
(1988) 07 CAL CK 0023
In the Calcutta High Court
Case No : Matter No. 2131 of 1987

Kali Prosad Mallick

APPELLANT

Vs

Calcutta Municipal Corporation and Others

RESPONDENT

Date of Decision : 15-07-1988

Acts Referred:

West Bengal Town and Country (Planning and Development) Act, 1979 — Section 36, 37, 38, 44, 46

Citation : (1988) 2 CALLT 289

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Advocate : Pradip Kumar Ghosh and Susanta Kumar Bose, for the Appellant; Bhabani Shankar Bagchi, for the Respondent

Judgement

Bhagabati Prasad Banerjee, J.—In this writ application an important question of law of public importance was raised and the same is what is the legal effect of a Draft Development Plan u/s 36(i) of the West Bengal Town and Country (Planning and Development) Act, 1979, prepared by the Calcutta Metropolitan Development Authority and whether the Calcutta Metropolitan Development Authority could compel the implementation of the provisions contained in the draft scheme without making it final while sanctioning a building plan under the provisions of the Calcutta Municipal Corporation Act, 1980.

2. The facts of this case are that the petitioner is the owner of premises No. 4/A, Wood Street, Calcutta and that in order to construct a new building at the said premises instead of the old building at that site negotiated with the tenants so as to make it feasible to make such new construction after demolition of old structure and after entering into agreement and understanding with the tenants on the basis of such negotiation prepared a plan for construction of anew building thereon and submitted the same for sanction before the Calcutta Municipal Authority. Before submission of the said plan to the Calcutta Municipal Authority the petitioner applied to the Calcutta Improvement Trust in order to

find out whether the said premises affected by any scheme framed by the said Trust. The Calcutta Improvement Trust by letter, dated 17th November 1980 informed the petitioner that the said property was not affected by any scheme or alignment made by the Trust. An application for sanction of the building plans was submitted on or about 23rd October 1980 before the Calcutta Municipal Corporation and that the said plan was not pursued by the petitioner and ultimately the same was refused on or about 31st March 1983. Thereafter, the petitioner decided to make a fresh application for sanction of the said building plan and for that purpose the petitioner sought for clearance certifications from the Urban Land Ceiling Authorities as well as from the Deputy Commissioner of Police, Traffic Department and also the West Bengal Fire Services. Those Authorities accordingly issued clearance certificates in this behalf. The petitioner also applied for clearance certificate from the Chief Valuer and Surveyor of the Corporation and other departments of Calcutta Corporation with regard to the said proposal and that the petitioner also obtained clearance certificate from the said Authority. Thereafter, the petitioner was directed by the Municipal Authorities to submit a registered Undertaking in respect of the existing tenants to the extent that the petitioner will not evict any tenants and in case, it is necessary to evict any tenant, the petitioner would provide the said tenant with alternative accommodation for identical area in or about the premises by mutual agreement with the tenants and also would undertake to make construction strictly on the basis of the sanctioned plan. Such as undertaking was duly filed by the petitioner as required by the Municipal Authorities. At this stage the petitioner was asked by the Municipal Authorities to obtain a "No Objection Certificate" from the competent authority under the Urban Land (Ceiling & Regulation) Act 1976. The petitioner applied before the said competent authority under the said Act for a "No objection Certificate". The said competent authority by their memo dated 3rd August 1985 informed that they had no objection to the proposed construction of a new building at premises No. 4/A, Wood Street Calcutta. For the purpose of obtaining clearance from different authorities, it is stated that it took about 20 months lime from the date of making application which was made on 25th September 1987. In the meantime, inspection of the site was made, by the District Building Surveyor who found that the said plan was in complete confirmity with the Building Rules. All the formalities were complied with and it appears that there was no impediment in the way of sanctioning of the plan submitted by the petitioner in this behalf. The petitioner at this stage received a letter dated 9th February 1987 from the Deputy City Architect Borough No. 7 of the Calcutta Municipal Authority in which it was stated that -

"With reference to your plans and application submitted to this department for the erection of a five storied building at the above premises, this is to inform you that the guidelines of the "Outline development plan" (O.D.P.) u/s 31 of the West Bengal T. & C.P. Act 1979 do not stand complied with by the proposal contained in the plans under reference You are, therefore, requested to take adequate

measures in this regard by submitting revised plans so as to comply with the said guidelines before the case is further processed through the Municipal Building Committee for consideration of sanction."

