

(2008) 12 CAL CK 0017
In the Calcutta High Court
Case No : Writ Petition No. 22364 (W) of 2007

Sri Prabin Chowdhury

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 24-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 12 CAL CK 0017

Hon'ble Judges : Tapan Kumar Dutt, J

Bench : Single Bench

Advocate : Asok Banerjee and Mr. Shyamal Sanyal, for the Appellant; D.P. Mukherjee, Mrs. Smritikana Mukherjee and Mr. Debjit Mukherjee for Howrah Municipal Corporation, for the Respondent

Judgement

Tapan Kumar Dutt, J.—Heard the learned advocates for the respective parties.

2. The petitioner's case is that the petitioner was empowered by the private respondents to develop the property in question at 78, Sri Ram Dhang Road, Salkia, Howrah and a plan for a two storied building with mezzanine floor was sanctioned by the respondent municipal authorities for such purpose. It appears that a notice of demolition dated 14.06.2007 was issued by the respondent Municipal Corporation in respect of the construction of the building in question. Challenging such notice of demolition the petitioner moved a writ petition in this Court being W.P. No. 14154 (W) of 2007 and an Hon'ble single Judge of this Court by order dated 01.08.2007 was pleased to dispose of the said writ petition by observing inter alia that the proceeding against the petitioner was not conducted legally and by ordering that the respondent Municipal Corporation is granted liberty to serve a fresh notice upon the petitioner within a stipulated period of time indicating therein the deviations made by the petitioner while raising the construction and the petitioner shall be at liberty to give a reply and he shall also be given an opportunity of hearing and the Howrah Municipal Corporation shall pass final order within a stipulated period of time. It appears

that time was indicated in the said order within which the parties had to take necessary steps and do certain things as contained in the said order. His Lordship was also pleased to observe that in the event the Howrah Municipal Corporation fails to pass final order within the time-frame, the petitioner shall be at liberty to raise construction in accordance with law. His Lordship was pleased to quash the notice of demolition dated 14.06.2007.

3. It appears that thereafter the respondent municipal authorities notified the petitioner with regard to the deviations which the petitioners caused in constructing the building in question. The learned counsel for the petitioner submitted that the respondent municipal authority did not act within the time-frame fixed by the Court and the petitioner intended to continue with the construction in terms of the aforesaid order dated 1st August, 2007 (paragraph 36 of the writ petition may be referred to). It further appears that the petitioner through his learned advocate wrote a letter dated 21.08.2007 to the respondent municipal authority for recalling of the order by the municipal authority indicating the deviations made by the petitioner in the construction of the building in question (paragraph 37 of the writ petition may be referred to). Subsequently, it appears that by a notice dated 29.09.2007 u/s 177(1) of the Howrah Municipal Act, 1980 (hereinafter referred to as the said Act) issued by the respondent municipal authority, the private respondents and/or the petitioner were directed to stop work in respect of the alleged unauthorized construction which has been allegedly started again neglecting the previous stop-work notice. Such notice dated 29.09.2007 (annexure P-18 to the writ petition) has been challenged in the present writ petition.

4. In the present writ petition an Hon'ble single Judge of this Court by order dated 09.10.2007 was pleased to direct the petitioner to file his reply to the impugned notice dated 29.09.2007 and the respondent municipal authority was directed to pass final order in connection with the proceeding initiated against the petitioner in accordance with law, upon giving the petitioner an opportunity of hearing, within a stipulated time. His Lordship was also pleased to observe that if a decision is taken adverse to the interest of the petitioner, the final order must contain reasons and in the event no final order is passed within a certain date, the stop-work notice issued against the petitioner shall stand revoked and the petitioner shall be entitled to raise construction strictly in accordance with the sanctioned plan. It appears that thereafter the petitioner filed his reply to the said notice dated 29.09.2007 and the respondent Municipal Authority concerned passed the final order dated 29.10.2007. Copy of such final order has been brought on record by the petitioner by way of a supplementary affidavit.

5. It further appears from a perusal of the order dated 19.12.2007 passed on the present writ petition that the learned counsels for both the sides had agreed to the appointment of an Engineer for the purpose of ascertaining as to whether the petitioner has raised any construction at the premises in question in deviation of the sanctioned plan or not, and, accordingly, a Special Officer, who is an enlisted

Civil Engineer in the list of Engineers maintained by this Court, was appointed for the purpose of ascertaining whether any construction has been raised by the petitioner at the premises in question in deviation of the sanctioned plan or not. The Special Officer was directed to make necessary inspection upon prior notice to both the parties and to submit a report in this regard. This Court by the said order dated 19.12.2007 directed the parties to maintain status quo as regards the nature and character of the construction in question until further orders.

