

(2016) 09 MP CK 0011
In the Madhya Pradesh High Court
Case No : Writ Appeal No. 310 of 2016

Smt. Probhjot Kaur Chhabra

APPELLANT

Vs

Indore Municipal Corporation

RESPONDENT

Date of Decision : 12-09-2016

Acts Referred:

Madhya Pradesh Bhumi Vikas Rules, 1984 — Rule 102, Rule 12(k), Rule 63
Madhya Pradesh Municipal Corporation Act, 1956 — Section 308A

Citation : (2016) 4 MPLJ 701

Hon'ble Judges : Shri P.K. Jaiswal and Shri D.K. Paliwal, JJ.

Bench : Division Bench

Advocate : Shri Rishi Tiwari, Learned Counsel, for the Respondents; Shri Vijay Assudani, Learned Counsel, for the Appellants

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J. - This intra court appeal has been filed by the appellants against the order dated 2.8.2016 passed in W.P. No. 593/2015 whereby, the learned writ court upheld the directions contained in the notice dated 21.1.2015 for stopping the unauthorized user of the terrace and disposed of the writ petition by granting liberty to file reply to the show cause notice for removal of unauthorized construction, if not already filed and directed the Municipal Corporation to take decision in accordance with law.

2. Facts of the case are that multiplex building has been constructed by the appellants after obtaining necessary permission on 15.11.2016 over an area of 23648.16 Sq. Mtrs. area with 18 Mtrs. high building with the conditions :-

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fu;e 63 vuqlkj dsoy lfoZlsl gsrq jgsxkA 1 Hkou dh dqy mapkbZ 18-0 j[kuh gksxhA 2- fcYMj yk;lsal dza0 254 fnukad 30-08-2006 esa of.kZr "krksZa dk ikyu vfuok;Z

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3. On 30.3.2007, high rise committee passed an order thereby granting permission for construction of 30 meters high-rise multiplex building under the provisions of M.P. Bhumi Vikas Niyam, 1984. On 3.4.2007 vide Annexure P/7, Municipal Corporation granted permission for construction of multiplex commercial building with the height of 24 meters and construction of 41701.08 Sq. Mtrs by imposing certain conditions. Relevant conditions reads as under :-

vkids }kjk izLrqe ekufp= iwoZ nk0 dz0 13800 fnukad 15-11-2006 ds vuqlj.k esa ry?kj&3 ,oa ry?kj&2] esa lEiw.kZ ikfdZax] ry?kj&1 O;kolkf;d] Hkwry] izFkery] f} rh;ry] r`rh;ry ,oa prqFkZry fjokbZTM eYVhQ~ysDI "kkWfiar dkEiysDI def"kZ;y mi;ksx gsrq rFkk VsjslQ~yksj dk mi;ksx fu;e 63 vuqlkj dsoy lfoZlsl gsrq jgsxkA 1- Hkou dh vf/kdre mapkbZ 24 eh0 j[krs gq, eYVhQ~ysDI iw.kZr% okrukqdwfyr j[kuk gksxkA

4. On 19.6.2008 a revised building permission was issued thereby permitting construction of 5 multiplex in place of 4 multiplex, but reducing the height from 24 Mtrs to 23.5 meters and the area of construction was made 41703.45 Sq. Mtrs. On completion of construction of entire multiplex commercial building Municipal Corporation issued completion certificate on 8.8.2008.

5. On 9.12.2011, the State of M.P. conducted an enquiry as regard alleged illegal construction and opined that the matter be compounded. On 12.6.2012, the said application for compounding has been rejected by the respondent No.2 ? Building Officer. On application for recalling the order dated 12.6.2012 was passed on 15.6.2012.

6. On 21.1.2015 notice has been issued by the respondent No.2 for stopping use of terrace floor for the purpose of restaurant on the ground that the building permission was granted for using terrace as service area and contrary to the permission, the appellants are using terrace for the purpose of running a restaurant known as "Shisha Lounge".

7. In terms of Section 308-A of the Municipal Corporation Act, 1956, (hereinafter referred as "the Act of 1956") the unauthorized user of the premises cannot be compounded and directed the appellants to stop using the terrace floor for the purpose of restaurant and remove all the permanent and illegal construction within a period of 3 days else action will be taken by the Municipal Corporation for removal of illegal construction under the provisions of the Act of 1956 and M.P. Bhumi Vikas Rules, 2012 (hereinafter referred as "the Rules of 2012"). The said action has been challenged by filing writ petition on the ground that the notices have wrongly been issued. It is alleged that the order dated 12.6.2012 has been passed without giving any opportunity of hearing to the appellants and that it has been passed by Zonal Officer whereas, the Commissioner, Municipal Corporation is only competent to decide the application for compounding.