3. It appears that on 27th of June, 1986 a notice was issued by the Chief Executive Officer, Calcutta Metropolitan Development Authority wherein it was notified that the outline development plan for Ward No. 45 (63) of the Calcutta Municipal Corporation had been prepared by the Calcutta Metropolitan Development Authority being the Development Authority for the Calcutta Metropolitan Planning area in exercise of the power conferred by Sub-Section (1) of Section 36 of the West Bengal Town and country (Planning and Development) Act 1979. By the said notice objection was invited against the said draft development plan within 60 days from the date of the publication of the said notice.

4. At this stage, the petitioner moved this writ application under Article 226 of the Constitution of India alleging that the Calcutta Municipal Authorities were bound to sanction a plan in accordance with the provisions of the Calcutta Municipal Corporation Act as there was no legal force and sanction behind the draft outline development plan prepared u/s 36(1) of the said Act and as such the Municipal Authority cannot refuse to sanction the plan on the plea that the plan must conform with the requirements of the said development plan which was in a draft stage.

5. In order to examine the legal effect of issuing of a public notice after preparation of a draft development plan u/s 36(1) of the said Act, it is necessary to examine the scheme of the West Bengal Town and Country (Planning and Development) Act 1979.

Section 2(9) of the said Act defines "Development Plan" means "any Outline Development Plan or Detailed Development Plan prepared under this Act".

Section 36 of the said Act provides - Public Notice of the preparation of the Development Plan -

"(1) After the modifications, if any, the planning Authority or the Development Authority shall publish a public notice in the Official Gazette and in one or more local newspapers, of the preparation of the Development Plan and the place or places where copies of the same may be inspected, inviting objections in writing from any person with respect to the Development Plan within a period of sixty days.

(2) The notice of preparation of the Development Plan as provided under the preceding sub-section, shall, notwithstanding anything contained in the Land Acquisition Act 1894 (1 of 1894), be deemed to be a declaration duly made u/s 4 of the said Act.

(3) After the expiry of the period mentioned in sub-section (1), the concerned authority shall appoint a Committee consisting three of its members, to consider

the objections filed under sub-section (1) and submit report withing such time as the Planning Authority or the Development Authority may fix in this behalf.

(4) The Committee so appointed shall have power to invite any other person, and such a person shall have a right to take part in the discussion of the Committee relevant to that purpose but shall not have a right to vote at a meeting and shall not be a member for any other purpose.

(5) The Committee so appointed shall afford a reasonable opportunity of being heard, to any person, including representatives of Government Departments or local authorities who has or have filed any objection, and who has or have made a request for being so heard.

(6) As soon as may be, after the receipt of the report from the Committee, but not later than sixty days, the Planning Authority or the Development Authority shall consider the report and may make such modifications in the Development Plan as it considers proper and shall submit the development Plan with or without modifications together with the report of the Committee to the State Government."

Section 37 - "Approval of the State Government -

(1) As soon as may be, after the receipt of the Development Plan together with the report of the Committee, but not later than sixty days, the State Government may either approve the Development Plan with or without modifications or return the Development Plan to the concerned authority to modify the plan or to prepare a fresh plan in accordance with such directions as the State Government may issue in this behalf.

(2) After modification in the plan or preparation of a fresh plan in accordance with the directions of the State Government under sub-section (1), the same shall be submitted to the State Government for approval and the State Government shall intimate its decision within sixty days of the receipt of the plan."

