

(1998) 02 OHC CK 0031

In the Orissa High Court

Case No : O.J.C. No's. 14518, 14519 and 14597 of 1997

Manindra Kumar Ray and Others

APPELLANT

Vs

Bhubaneshwar Development Authority and Another

RESPONDENT

Date of Decision : 11-02-1998

Acts Referred:

Orissa Development Authorities Act, 1982 — Section 16

Citation : AIR 1998 Ori 141

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : L. Mohapatra, B.K. Nayak, G.K. Nayak and G.K. Bohera, for the Appellant; A.S. Naidu and D. Mohapatra, for the Respondent

Judgement

Pasayat, J.—These four writ applications are inter-linked and are disposed of by this common judgment. Petitioner in each case had applied for permission in terms of the Orissa Development Authorities Act, 1982 (in short, the "Act") for development of the land by construction of building.

2. Factual position so far as undisputed is as follows:

Application was filed for approval of plan along with requisite fees. The same was taken up for consideration by the Building and Planning Committee, and the Committee recommended for issuance of permission for construction of apartments. Subsequently the opposite parties asked for furnishing certain information. These were furnished. Notice under Sub-section (7) of Section 16 was given by registered post.

3. The controversy revolves round the question whether there was approval of the plan by operation of the deeming provision contained in the proviso to Sub-section (3) of Section 16 of the Act, and by operation of Sub-sections (7) and (8) of said Section.

4. According to the petitioners, as the authorities did not take steps as were mandated in law, by operation of the deeming provision, the plans are deemed to

have been approved, and any subsequent communication is of no consequences.

The stand of Bhubaneswar Development Authority (in short, "BDA") is to the effect that Section 16 has no operation to multi-stories buildings, and in any event the notice purported to have been given under Sub-section (7) of Section 16 of the Act had not been placed before the Vice-Chairman, and the erring members of the staff have been taken to task for not having done so. It was pointed that the Regulations as referred to in Section 16 of the Act have been made by the B.D.A. with previous approval of the State Government and the said Regulations are called the Bhubaneswar Development Authority (Planning and Building Standards) Regulations, 1993 (in short, the "Regulations"). With reference to the counter-affidavit filed, it is slated that there has been really no refusal of approval of the plan, and the Zonal Development Plan is in the process of finalisation and construction of multistoried building in the heritage zone may not be permissible. With reference to Regulation 34, it has been stated that the area and height limitation for residential buildings have been prescribed in the Regulations and in no case there can be any variation of the limitations. It is, however, accepted that the Zonal Development Plan has not yet been brought into effect, and is under consideration of the State Government.

5. A deeming provision is made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail but in each case it would be a question as to with what object the legislature has made such a deeming provision. Whenever the word "deemed" is used in a statute in relation to a person or thing, it implies that the legislature, after due consideration, exercised its judgment in conferring that statute or attribute to a person or thing. Where a thing is to be deemed something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J. In *R. v. Norfolk Co.*, 60 LRE 380). Lord Asquith in *East End Dwellings Co. v. Finsbury Co.* 1952 AC 109 observed, "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine, as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.....The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." "Deemed" is a word which as Lord Redcliffe said in *St. Aubyn v. A. S.*, (1951) 2 All ER 473 is apt to include the obvious, the uncertain and the impossible.

6. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the

main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso therefore is to carve out an exception to the main enactment and it excludes something which otherwise would have within the main provision. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real objectment of the main enactment, unless the words of the proviso are such that it is its necessary effect.

7. The residual question is whether there was deemed approval of the plans. According to the petitioners, the time stipulations have not been adhered to and by lapse of prescribed time there is deemed approval by operation of the proviso. Reliance is placed on Sub-sections (3), (7) and (8) of Section 16. The provisions read as follows :

"(3) On receipt of any application for permission under Sub-section (1), the Authority shall furnish the applicant with a written acknowledgement of its receipt and after making such enquiry as it considers necessary in relation to any matter specified in the development plan in operation or in relation to the regulations pertaining to planning and building standards or in relation to any other matter as may be prescribed under regulations, shall by order in writing, either grant the permission, subject to such condition, if any, as may be specified in the order or refuse to grant such permission;

Provided that where the provisions of Chapter IX have been brought into force in any area under the jurisdiction of the authority and the application for permission under Sub-section (1) relates to such area, the Authority shall not grant permission unless development charges, if any, have been paid in respect of the land or building to which the permission relates;

Provided further that before making any order refusing permission, the applicant shall be given a reasonable opportunity to show cause why the permission should not be refused.

