

(2008) 06 SHI CK 0007
In the High Court Of Himachal Pradesh

Dr. Shashi Pal Sood and Another

APPELLANT

Vs

Smt. Neelam Arora and Others

RESPONDENT

Date of Decision : 18-06-2008

Acts Referred:

Himachal Pradesh Municipal Corporation Act, 1994 — Section 244

Citation : (2008) 3 ShimLC 167

Hon'ble Judges : Jagdish Bhalla, C.J;Rajiv Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. A challenge has been laid by medium of this Letters Patent Appeal under clause 10 of the Letters Patent against the judgment of the learned Single Judge dated 9.5.2008.

2. Mr. R.L. Sood, Senior Advocate submits that the judgment of the learned Single Judge dated 9.5.2008 is not sustainable in the eyes of law. He also contends that his client had acquired vested right to raise the construction on the basis of permission accorded by the Municipal Corporation on 27.3.1993, which was renewed from time to time and according to him the subsequent notifications issued by the State Government under the provisions of the Himachal Pradesh Town and Country Planning Act, 1977 on 11.8.2000 and 22.8.2002 are prospective in nature.

3. The learned Deputy Advocate General and Mr. Vikrant Thakur, Advocate vice Mr. Shrawan Dogra, Advocate have supported the judgment dated 9.5.2008.

4. We have heard the learned Counsel for the parties and have carefully gone through the pleadings.

5. It will be apt at this stage to take note of few facts which constituted the basis for passing of the judgment dated 9.5.2008 by the learned Single Judge. The appellants submitted an application for addition and alterations to the

respondent-Corporation pursuant to which the necessary permission was accorded by the Commissioner of the Municipal Commissioner on 27.3.1993. The appellants submitted an application on 6.5.1995 for extension of time limit for the construction/completion of house No. 79/1, Lower Bazar, Shimla. The permission for construction/completion of house was granted for a further period of one year by the Commissioner, Municipal Corporation on 20.7.1995. The appellants thereafter submitted an application for enlargement of time on 29th August, 1996. The Commissioner, Municipal Corporation extended the time limit for construction/completion of a house on 10.12.1996. Yet another application was filed by the appellants for extension of time limit on 17.2.1998 and the same was extended by another one year on 26.3.1998.

6. The State of Himachal Pradesh had issued notification on 11th August 2000 under the provisions of the Himachal Pradesh Town and Country Planning Act, 1977 (Annexure P-2) with the writ petition. The effect of notification dated 11th August, 2000 is that all private as well as Government constructions were totally banned within the core area of Shimla Planning Area. The State had only permitted construction on the old lines with its prior approval. It is not disputed by the parties that the building in question i.e. 79/1, Lower Bazar, Shimla falls in core area. The State Government had issued another notification dated 22nd August, 2002 whereby further amendment was carried out in the Interim Development Plan. It is evident from the notification dated 22nd August, 2002 that new construction in core area in respect of residential buildings was to be allowed up to maximum two storeys and ancillary uses thereto with the permission of the State Government. However, in case of reconstruction of old structure or building the same was to be permitted by the State Government subject to the condition that the plinth area and number of storeys on old lines shall remain the same as were existing earlier. The core area was also defined in this notification. The development permission was to be accorded by the Government of Himachal Pradesh. It is evident from the notification that it had permitted maximum number of two storeys and as far as re-construction is concerned, the permission was subject to the condition that plinth area and number of storeys on old lines will remain the same as were existing earlier.

7. The appellants submitted application to the Commissioner, Municipal Corporation on 12.7.2002 for extension of time. The same was allowed by the Commissioner, Municipal Corporation on 5.10.2002. Respondents No. 1 and 2 (hereinafter referred to the petitioners for brevity sake) preferred CWP No. 1030/2003 seeking following reliefs:

(i) to direct the respondents No. 1 to 3 to discharge their statutory duties and ensure the compliance of the provisions of the Interim Development Plan for Shimla Planning Area i.e. Annexure P-1 supra;

(ii) to direct the respondents No. 1 to 3 to ensure the compliance of the notification dated 22.3.2002 Annexure P-7 supra;

(iii) to direct the respondents No. 1 to 3 not to allow the respondents No. 4 and 5 to raise construction in violation of the aforesaid provisions of the Interim Development Plan for Shimla Planning Area, Annexure P-I supra; and Annexure P-7 supra.