8. Per contra, learned counsel for the Municipal Corporation, Indore opposed the prayer and submitted that under Section 308-A of the Act, unauthorized user of the premises cannot be compounded. In respect of competency of the Building Officer, it is pointed out that since the application for compounding was made to the Building Officer, therefore, it has been decided by the Zonal Officer. The height of the building of the appellants is 23.5 meters but by raising a temporary construction on the terrace, he has increased the total building height from 23.5 Mtrs. to 31.50 Mtrs. The learned writ court considering the fact that as per building permission granted on 15.11.2006, revised permission dated 3.4.2007 and another revised permission dated 10.6.2008, the terrace floor will be used as per Rule 63 of the Rules of 2012 only for service purpose and there was no permission to use the terrace floor for any commercial purpose and held that to that extent the notice dated 21.1.2015 does not suffer from any error and the building officer has rightly ordered to stop the use of terrace floor for commercial purpose for running a restaurant known as "Shisha Lounge".

9. In respect of a rejection of the application for compounding vide order dated 12.6.2012, the learned writ court has held that the Zonal Officer was not competent to decide the application for compounding, the application for compounding is required to be considered by the Commissioner himself in terms of Section 308-A of the Act and, therefore, quashed the order dated 12.6.2012 and disposed of the writ petition with a direction to take decision in the show cause notice dated 21.1.2015 in accordance with law.

10. Learned counsel for the appellant has drawn our attention to the law laid down by the Apex Court in the case of Kewal Kishan Gupta v. J&K Special Tribunal & Ors., reported as AIR 2005 SCW 2908 and submitted that the change of use was compoundable. He further submitted that Section 308-A of the Act of 1956, specifically provided that if the building is constructed without permission then is compoundable. He further submitted that the learned writ court has failed to appreciate that notice dated 21.1.2015 was issued on the basis of building permission dated 15.11.2006, which has been subsequently revised on 30.3.2007 and 10.6.2008, raising the height of the building from 18 meters to 23.5 meters. He has drawn our attention to Rule 102 and Rule 12 (k) of M.P. Bhumi Vikas Rules, 2012 and submitted that no permission is required, if the construction raised is of temporary nature. In respect of permanent and temporary construction of terrace floor, he submitted that as per Rule 63, construction of 2nd roof/terrace floor is permissible and prayed that impugned judgment/order be set aside and the notice-cum-order issued by the respondents on 21.1.2015 be also set aside.

11. Per contra Shri, Rishi Tiwari, learned counsel for the respondents has drawn our attention to Annexure R/2, building permission dated 15.11.2006, Annexure R/3 revised building permission dated 3.4.2007 and Annexure R/4 (another revised permission dated 10.6.2008) and submitted that as per Rule 63 of the Rules of 1984, the terrace will be used for panel room, culture room, roof bank,

lift room, generator room and A.C. Plant etc. By revised building permission dated 3.4.2007, the height of the building is enhanced from 18 meters to 24 meters and permission was granted to construct ground floor plus four floors instead of ground plus three floor meaning thereby, that construction of one more floor is granted to the appellants. On 10.6.2008, building permission was further revised and instead of construction on 4th multiplex, the appellants were permitted to construct 5 multiplex and height was reduced from 24 meters to 23.5 meters. The use of terrace floor shall remain same, ie., as per Rule 63 of the Rules of 1984. The appellants will use the terrace floor as service area. The appellants contrary to the permission illegally constructed restaurant on terrace floor and wine shop known as "Shisha Lounge". As per report dated 9.12.2011 (Annexure P/15), the illegal construction, which was made in the year 2011 has not been removed. As per the Act of 1956 and the Rules made therein permission is must. The aforesaid illegal construction is not compoundable under Section 308-A of the Act of 1956. He submitted that illegal construction in question is not compoundable and the learned writ court rightly upheld the action of the Municipal Corporation for stopping unauthorized use of the terrace and prayed for dismissal of the writ petition.

