
(2005) 11 OHC CK 0023
In the Orissa High Court
Case No : Writ Petition (C) No. 859 of 2005

Smt. Sudhamayee Acharjya and Others	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 08-11-2005

Acts Referred:

Bangalore Development Authority (Plan and Building Standard) Regulations, 2001 — Regulation 12
Orissa Development Authorities Act, 1982 — Section 10, 106, 11, 12, 123
Orissa Town Planning and Improvement Trust Act, 1956 — Section 31, 32

Citation : (2006) 101 CLT 110

Hon'ble Judges : S.B. Roy, C.J; M.M. Das, J

Bench : Division Bench

Advocate : G.P. Mohanty and H.P. Mohanty, for the Appellant; A.G.A. for O.P. Nos. 1 and 2, D. Mohapatra, D.K. Sahoo, M. Mohapatra, S.K. Swain and B. Dash for O.P. No. 3, C. Mohanty, S. Rath, B.R. Mohanty and G.G. Goswamy for O.P. No. 5 and J. Patnaik, B. Mohanty, T.K. Pattnaik, S. Das, P.K. Nayak, S. Pattnaik and A. Patra for O.P. No. 6, for the Respondent

Judgement

M.M. Das, J.—The petitioners in this Writ Petition who are residents of Nayapalli area in Bhubaneswar Town, have filed the present Writ Petition in the nature of Public Interest Litigation for quashing the lease and subsequent approval of the building plan and grant of permission made in favour of Opp. Party No. 6 for construction of a hotel over Plot No. B/6 corresponding to revenue plot Nos. 1578 (Part), 1603 and 1602 (Part) in Khata No. 1427 in unit XVI, mouza Jayadev Bihar, Bhubaneswar. The petitioners have further sought for issuance of writ of mandamus directing the Opp. Parties 1 to 5 to strictly follow the master plan prepared under the Orissa Development Authorities Act, 1982 (for short "O.D.A. Act").

2. It is the case of the petitioners that the above mentioned land was earmarked for construction of a Bus stop in 1974 master plan and the concerned authorities without adhering to the provisions of the statute governing the field and in

violation thereof have permitted the Opp. Party No. 6 to construct a hotel over the said land. The petitioners have further alleged that if such a hotel is allowed to be constructed over the plot in question, the same would be facing the residential houses of the inhabitants of the locality and would not only disturb the peace of the locality but also will affect their right of privacy. According to the petitioners, if the hotel is permitted to function in the said site, it would also cause parking problems and will endanger the lives of the small children who use the road in front of the proposed hotel, while going to and returning from the School.

3. Mr. G. P. Mohanty, Learned Counsel appearing for the petitioners submitted that the land described above being originally earmarked for a Bus stop in the master plan prepared in 1974, the concerned authorities have violated the provisions of Sections 8 to 14, 22 & 106 of the O.D.A. Act. Mr. Mohanty vehemently argued that under proviso to Section 8 of the O.D.A. Act, the master plan of 1974 which was prepared under the Orissa Town Planning and Improvement Trust Act, 1956 (hereinafter referred to as "the O.T.P. & I.T. Act") became a valid Master Plan under the O.D.A. Act. He further contended that no document has been produced by the Opp. Parties to show that the Master Plan of the year, 1974 was modified and a comprehensive Master Plan was prepared and published in the year, 1994 as pleaded by the Bhubaneswar Development Authority (for short "B.D.A."). He drew the attention of the Court to the provisions of Sections 69 & 70 of the O.D.A. Act and submitted that though in Section 70 it is provided that 30 percent of the land in a residential zone can be utilised for the purpose of ancillary and compatible uses, but hotel being not ancillary to the residential area and not a compatible use, it should be held that construction of a hotel in a residential area which, in fact, is an industry, should not be permitted. It was further contended on behalf of the petitioners that since vacant land is available in commercial zones and industrial zones, permitting construction of hotel in residential zones ipso facto speaks mala fide on the part of the Opp. Parties 1 to 5. In support of his contention, Mr. Mohanty relied upon the decision in the cases of Bangalore Medical Trust Vs. B.S. Muddappa and others, and H. Kashinath and others Vs. State of Karnataka and others, .

4. In W.P.(C) No. 13624 of 2004 where the petitioner's association has also made a similar challenge to the grant of lease of the land in favour of M/s Hotel Bari International and permission to construct the hotel, the B.D.A., the Proprietor of the Hotel as well as the State of Orissa have filed their counter affidavits and they have adopted the said counter affidavits in the present Writ Application.

