

(1991) 02 CAL CK 0029
In the Calcutta High Court
Case No : C.O. No. 12072 (W) of 1987

Binani Metals Ltd.

APPELLANT

Vs

The CMC and Others

RESPONDENT

Date of Decision : 15-02-1991

Acts Referred:

West Bengal Town and Country (Planning and Development) Act, 1979 — Section 134, 36(6), 38(3), 46(3), 46(5)

Citation : (1991) 2 CALLT 423

Hon'ble Judges : Ajay Nath Ray, J

Bench : Single Bench

Advocate : Aloke Ghosh, Prodip Ghosh, P.K. Roy and Barin Banerjee, for the Appellant; Sumit Panja and Manasi Bhattacharjya for the Respondent No. 6, for the Respondent

Judgement

Ajay Nath Ray, J.—This is an application which was originally directed towards this end in view that the Calcutta Municipal Corporation while considering grant of sanction of the building plan of the writ petitioner in respect of 81 Netaji Subhash Road would not take into consideration certain development plans of the C.M.D.A. Annexure "D" to the writ petition is the communication which was standing in the way of grant of Municipal permission to the writ petitioner.

2. What had happened was that in the extra ordinary Calcutta Gazette of Friday 27th of June 1986 a notice had come out regarding certain Outline Development Plans of the C.M.D.A. The Municipal authorities on that basis and on the basis of their communications, of which Annexure "D" to the writ petition is an example, were not inclined to grant building permission which might be inconsistent with the said C.M.D.A. plans if and When the same became finalised.

3. On the 17th of December 1987 an interim order was passed by this Court to the effect that the Municipal authorities were to grant permission Under the Municipal Corporation Act 1980 and the relevant building rules without taking into consideration the said memo being Annexure "D" provided the plan was in

accordance with the provisions of the said Act and the said Building Rules. But actual building was not allowed.

4. It is the admitted position before me to-day that pursuant to the said interim order on the 14th of July 1988 the Calcutta Municipal Corporation has accorded sanction to the writ petitioner for building on the said 81 Netaji Subhash Road in accordance with their plan.

5. Before me to-day the learned Counsel appearing for the Municipal Corporation has said that the said permission was granted pursuant to the interim order, pending strictly out of consideration the said "hatched" plan of the C.M.D.A.

6. The question to-day arising before me is how far the said proposed plan of which the first publication was intimated in the Gazette of 1986 can still stand in the way of grant of permission to the writ petitioner to carry on with the building works in view of the provisions of the West Bengal Towns and Country (Planning and Development) Act 1979.

7. It must be emphasized that in the interim order of 17th December 1987 though the question of consideration of permission was decided as an interim measure on the lines indicated above yet the writ petitioner was thereby also directed not to commence construction works on the basis of such permission until further orders of this Court.

8. u/s 134 of the Town and Country Planning Act, of which I have given the full title above, it is permissible to delegate authorities and powers, and it is also the admitted position before me that in so far as the permission of the Development Authority is concerned for the instant case the Calcutta Municipal Corporation has itself become such delegated Development Authority pursuant to the enabling provision of the said Section 134. The question is whether the Municipal Corporation has any further act to do or any decision to take with regard to the provisions of the said Town and Country Planning Act inspite of their having granted the said earlier permission of 14th July 1988.

9. Even before the 1986 Gazette notification of the Development Plan, the writ petitioner was granted a permission under the Town and Country Planning Act and the said permission is Annexure "C to the writ petition. There was no question of any building limitation at that stage as that was in 1987. But the question then related to use of the site for commercial purposes. Such permission at that stage was granted by the C.M.D.A. itself because delegation of authority u/s 134 had not taken place. The said permission was granted on 26th November 1984 but that is of no use today as it has lapsed by reason of the provision of Section 48 of the Town and Country Planning Act. The question is whether a renewal or a fresh application for permission under the combined reading of Section 46 and Section 48 is necessary on the part of the writ petitioner, and if so, how the same is to be dealt with by the Municipal Corporation now as a delegated authority under the Planning Act.

10. u/s 46(3) of the said Planning Act, at the time of granting permission two things are to be had regard to by the permitting authority and they are the provisions of an operative development plan, and, as a residuary clause, any other material consideration.

11. It is again the admitted position before me that from 1986 to 1991 the proposed development plan has only gathered dust. It has been emphasized before me that even the stage envisaged u/s 36(6) of the Town and Country Planning Act has not been reached because report of the concerned committee even is nowhere in sight. Thus no finalisation or going into operation of the plans as envisaged u/s 38(3) is therefore nowhere in sight. Under these circumstances it would appear unjust and an oppressive curtailment of private rights if building activities are to be stopped by refusing permission on the tenuous ground of a development plan having been proposed five years ago with no steps taken thereon. This would stand in the way of individuals who earnestly seeking to go on with their immediate building activity.

