

(1993) 10 CAL CK 0020
In the Calcutta High Court
Case No : F.M.A.T. 1 of 1993

Executive Officer, Digha Planning Authority
Vs

APPELLANT

M/s. Hotel Sea Gull and others

RESPONDENT

Date of Decision : 13-10-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 144
West Bengal Town and Country (Planning and Development) Act, 1979 — Section 102,
137, 137(2), 2(12), 2(3)

Citation : AIR 1994 Cal 95 : 98 CWN 885

Hon'ble Judges : Suhas Chandra Sen, J;Arun Kumar Dutta, J

Bench : Division Bench

Advocate : Asoke Kumar Maiti, Pinaki Ranjan Mitra and Parimal Kumar Pahari, Bhabes Chandra Biswas, for the Appellant; Sakti Nath Mookerjee, Asoke Kumar Banerjee and Asim Kumar Mukhopadhyay, for the Respondent

Judgement

Arun Kumar Dutta, J.—The instant Appeal is directed against the judgment and order dated 22-12-1992 passed by Susanta Chatterji, J. in C.O. No. 10579 (W) of 1992.

2. The facts giving rise to the said writ petition may shortly be stated as follows:--

One Molay Kumar Guha was originally the owner of the Hotel, namely, M/s. Sea Gull, on part of plot No. 240, Khata No. 96, Mouza-Govinda Basan, P.S. Ramnagar (at present Digha), District Midnapore. After obtaining a sanctioned plan from the then Authority, Pudima II Gram Panchayat, on 19-1-1990 for construction of five-storied building thereon, and raising partly finished two-storied building he had been carrying on Hotel business by paying taxes and complying with requisite formalities therefore. By a registered Deed of Conveyance dated 7-6-1991 Sushil Pal Chowdhury and Dulal Pal Chowdhury had purchased the said Hotel with all that partly finished two-storied pucca "L" pattern structure/building standing thereon, including the business of the Hotel

and its goodwill. They had thereafter executed a Deed of Partnership on 5-8-1991 for carrying the Hotel business in the name and style "Hotel Sea Gull". They continued to carry on Hotel business by paying trade tax to the Gram Panchayat and complying with all other formalities therefore. The said two partners of the Writ Petitioner-Hotel (hereinafter referred to as Hotel) had undertaken construction of second floor in the month of July, 1992 in terms of the said sanctioned plan, still in force, which had almost been completed. The centering of the roof was also completed and the construction work was in progress. The management of the area (which was originally under the aforesaid Gram Panchayat) was acquired by the Digha Planning Authority on and from 20-11-1990 by virtue of a Notification under the West Bengal Town and Country (Planning and Development) Act, 1979 (hereinafter referred to as the Act).

3. When construction of the roof of the second floor on the said Hotel was about to be started the respondent No. 2, Executive Officer, Digha Planning Authority (hereinafter referred to as Officer) had issued a notice u/s 54 of the Act upon the petitioner, being Memo No. 238/XXX-24/DPA/ 92 dated 24-7-92, directing it to discontinue further construction of the building on the aforesaid plot in terms thereof, informing therein that necessary permission for such development is required under the said Act (copy of which had been marked as Annexure "B" to the Writ Petition). Immediately thereafter, the Writ Petitioner had received another notice from the Sub-Divisional Executive Magistrate, Cental, in Misc. Case No. 151 of 1992 asking it to appear before the Court and show-cause by 25-8-1992 as to why a proceeding u/s 144 of the Criminal P. C. (hereinafter shortened into Code) should not be drawn up against it. By another subsequent notice dated 14-8-1992, the aforesaid Magistrate had directed the petitioner not to raise any construction and/ or further construction and not to make any disturbance to the first party therein. The said case was fixed for further hearing on 14-9-92, and the restraint order was directed (on 25-8-92) to continue; and police picket was also posted in front of the Hotel.

4. It has been contended by the Writ Petitioner that the respondent No. 2 had no right to interfere with the said construction work, which was undertaken on the basis of a Plan, duly sanctioned by the aforesaid Gram Panchayat. It has further been contended that there are other five-storied buildings very close to the Hotel, which had been constructed as per Plan sanctioned by the Panchayat, and completed after the Development Authority had acquired management of the area, amounting to discrimination between the parties standing on similar platform.