XXXXXX XXX (7) If the Authority, does not communicate its decision either granting or refusing commission to the applicant within two months from the date of receipt of the application by the Authority the applicant shall in the form prescribed by regulations draw the attention of the Vice-Chairman of the Authority with regard to his application, by registered post.

(8) If, within a further period of one month from the date of receipt of the application drawing such attention, as mentioned in Sub-section (7), the Authority does not communicate its decision, either granting or refusing permission such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of the three months period.

Provided that, in computing the period of two months under Sub-section (7) and further one month under Sub-section (8) the period in between the date of requisitioning any further information or documents from the applicant and the date of receipt of such information or documents from the applicant shall be excluded."

8. A combined reading of Sub-sections (3), (7) and (8) makes it clear that the following consequences flow;

(a) If the Authority does not communicate its decision either granting or refusing permission to the applicant within two months from the date of receipt of the application, the applicant has the right to bring to the notice of the Vice-Chairman of the Authority in the form prescribed by the Regulations with regard to his application.

(b) The application is to be sent by registered post.

(c) If within a further period of one month from the date of receipt of the application drawing the attention, as mentioned in Sub-section (7), the Authority does not communicate its decision, either granting or refusing permission, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of three months period.

While computing the period of two months under Sub-section (7) and further period of one month under Sub-section (6), the period in between the date of requisitioning any further information or documents from the applicant and the date of receipt of such information or documents from the applicant shall be excluded.

9. Learned counsel for the petitioners submitted that in case of group housing scheme the position is different and in any event in respect of residential buildings also the B.D.A. in the past had granted permission for construction of multi-storied houses under Regulation 34.

10. The distinction sought to be made by Mr. Naidu, learned counsel for the B.D.A. between "building" as referred to in Section 16, and "multi-stories building" is without any substance. "Building" has been defined in Section 2(v) of the Act which reads as follows :

"(v) "building" includes any structure or erection or part of a structure or erection which is intended to be used for residential, industrial, commercial or other purposes, whether in actual use or not;"

There is no exception carved out for a multi-storied building. The Regulations also define "building" in Regulation 2(12). Same reads as follows :

"(12) "building" means any structure for whatsoever purpose and of whatsoever materials constructed and every part thereof whether used as human habitation or not and includes foundation, plinth, walls, floors, roofs, cheneys, plumbing and building services, fixed plat-forms, varandah, balcony, cornice or projection,

part of a building or anything affixed thereto or any wall enclosing or intended to enclose any land or space and signs and outdoor display structures;

Explanation -- Tents, shamianas, tarpauline shelters, etc., shall not be considered as building."

Therefore, the description of building as a multi-storied one does not make it different from building as defined in the Act and the Regulations. Section 16 has application to multi-storied buildings.

11. The time-limit prescribed in the provision contained in Sub-sections (7) and (8) of Section 16 clearly applies to the facts of the case. There is dispute as to whether the notice was really placed before the Vice-Chairman. As the notice was received by an authorised person that dispute is of no consequence. If any person, who is authorised to receive letter on behalf of the Vice-Chairman, and has been receiving such tellers and had in fact received the letter, the dispute as to whether it was placed before the Vice-Chairman or not is an internal matter of the Authority. What action can be taken against the person for not placing it before the Vice-Chairman is not the subject-matter of dispute here. The inevitable conclusion is that the notice in fact was served on the Vice-Chairman. However, the dispute is regarding height upto which the permission can be granted. This aspect needs a decision. There being no dispute that residential building can be constructed upto the height as indicated in Regulation 34, the approval may be accorded if other conditions are satisfied. It would, however, be open to the Authority to accord approval beyond that height in case the petitioners satisfy that in several other cases, it has been done in the past without any variation and with reference to other provisions. We may note here that for preservation of buildings of historical or architectural interest, no construction or reconstruction of any building, within a radius of 30 metres from a building of historical or architectural interest shall be permitted by the Authority without prior clearance of Orissa Art Commission in terms of Regulation 26. In case the proposed buildings do not come within that area, there can be no difficulty as the law presently stands for approving the plan of the petitioners. However, if any statutory prescription is made which prohibits construction, obviously that has to be taken note of at the relevant time. To avoid unnecessary delay, the petitioners are directed to appear before the Vice-Chairman on 17-6-1998. Let the final decision be taken within three months from today.

The writ applications are disposed of accordingly. A copy of this judgment be handed over to Mr. A. S. Naidu, learned counsel for B.D.A. for compliance.

S.C. Datta, J.

12. I agree.