
(1995) 08 GAU CK 0031
In the Gauhati High Court
Case No : Civil Rule No. 1371 of 1994

Jadav Chandra Das

APPELLANT

Vs

Gauhati Municipal Corporation

RESPONDENT

Date of Decision : 25-08-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 226
Gauhati Municipal Corporation Act, 1971 — Section 337, 337

Citation : (1996) 1 GLJ 43 : (1995) 3 GLT 588

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : K.K.Nandi, H.Talukdar, B.R.Dey, A.B.Choudhary, Advocates
appearing for Parties

Judgement

1. This matter is short, the question involved is regarding the scope and power of the Gauhati Municipal Corporation (hereinafter called the Corporation) to issue notice under section 337 of the Gauhati Municipal Act, 1971.

2. The question which first arise is within what time this notice is to be issued by the authority inasmuch as in the section no time limit has been prescribed. Can this notice be issued after completion of the building and it is being assessed by the authority and taxes are realised. Can this power be utilised by the authority at any time according to its sweet will keeping the sword of democles hanging over the head of the person who completed the construction of the building, gets it assessed under section 150 under the Act, and it is amended from time to time and a new assessment list is prepared under section 159 of the Act.

3. To appreciate the contention let us have a look at section 337 of the Act which is quoted below:

"337. Power to require removal or alteration of work not in conformity with byelaws executed notwithstanding rejection of plan etc. (1) If any building is erected or reerected in contravention of any development scheme mentioned

under section 322 or any building byelaws made under section 416 (1) D, without plans having been deposited, or notwithstanding the rejection of plans or otherwise than in accordance with any requirements subject to which the Commissioner passed the plans, the Commissioner may, without prejudice to his right of taking proceedings in a Court of law for such contravention, by notice to the owner either require him to pull down or remove the work or if he so elects, to effect such alteration therein as may be necessary to make it comply with the said scheme or byelaws or other requirements specified in the notice.

(2) In any case in which the erection or reerection of any building has been commenced or is being carried on unlawfully as mentioned in subsection (1) the Commissioner may, by a written notice, requires the building operation to be discontinued from the date of service of the notice.

(3) If a person to whom a notice has been given under the foregoing provisions of this section fails to comply with the notice before the expiry of 7 days, the Commissioner may, pull down or remove the work in question, or effect such alteration therein as he deems necessary, and may recover from him the expenses reasonably incurred by the Commissioner in so doing, and such dues shall be recoverable as arrears of municipal tax.

(4) Where plans were approved, it shall not be open to the Commissioner to give such a notice on the ground that the building contravenes any scheme or byelaws, as the case may be, or does not comply with the requirements under this part."

4. The factual matrix of this case is that the petitioner's father constructed 3 houses in Ward No. 13 of the Gauhati Municipality at Kedar Road, Holding No.61, AT House, year of construction 1945, Holding No.61 A, semi RCC, year of construction 1948, Holding No.62A, year of construction 1977, Holding No.62, RCC three storied, year of construction 1960. All these houses were assessed by the authority and taxes were also being realised from the owners. It further appears that the father of the petitioner had a soap factory in one of the houses and the Gauhati Municipal Corporation issued licence under section 273 read with section 378 of the Act and this was renewed from time to time and the last licence is dated 21.3.94. These are Annexure 4 to 7 respectively to the writ application. On 12.1.94 vide Annexure 1 the following notice was issued to Shri Yadav Das, the father of the petitioner and that the notice is quoted below: (not quoted: Editor)

Thereafter on 2.4.94 a notice was issued under section 337 (1) and (2) of the Act and that notice is quoted below : (not quoted : Editor)

5. This writ application has been filed challenging the legality and validity of Annexure 5 to the writ application which is quoted above.