5. Being aggrieved by and dissatisfied with the aforesaid Notice under Sec. 54 of the Act, the subsequent Notice issued by the said Executive Magistrate to stop work of construction, and illegal posting of police picket by the concerned respondents, the petitioner has moved the aforesaid Writ Petition under Article 226 of the Constitution of India for the reliefs prayed for therein.

6. By a subsequent Supplementary Affidavit the Writ Petitioner contends that

shortly after the service of notice upon the respondent No. 2 on 2-9-92 about the moving of the Writ Application, the latter had issued a demolition Notice under S. 53(1) of the Act, being No. 288/2UC-7/92 dated 31-8-1992, received by the former (petitioner) on 2-9-90 at 5 p.m., copy of which has been marked Annexure "A" to the said Supplementary Affidavit, praying for stay thereof. The Writ Petition had been opposed by the respondent therein by filing affidavit-in-opposition.

7. The Court below, upon hearing the contending parties, had allowed the Writ Petition by rendering the impugned judgment and order for the reasons recorded therein holding, inter alia, that the petitioner-Hotel, having existing building, would not be required to seek further permission under S. 46 of the Act, apart from the sanction granted by the appropriate competent authority for the purpose of development of the said building.

8. Being aggrieved by the judgment and order so passed by the Court of first instance, the respondent No. 2 has preferred the instant Appeal.

9. The point for determination here before us is how far the Court below was justified in passing the impugned judgment and order, the way it did.

10. The Writ Petitioner, as noted above, has challenged the legality and validity the vires of the impugned Notices under Ss. 54 and 53(1) of the Act. The Notice under S. 54 is Annexure "B" to the Writ Petition. The Notice under Sec. 53(1) is Annexure "A" to the Supplementary Affidavit filed by the Writ Petitioner.

11. By the Notice under Sec. 54 asking the Writ Petitioner to stop unauthorised development in terms thereof, the concerned Authority had informed the former that necessary permission for such development is required under Sec. 46 which has not been obtained by it. And, by the subsequent Notice under S. 53(1) requiring the Writ Petitioner to demolish the construction undertaken it had further been reiterated therein that it is mandatory to obtain permission in writing under Sec. 46 for undertaking development by way of construction on the existing Hotel building, and that the Writ Petitioner did not desist from carrying on the work of construction despite Notice to stop under S. 54, necessitating the issue of the said subsequent Notice under Sec. 53(1). The aforesaid two impugned Notices under Ss. 54 and 53(1) had been issued only on the ground that permission for development under Sec. 46, as required, had not been obtained by the Writ Petitioner; and on no other ground.

12. A case, however, was sadly and feebly sought to be made out by the respondent No. 2 about alleged violation of the provisions of the Environment (Protection) Act, 1986 and the guidelines issued by the Central Government thereunder, as appearing from the Affidavit-in-Opposition filed on his behalf. But, as already indicated above, there is not the nearest and faintest whisper in any of the aforesaid two impugned Notices under Ss. 54 and 53(1) about any alleged violation/ contravention of any provision of the Environment (Protection) Act, 1986 and/or any of the guidelines issued thereunder; and there is nothing

whatsoever therein to indicate that the same had been issued therefore. Such question does not, Therefore call for our consideration in the instant Appeal. Should the State feel that there has been any such violation by the Writ Petitioner it is open to it to proceed according to law, if so thought fit and proper, and if so advised.

13. Upon the respective contentions of the contending parties, such as they are, the points emerging for consideration are:--

"(1) Whether permission under Sec. 46 of the Act is required for development of existing building or for development of vacant land only, and

(2) Whether permission for development under Sec. 46 of the Act would be required in the absence of Development Plan."

14. To the first point first. The Court below has held that no permission under Sec. 46 is required for development of existing building. Let us analyse the relevant provisions of the Act to find answer to the point.