5. The B.D.A. in its counter affidavit has denied the allegation that the land described above, was originally reserved for construction of a bus stop in the year 1974 Master Plan. Though it is stated in the counter affidavit that in the 1974 Master Plan. There was a provision for construction of a Bus stop in Sector N-4, on super imposition of the maps it is clearly ascertained that the plots of

land leased out for construction of the hotel does not cover the land which was ear-marked for construction of a Bus stop in the 1974 Master Plan. Relying upon the averments made in the counter affidavit Mr. Dayananda Monapatra, Learned Counsel appearing for the B.D.A contended that the B.D.A. (Plan and Building Standard) Regulation, 2001 permits construction of hotel in residential zone. An application being made by the Proprietor of the hotel for permission, as required u/s 16 of the O.D.A. Act, for construction of basement +2 storied building, the concerned authorities, in accordance with the provisions of the O.D.A. Act and on considering all relevant aspects, approved the said plan for construction of the building on 19.9.2002 and the concerned authorities are regularly supervising the construction so as to prevent any deviation from the approved plan. He further submitted that the land in question was allotted and leased out by the G. A. Department of the Government for construction of the hotel as per the decision of the Government.

6. In the counter affidavit filed on behalf of the State, it has been averred that the land in question is within a residential used zone and is not reserved for Bus stop. It is further stated that construction of the hotel over the land in question does not violate the Zoning Regulation of the B.D.A. Thus, in effect, the Opp. Parties contended that there has been absolutely no violation of any of the provisions of the O.D.A. Act nor the regulations made thereunder and for the above reasons, the Writ Application is devoid of any merit.

7. In order to appreciate the rival contentions of the respective parties, it is necessary to refer to some of the provisions of the O.D.A. Act and the Zoning Regulations framed thereunder.

Sections of the O.D.A. Act provides for preparation of an interim development plan for the concerned area. In the proviso to Section 8, it is prescribed that if before the constitution of an Authority under the O.D.A. Act for any development area, a Master Plan of such area or part thereof, has been published u/s 31 of the O.T.P. & I.T. Act or approved u/s 32 thereof, the said Master Plan shall be deemed to be an interim development plan published by the authority. Section 9 of the O.D.A. Act provides for preparation of a comprehensive development plan after conducting a survey. Section 10 provides for preparation of zonal development plan for each of the zones into which the area covered by the comprehensive development plan may be divided. Sections 11, 12 & 13 of the O.D.A. Act provide the manner in which the development plan is to be approved by the State Government and the coming into operation of the development plan. Section 14 empowers the authority under the O.D.A. Act to make any modification to the development plan in the manner provided therein. Section 125 of the O.D.A. Act prescribes the procedure for making rules and regulations as provided under Sections 123 & 124 of the O.D.A. Act. Zoning Regulations have been framed as per the O.D.A. Act. Regulation 70 in Part-IV of the Zoning Regulations framed under the O.D.A. Act prescribes as follows :

70. (1) Permission for different uses shall be accorded outright for principal use

earmarked in the different zones described in column (2) of the table No. 17.

(2) Upto 30% of the land in a permissible zone can be utilized for the purpose of ancillary and compatible uses as specified in column (3) of the said table. Permission shall be granted on first-come-first serve basis.

(3) The purposes specified in column (4) of the said table shall not be permitted in the areas reserved for particular uses.

(4) In the "open space use" zone, activities like parks, playgrounds, temporary fairs, plantations, may be taken up. Only Residential buildings may also be permitted in the open space use zone if the following conditions are satisfied along with other conditions of these Regulations.

(i) the land is a stitiban land and is not a leasehold land;

(ii) the coverage is not more than 40%;

(iii) The height is not more than 7.0 (seven) metres; and at least 20 percent of land is used for plantation;

(5) In transport use zone, activities relating to roads, transport depots, bus terminal, bus stop, truck terminal, shall be permissible. In case of such use, a fee will be charged by the Authority, which shall be spent for development and ancillary facilities in these zones.

(6) In green belt use zone, the activities like agriculture, plantation, burial grounds, solid waste disposal units, shall be permissible.

(7) The permissions granted in exception of zonal use shall be incorporated in the public notice in the manner as referred to in Regulation 12.

(8) Where a land put to mixed use in a particular zone as per Regulations, the main use should cover not less than 2/3rd of the total floor area and the ancillary use should not exceed 1/3rd of the total area.

LANE USE PERMITTED/PROHIBITED IN DIFFERENT USE ZONES (See Regulation 70)

Table		-	17
Use			
Zone Use Permitted Up to 30% of the area Use to be permitted on Prohibited first-cum-first served basis			
(1)	(2)	(3)	(4)
1.			

