
(2010) 04 MAD CK 0250

In the Madras High Court

Case No : Writ Petition No. 4755 of 2010 and M.P. No. 1 of 2010

Rafiq Sait

APPELLANT

Vs

The Commissioner, The Executive Engineer Zone X and
Assistant Engineer Division 142, Corporation of Chennai

RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Madras City Municipal Corporation Act, 1919 — Section 256, 256(1), 256(2), 256(3), 256A

Citation : (2010) 3 CTC 353 : (2010) 4 LW 737 : (2010) 4 MLJ 284

Hon'ble Judges : K.K. Sasidharan, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : A.R.L. Sundaresan for R. Mohan, for the Appellant; P. Wilson, A.A.G. assisted by V. Bharadhidasan, for Respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—This writ petition is directed against the notice dated 3 March, 2010 on the file of the Commissioner, Corporation of Chennai, whereby and whereunder the petitioner was informed that the officers of the Corporation would enter his premises bearing Door No. 13/26, C.P. Ramasamy Road, Alwarpet within the jurisdiction of Zone - X for the purpose of demolition of unauthorised deviated portions of the building after the expiry of twenty-four hours from the date of service of notice.

Background Facts:

2. The petitioner is the owner of the property bearing Old Door No. 26 corresponding to New No. 13, situated at C.P. Ramaswamy Road, Chennai. The property was purchased in the year 2005 and after demolishing the existing structure, the petitioner obtained planning permission for putting up a non-residential building. The first respondent processed the application and as per order dated 10 October, 2006 building plan was issued permitting construction of ground plus first floor. The petitioner constructed additional structure in the

second floor as well as in the basement. Since there was a deviation from the sanctioned plan, the petitioner closed the basement by retaining the ground, first and a portion of the terrace building.

3. While the finishing work of the building was in progress, the officials of the respondents came to the premises at about 3.00 p.m. on 5 March, 2010 and served the impugned notice purported to be issued u/s 378 of the Madras City Municipal Corporation Act. The impugned notice was issued without issuing show cause notice or giving an opportunity of hearing. Accordingly, the petitioner is before this Court.

4. The second respondent filed a counter wherein it was contended that the construction was in total violation of the sanctioned plan. The petitioner has constructed the building with Basement, Ground Floor, First Floor and Second Floor, out of which, the basement and second floor are unauthorised, made in deviation from the sanctioned plan. The violation was noticed by the officials of the Corporation. Accordingly, notice under Sections 256(1) and (2) of the Chennai City Municipal Corporation Act was issued to the petitioner on 24 January, 2008. Subsequently another notice u/s 256(3) of the Act was issued on 27 April, 2008. However there was no reply from the petitioner and as such the Municipal Corporation was constrained to pass the impugned order. The first respondent has also indicated the required side set backs and violation in the matter of providing such set backs in respect of the building constructed by the petitioner. According to the second respondent the petitioner is not entitled to make an application under the regularisation scheme, 2007 inasmuch as the very construction was put up only after the cut off date. In short, the respondents justified the action taken for the purpose of demolishing the unauthorised construction.

Submissions:

5. The learned Senior Counsel for the petitioner would contend that no notice was given to the petitioner before issuing the impugned order of demolition and therefore the very proceeding was violative of the principles of the natural justice. According to the learned Senior Counsel the petitioner submitted a revised plan on 10 March, 2010 and it was returned by the Corporation. Subsequently, on 19 March, 2010 the petitioner filed an application for regularisation before the Chennai Metropolitan Development Authority and the authority is now seized of the matter and therefore it was not open to the Corporation to execute the impugned order during the currency of regularisation proceedings. According to the learned Senior Counsel, the application for regularisation was altogether a different step, which has nothing to do with the challenge made to the impugned order, which is per se illegal and as such it is liable to be set aside.

6. The learned Additional Advocate General appearing on behalf of the Chennai Corporation disputed the contentions raised by the petitioner. According to the

learned Additional Advocate General, notices dated 20 November, 2007 and 5 April, 2008 were served on the authorised agents of the petitioner and as such there was no violation of the principles of natural justice in the matter of issuing the order of demolition. Learned Additional Advocate General also pointed out that, the very fact that the petitioner filed an application for regularisation clearly shows that the construction was in violation of the approved plan and as such the question of prejudice on account of the alleged absence of notice loses significance.