15. In terms of Sec. 46(1) "any person or body intending to carry out any development on any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form containing such particulars and accompanied by such documents and plans as may be prescribed". Under S. 2(7) of the Act the word "development" with its grammatical variations means the carrying out of building (engineering, mining or other) operations in, on, over, or under land, or the making of any material change in any building or land or in the use of any building or land, and includes division of any land. Under Sec. 2(3) of the Act "building operations" includes, amongst other things:--

"(a) erection or re-erection of a building or any part of it,

(b) roofing or re-roofing a building of any part of a building of an open space,

(c) any material alteration or enlargement of any building."

Under Sec. 2(12) of the Act "land" shall have the same meaning as in the Land Acquisition Act, 1894 (1 of 1894) and shall include land covered by water. Section 3(a) of the Land Acquisition Act, 1894 expresses that land includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.

16. The aforesaid definitions being, what they are, there could be no mistaking that raising of further construction over the existing first floor of the Hotel building clearly amounts to "building operations", and is thus "development" in, on, over, the land in question, more particularly, when the same amounts to material alteration and enlargement of the existing building and roofing of the same within the meaning of sub-sees. (3), (7) and (12) of S. 2 and S. 46(1) of the Act. That being so, permission under Sec. 46 would clearly be required for development of existing Hotel building. The finding of the Court below to the

contrary cannot clearly be sustained as such.

17. To the second point next. The learned Advocate for the Writ Petitioner-Hotel, referring us to the various provisions of the Act, including Ss. 46(2), 102 and 51, had waxed eloquent that no permission u/s 46 would be required so long as Development Plan is not prepared and Notification under S. 102 regarding levy of Development Charge is not published in terms thereof. In the instant case no Development Plan has, admittedly, been prepared as yet. It has been submitted by Mr. Banerjee that no Notification for levy of Development Charge has yet been published under Sec. 102 of the Act. Evidently and undeniably, the Act has come into force in the area in question, being Mouza-Gobinda Basan, J.L. No. 99, P.S. Digha, District Midnapore, with effect from 20-11-1990 under a Notification issued therefore.

18. According to the respondent No. 2 (appellant herein), the Development Plan in respect of the said area is under preparation, which is also admitted by the Writ Petitioner in paragraph 9 of its Affidavit-in-Reply. It has further been affirmed by the appellant in its Supplementary Affidavit, supported by Annexures, that steps are being taken to complete the Outline Development Plan on or before 19th October, 1993; and all necessary statutory steps have been taken for preparation of the Plan and imposition of Development Charge in the manner stated therein.

19. Section 46(1) of the Act, as it is, does not appear to be a qualified provision. It has been clearly provided therein that any person or body intending to carry out any development on any land shall make an application for permission in terms thereof. There is not the slightest indication therein that the Section would not apply in the absence of a Development Plan.

20. Sub-section (3)(i) of S. 46 of the Act provides that the concerned Authority in dealing with an application for permission shall have regard to -

"(a) the provisions of the Development Plan, if it has come into operation; and
(b) any other material consideration."

21. The aforesaid provision, such as it is, would at once make clear that the concerned Authority, while dealing with an application for permission shall have regard to the provisions of the Development Plan, if it has come into operation; and, if not, any other material consideration, obviously implying that Section 46(1) would be applicable even when Development Plan has not come into operation.

22. Section 51 of the Act has provided for power of revocation and modification of permission to development in terms thereof. Sub-section (1) thereof runs as follows:--

"(1) if it appears to the Planning Authority or the Development Authority that it is expedient, having regard to the development plan prepared or under preparation

or to be prepared and to any other material consideration, that any permission to develop land granted under this Act or any other law, should be revoked or modified, the Planning Authority or the Development Authority may, by order, revoke or modify the permission to such extent as appears to it to be necessary:

Provided that -

(a) where the permission relates to the carrying out of building or other operations, no such order shall -

(i) affect such of the operations as have been previously carried out;

(ii) be passed after these operations have been completed;

(b) where permission relates to a change of use of land, no such order shall be passed at any time after the change has taken place."