Section 38, "Coming into operation of the Development Plan -

(1) Immediately after the Development Plan has been approved by the State Government the Planning Authority or the Development Authority shall publish a notice in the Official Gazette and in a local newspaper or newspapers, of the approval of the Development Plan and the place or places where copies of the Development Plan may be inspected.

(2) The publication of the notice in the Official Gazette of the approval of the Development Plan shall, notwithstanding anything contained in the Land Acquisition Act 1894 (1 of 1894), be deemed to be declaration duly made u/s 6 of the said Act.

(3) The Development Plan shall come into operation from the date of publication of the aforesaid notice in the Official Gazette.

(4) After the coming into operation of the Detailed Development Plan, the Outline Development Plan shall stand modified or altered to the extent the proposals in the Detailed Development Plan are at variance with the Outline Development Plan.

(5) If the Development Plan contains zoning and sub-division regulations as referred to in clause (d) of sub-section (4) of Section 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 situated, to enforce such regulatory measures in supersession of the rules and regulations, if any, applicable to such area or zone."

Section 39, "Reference to High Court questioning the validity of the Development Plan--

(1) Within one month of the coming into operation of the Development Plan, any person aggrieved by it may make an application to the High Court questioning the validity of the Development Plan or any provisions contained therein on the following grounds :

(a) that is not within the powers conferred by this Act or

(b) that any requirement of this Act, or any rules made thereunder have not been complied with in relation to the making of the Development Plan.

(2) The High Court, after giving an opportunity to the authority concerned and the State Government to be heard -

(a) may stay, until the final determination of the proceedings, the operation of any provisions contained therein so far as it affects any property of the applicant, and

(b) if satisfied that the Development Plan or any provision contained therein is not within the powers conferred by this Act, or that the "interest of the applicant has been substantially prejudiced by a failure to comply with any requirement of this Act or rules, may quash the plan or any provision contained therein generally or in so far as it affects any property of the applicant.

(3) Subject to the above provisions of this Section, a Development Plan shall not, either before or after it has been approved, be questioned in any manner, in any legal proceedings wheresoever."

Section 46. "Permission for development -

(1) Any person or body (excluding a department of the Central or the State Government or any local authority) intending to carry out any development or any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form and containing such particulars and accompanied by such documents and plans as may be prescribed.

(2) On such application having been duly made, and on payment of the

development charge as may be assessed under Chapter IX -

(a) the Planning Authority or the Development Authority may pass an order -

(i) granting permission unconditionally or

(ii) granting permission subject to such conditions as it may think fit, or

(iii) refusing permission.

(b) without prejudice to the generality of clause (a) of this sub-section the concerned authority may impose conditions -

(i) to the effect that the permission granted is only for a limited period and that after the expiry of that period, the land shall be restored to its previous condition, or the use of the land permitted shall be discontinued;

(ii) for regulating the development or use of any other land under the control of the applicant or for the carrying out of works on any such land as may appear to the authority expedient for the purpose of the permitted development.

(3) (i) The, concerned authority in dealing with the applications 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.

(ii) The provision of sub-section (1) shall not apply to applications under sub-section (5).

(4) When permission is granted subject to conditions or is refused, the grounds of imposing such conditions or such refusal shall be recorded in the order and the order shall be communicated to the applicant.

(5) In the case of a department of the Central or the State Government or any local authority (where the local authority is not also the Development Authority) intending to carry out any development other than operational constructions (which shall always be outside the purview of the Planning or Development Authority), on any land, the concerned department or authority, as the case may be, shall notify in writing to the Development Authority or its intention to do so, giving full particulars thereof and accompanied by such documents and plans; as may be directed by the State Government from time to time, at least, one month prior to the undertaking of such development.