(iv) to direct the respondents No. 1 to 3 to take appropriate steps while ensuring the compliance of the Regulation No. 10-4-1-2(x) Annexure P-I as amended vide the notification dated 22.8.2002, Annexure: P-7 and P-7-A supra and to demolish the un-authorized construction raised by the respondents No. 4 and 5 and to restrain the respondents No. 4 and 5 from raising the construction of their building No. 79/1 Lower Bazar, Shimla in violation to the provisions of the Town and Country Planning Act, 1977, H.P. Municipal Corporation Act, 1994 and the Interim Development Plan for Shimla Planning Area;

(v) to call for the entire relevant records of the case;

(vi) to award the cost of this writ petition in favour of the petitioners; and

(vii) to pass any other and further order(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of this case and in the interest of justice in favour of the petitioners.

8. The appellants, State and the Municipal Corporation filed separate replies to the writ petition. The State has admitted in its reply that the construction in the core area had to be carried out in accordance with the notification dated 11.8.2000 and 22.8.2002. The reply of the Municipal Corporation in nutshell was that the sanction dated 5.10.2002 has been accorded in accordance with law and the notifications issued by the State of Himachal Pradesh on 11.8.2000 and 22.8.2002 were prospective in nature and will not effect the sanction already accorded. The petitioners had filed rejoinder to the reply filed by the Corporation.

9. The thrust of the reply filed by the appellants to the writ petition filed by the petitioners was that the writ petition was misconceived since the appellants were accorded the necessary permission in accordance with law and the petition was filed merely to harass the petitioners. The learned Single Judge allowed the writ petition on 9th May, 2008.

10. We have to consider the manner in which the building permission was accorded in favour of the appellants which was extended from time to time to see whether those were hit by the amendments carried out in the Interim Development Plan under the Himachal Pradesh Town and Country Planning Act, 1977 or not. As noticed above, the initial building permission was accorded in favour of the appellants on 27.3.1993 and the same was renewed on 20.7.1995, 10.12.1996, 26.3.1998 and 5.10.2002. It is clear that the permission which was accorded on 26.3.1998 was for a period of one year and thereafter the same has elapsed. The appellants submitted application for extension of time on 12.7.2002. The Commissioner, Municipal Corporation extended the time on 5.10.2002. This was not permissible under the law since the earlier sanction

granted on 26th March, 1998 was for a period of one year. The learned Single Judge has taken this aspect into matter while allowing the writ petition filed by the petitioners. The learned Single Judge has rightly taken into consideration the true import of Sections 244 and 247 (3) of the Himachal Pradesh Municipal Corporation Act, 1994 while allowing the writ petition.

11. Admittedly, the appellants had not commenced the construction as per the earlier sanction granted with effect from 27th March 1993 up to 5th October, 2002. During 26th March, 1998 and 5th October, 2002, two notifications dated 11.8.2000 and 22.8.2002 were issued by the State Government. No construction could be carried out in the core area without the permission of the State Government as per notification dated 11.8.2000. Similarly, no construction could be carried out in the core area as per notification dated 22.8.2002 without the permission of the State Government. In the present case after the issuance of notifications dated 11.8.2000 and 22.8.2002, the competent authority to accord the development permission was the State Government. The stand taken by the State Government that there was a single window system cannot be accepted. The maximum number of storeys which could be constructed under notification dated 22.8.2002 are two and even the permission for reconstruction was subject to condition that plinth area and number of storeys on old lines shall remain the same as were existing earlier. The Municipal Corporation in its reply has categorically admitted that old building No. 79/1 consisted of two storeys. The Himachal Pradesh Municipal Corporation Act, 1994 and the Himachal Pradesh Town and Country Planning Act, 1977 though operate in different fields, but are complementary and supplementary to each other. Section 34 of the Himachal Pradesh Town and Country Planning Act, 1977 reads thus:

34. Every permission granted u/s 31 or Section 32 or Section 33 shall remain in force for a period of three years from the date of such grant and thereafter it shall lapse:

Provided that the Director may, on an application, extend such period from year to year but the total period shall, in no case exceed five years from the date on which the permission was initially granted:

Provided further that such lapse shall not bar any subsequent application for fresh permission under this Act.

12. It is evident from the phraseology employed in Section 34 of the Himachal Pradesh Town and Country Planning Act, 1977 that the maximum period for which the extension could be granted is five years. The permission granted by the Municipal Corporation is hedged by the rigours of Section 244 read with Section 247(3) of the Act as rightly considered by the learned Single Judge.