23. In terms of the aforesaid provision the concerned Authority may revoke or modify any permission to develop land granted under the Act (or any other law) if it appears to it, having regard to the Development Plan prepared or under preparation or to be prepared.....; that it is expedient to do so; clearly implying that permission to develop land under the Act would be required even when Development Plan is under preparation or to be prepared. The aforesaid provision, as it is, does not indicate that permission under Sec. 46 would not be required in the absence of a Development Plan in a particular area.

24. Section 56 of the Act provides for interim provision pending preparation of Development Plan. It runs as follows:--

"Where the Planning Authority or the Development Authority, in the exercise of its functions and powers with respect to any area under it, is required to have regard to the provisions of Development Plan before such Development Plan has become operative, the concerned Authority shall have regard to the provisions which, in its opinion, will be required to be included for securing the proper planning of the concerned area."

25. In terms of the aforesaid provision the Authority concerned while exercising powers and functions under the Act is required to have regard to the provisions of Development Plan before such plan has become operative and shall also have regard to the provisions which, in its opinion, would be required to be included for securing proper planning of the concerned area, obviously implying that the powers and functions thereunder are to be exercised by the concerned Authority under the Act pending preparation of Development Plan in terms of the aforesaid provision.

26. It would also be pertinent to refer to Sec. 137 of the Act in this context which provides for overriding effect in terms thereof. The sub-sections (1) and (2) thereof read as follows :--

"(1) The provisions of this Act and the rules and regulations made thereunder

shall have effect notwithstanding anything inconsistent therewith contained in any other law.

(2) Notwithstanding anything contained in any other law -

(a) when permission for development in respect of any land has been obtained under this Act, such development shall not be deemed to be unlawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under any other law for such development has not been obtained; this shall not, however, be construed as exemption to application for permission and of payments of such fees and charges as required by such other law.

(b) when permission for such development has not been obtained under this Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has been obtained."

27. Clause (b) of sub-section (2) of S. 137 clearly provides that any development carried out only by obtaining permission, approval or sanction for such development under other law shall not be deemed to be lawfully undertaken or carried out when permission for such development has not been obtained under the relevant Act XIII of 1979. The said provision being, what it is, further construction undertaken on the Hotel in question on the basis of a plan approved/sanctioned by the then Authority-Gram Panchayat, having competence do so, cannot clearly be deemed to have been lawfully undertaken when permission for such development has been obtained under the relevant Act of 1979. If the said further construction on the Hotel in question (development) cannot be deemed to be lawfully undertaken, it must certainly be held to be unlawful, and as such unauthorised, as not authorised by law.

28. It would also be pertinent to note that Sec. 52 of the Act provides for penalty for unauthorised development (or for use otherwise than in conformity with the Development Plan). In terms of the said provision any person commencing, undertaking or carrying out development, amongst other circumstances, without permission as required under the Act would be liable for punishment in terms thereof.

29. Section 53 of the Act provides for notice regarding unauthorised development (or use otherwise than in conformity with the Development Plan) requiring, amongst other things, "demolition or alteration of any building or works" in terms of sub-section (2)(a) thereof. Section 54 of the Act also empowers the concerned Authority to stop unauthorised development in terms thereof.

30. Section 55 as will empowers the concerned Authority to require removal of unauthorised development (or use) having regard to the Development Plan prepared, or under preparation, or to be prepared, and to any other material

consideration in terms thereof.

31. On a close scrutiny of the aforesaid provisions it seems clear to us that the provision of Sec. 46 would apply even in the absence of Development Plan, when the same is under preparation or to be prepared. The said view would all the more be confirmed when the aforesaid relevant provisions of the Act viz. Sections 45, 46, 51, 55 and 56 are read together with Sec. 137 of the Act providing for overriding effect in terms thereof, as indicated above. It would also seem significant and observable to note in this context that Sec. 31(4)(d) of the Act provides that outline Development Plan (in terms thereof) may also:--

"(d) includes regulations (hereinafter called Zoning and Sub-Division Regulations) to control within each zone the location, height, number of storeys and sue of buildings and other structures, the size of yards, courts and other open spaces and the use of buildings, structures and land and sub-division of land and the street alignments, set back distances, embankment, constructional activities destroying natural scenic beauty and provide for amenities in hill areas and coastal areas and such other issues as may be considered appropriate by the Authority."