(6) Where the concerned authority raises any objection in respect of the conformity of the proposed development either to any development plan under preparation, or to any of the building bye-laws in force at the time, or due to any other material consideration under sub-section (7), the department of the authority, as the case may be, shall-

(a) either make necessary modifications in the proposals for development to

meet the objections, or

(b) submit the proposals for development together with the objections raised by the concerned authority to the State Government for decision. When proposals and objections have been submitted, no development shall be undertaken until the State Government has finally decided on the matter.

(7) The State Government on receipt of the proposals for development together with the objections of the concerned authority, shall either approve the proposals with or without modifications or direct the concerned authority to make such modifications in the proposals as it considers necessary in the circumstances."

Section 56. "Interim provision pending preparation of development plan-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."

6. From the aforesaid provisions of the said Act it appears that Section 36 provides the mode for issuing a notice with regard to the draft development plan and provides provisions for inviting objections ,and also the manner in which objection has to be disposed of and that after the objections are disposed of, the committee appointed in this behalf shall submit a report before the Planning Authority or the Development Authority who shall consider the report and make such modifications in the development plan as it considers proper and shall submit the same with or without modifications together with the report of the committee to the State Government.

7. Section 37 of the said Act provides the power of the State Government to approve the development plan with or without modifications or to refer the same to the concern authority to modify the plan or to prepare a fresh plan in accordance with such directions as the State Government may issue in this behalf and that after modification or preparation of a fresh development plan it has to be re-submitted to the Government who shall thereon give decision in the matter.

8. The Development Plan approved by the State Government shall be published in accordance with the provisions of the Section 38 of the said Act in the Official Gazette or in the local newspaper and that after it is being published in the manner laid down in Section 38, the said development plan becomes operative and that after it has become operative and final no person shall use or permit to be used any land or carry out any development in that area otherwise than in conformity with such development plan. In other words, only after the development plan is finally published u/s 38 of the said Act, no plan could be sanctioned by the Municipal Authority which does not confirm with a requirement of the said development plan.

9. Mr. Pradip Kumar Ghosh, learned Advocate appearing on behalf of the petitioner submitted that in view of the provision of law as set out above unless the development plan is finally approved and published in accordance with the provisions of Sections 37 and 38 of the said Act, no authority or Municipal Authority could be called upon to enforce the provisions of a development plan. Mr. Ghosh submitted that on the basis of the draft development plan neither the Calcutta Metropolitan Authority nor the Municipal Authority could say that no plan could be sanctioned unless it confirms with the provisions of the draft development plan as it would lead to a wholly unreasonable and absurd result which is contrary to the scheme of the said Act.

10. Mr. Pradip Kumar Ghosh, learned Counsel appearing on behalf of the petitioner contended that if it was the intention of the legislature that as soon as a draft development plan is prepared all constructions and/or developments had to be made strictly following the provisions of the draft development plan, in that event, the legislature should have provided a provision in clear words making a mandatory provisions for complying with the provisions of a draft development scheme as soon as published inviting objections or providing provision that no plan could be sanctioned or no construction should be allowed to be made so long as the draft is not made final. Mr. Bhabani Sankar Bagchi, learned Advocate appearing on behalf of the Respondents submitted that the draft development plan was required to be followed while sanctioning a plan for the purpose of making any construction before it is being filial in view of the provisions of Section 56 of the said Act.

11. On plain reading of the provisions of Section 56 of the said Act, it appears where the planning Authority or the Development Authority in 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 the provisions which, in its opinion, will be required to be included for securing the proper planning of the concerned area. Section 56 of the said Act cannot be said to be a provision for implemening a draft development plan before its finalisation in as much as the said Section provides that "where it is required having 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." In other words, if there is any provisions provided under the Act which requires that such draft development plan before it has become final and operative, should be given due regard in that event the same should be taken into consideration of the same if the said authority is of the opinion that the same was required to be observed for securing the proper planning of the concerned area. There is also no provision in the Act which requires even by necessary implication that a draft development scheme had to be given due regard pending finalisation of the development scheme. It further appears on proper construction of the provisions of Section 56 of the said Act that the same

