Ruma Pal, on 14th June, 1993 in C.O. No. 6169 (W-)/92 from where the necessary observations have been quoted in this order. The Chairman, Panihati Municipality shall dispose of the matter within a period of two months from this date positively after giving hearing to the writ petitioner and the private respondent and by passing a reasoned order in accordance with law."

5. Pursuant to the said direction, the impugned order has been passed. It is unfortunate that a writ application has to be filed by the petitioner despite the observations and directions, made by this court in three other writ applications. A bare perusal of the impugned order would clearly show that the respondent No. 1 has failed to apply his mind with regard to the requirement of law to be complied with before a power of relaxation could be exercised. The dicta of Pal, J., to the effect that power of relaxation has to be exercised bona fide and upon assignment of reasons, has not been taken note of. Furthermore, the further direction of Pal, J. as regards nature of deviation and further question arising therefrom as to whether such deviation would be a major or minor one so as to merit relaxation of the building rules, has not been answered in the impugned order.

6. Mr. Bhunia, learned counsel appearing on behalf of the private respondent has relied upon a Division Bench decision of this court in Smt. Maya Sen v. Bhawani Mazumdar, reported in (1997) 2 Cal LT 301. The said decision does not assist Mr. Bhunia in the instant case. As indicated hereinbefore, question which arose before this Court in the three other writ applications was as to whether the respondents have been allowed to keep the construction which had been made in violation of the provisions of the building rules. The said question involves a public law element and the same cannot be said to be a private dispute as such. Furthermore, as indicated hereinbefore, complaint of the writ petitioner had been entertained and it had been found that the private respondent had taken recourse to violation of the building rules, as a result whereof a portion of structure was directed to be demolished. In any event, in this writ application the question which arose for consideration is the legality or validity of an order passed by a statutory authority. In this view of the matter, there cannot be any doubt whatsoever that this application is maintainable.

7. For the reasons aforementioned, this application is allowed. The impugned order dated 29-11-96 as contained in annexure "M" to the writ application is set aside and the respondent No. 1 is hereby directed to pass an appropriate order after giving an opportunity of hearing to the parties. Such an order should be a speaking one and in the light of the directions issued by R. Pal, J. as noticed hereinbefore, at an early date and preferably within 6 weeks from the date of communication of this order. It is, however, made clear that by reason of this order, the private respondent is not debarred from white-washing or colour-washing the structure or make such repairs which do not require permission of the authorities under the West Bengal Municipal Act.

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