12. Be that as it may, I am unable to accede to the contention of Mr. Ghosh for the appellants that the words "any other material consideration" u/s 46(3b) can never include a proposed plan which has not yet come into operation. If for example the plan has already been sent to press for gazetting and yet it has not actually been gazetted though it is likely to be so gazetted in near future, would it be proper for a permitting authority not to consider the provisions thereof at all because a proposed plan is not specifically mentioned in Section 46(3) ? The answer would clearly be in the negative because that would be absolutely contrary to the ordinary common sense. On the other hand is it a material consideration after a C.M.D.A. plan has become so old and stale as to be practically be yond all hope of revival ? Should the provisions of the same should be used forever by the permitting authority to stop or impede proposed construction by refusing permission on the basis of restriction or curtailment which really have no chance of having any finalized operation in future ? Again the answer must be in the negative. It is a question of assessment by the, permitting authority and this assessment they must make on reasonable and material considerations which will pass scrutiny even when the reasons are brought out in the open. These reasons must not be such as to be unacceptable to a mind which inquires judicially and fairly. These must be fair and germane reasons for accord of permission or refusal thereof. I do not agree with the submissions of Mr. Ghosh that because a proposed plan is not mentioned in Section 46(3) the words "any other material consideration" cannot ever include such a proposed plan. This is not an instance whether the mention of a particular excludes by implication the other things which are not mentioned. That is because there is nothing in the context to show that only generally material considerations, other than a proposed development plan, were intended within the frame work of Section 46(3). The second reason is that under Sub-sections 5 and 6 of Section 46 a development plan under preparation is considered and mentioned. The resultant effect of those Sub-sections is that a central or state or

local authority may be permitted to build by the State Government inconsistently with a proposed development plan under certain circumstances. In Sub-section (6) the words "any other material consideration" are used subsequent to the item, being a development plan, under preparation. Therefore the words "material consideration" must include generally a development plan under preparation. Because otherwise the word "other" would not have any meaning in the said phrase. If I say, a hare a tortoise or other animal, I automatically imply that a hare and tortoise are also themselves animals.

13. The further objective interpretation is that town and country planning is meant usually to check unplanned building activity on the part of the individuals. The state or other authority are usually accorded with less responsibility for unplanned building activity. If Mr. Ghosh's submission or interpretation of Section 46(3) is to be accepted then it would result in this that though a State or other authority can build inconsistently, with even a proposed development plan only after a particular process and a sanction of the State Government, yet a private individual could freely build inconsistently with a proposed development plan and the permitting authorities could not refuse permission on the ground of such a proposed plan. This would in my opinion be an interpretation utterly opposed to the ordinary well-known course of events.

14. I am told that from the 12th December 1990 special provisions have been introduced where by the Municipal Corporation is to take into consideration proposed plans by the authorities under the Town and Country Planning Act. Whether that is declaratory of the law already existing or is a change in the law need not be considered by me, in that light, because in the view that I take, I have come to the conclusion independently by application of these above principles that u/s 46(3) (b) a proposed plan can be taken into consideration and therefore that part of the new provisions introduced on 12th December 1990 would, according to this view, be no more than a mere clarification or declaration of the law already existing. The position to-day, therefore, is, that the permission granted by the municipal authorities pursuant to the interim order shall stand and no further permission shall be needed for construction by the writ petitioner in so far as the provisions of the Calcutta Municipal Corporation Act or the Building Rules thereunder are concerned.

15. However, the writ petitioners shall not construct unless they have first obtained either renewal of their 1984 permission u/s 46 of the Town and Country Planning Act or a fresh permission thereunder. The writ petitioner shall make an application to that effect for obtaining the permission under the Planning Act to the appropriate authority within two weeks hereof. Such application shall be made in the required and usual manner and shall be accompanied by whatever documents or papers are required to accompany such applications.

16. Within four weeks of lodgement of such application the Calcutta Municipal Corporation or such other authority being any of the respondents herein as has duty and power to dispose of application for permission under the Town and

Country Planning Act in respect of the petitioner's premises shall dispose of the said application for permission by reasoned order. In particular, if permission is refused or in any manner sought to be affected by the existence of the proposed C.M.D.A. plan about which Gazette Notification came out (as I have stated earlier on 27th June 1986) the permitting authority shall clearly state why it is being at all thought necessary to keep in line with the said proposed development plan in spite of the long laps of five years and in spite of no steps having been taken thereunder.

17. The petitioner shall be free to build if and when the permission under the planning Act is granted. Since the application has in part succeed, and since consideration of the proposed C.M.D.A. plans is somewhat of a factor, I do not think any costs should be allowed either way in this matter. In case no reasoned order is forthcoming within four weeks of lodgment of application as aforesaid it will be open to the writ petitioner to contend that such silence is to be deemed as a permission under the Town and Country Planning Act of 1979 before any appropriate court or authority and obtain necessary orders or permission to build in that regard.

18. This writ petition is accordingly disposed of.

19. Let xerox copies of this order be given to the learned Advocates for the parties on an undertaking to apply for certified copies of this order on the usual terms.