6. It further appears that by order dated 04.03.2008 an Hon''ble single Judge of this Court was pleased to order that the respondents shall file their opposition to the writ petition within five weeks and reply, if any, shall be filed within one week thereafter. In spite of this order, the respondents did not file any opposition to the writ petition and as such the allegations made in the writ petition were not controverted by any of the respondents by way of any affidavit-in-opposition.

7. Subsequently, the Special Officer submitted his report before this Court. Copies of the Special Officers'' report were served upon the learned advocate for the petitioner as well as the learned advocate for the respondent municipal authority and the respondent municipal authority filed an affidavit-in-opposition to the report submitted by the Special Officer. The petitioner did not file any affidavit against the Special Officer''s report since the petitioner''s learned advocate had submitted that in so far as, the petitioner is concerned there is no need to file any affidavit against the Special Officer''s report.

8. From the final order dated 29.10.2007 passed by the respondent municipal authority, Borough-I, Howrah Municipal Corporation, it appears that it has been observed by the said respondent authority that the area of the mezzanine floor is found exceeding the criteria of mezzanine floor contrary to rule 51 of the Howrah Municipal Corporation Building Rules, 1991. The respondent municipal authority further found that the increase in the floor to floor height caused increase in total height of building and with increase in area of floor immediately above the ground floor there is violation of the provisions of rule 45 and rule 51 of the said Building Rules of 1991. By the said order dated 29.10.2007 the respondent municipal authorities recorded that the Borough Committee had decided to pass again an order to demolish the unauthorized construction above the first floor and any unauthorized construction made further since this Court''s order dated 01.08.2007. The Special Officer''s report clearly reveals that the petitioner has made certain deviations from the sanctioned plan. The petitioner has not filed any affidavit against the said Special Officer''s report. For instance, the Special Officer has reported, inter alia, that the garage height has been raised to 2.85 m. against 2.10 m. as shown in the sanctioned plan which has resulted into a deviation of 750 mm. The mezzanine floor has been sub-divided into smaller compartments which is not allowable under the law, the area of the mezzanine floor as per site does not exceed what is shown in the sanctioned plan but it exceeds the allowable area under the law and there has been increase in height of the 10 numbers of columns in the G. F. (east side) and the slenderness ratio of

the columns has exceeded the permissible limit and, therefore, no further loads, that is, no further construction, is desirable at the said side. The Special Officer has reported that some remedial measures are required to be taken to strengthen the stability of the columns so that further construction over the portion concerned could be done. The Special Officer has also reported that on the western side the construction above the garage and the mezzanine floor portion of the building can be raised further.

9. In the affidavit-in-opposition filed on behalf of the respondent municipal authorities even though objection has been raised by the respondent municipal authority against the Special Officer's report yet from a perusal of the said affidavit-in-opposition it does not appear that any serious dispute has been raised by the respondent municipal authority against the Special Officer's report excepting that the respondent municipal authority has alleged that the measurements recorded by the Special Officer in the report do not reflect the actual construction made in deviation of the sanctioned plan. From the facts and circumstances of the present case and from the materials on record and also considering the submissions made by the learned counsels for the respective parties it appears to this Court that the fate of this case depends much upon the report of the Special Officer and the Special Officer's report has to be taken into consideration while deciding the present writ petition.

10. On a perusal of the Special Officer's report there cannot be any dispute that the petitioner has caused deviations from the sanctioned plan while making constructions at the premises in question and also there is no dispute that the area of the mezzanine floor as per site exceeds the allowable area as envisaged under the law even though it does not exceed the area shown in the sanctioned plan. The Special Officer has also observed that the mezzanine floor is not permissible and that remedial measures are required to be taken to strengthen the stability of the columns for further construction as contained in the said report.

11. There is no dispute that the final order was passed by the respondent municipal authority within time stipulated by this Court. There is also no dispute that both the parties had agreed for appointment of a Special Officer and that the Special Officer should file the report. In such circumstances, now, the question is as to what should be done in view of the Special Officer's report.

12. The learned Counsel for the petitioner has submitted that the respondent municipal authorities did not file any affidavit-in-opposition to the writ petition and, therefore, the respondent municipal authorities did not controvert any of the statements made in the writ petition and, therefore, the respondent municipal authority cannot be allowed to challenge the statements made in the writ petition. The said learned counsel also submitted that the respondent municipal authority did not carry out the required spot inspection at the relevant time and, therefore, the said respondents were wrong in alleging that the petitioner has made certain deviations from the sanctioned plan. Such

submissions made by the petitioner's learned counsel loses much of its importance in view of the fact that the Special Officer made an inspection of the construction in question and has submitted his report and the observations and findings of the Special Officer are contained in such report. The petitioner's learned counsel next submitted that the Commissioner of the respondent Municipal Corporation has the discretionary power to regularise the deviations particularly when there is nothing on record to show that public safety is endangered for such directions. The said learned counsel referred to section 177(1) and section 177(A) of the Howrah Municipal Corporation Act, 1980.