6. I have heard Shri BR Dey learned Advocate for the petitioner and Shri AB Choudhury, learned Advocate for the respondent Nos.1, 2 and 3. No

affidavit in opposition has been filed. No record has been produced. The Gauhati Municipal Corporation Act came into existence in the year 1971. Earlier to it is the Assam Municipal Act which operated in the field. Section 171 of the Act provided for prohibition of building without sanction. Section 171 is quoted below in its entirety : (not quoted : Editor)

6A. Section 76 of the Assam Municipal Act, 1956 gives the power to the Board to determine the valuation of the holding. Section 77 of the Act provides for return to be given by the owner or the occupier to furnish him with the return of the requisite or annual valuation thereof and the description of the holding in such details as the Board may prescribe, the assessor at any time between sunrise and sunset may enter, inspect and measure any such holding. Section 78 provides for penalty, for default in furnishing return. Section 79 provides for determination of the annual value of the holding. Section 80 provides for determination of rate of taxes on holding. Section 81 provides for preparation of assessment Register. Section 82 gives the power to the Board to assess consolidated tax for house and land on which it stands. There are other provisions for revision of assessment and valuation list. For the disposal of this case we are not concerned with the same. Then came the Municipal Corporation Act. Chapter XII deals with the property taxes. Section 147 provides for components and rate of property tax. Section 148 provides for exemption from general property tax. Section 149 provides for water tax and scavenging tax. Section 150 provides for determination of rateable value of land and building assessable to property taxes. Section 151 is regarding charge by measurement in lieu of water tax in certain cases. Section 152 is special rights of scavenging charge in certain cases. Section 153 is incidents of property taxes. Section 154 is recovery of property taxes from occupier. Section 155 is regarding property taxes shall be first charge on which they are assessed. Section 156 is the assessment list. Section 157 is the evidential value of assessment list. Section 158 is the power to prepare and amendment of assessment list. Section 159 is preparation of new assessment list. Section 160 is the notice of transfer. Section 161 is the notice of erection of building. Section 162 is the notice of demolition or removal of building. Section 163 is the power of the Commissioner to call for information and returns to enter and inspect the premises.

7. Then let us have at Chapter XXVI which provides for land, building and streets and development schemes. Section 322 is regarding development scheme. Section 323 enumerates the matter to be provided for any development scheme. Section 324 is with regard to submission of development scheme to the Corporation for approval. Section 325 is with regard to development scheme should comply with the Masters Plan and Zonal Development Plan. Section 326 is with regard to power of the Government to require Corporation to make scheme. Section 327 provides for prohibition of erection or reerection of building without permission. Section 327 and 328 are quoted below:

"327. Prohibition of erection or reerection of buildings without permission. No

person shall: .

- (i) erect or reerect any building; or
- (ii) commence to erect or reerect any building; or
- (iii) make any material external alteration to any existing building;
- (iv) construct or reconstruct any projecting portion of a building which the Commissioner is empowered to require to be set back or is empowered to give permission to construct or reconstruct :
- (a) Unless the Commissioner or the Engineer so empowered has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal to grant such permission; or
- (b) after the expiry of one year from the date of the said permission or such longer period as the Commissioner may allow;

Provided that nothing in this section shall apply to any work, additional or alteration which the Corporation may by byelaws declare to be exempted.

328. Notice of buildings. (1) Every person who intends to erect or reerect a building shall submit to the Corporation :

- (a) an application in writing for approval of the site, together with a site plan of the land, and documents of title and, in the case of land which is the property of the Government or of the Corporation a certified copy of the documents authorising him to occupy the land, and if so required by the Commissioner, the original document or documents; and
- (b) an application in writing for permission to execute the works together with a ground plan, elevations and sections of the building and a specification of the work.

(2) Every plan of any building to be constructed wholly or partly of masonry submitted under sub section (1), shall in token of its having been prepared by him or under his supervision bear the signature of a surveyor, licensed or duly approved by the Corporation.

(3) Every document submitted under subsection (1) shall be prepared in such manner and shall contain such particulars as may be required by byelaws in this behalf.

(4) Nothing herein contained shall require a person to comply with the provisions of clause (b) of subsection (1) of this section until such time as the site has been approved by the Commissioner or such person as he may direct:

Provided that an application shall be disposed of within 60 days from the date of receipt."