Analysis:

7. There is no dispute that the petitioner was given planning permission as per proceedings dated 10 October, 2006 permitting him to put up ground plus one floor. Even as per the affidavit filed in support of the writ petition, the petitioner has constructed basement and second floor, which were not shown in the approved plan. Similarly, there is an indication in the affidavit that the construction was done without the required FSI. Though the respondents have alleged that the second floor was constructed by the petitioner in total violation of the sanctioned plan, the petitioner has taken up a contention that only a small room was constructed in the second floor.

8. This matter was moved on a holiday as per the permission granted by My Lord The Hon"ble Chief Justice and an interim order was granted against demolition as per order dated 6 March, 2010. It was only after the said interim order, the petitioner has filed a revised plan before the Corporation. Though the learned Senior Counsel contended that the application was simply returned by the Corporation, a reading of the same would make the position clear that the revised plan was rejected on merits as per order dated 15 March, 2010. In any case, the legality or correctness of the order dated 15 March, 2010 has not been challenged by the petitioner. It is also a matter of record that the petitioner has filed an application for regularisation before the Chennai Metropolitan Development Authority on 19 March, 2010. The question as to whether the petitioner is entitled to the benefits of the ordinance with respect to regularisation is a matter to be considered by the statutory authorities.

9. The core issue to be decided in this matter is as to whether notice was issued to the petitioner before passing the impugned order.

10. The Chennai City Municipal Corporation Act, 1919 is a self contained code governing the law relating to Municipal affairs of the City of Chennai. Section 256 of the Chennai City Municipal Corporation Act, (hereinafter referred to as "the Act") provides for demolition or alteration of the building unlawfully commenced, carried on or completed. Section 256(1) provides that in case the Commissioner is satisfied that the construction or re-construction of any building has been commenced without obtaining the permission of the Commissioner or in contravention of the approved plan, he has to pass a provisional order requiring the owner or the builder to demolish the work done, or so much of it as, in the

opinion of the Commissioner, be necessary to bring the work into conformity with the Act, rules, by-laws or the sanctioned plan. Section 256(2) provides that the Commissioner has to serve a copy of the provisional order on the owner of the building together with a notice requiring him to show cause within a reasonable time to be indicated in such notice as to why the order should not be confirmed. Section 256(3) provides that in case the owner fails to show cause to the satisfaction of the Commissioner, it would be open to him to confirm the order with or without any modification. Section 256-A provides for taking action for demolition of the building, in case, it was constructed without permission or in contravention of the approved building plan. Section 257 clearly provides for issuance of notice to the owner of the building before passing further orders for demolition.

11. The impugned order was issued u/s 378 of the Act. The said provision relates to the power of the Commissioner to inspect, which includes the power to survey, measure or execute the work.

12. Section 374 of the Act provides the method of serving documents. The said provision reads thus:

374. Method of serving documents-

(1) When any notice or other document is required by this Act, or by any rule, by law, regulation or order made under it to be served on or sent to any person, the service or sending thereof may be effected--

(a) by giving or tendering the said document to such person; or

(b) if such person is not found by leaving such document at his last known place of abode or business or by giving or tendering the same (to his agent, clerk or servant or some adult member) of his family; or

(c) if such person does not reside in the city and his address elsewhere is known to the commissioner, by sending the same to him by post registered; or

(d) if none of the means aforesaid be available, by affixing the same in some conspicuous part of such place of abode or business.

(2) When the person is an owner or occupier of any building or land it shall not be necessary to name the owner or occupier in the document, and in the case of joint owners and occupiers it shall be sufficient to serve it on, or send it to, one of such owners or occupiers.

[(3) Whenever in any bill, notice, form or other document served or sent under this Act, a period is fixed within which any tax or other sum is to be paid or any work executed or any thing provided, such period shall, in the absence of the express provision to the contrary in this Act, be calculated from the date of such service or sending by post registered.]