12. To appreciate the contention of the learned counsel for the parties, we are reproducing Section 308-A of the Municipal Corporation Act, 1956, which reads as under :-

"308-A. Compounding of offences of construction of buildings without permission

[Notwithstanding anything contained in this Act or any other Act, for the time being in force or any rules or bye-laws made thereunder, the Commissioner may compound the offence of constructing buildings without permission or contrary to the permission granted, if-

- (a) such construction does not affect the regular building line;
- (b) the unauthorised construction made in the marginal open spaces or in excess of the prescribed floor area ratio does not exceed ten percent of the prescribed floor area ratio;
- (c) such construction does not come within the area notified by the State Government as a hill station or a place of tourist importance or sensitive from the point of ecology;
- (d) such construction does not come within the area specified for parking or vehicles;
- (e) such construction does not come within the boundary of roads or within the area affecting alignment of public roads;
- (f) such construction does not come within the area specified for Tanks (Talab);
- (g) such construction does not come within thirty metres or such further distance from the river bank as may be specified in the master plan of the concerned

town;

(h) such construction does not come within the area of any nallah and water stream:]"

13. From perusal of the aforesaid, it is clear that under Section 308-A of the Act of 1956, an offence of constructing a building without obtaining previous permission of the Corporation or constructing the same contrary to the permission granted can be compoundable. Section 308-A of the Act of 1956, does not provide for compounding of unauthorized user of the premises.

14. Rule 63 of M.P. Bhumi Vikas Rules, 1984 reads as under :-

"Height exceptions-Roof Structures. - The following appurtenant structures shall not be included in the height of the building unless the aggregate area of such structures including pent-houses exceeds one-third of the area of roof of the building upon which they are erected :-

(a) roof tanks and their supports;

(b) ventilating, air-conditioning, lift rooms and similar service equipment;

(c) roof structure other than plant-houses; and

(d) chimneys and parapet walls and architectural features not exceeding 1 meter in height."

15. From the aforesaid, it is clear that if the penthouse exceeds one-third area of the roof of the building the same shall be included in the height of the building.

16. In the present case, the builder added an additional construction on the roof of the building, which is unauthorized. Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Only such deviations deserve to be condoned those are bona fide or are attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. Deviation by builder like appellants can safely be assumed to be a deliberate and done with an intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future.

17. Learned counsel for the appellants has drawn our attention to the decision of the Apex Court in the case of Kewal Kishan Gupta v. J&K Special Tribunal & Ors. (supra) wherein B.C. Road was shown as residential zone in the master plan, but were being used for commercial purposes. The construction was far in excess of the sanctioned plan and the appellant therein converted the land use from residential to commercial purpose. The Division Bench of Jammu and Kashmir High Court dismissed the writ petition on the ground that there was conversion of the land use from residential to commercial contrary to the lease deed

whereas the compounding authority compounded the offending structure and directed the appellant to deposit the compounding fee. The Apex Court held that the phase of rapid growth of industrial development also makes it unnecessary for permitting demolition of the structure even if it be in contravention of the provisions of the Act or the zoning provisions in the previous Master Plan. Hon"ble the Supreme Court considered the notification dated 9.8.2004, issued by the Commissioner and Secretary to the Government of Jammu and Kashmir by which master plan of Jammu 2021 has been published. Paragraph 6.9.11 at page 81 of the said Master Plan specifically provides that B.C. Road area is earmarked as special area to be developed as a mixed use zone having residential, commercial, light industry, institutional and other uses.

18. In the case in hand, the construction of "Shisha Lounge" on the roof is contrary to the provisions of M.P. Bhoomi Vikas Rules, 1948 and in violation of Rule 63 of the Rules of 1984 and, therefore, the law laid down by the Apex court in the case of Kewal Kishan Gupta v. J & K Special Tribunal & Ors. (supra) will not apply in the present facts and circumstances and the same is distinguishable.

19. The cases of professional builders like the appellant stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future.

20. In the facts and circumstances of the present case, we are of the view that the learned writ court rightly upheld the direction contained in the notice dated 21.1.2015 for stopping the unauthorized user of the terrace is found to be just and proper and in accordance with law and directed that the appellants cannot be permitted with the unauthorized user of the premises any further.

21. For these reasons, no case to interfere with the order passed by the learned writ court, which is just and proper as prayed is made out. Writ appeal filed by the appellants has no merit and is, accordingly, dismissed.