Residential 1. Residential, Hostel, 1. Places of worship. 1. Slaughter Use Zone Boarding houses houses, with density limita- Industries. tions, if any.

2. Schools. 2. Professional, Comme- 2. All uses rcial, Government not speci- and Semi Government fically offices Institutions. permitted. 3. Health Clinics. 3. Service uses and shops. 4. Social, cultural and 4. Hotels, Hospitals and neighbourhood, Sanatoria not treating recreational Insti- contagious diseases

tutions with mental patients, if set adequate parking back and coverage facilities. of plots are such as not to constitute nuisance to the residential area. 5. Public Utilities and 5. Colleges and Research public buildings. Institutions of non- commercial nature, if the building is located at a distance of not less than 8 metres. From the boundary of the plot. 6. Non - commercial 6. Rearing of poultry and agricultural gardens, cattle for non-comm- nursery and green ercial use if no bird or houses. animal is Housed closer than 6 metres of a Dwelling. 7. Any neighborhood 7. Removal of gravel, clay recreation uses sand or stone for including clubs and development of site other semi-public which will not in the recreational uses. stagnation of water or cause other nuisance. 8. Accessory uses 8. Bus stop. clearly incidental to residential use (except service uses) which will not create a nuisance or hazard.

9. Customary home 9. Petrol filling Station occupation if the on roads of 12 metres. area for such use Or more width if they does not exceed fulfill other requirement 25 percent of the laid down in this total floor area of connection. the dwelling and there shall be no public display of the goods.

8. Though it has been averred that the Government and the statutory authorities have grossly violated the Master Plan of the city in permitting the hotel to be constructed in a residential zone, but no allegation of violation of any specific provision of the O.D.A. Act or the Zoning Regulations has been made by the petitioners. It appears from the averments made in the counter filed on behalf of the B.D.A. that a comprehensive development plan was prepared in the year 1994 by the competent authority under the said Act in which the land in question was not ear-marked for Bus stop. It has been furhter averred that the area ear-marked for Bus stop in the plan prepared under the O.T.P. & IT. Act in 1974, is not the land leased out for construction of the hotel by the G.A. Department of the Government.

9. The only question left for consideration is as to whether the Opp. Parties have acted contrary to the O.D.A. Act and the Zoning Regulations framed thereunder in leasing out the land in favour of M/s. Hotel Bari International/its Proprietor and approving the building plan for construction of a hotel over the land in question which is admittedly a part of a residential zone. In order to discern the above, we would refer to Regulation 70 in Part IV of the Zoning Regulation quoted above. It is clear from table 17 of the said Regulation that 30 per cent of a residential use zone can be permitted to be used for construction of hotel on "first come first serve basis" provided sufficient set back is left as per the O.D.A. Act and Building Regulations so as to prevent nuisance to the residential area.

10. In the case of Bangalore Medical Trust (supra) the Supreme Court while dealing with conversion of public park into a private Nursing Home and the maintainability of a Public Interest Litigation held that such an application is maintainable as under the Bangalore Development Authority Act, a private

Nursing Home could neither be considered to be an amenity nor it could be considered improvement over necessity like a public park. The exercise of power in conversion of a public park into a private Nursing Home was contrary to the purpose for which it was conferred under the Statute.

11. In the case of H. Kashinath and Ors. (supra) the Supreme Court was dealing with legality of a lease granted to an association for a piece of land earmarked for public or semi-public purpose under the comprehensive development plan. In that context, the lease granted to the association for the purpose of building a theatre to give training to the film artists and for the purpose of development of drama and films was held to be not for public or semi public purpose but purely for the benefit of the lessee. On such finding, the Supreme Court set aside the lease granted by the concerned authority to the association for constructing and setting up the theatre in question. In the present case, however, as referred to earlier, the Zoning Regulations framed under the O.D.A. Act, make specific provision for construction of hotel in the residential use zone provided, of course, the said construction of hotel will not be permitted to cause any sort of nuisance to the residential area.

12. Considering the submissions made and the provisions of the relevant Act and the Regulations, we are of the view that the prayer of the petitioners to set aside the lease granted for construction of the hotel over the land in question cannot be granted. While declining to interfere with the lease granted in favour of the Opp. Party No. 6 for construction of the hotel, we direct that the competent authority under the O.D.A. Act will ensure that the construction of the hotel is made strictly in accordance with the plan approved by the authority and the Opp. Party No. 1 should also take all necessary steps to prevent any sort of nuisance being caused by establishment of the said hotel to the residential area or its inhabitants.

13. With the above observations and directions, the Writ Application is disposed of.

S.B. Roy, J.

14. I agree.