13. The petitioner has specifically denied the receipt of notice before passing the

impugned order by the City Corporation. In the counter affidavit filed by the second respondent, it was stated that notices dated 24 January, 2008 and 27 April, 2008 were issued to the petitioner. However there was nothing in the counter affidavit indicating as to who received the notices and the authority of the person to receive such notices on behalf of the petitioner. During the course of arguments, learned Additional Advocate General has produced a copy of the notice duly acknowledged and on instructions from the second respondent submitted that the notices were received only by the site Engineer on behalf of the petitioner. However, the learned Senior Counsel for the petitioner disputed the said contention and submitted that there was no such site Engineer appointed by the petitioner so as to enable him to receive the notice on behalf of the Principal.

14. When the Act contains a specific provision as to how notice has to be served, it has to be served only in such prescribed manner. Section 256 contemplates notice on the owner of the building. Section 374(1)(a) also provides for giving or tendering the documents to whom it was intended to be served. It is true that Section 374(1)(b) permits service of notice on the agent, clerk or servant or some adult member of the addressee. There is also an indication that in case the addressee does not reside in the city and his address else where was known to the Commissioner, notice has to be sent by registered post and it is only by way of last resort, notice could be affixed in a conspicuous part of the place or business of the addressee.

15. The dispute has arisen only because of the carelessness on the part of the officials of the Corporation in recording the name of the person, who actually received the notice and his relationship with the owner of the property. Nothing prevented the officials of the Corporation from sending the show cause notice by registered post to the petitioner. Since no details are furnished in the acknowledged copy of the notice about the person, who actually received the notice and his authority to receive such notice on behalf of the owner, the writ petitioner is now taking advantage of the situation.

16. The petitioner in his affidavit filed in support of the writ petition as well as in the reply affidavit explained the factual position for the purpose of showing that his construction was not in violation of the building regulations. The explanation as found in the pleadings filed on behalf of the petitioner, is a matter to be considered by the statutory authority. Therefore the question is as to whether there was a valid consideration of the case of the petitioner before issuing the impugned order of demolition. It is true that subsequent to the impugned order, the petitioner has filed an application with a revised plan. The petitioner has also filed an application for regularisation before the Chennai Metropolitan Development Authority.

17. The other question is as to whether the subsequent application for revision of the building plan or the application for regularisation would stand in the way of the petitioner in challenging the validity of the impugned notice of demolition.

18. The factum of submission of a revised plan or the subsequent application for regularisation of construction would not operate as a bar in challenging the legality and correctness of the impugned demolition order, as it was passed without affording an effective opportunity to the petitioner to explain his position.

19. The statutory authorities initiating proceedings by invoking the provisions of a statute, owes a duty to follow the procedure contemplated by the Act and Rules made thereunder. When the statute mandates that notice should be given to the parties before taking action, the attempt should be to effect service of notice in the usual manner. In case the statute itself provides the manner and method of service of notices, such methods should be scrupulously followed. Service of notice on the person as and when proceedings are initiated can never be termed as an empty formality. The attempt of the authorities should be to pass orders with notice to the parties, as otherwise, the proceedings would get delayed unnecessarily on account of litigations, complaining of violation of the principles of natural justice.

20. Though in the reply affidavit and more particularly in paragraph 2, the petitioner has categorically stated that neither himself nor any of his agents have ever received the notices dated 24 January, 2008 and 27 April, 2008, the respondents have not indicated the name of the agent, who actually received the notices on behalf of the petitioner. Admittedly notices were not served by registered post. The impugned order would result in civil consequences to the petitioner inasmuch as the construction has to be demolished even without an opportunity to the petitioner to submit his case. It was the consistent case of the respondents that they have issued notices u/s 256(1) and 256(3) on 24 January, 2008 and 27 April, 2008 respectively. Therefore even as per the respondents, notice should be issued to the owner before passing the order of demolition. However, the fact remains that the respondents were not in a position to justify their stand that notices were served either on the owner or on his authorised representative. In such circumstances, we are of the considered view that the issue requires to be considered by the first respondent afresh by treating the impugned order as a show cause notice.

21. In the result, the impugned order dated 3 March, 2010 is quashed. The petitioner is granted seven days time from the date of receipt of a copy of this order to submit his objections to the notice of demolition. The first respondent or his delegate is directed to consider the said objection and pass appropriate orders on merits and as per law, as expeditiously as possible.

22. The writ petition is allowed as indicated above. Consequently, the connected MP is closed. No costs.