Section 32(6)(b) as well provides that Detailed Development Plan (in terms thereof) may also:--

"(b) include zoning regulation to regulate within each zone, and location, height, number of storeys, and size and number of buildings and other structures, the size of yards, courts and other open spaces and the use of buildings, structures and land."

32. And, Section 38(5) of the Act further provides that:--

"(5) If the Development Plan contains Zoning and Sub-Division Regulations as referred to in clause (d) of sub-section (4) of S. 31, it shall be the duty of the Corporation or the Commissioners of the Municipality or any other local authority, within whose jurisdiction such area or zone is situate, to enforce such regulatory measures in supersession of the rules and regulations, if any, applicable to such area or zone."

33. The aforesaid provisions would as well make clear that the aforesaid Zoning and Sub-Division Regulations could very well be included in Outline Development Plan and Detailed Development Plan under Ss. 31 and 32 before the Development Plan comes into operation under Sec. 38. And, under subsection (5) of S. 38 it shall be the duty of the Corporation or the Commissioners of the Municipality or any other local authority to enforce Zoning and Sub-Division Regulations in terms thereof. Permission under S. 46 of the Act would, therefore, be all the more obligatory for any development within the notified area for giving effect to such Zoning and Sub-Division Regulations, if any, and for giving effect to the Scheme of the Act which has been enacted "to provide for the planned development of the rural and urban areas in West Bengal and for matters

connected therewith or incidental thereto". In the absence of any such regulation, there might be sporadic, haphazard and unplanned development, in a particular area, not in conformity with Development to be prepared, while the same is under preparation which could not conceivably have been intended by the Legislature giving rise to manifestly absurd result. It would also be pertinent to note that under the proviso to sub-section (I) of S. 51 permission to develop land (granted under this Act) or any other Law, as in the instant case where Building Plan had been approved/ sanctioned by the then Authority, the concerned Gram Panchayat, such permission cannot be revoked or modified, where the same relates to building or other operations, affecting:

(i) such of the operation as have been previously carried out;

(ii) the operations which have been completed.

That being so, such of those operations (previously carried out or completed) could not be touched, which is also likely to affect the scheme of the Act for planned development. Sub-section (2) of S. 51 further provides :

"(2) When permission is revoked or modified by an order made under sub-section (sic) the owner claims from the Planning Authority or the Development Authority within thirty days from the date of revocation or modification, an amount for the expenditure incurred in carrying out the works after the grant of permission and in accordance with such permission, which has been rendered abortive by the revocation or modification, the Planning Authority or the Development Authority shall, after giving the owner a reasonable opportunity of hearing by an officer appointed by it in this behalf, and after considering the officer's report, assess and offer such amount to the owner, as it thinks fit."

34. In terms of the said provision when any such permission is revoked or modified, the expenditure incurred in carrying out the works has to be assessed and offered to the owner from the Public Exchequer at the cost of and to the detriment and prejudice of the people at large and the State, which could neither have been intended by the Legislature.

35. It had been submitted by the learned Advocate for the Writ Petitioner-respondent Mr. Banerjee that no permission u/s 46(1) would be required unless levy of Development Charge is notified in terms of S. 102 and assessed under sub-section (2) of S. 46. But to that we would at once note with a minute of dissent that payment of Development Charge under sub-section (2) of S. 46 is not a condition precedent for making application for permission under sub-section (1), but is a pre-condition for passing order by the concerned Authority on such application under S. 42(2)(a). And, in terms of S. 45 no development etc. could be undertaken or carried out after the coming into force of the Act to a particular area:--

"(a) without obtaining a certificate from the concerned Authority certifying that the development charge as leviable under this Act has been paid or that no such

development charge is leviable and

(b) without obtaining the permission in writing as provided for hereinafter."

The aforesaid provisions would as well make clear that no development on any land could be undertaken (after the coming into force of the Act to a particular area) without obtaining permission under the Act and without payment of development charge, as leviable under the Act, irrespective of whether Development Plan has been prepared or not.

