

(2006) 07 CAL CK 0016
In the Calcutta High Court
Case No : Writ Petition No. 15840 (W) of 2006

Madan Mohon Pal and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 19-07-2006

Acts Referred:

West Bengal Municipal (Building) Rules, 1996 — Rule 5
West Bengal Municipal Act, 1993 — Section 15, 218(1), 218(5)

Citation : (2007) 4 CHN 394

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Asok De and Sulekha Mitra, for the Appellant; Gopal Chandra Ghosh and Radha Dutt, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—The petitioners who are the owners of holding No-29/7/N/A in Ward No. 4 at Ghutkia under Katwa Municipality comprising of Plot Nos. 283, 284 and 299 constructed a single storied building in the said holding as per the sanctioned building plan being No. 14E dated 4th May, 1990.

2. It appears from the sanctioned plan being Annexure "P-I" to this writ petition that sanction was granted for construction of building on two plots of land, viz., Plot Nos. 283 and 299. Admittedly, site plan was also approved by the Municipal authority at the time of grant of such sanction to the said building plan.

3. Trouble started when the petitioners submitted a building plan together with the site plan in 2004/2005 for sanction and / or approval thereof in respect of the proposed construction of one additional storey on the existing ground floor construction of the said premises.

4. The site plan and/or building plan which were submitted by the petitioners were returned to the petitioners for re-submission after removal of the notified defects therein.

5. The petitioners re-submitted the site plan and/or building plan to the Municipal

authority after removal of the defects but the Municipal authority found that the same was not in order and as such, the said site plan and the building plan were again returned to the petitioners.

6. The petitioners again re-submitted the same after making necessary corrections therein on 27.02.2006 by registered post with A/D.

7. Since the petitioners prayer for grant of approval to the site plan and/or sanction to building plan as aforesaid were kept unattended by the Municipal authority, the petitioners submitted a representation before the Municipal authority for early consideration of the petitioners' prayer for approval of the site plan and/or grant of sanction to building plan at an early date.

8. The Chairman of the said Municipality, after considering the documents produced before him, by his order dated 21.6.2006 rejected the petitioners' prayer for grant of approval and/or sanction of the site plan and/or building plan, as aforesaid, for various defects therein, such as-(i) site plan was not drawn according to the prescribed scale, (ii) the requisite certificate of the licensed building surveyor was not given along with the application for the grant of sanction and (iii) the defects which were notified by the Katwa Municipality in its earlier letter were not removed.

9. The Municipal authority has also issued a notice for removal of the construction which the petitioners raised on the roof of the existing ground floor construction without any sanction plan

10. The petitioners have challenged the propriety of the order dated 21st May, 2006 passed by the Chairman of the said Municipality being Annexure "P-13" to the writ petition as well as the legality and/or the validity of the notice of demolition issued by the Chairman of the Katwa Municipality on 3rd July, 2006 being Annexure "P-15" to the supplementary affidavit in this writ petition.

11. Mr. Dey, learned Senior Advocate, appearing for the petitioners, submitted that since the site plan was approved by the Municipal authority earlier at the time of grant of sanction to the building plan in respect of the ground floor construction of the said premises, the petitioners are not required to submit a site plan once again for obtaining sanction to the building plan for the proposed construction on the 1st floor of the said premises. Mr. Dey further submitted that the notified defects were all removed from the plan, which was re-submitted on 27.02.2006.

12. Accordingly, Mr. Dey submitted that the order which was passed by the Chairman of the said Municipality on 21st June, 2006 being Annexure "P-13" to this writ petition, cannot be sustained.

13. Mr. Dey further submitted that the order of demolition which was passed by the Municipal authority as indicated in the communication letter dated 3rd July, 2006 issued by the Chairman of the said Municipality cannot be sustained as the said order of demolition was passed by the Municipal authority without giving any

opportunity of hearing to the petitioners and also without indicating therein the reasons for which the extraordinary emergent power was exercised u/s 218(5) of the said Act in the instant case.

14. Mr. Dey, thus, prayed for quashing of the said notice being Annexure "P-15".

15. Mr. Ghosh, learned Advocate, appearing for the Municipality, refuted the said submission of Mr. Dey by contending that since approval of the site plan and/or sanction to the building plan was granted to the petitioner in 1990 for construction of a single storeyed building on two plots of land being Plot Nos. 283 and 299, sanction to the building plan for the proposed construction on the first floor on the existing construction which extends to an additional Plot No. 284 cannot be granted unless the site plan is approved in respect of said additional plot on which such construction is also proposed.

16. Mr. Ghosh further submitted that when admittedly the petitioners have made some construction on the first floor of the said building without any sanction plan, the petitioners cannot avoid demolition of such illegal construction on the ground of technical defects and/or for want of hearing.

17. Mr. Ghosh, thus, supported the impugned order as well as the notice issued by the Municipal authority, as aforesaid.

18. Heard the learned Counsel of the parties. Considered the materials-on-record.

19. Let me first of all consider the submissions of the respective Counsel of the parties with regard to the legality of the impugned order being Annexure "P-13" to the writ petition.

20. Rule 5 of the West Bengal Municipal (Building) Rules, 1996 provides for submission of site plan either before the submission of the building plan or at least simultaneously with the submission of the building plan to the Municipal authority for its approval.