is only confined to an unplanned or undeveloped area. No material whatsoever has been disclosed by the Respondents on affidavit to show any reasons for which the said authority was of the opinion that the draft development plan was required to be followed for securing the proper planning of the concerned area. The provisions of this Section could be applied if there was material on record before the authorities concerned on the basis of which the authorities concerned must form an opinion that the provisions of the draft development plan should be observed for proper planning of the concerned area. In any event the condition precedent for invoking the provisions of Section 56 is the formation of the opinion as required under the law. In the instant case, in the Affidavit-in-Opposition filed on behalf of the Calcutta Metropolitan Development Authority, it was only stated that "for the purpose of securing proper planning of the Calcutta Municipal Corporation Area falling within its Wards No. 45 and 63 CMDA considered it necessary u/s 56 of the said Act to have regard to the proposed development control regulations in the Outline Development Plans of the said two Wards before any permission is granted, under the power delegated to the local authorities including the Calcutta Municipal Corporation in CMDA's notification bearing No. 98, dated 5.4.1985 as amended by notification No. IIII, dated 6.11.1986, to any development proposal in the said two wards of the Calcutta Municipal Corporation. Accordingly, the CMDA advised the Calcutta Municipal Corporation to issue necessary instructions to its concerned officers to examine applications for development permission in Ward Nos. 45 and 63 of the Calcutta Municipal Corporation with reference to the development control guidelines proposed in the Outline Development Plans for the said two Wards." The provisions of Section 56 of the said Act do not provide power to be exercised in such a manner.

12. It appears that the Calcutta Metropolitan Development Authority have issued notification dated 6th April 1985 as well as 6th November 1986, whereby the power of the said authority u/s 46 of the said Act was delegated on the strength of the power conferred u/s 134 of the said Act and in that notification certain conditions and restrictions have been imposed. One of such restrictions is that no development permission should be given within the area of Calcutta Metro Railway area and further prohibition has been imposed on the construction of factories, buildings in some areas. It is not necessary to set out the contents of the said notification in details, but one thing is clear that the Calcutta Metropolitan Development Authority could not impose such prohibition and/or restriction u/s 46 of the said Act. Section 46 of the said Act, inter alia, provides power to deal with individual applications for permission and it is provided that while dealing with such application for permission, the authorities concerned shall have regard to the development plan if it comes into operation or other material consideration and that permission could be granted or refused after recording reasons. So, Section 46 does not confer any blanket power to prohibit constructions by an omnibus and wholesale order but it provides power in the individual case either to grant or to refuse permission on some factors without

fully giving any guideline, but leaving the matter at the discretion or sweet will of some Authority and that too without giving any notice or hearing. From this it is evident that the authorities concerned are not fully aware of the scope and ambit of the provisions of the Act. The scope and effect of Sections 44 and 46 of the said Act was considered by me in details in the case of *Shri Samaresh Das v. Calcutta Municipal Corporation and Ors.* reported in 1986(1) CHN 38, and it is not necessary to decide this question afresh. In that case it was held by me that Section 46(2) of the said Act provides grant of permissions for a limited period imposing certain terms and conditions under the Scheme of the Act it is nowhere provided that the Calcutta Metropolitan Development Authority had been conferred with any power to prohibit the use of any land in a particular manner in contemplation of preparation of development plan.