36. Submitting to the contrary that the provisions of S. 46 would apply after the coming into operation of the Development Plan in an area, the learned Advocate for the Writ Petitioner-appellant had referred us to the decision of a Division Bench of this Court in *C.M.D.A. v. Cast India Hotels Ltd.* (1992)1 Cal LJ 419 wherein their Lordships have observed in paragraph 38 thereof as follows :--

"On a combined reading of the said provisions and applying the principles of harmonious construction of different provisions of the statute, it is clear that the provisions of Sections 45 and 46 will apply only after the coming into operation of the Development Plan in an area, and the imposition of Development Charges. Otherwise, an anomalous situation may arise. Admittedly, no such Development Plan has yet been prepared in respect of the said area and, as such, there is no question of any Development Plan coming into operation. Nor has any notification been issued relating to the imposition of Development Charges. Accordingly, Ss. 45 and 46 cannot be invoked at all in the instant case by the authority concerned,"

37. But Their Lordships have also observed in paragraph 71 as follows:--

"Assuming that Section 46 of the said Act would apply even in the absence of a Development Plan, this would only mean that when no Development Plan has been prepared or enforced, any person intending to make any work of construction or reconstruction of or addition or alteration to an existing building will have to apply for permission to do so from the C.M.D.A. The C.M.D.A. in dealing with such permission must confine itself to the expressed terms of sub-section (3) of S. 46."

38. Quoting the aforesaid Section 46(3) (already quoted above), their Lordships went on to add :--

"If no Development Plan has come into operation, as in the instant case, the Authority will have no occasion to refer to any Development Plan. The Authority can only have regard to any other material consideration."

39. Their Lordships had thereafter proceeded to consider what "any other material consideration" means. All the relevant provisions of the Act, S. 137, in particular, do not seem to have been placed before Their Lordships in the said case.

40. However that may be, unhappily for the Writ Petitioner-Hotel, the said

decision would be of little assistance to it as the facts therein are clearly distinguishable from and do not seem to be applicable to the facts of the instant proceedings before us. In the aforesaid case the Writ Petitioner, a Hotelier, a Company running a hotel named and styled as Oberoi Grand Hotel at a most posh locality of Calcutta had decided to redevelop the Hotel by pulling down a substantial portion and reconstruct building thereon. As indicated in paragraph 23 of the decision, "the real hitch is that the C.M.D.A. would not permit any work of reconstruction or addition or alteration to an existing structure unless 60% of the total building site was kept open as vacant land and the F.A.R. was restricted only 3". As the building complex of the Grand Hotel which was constructed according to the Building Rules then prevailing (which are still applicable) leaves only 50% of the site as open space, it was absolutely impossible for the hotel to meet the said requirement of the C.M.D.A. The same also applied to F.A.R. The existing structure of the hotel had already consumed F.A.R. which was nearly 4. With the proposed construction, the F.A.R. would have been 3.9, which was permissible under the Building Rules. But the C.M.D.A. wanted to restrict the F.A.R. to 3. If the said requirements of the C.M.D.A. were to be fulfilled, the petitioner-Company would have to pull down a substantial portion of the hotel building so as to generate additional 10% of the open space and to bring down the F.A.R. to 3. It was against the aforesaid arbitrary decision of the C.M.D.A. that the said relevant writ petition was directed.

41. In the aforesaid case, the proposal was to construct a modern Shopping-cum-Commercial Complex on a land which was already built up, where there were already clusters of shops. If the proposal had been considered on its own merits, taking into account the relevant facts and circumstances, the authorities would have found that far from causing any hindrance to Town Planning, the implementation of the said proposal, namely, the construction of an ultramodern Shopping Complex side by side with a four-storied car parking arrangement would have been conducive to Town Planning. Their Lordships in the said decision had thus observed in paragraph 73 of the said decision that such a project, far from being a hindrance to future Town Planning would, in fact, have been conducive to the implementation of future Development Plan in the area. If the authority concerned had taken into consideration these aspects of the matter which are all relevant considerations and hence material considerations within the meaning of S. 46(3) of the Act, then instead of refusing permission to develop, the authority should have welcomed the idea of such improvement and redevelopment taking place entirely on the basis of private investment, which would have contributed substantially to the planning and development of the said area.