13. Mr. R.L. Sood strongly relies upon the ratio laid down by their Lordships of the Hon'ble Supreme Court in M/s. Live Oak Resort P. Ltd. and Another Vs. Panchgani Hill Station Municipal Council and Another, The judgment cited by Mr. Sood is distinguishable on the facts. In that case the building permission had

been granted and the construction had also been started. In the present case before the permission was renewed, two notifications dated 11.8.2000 and 22.8.2002 were issued and no construction had commenced by that time. The case of the appellants was to be considered afresh by the Commissioner of the Municipal Corporation as per the provisions of these two notifications. The Application was preferred by the appellants on 12.7.2002 and the permission was accorded on 5.10.2002. Thus on the date when the sanction was extended, the law on the basis of notification dated 22.8.2002 was applicable and the Commissioner, Municipal Corporation was not competent to accord the extension of sanction accorded on 27th March, 1993, though the same had already elapsed after the expiry of one year i.e. on 26th March, 1998. The building permissions are not accorded in perpetuity and they have to be considered on the basis of existing laws. The contention of Mr. Sood that the appellants had acquired vested rights on the basis of the earlier sanction accorded on 27th March, 1993 which was extended from time to time merits rejection on the basis of the definitive law laid down by the Hon'ble Supreme Court in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, Their Lordships after noticing various provisions of the Himachal Pradesh Town and Country Planning Act, 1977 and the Himachal Pradesh Municipal Corporation Act, 1994 have held as under:

In our opinion, the 1977 Act and the 1994 Act operate in different fields and they are complementary and supplementary to each other. The provisions of both the Acts can be worked out. There is no conflict between the two Acts. The 1977 Act deals with laying down the broad policy. It provides for preparation of development plans including the internal development plans. Indisputably, such development plans when made would be binding upon the local authority. It may, however, be not correct to contend that despite the fact that the operation of the Acts cover two different fields, namely, the 1977 Act deals with laying down the overall policy matter and the 1994 Act deals with the grant of building plans in terms of the provisions thereof by the Commissioner of the Municipal Corporation; only because sanction for development in the Mall area of the town of Shimla was granted by the State in terms of the 1977 Act, the same would mean that the same was binding upon the Municipal Corporation or that the provisions of the 1994 Act or the building bye-laws were not required to be complied with at all.

We have noticed hereinbefore that even in the order of sanction passed in favour of the respondents by the State, a condition was imposed that before undertaking the development activities by way of erection of the building, the respondents would take the requisite sanction from the Municipal Corporation. Even if such a condition had not been imposed, the provisions of the Municipal Corporation Act, as noticed hereinbefore, would operate.

Section 243 of the 1994 Act clearly mandates that erection of a building must precede grant of express sanction of a building plan. How and in what manner

the same is required to be dealt with is provided in Sections 244 and 245 of the 1994 Act. Clause (a) of Sub-section (2) of Section 246 in no uncertain terms restrict the power of the Appellant-Corporation, to grant sanction for erection, inter alia, for development of an area by way of erection of a building or otherwise, not only if the same is not in conformity with the building bye-laws, but also if it contravenes any other law or rules operating in the field.

In any event, as in the meanwhile, the period for which the building plan was sanctioned by the State had expired, the question as to whether in the aforementioned fact situation obtaining, the respondents acquired any vested right despite the amendments in the regulation by defining "core area" and providing for the heritage zone is the issue, in our opinion, is misconceived.

It is now well-settled that where a statute provides for a right. but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no longer res Integra.

It is in the light of the aforementioned principle that the question as to whether the respondents had acquired any vested right or not must be considered. Strong reliance, in this behalf, has been placed by Mr. Ganguli on a decision of the Division Bench of this Court in M/s. Live Oak Resort P. Ltd. and Another Vs. Panchgani Hill Station Municipal Council and Another, . The said decision was rendered on its own facts. In that case a building plan had been granted; construction had been started in terms of the building plan as also the rules which were applicable at the relevant point of time. The question which arose for consideration therein was as to whether a subsequent amendment to the rules, in respect of additional FSI shall have any effect on the sanctioned building plan, it was contended that keeping in view the environmental question, the same will have not.

14. It will be pertinent to reproduce Section 246 (2) (a) and Sub-section (3) of Section 247 of the Himachal Pradesh Municipal Corporation Act, 1994, which read thus:

246 (2)(a).-That the building or work, or the use of the site for the building or work or any of the particulars comprised in the site plan, ground plan, elevation, Section or specification would contravene the provisions of any bye-law made in this behalf or of any other law or rule, bye-law or order made under other law."

247 (3).-If the person or any one lawfully claiming under him does not commence the erection of the building or the execution of the work within one year of the date on which the building or work is sanctioned or is deemed to have been sanctioned, he shall have to give notice u/s 244 or, as the case may be, u/s 243 for fresh sanction of the building or the work and the provisions of this Section shall apply in relation to such notice as they apply in relation to the original notice.

15. It is thus evident that the extension of permission granted by the Commissioner cannot be said to be in accordance with law. Since the construction had not commenced after the permission accorded on 27.3.1993, a notice was required to be issued u/s 243 or 244 for fresh sanction. The application of the appellants was to be considered afresh as per the existing laws on the basis of the provisions contained in Sections 246 (2)(a) and 247 (3) as noticed above.