13. In the instant case, the question is what is the scope and ambit of Section 56 of the said Act and whether on the strength of the provisions contained in Section 56 of the said Act, the draft development scheme could be enforced and implemented and consequently the permission could be refused, if it does not conform with conditions and restriction proposed in the said draft development scheme. From the scheme of the said Act, it appears that the draft development plan, unless it is finalised in the manner indicated under the Act could not come into operation and that Section 44 of the said Act provides that after coming into operation of the development plan in any area, no person shall use or permit to be used any land or carry out any development in that area otherwise than in conformity with such development plan. The provision is clear and unambiguous. It clearly provides that when the development plan is finalised, in that event, no person could be permitted to make any construction violating the provisions of the said scheme. Section 56 of the said Act does not provide in so many clear words that pending finalisation of the development scheme as an interim measure, the draft development plan should be followed and nobody should be permitted to make any constructions, otherwise than in conformity with such draft development plan. It is necessary to examine what is the effect of not providing any provisions in this regard in so many clear words. It is a firmly established principle that by the exercise of power, the property or other economic interest of a person should not be taken away impaired or endangered except under clear authority of law. In this connection, reference may be made to the passage at para 295 at page 613 in *Statutory Interpretation* by F.A.R. Bennion wherein it is provided that "one aspect of the principle against doubtful penalisation is that by the exercise of such power, the property or other economic interest of a person should not be taken away impaired or endangered except under clear authority of law."

14. If Section 56 of the said Act is interpreted in the manner as suggested by Mr. Bagchi, learned Counsel appearing on behalf of the Respondents that the said provision provides an interim power to implement the draft development scheme, in that event, in my view, that would create an anomaly and would produce a wholly irrational and illogical result.

15. It is the cardinal rule of interpretation that "the Court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction for example where it appears, the Parliament really intended or the literal meaning is too strong. (See para 322 of the Statutory Interpretation by Bennion).

16. The law must be predictable. It is the principle of the legal policy. The law should be certain and therefore, practicable. At para 128 of Bennion's Statutory Interpretation, it is provided that "it is a principle of legal policy that law should be just and that court's decision should further the ends of justice. The Court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislature intended to observe this principle. The Court should, therefore, strive to avoid adopting a construction which leads to injustice".

17. It was held by Lord Reid in the case of *Coutts & Co. v. I. R. C.* 1953 App cas 267 that "In general if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results." In my view, the meaning of provisions of Section 56 could not be stretched so far to contend that Section 56 of the said Act is a provision for implementation of the draft development plan and such a construction cannot be given, which have the effect of imposing a ban on construction of any building except otherwise in accordance with the draft development Scheme which was not finalised.

18. On plain reading of Section 56 of the said Act, in my view, the same cannot be said to be a provision which was intended to implement the draft development scheme as an interim measure and accordingly, it must be held that there is no provision under the said Act which requires that a draft development scheme before its finalised, should be given effect to and the Calcutta Municipal Authority had to follow the provisions of the draft development plan while sanctioning the plan under the provisions of the Calcutta Municipal Corporation Act.

19. Accordingly, I hold on proper construction of the provisions of Section 56 read with the provisions of Section 44 of the said Act that unless the development plan is finalised, a person cannot be compelled to use any land for carrying out any development in the area otherwise than in conformity with such development plan. As soon as the draft development plan is published, no person could be compelled to use any land or make any construction otherwise than in conformity with such draft development plan. Accordingly, I hold that the direction of the Calcutta Metropolitan Development Authority to sanction plan on the basis of the draft development scheme is illegal and invalid and consequently, the Calcutta Municipal Corporation cannot compel the petitioner to follow the provisions of draft development plan for the purpose of proposed

construction.

20. In the result, the writ application succeeds. The Respondents Nos. 1 to 6 are directed to sanction the plan submitted by the petitioner forthwith and further the Respondents are restrained from giving any effect to or act upon the draft Outline Development Plan published u/s 36(1) of the West Bengal Town and Country (Planning & Development) Acts 1979 so long it is not made final according to law and not to take the same into consideration while sanctioning the plan submitted by the petitioner. The petitioner would be permitted to make construction on the basis of the plan sanctioned, if any, by the Municipal Authority strictly on the basis of the provisions of the Calcutta Municipal Corporation Act without having any regard to the draft development plan published u/s 36(1) of the said Act.

21. There will be no order as to costs.