Section 329 is the power of the Commissioner to refuse erection or re erection of

building. Section 333 are the grounds on which site of proposed building may be disapproved. Section 331 enumerates the grounds on which permission to erect or reerect the building may be refused. Section 332 is the power of the Commissioner to direct, modification of sanction plan of building before its completion. Section 334 provides for intimation of completion of building. Other section are not necessary for the disposal of this case. The Gauhati Municipal Corporation did not frame any building byelaws of its own, but adopted building byelaws, namely building byelaws came into existence after 1959 when the Town and Country Planning Act was enacted and Gauhati Development Authority was constituted. Byelaws No.3 provides for giving a notice to the authority regarding his intention to erect, reerect or making alteration in any place in a building or part thereof and it further provides that such notice shall be accompanied by the plans and statement confirming to byelaws Nos.5 and 8 blue or white prints. Byelaws No.5 provides the plan to accompany such a notice. Bye law No.6 provides for statement accompanying notice. Byelaw No.7 provides for signing of the plans. Byelaw No. 12 provides for fees. Byelaw No. 13 provides for inspection after notification which is quoted below : (not quoted : Editor)

Byelaw No. 14 is regarding construction not according to the plans. Byelaws No. 15 is sanction with or without modification or refusal. Byelaws No. 16 is the duration of the sanction and the sanction once accorded shall remain valid upto one year. Byelaw No. 17 provides that the owner upon commencement of his work under the building permit shall give notice to the authority that he has started his work and the authority shall cause inspection of the work to be made within 14 days following the receipt of the notice to verify that the building has been located in accordance with the sanctioned plans. If, however, the authority fails to make the inspection within the specified period it shall be presumed that the authority has no objection to the construction. Byelaw No. 18 is regarding occupancy certificate. Byelaw No. 19 provides for penalty for violation of the byelaws. Byelaw No.20 is with regard to existing building and it provides as follows:

"20. Existing buildings. Nothing in the regulations shall require the removal, alteration or amendment of, nor prevent the continuance of use and occupancy in a lawfully existing building, except as may be necessary for the safety of life and property."

The four forms A, B, C and D are quoted below : (not quoted : Editor)

8. A perusal of this provision will show that elaborate provisions have been made regarding construction, supervision and occupation of the building. The question is that whether the Municipal authority can exercise the power under section 337 at any time after completion of the building. No time has been prescribed regarding the exercise of this power. As no time has been prescribed it must be held that a reasonable time will apply regarding the exercise of such power. The word "reasonable" means fair, justice and not absurd. The word "reasonable time" has been used in the explanation to section 46 of the Contract Act and the

law is crystallised with the question what is reasonable time is one to be (decided not by general abstract consideration but by particular circumstances of each case. There is no such thing as a reasonable time in the abstract It must always depend upon circumstances which differ from case to case. In the field of special law, the Limitation Act provides the limitation and the object of the statute of limitation is preventive. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right such extinguishment of claim by statutory interference results in making certain demands/actions stale and it is to be construed strictly. The statute of limitation seeks to take away or restrict the rights to take legal actions, and it must be viewed strictly with a leaning in favour of the litigant. Further the limitation laws being technical by their very nature, there can be no invocation of any equitable or ethical consideration to get over them. The hurdle of limitation cannot be crossed under the guise of any hardship or imagine inherent discretion of any jurisdiction of the Court. Now even in the field of Criminal Jurisdiction limitation has been prescribed by inserting section 467 and 468 in the Code of Criminal Procedure and the object of the Criminal Procedure Code in putting a bar of limitation on prosecution is clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the Court by filing vexatious and belated prosecution long after the date of offence. It is not in the interest of justice to allow the prosecution to start after long delay keeping a person in suspended animation without any cause at all and it can not be with the spirit of the procedure established by law. Even in the field of writ jurisdiction though the period of limitation prescribed by Limitation Act do not strictly apply to application under Article 226 of the Constitution of India, yet the Courts in their wisdom refused to accept a stale claim. This being the position of law, I hold that the power under section 337 of the Act must be applied within a reasonable time. What is reasonable time in such a case shall be dealt with in the later part of the judgment.