16. The appellants have failed to point out that at any time any notice as per Section 244 was issued to the Corporation. It will also be apt at this stage to take note of bye-law 2.03 of the Building Bye-Laws framed in the year 1988 which reads thus:

All mandatory Zonal Plan regulations regarding use, coverage, set backs, open spaces, height, number of storeys, parking standards etc. for various categories of building including modification thereon made from time to time shall be applicable mutatis mutandis in the building regulations under these bye-laws. All amendments/modifications made in those regulations will automatically be included as part of these bye-laws.

17. We hold that in view of bye-law 2.03 of the Building Bye-Laws notified in the year 1988, all the modifications/amendments made in the regulations automatically are to be treated integral part of the Building Bye-Laws and consequently no construction could be commenced or completed without complying with these regulations.

18. Lastly, Mr. Sood argues that the petitioners had not approached this Court with clean hands and the writ petition was liable to be dismissed on this score alone. It is settled law by now that the parties must refrain from making misleading statement and from giving incorrect information to the Court. The parties cannot be permitted to choose their material facts. The question whether the party has concealed or suppressed the material facts is required to be considered in the light of the facts and circumstances of each case and upon the nature of the lis. It will vary from case to case what can be termed as "material facts" or "non-material facts". The learned Single Judge though has adversely commented upon the conduct of the appellants, but on the basis of ratio laid down by their Lordships of the Hon'ble Supreme Court in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, had come to a right conclusion that the permission accorded to the appellants was not in consonance with law. The learned Single Judge was only required to consider whether the permission accorded in favour of the appellants was in accordance with law or not in view of two notifications dated 11.8.2000 and 22.8.2002 in larger public interest.

19. It is also evident from the phraseology employed in the building permission dated 27.3.1993 that the same was for carrying out addition/alteration, but it appears the same has been mis-construed by the respondents as permission for

raising either new construction or reconstruction on old lines. The true import of the expression "addition/alteration" is that the basic structure will not be altered but the addition/alteration will be carried out in the same. However, by no stretch of imagination, neither new construction nor re-construction on old lines could be raised if the permission was only for addition/alteration as is in the present case.

20. The upshot of the above discussion is that:

(i) the amendments carried in the Interim Development Plan prepared under the Town and Country Planning Act, 1977 from time to time shall get automatically incorporated in the Building Bye-Laws framed by the Municipal Corporation as noticed above;

(ii) the initial permission was accorded in favour of the appellants in the year 1993 and it was renewed in the year 1998 for a period of one year. There is a gap of more than three years at the time when the application was filed by the appellants on 12.7.2002 seeking extension of sanction. The maximum period prescribed for extension as per the provisions of the Town and Country Planning Act, 1977 as noticed above is five years. The permission accorded in the year 1993 had in fact come to an end in the year 1996;

(iii) the appellants were required to furnish fresh application seeking building permission strictly in conformity with amendments carried in the Interim Development Plans on 11.8.2000 and 22.8.2002;

(iv) it is evident from the combined reading of notifications dated 11.8.2000 and 22.8.2002 that as far as core area is concerned for raising new construction or reconstruction on the old lines, the competent authority to accord building permission is the State and not the Municipal Corporation, Shimla;

(v) the appellants had submitted an application for renewal on 12.7.2002 for extension of time and the same was accorded by the Municipal Corporation on 5.10.2002. When the Commissioner, Municipal Commissioner had accorded the permission for extension of sanction, the notifications dated 11.8.2000 and 22.8.2002 had come into force;

(vi) there cannot be any vested right acquired by the person on the basis of sanction granted by the competent authorities if no construction is raised and no notice has ever been issued to the competent authority as stipulated in the Himachal Pradesh Municipal Corporation Act, 1994 read with the provisions of the Town and Country Planning Act, 1977;

(vii) the building permissions are to be accorded on the basis of the existing laws prevalent at the time when the applications are to be considered. This position has been succinctly explained by the Hon'ble Supreme Court in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, ;

(viii) the permission granted by the Commissioner, Municipal Corporation is a nullity and no construction could be commenced by the appellants on the basis of

this permission. The State as well as the statutory functionaries of the Corporation are remiss in discharge of their statutory duties since they have failed to look into the relevant provisions of law at the time when the application was considered and allowed; and

(ix) the Commissioner, Municipal Corporation had no authority/jurisdiction to accord the permission as per notifications dated 11.8.2000 and 22.8.2002.

21. Consequently, in view of the discussions made hereinabove, there is no merit in the Letters Patent Appeal and the same is dismissed. Consequences to ensue. There shall be no order as to costs.