21. Rule 5 of the said rules makes it clear that sanction to the building plan cannot be granted unless the site plan is approved. The title of the said Rule also makes it clear that site plan is required to be approved at every stage of sanction of the plan either for construction or for reconstruction of the building.

22. That apart, it appears from the building plan appearing at page 39B of the writ petition that the petitioners applied for sanction of the proposed first floor construction on three plots of land, one of which being Plot No. 284 was not included either in the earlier approved site plan or in the earlier building sanctioned plan.

23. Under such circumstances, this Court holds that without approval of the site plan for the proposed construction, the building plan cannot be sanctioned by the Municipal authority. This Court, thus, holds that the Municipal authority did not commit any illegality in rejecting the petitioners' prayer for grant of sanction to the building plan for the proposed construction on the first floor of the existing

ground floor construction.

24. This Court, however, does not think it fit to direct the Municipal authority to approve the site plan submitted by the petitioners at this stage inasmuch as nothing has been shown to this Court that the defects in the site plan which were notified in the impugned order were either rectified or the said site plan was re-submitted on 27.02.2006 in conformity with the provision as contained in Rule 5 of the said rules.

25. With regard to the challenge regarding the legality of the impugned notice of the demolition being Annexure "P-15" to the supplementary affidavit, this Court holds that the Chairman alone is not competent to pass any order of demolition either under Sub-section (1) of Section 218 or under Sub-section (5) of Section 218 of the West Bengal Municipal Act, 1993.

26. Section 218(1) of the said Act authorises the Board of Councillors to pass an order of demolition if the Board of Councillors after giving a reasonable opportunity of hearing to the owner of the building is satisfied that the erection of any building was made in contravention of any of the provisions as contained in Clauses (A), (B) and (C) thereunder. The expression "may make an order directing that such erection, alteration, addition or projection, as the case may be or so much thereof as has been executed unlawfully, be demolished or altered", appearing in Section 218(1) makes it clear that a discretion has been left in the hands of the Board of Councillors either to pass an order of demolition or to pass an order of retention and/or alteration in suitable circumstances.

27. In any event, in view of the Division Bench decision of this Court in the case of Priya Brata Maity v. State of West Bengal reported in 2000(1) CLJ 175, this Court holds that the Chairman alone cannot pass any order of demolition of any construction, even if it is found to be illegal and/or unauthorised and/or without any sanctioned plan.

28. Section 218(5) of the said Act has an overriding effect inasmuch as it provides that notwithstanding anything contained in the foregoing provisions of Section 218 of the said Act or elsewhere in this chapter, if the Chairman-in-Council is of opinion that immediate action is necessary in respect of any building being constructed or any work being carried on, in contravention of the provisions of this Act, it may for reasons to be recorded in writing cause such building or work to be demolished forthwith.

29. Even the said provision makes it clear that the Chairman alone cannot exercise that power. Such power can be exercised by the Chairman-in-Council, constituted u/s 15 of the said Act. The power of the Chairman-in-Council to exercise this power is not unrestricted as Sub-section (5) of Section 218 of the said Act provides that even before exercising the said power by the Chairman-in-Council, not only an opinion regarding the necessity of taking immediate action in respect of such construction is required to be formed Chairman-in-Council but also the reasons for taking such step, i.e., the basis for the formation of the

opinion should be recorded in writing before taking such extraordinary step in emergent circumstances.

30. Nothing could be produced before this Court by the Municipal authority to show that the Board of Councillor either formed such opinion or recorded the reasons in writing for exercising such extraordinary power before passing the impugned order of demolition.

31. Furthermore, nothing has been produced to demonstrate that such order of demolition was passed by the Chairman-in-Council.

32. Under such circumstances, this Court holds that the impugned order of demolition was passed by the Chairman alone in excess of his jurisdiction and as such the said order of demolition as well as the notice of demolition being Annexure "P-15" to the supplementary affidavit which was served upon the petitioners, cannot be sustained. Accordingly, both the demolition order as well as the demolition notice stand quashed.

33. On the prayer of Mr. Dey, leave is however given to the petitioners to submit a site plan and a building plan for the proposed construction of the first floor on the existing ground floor construction afresh before the Municipal authority within a month from date.

34. In the event, the petitioners submit such site plan/building plan before the Municipal authority within the time as aforesaid, the Municipal authority will consider the same in accordance with law and in the event it is found that the said site plan can be approved and the building plan can also be sanctioned and the construction which has been made by the petitioners so far as can also be retained as per the building rules, then the Municipal authority win regularise such construction by granting approval and/or sanction to the site plan and/or building plan and will also permit the petitioners to complete the said construction in accordance with the plan to be sanctioned by the Municipal authority.

35. It is, however, made clear that in the event it is found that neither the site plan can be approved nor the building plan can be sanctioned nor the construction made so far can be retained, then the Municipal authority, viz., the Board of Councillor may pass appropriate order in respect of such construction, after giving a reasonable opportunity of hearing to the petitioners in terms of Section 218(1) of the said Act.

36. The petitioners are, however, restrained from raising any further construction in the said premises without any valid permission and/or sanction of the Municipal authority.

37. Since, this writ petition is disposed of at the motion stage without inviting the parties to file their respective affidavits in connection with this writ petition, let it be recorded that the allegations made by the petitioners are deemed to be not admitted by the respondents.

38. The writ petition is, thus, disposed of with the aforesaid observations.

39. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.

40. The learned Advocate for the petitioners is permitted to take down the gist of this order for communication to the respondents.