9. The object of all Municipal Acts is to regulate the matters of public convenience and compel public to conform to certain rules, the noncompliance whereof will result in dislocation of normal comfort which such statutes are intended to achieve. The sense of orderly living in cities and the aesthetic sense of modern men will be shocked if the structures are allowed to come up irregularly. Such statute must be construed in such a manner as will test effect their purpose and protect their intended beneficiaries. Section 337 of the Act gives the power to the Commissioner to require, removal or alteration of work not in conformity with byelaw or executed notwithstanding rejection of plan. The word used in the section is "may", the word "may" in the section does not mean "shall" and the authority has a discretion whether he should pass an order for demolition or not. In applying this discretion the authority must give reasons and without applying its mind in a mechanical manner it cannot pass an order. This aspect of the matter came up for consideration in AIR 1956 SC 110 (Corporation of Calcutta vs. M. Agarwalla). That was an appeal against the judgment of the High Court of

Calcutta affirming the order of the Municipal Magistrate whereby he dismissed an application filed by the appellant under section 363 of the Calcutta Municipal Act, 1923 for demolition of certain construction on the ground that they had been erected without the previous, permission of the authorities and in contravention of the prescription laid down in the Building Rules. In paragraph 10,11,13 and 14 the Supreme Court, inter alia pointed out as follows :

"10. We agree with the respondent that section 363 does not require that when a building is shown to have been erected without permission or completed otherwise than in accordance with the terms of the permission or in breach of the building rules, an order for its demolition should be made as a matter of course. In our opinion, it does give the Magistrate a discretion, whether he should or should not pass such an order. That was the construction put in *Abdul Samad vs. Corporation of Calcutta* 33 Cal 287 (a), on section 449 of the Calcutta Municipal Act (Bengal Act III of 1899) which corresponds to section 363 of the present Act on language which is, so far as the present matter is concerned, the same. In reenacting the present section in the same terms as section 449 of Bengal Act III of 1899, it must be taken that the legislature has accepted the interpretation put on them in "33 Cal 287 (a)" as correctly representing its intention. It should accordingly be held that the word "may" in section 363 does not mean "shall" and that the Magistrate has under that section a discretion whether he should pass an order for demolition or not.

11. Then the question is whether the exercise of that discretion by the Courts below is open to review by this Court. It is a well settled principle that when the legislature entrusts to an authority the power to pass an order in its discretion, an order passed by that authority in exercise of that discretion is in general, not liable to be interfered with by an appellate Court, unless it can be shown to have been based on some mistake of fact or misapprehension of the principles applicable thereto.

13. The Courts below were also influenced by the fact that there was no complaint from the neighbours about the erection of the building. It must be remembered that the building rules are enacted generally for the benefit of the public and where those rules have been violated and proceedings are taken for an order for demolition of the building under section 368 what has to be decided is whether the breaches are of a formal or trivial character, in which case the imposition of a fine might meet the requirements of the case, or whether they are serious and likely to effect adversely the interests of the public, in which case it would be proper to pass an order for demolition.

Whether there has been a complaint from the public would not as such be material for deciding the question, though if there was one, it would be a piece of evidence in deciding whether the interests of the public have suffered by reason of the breaches.

14. The position, therefore, is that the orders of the Courts below are based on

mistake and misdirections, and cannot be supported. The conduct of the respondent in adopting a hide and seek attitude in completing the constructions in deliberate defiance of the law calls for severe action. It would be most unfortunate, and the interests of the public will greatly suffer if the notion were to be encouraged that a person might with impunity break the building rules and put up a construction and get away with it on payment of fine.

All this would be good justification for making an order for demolition. But then it is now nearly five years since the building was completed, and though section 363 (2) which direct that no application for demolition shall be instituted after a lapse of five years from the date of the work does not, in terms, apply as the proceedings have been started in time, we do not feel that after the lapse of all this time, an order for demolition is called for in the interest of the public.

We also take into account the fact that the orders in question would not have come before us in the normal course by way of appeal, were it not that the appellant desired that the decision of this Court should be obtained on certain questions of importance, and that purpose has been achieved. On a consideration of all the circumstances, we do not think that this is a fit case in which we should pass an order for demolition. We, should however, add that we find no justification for the strictures passed on the appellant by the Court below."