42. In the instant case before us, the Writ Petitioner-Hotel had been raising further construction on the Hotel building at Mouza-Gobinda Basan, within P.S. Digha (present), District Midnapore, where the Act has come into force with effect from 20-11-1990, which is the embryonic stage of development, yet to be born as a planned township. In the words of Their Lordships in paragraph 77 of

the said decision.... "the parameter of Town Planning in the case of an old city like Calcutta would be different from that of a planning for a new city which is yet to be born". Town Planning in the case of an old city like Calcutta which sprang up in a historical process sporadically and in an unplanned and haphazard manner must be adjusted to the realities of the situation. The flexibility that the Planners may enjoy and the restriction they may impose while planning for a new city, yet to be born, could not be applicable when the process of Town Planning is to be super-imposed on a city like Calcutta. The existing buildings and structures, existing layout of roads, streets, lanes and by-lanes and the existing pattern of land use and the like are some of the constraints which cannot be wished away for the convenience of Town Planning. Town Planning must proceed keeping in view the said constraints and skillfully negotiating the same.

43. Upon the discussions above, the aforesaid decision of the Division Bench of this Court in *C.M.D.A. v. East India Hotels Ltd.* (1992(1) Cal LJ 419) too heavily relied upon by the Writ Petitioner-respondent, does not seem to us to be applicable to the facts of the instant case before us, and would thus be of little avail to it. And, in view of the foregoing discussions, we are of the confined view that permission under S. 46 of the Act would be required even in the absence of Development Plan, while the same is under preparation or to be prepared. It would also be pertinent to note in this context that S. 47 of the Act provides for appeal against grant of permission subject to conditions or refusal of permission in terms thereof. An aggrieved person has accordingly a remedy by way of appeal in terms of the aforesaid provision. The point No. 2 stands accordingly answered. The Writ Petitioner-respondent not having obtained the requisite permission for undertaking further construction on the existing Hotel building, the impugned Notices under Ss. 54 and 53(1) of the Act could scarcely be quashed. The impugned judgment and order of the Court below could neither be sustained as such, and is liable to be set aside.

44. In the result, the Appeal succeeds and the impugned judgment and order of the Court below dated 22-12-92 be hereby set aside.

45. We, however, feel that in the peculiar facts and circumstances of the matter, the Writ Petitioner-respondent, in the interest of justice, should be given an opportunity to apply for permission u/s 46 of the Act for making further construction upon the existing Hotel building in terms of the Plan sanctioned/ approved by the then competent Authority, Pudima II Gram Panchayat, if the same is still in force. If any such application is duly and properly filed by it before the concerned Authority, the latter shall dispose of the same according to law by passing reasoned order after giving the Writ Petitioner all reasonable opportunity of being heard. The Writ Petitioner shall be at liberty to take all the points pleaded in the Writ Petition and any other relevant points it likes before the concerned Authority, who would deal with the same according to law. We, however, make it clear that we have not expressed any opinion about the merits of the Writ Petitioner's contentions in the Writ Application.

46. In order to enable the Writ Petitioner to avail itself of the opportunity granted hereunder, the concerned Authority shall not give effect to the impugned Notice under S. 53(1) of the Act for a period of eight weeks from date. The Writ Petitioner shall also preserve status quo in respect of the existing Hotel building during the aforesaid period. On the failure of the Writ Petitioner to apply for permission under Sec. 45 of the Act in terms of the opportunity granted" hereunder within the aforesaid period, the concerned Authority shall be at liberty to proceed with the matter according to law. If any such application for permission is filed by the Writ Petitioner within the aforesaid specified period in terms of this order, the Authority concerned must ensure that the Writ Petitioner might be in a position to make payment of Development Charge as may be assessed under Chapter IX, if not already assessed, if payable for the purpose, for consideration of the same under S. 46(2), and for carrying on development by way of further construction on the existing Hotel building in terms of S. 45 of the Act, in case permission is granted therefore under S. 46(1) of the Act.

47. In the facts and circumstances of the matter, the parties are directed to bear their respective costs of this hearing.

Suhas Chandra Sen, J.

48. I agree.

49. Appeal allowed.