10. It will be seen from that case that in that particular Act a period was fixed, that is, five years from the date of completion of the building within which the authority should take action. In our case there is no period, but at the same time it is found even assuming that there was no permission etc the building was assessed, tax was being realised and that is the position, the authority can not have any right to exercise the power under the section for demolition of the building, otherwise it will amount to giving a long handle to the authority and it will be fraud on the power. The authority must be deemed to waive this power of demolition. The facts which emerges in this case are as follows :

- (1) That the building was constructed by the petitioner on his own land.
- (2) That the petitioners were in possession and occupation of the building for quite a long period.
- (3) That the buildings were assessed by the Corporation and taxes were being realised.

So what can be legitimately and reasonably expected from the authority functioning in a society governed by Constitution and Rule of law which guarantees to its citizens against arbitrary invasion by the Executive of peacefully possession of a property.

11. The Court can exercise the power where statutory power is exercised contrary to some legal principles. Fraud on power voids the order if it is not exercised bonafide for the end in design. Lord Denning pointed out no judgment of a Court or order of a Minister can be allowed to stand if it is vitiated by fraud.

Fraud unreveals everything. In *Ram Manohar Lohia vs. State of Bihar*, AIR 1966 SC 740, it was laid down that the Courts have always acted to restrain a misuse of statutory power. The fraud may arise when authority misused its power in breach of law even by taking into account bonafide and with the best of intention some extraneous matters or by ignoring the relevant matters. Even that would render the impugned act or order ultra vires, it would be a case of fraud of powers (see paragraph 119 in (1976) 1 SCC 133, *Express News Paper Private Limited & others vs. Union of India & others*). Power is to be used bonafide for the purpose for which they are conferred, if this power of demolition is used after long lapse of time and after completion of the building and/or if a person is asked to produce the permission after a long lapse of time, it will be asking a person to do something which is impossible and law cannot be utilised to ask a person to do something which is impossible. Law cannot be utilised as a booby trap.

12. In that view of the matter I hold as follows: (i) The power under section 337 of the Act cannot be utilised and/or used in respect of a building constructed on the own land of a person after completion of the same and after assessed by the Municipal authority. Though no time limit has been prescribed under section 337 of the Act for issuance of notice, yet I hold that for the issuance of notice under this section one may take note of Article 137 of the Limitation Act. There is no good reason why the residuary Article of 137 should not be held to cover in its ambit, an application, an objection under special laws or other laws. Its language should not be interpreted narrowly so as to kept it confined to application under the Code of Civil Procedure. There being no warrant for it in the phraseology of the Article or in the scheme of the Schedule in 1963 Act. It is now well settled that Article 137 of the Limitation Act would apply to any petition or application when filed in a civil Court. In Article 137 the Legislature makes provision not for one definite type of cases but for an unknown type of cases of all kinds. In AIR 1988 Supreme Court 1077 (*Indoor Singh Rakhi vs. Delhi Development Authority*) the Supreme Court held that Article 13 7 applies to an application for reference under section 20 or section 8 of the Arbitration Act, though no limitation is prescribed under that Act. The Supreme Court in other case held that the residuary Article applies to all applications even outside the Code of Civil Procedure. So, if Article 137 applies the period will be three years and its time will run from the date when the right to apply accrues and the right to apply will accrue when the building is complete. Section 337 (i) itself provides that the Commissioner has the right to take proceedings in a Court of law for such contravention. The Court of law either may be a civil Court or a criminal Court. Section 404 of the Act provides for punishment for certain offences. Section 407 provides for prosecution. The maximum amount of penalty under this Act has not been specified. If the authority has the right to take action in Court, it can not have the right to issue notice, (ii) The power under section 337 of the Act must be utilised by the authority within a reasonable time, though no time has been prescribed in the section itself, but taking the cue from Article 137 of the Limitation Act, it can be utilised only within 3 years from the date of completion

of the building provided the building has not been assessed by the Municipality.

13. In that view of the matter Annexure 5, the notice dated 2.4.94 under section 337 (1) and (2) of the Act shall stand quashed. The writ application is allowed.

14. In this judgment I have decided the law with regards to the houses and building constructed by a person on his own land. I have not decided anything regarding construction which may be made on Government land or land of other public authority. The consideration for such a construction will be different. That aspect of the matter was not argued before me and I have also not decided that. That is left open to be decided in an appropriate case.