13. Section 177(1) of the said Act of 1980 reads as follows:

Where the erection of any building or the execution of any work in pursuance thereof has been commenced, or is being carried on, or has been completed without or contrary to the sanction or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Commissioner may in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be stopped or demolished or such addition or alteration thereto be made as the Commissioner considers necessary, by the person at whose instance the erection or the work has been commenced, or is being carried on, or has been completed :

Provided that no order under this provision shall be made unless such person has been given a reasonable opportunity in accordance with procedure as may be prescribed.

14. Reading the aforesaid provisions of law, this Court is of the view that the Commissioner has the discretion of allowing the petitioner to make additions or alterations to the construction in question which the Commissioner may deem necessary. It also appears to this Court that in each and every case of deviation from the sanctioned plan or contravention of the provisions of the said Act and/or its Building Rules and Regulations the Commissioner is not compulsorily bound to make an order of demolition of the construction that may be in question. The expression "Commissioner may in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be stopped or demolished or such addition or alteration thereto be made as the Commissioner considers necessary" indicates that a certain discretion has been given to the Commissioner which the Commissioner will have to exercise judiciously taking into consideration the facts and circumstances of each case individually.

15. Section 177(A) of the said Act contemplates a situation where the offending construction is in contravention of the provisions of the said Act and the rules made thereunder and which endangers or is likely to endanger human life, or any property of the Corporation whereupon the water-supply, drainage or sewerage or the road traffic is disrupted or is likely to be disrupted, or is likely to cause a fire hazard. In the present facts and circumstances of the case nothing has been

brought to the notice of this Court to show that the construction made so far at the premises in question poses any threat to human life and/or property. In this regard it is important to note, however, that the Special Officer has reported that no further construction, is desirable in some portion of the premises in question but if some remedial measures are taken to strengthen the stability of the columns then in that event further construction can be done over such portion. Thus, section 177(A) requires further consideration in the facts and circumstances of the present case at this stage.

16. The petitioner's learned counsel submitted that the respondent Municipal Corporation has passed the final order which has been annexed to the aforesaid affidavit-in-opposition of the municipal authority and the municipal authority's objection is confined to clause 4 of the said order. Clause 4 of the said order is quoted below:

4. The increase in floor to floor height causes increase in total height of building and with increase in area of floor immediately above the Ground floor violate the provisions of Rule 45 & Rule 51 of the HMC building rule 1991 as amended.

Hence the Borough Committee has decided to pass again order to demolish the unauthorised construction above 1st floor and any unauthorised construction made further since the passing of the Hon'ble High Court's order dated 01.08.07, and also to amend the notice and its enclosure as mentioned in the aforesaid observation within seven days from the dated of receipt of this order.

17. It appears from clause 2 of the said final order of the municipal authority that objection has also been raised by the respondent municipal authority that the area of mezzanine floor has been found to be exceeding the permissible limit under the relevant building rules. But it appears from records, as reported by the Special Officer, that such area of the mezzanine floor as per site does not exceed the area that it shown in the sanctioned plan but it exceeds the allowable area under the law. Thus it appears that the sanctioning of the plan in so far as such area of the mezzanine floor is concerned was not in accordance with law.

18. The learned counsel for the petitioner submitted that the objection raised by the respondent municipal authority with regard to the alleged violation of rule 45 and rule 51 of the Howrah Municipal Corporation Building Rules, 1991 cannot be sustained in view of the fact that rule 45 deals with the minimum height and area which are required to be maintained for rooms for human habitation and it does not prescribe the maximum limit and, in so far as rule 51 is concerned, the said learned counsel submitted that since the respondent municipal authority itself has sanctioned area shown in the plan and the petitioner has not exceeded such area, the respondent Municipal authority cannot now raise any objection against the mezzanine-floor-area.

19. This Court is of the view that such submission of the petitioner's learned counsel with regard to the alleged violation of rule 45 of the building rules is not sustainable under the law in view of the fact that the said building rules of 1991

do prescribe the permissible height of the building. The petitioner cannot be permitted to raise the height of the building according to his whims and fancies. Rule 45 only deals with the minimum height and area which are required to be maintained in respect of the rooms for human habitation and it does not give any license to the petitioner to violate any of the other provisions of the building rules concerned. It is unfortunate that the respondent municipal authority has sanctioned the area of the mezzanine floor which is not permitted under the law. The Special Officer has reported that the area of the mezzanine floor as per site does not exceed that which is shown in the sanctioned plan but it exceeds the permissible area. Thus the petitioner has maintained such area within the limits of the sanctioned plan. Considering such peculiar situation it cannot be straight away said that the mezzanine floor area is compulsorily required to be reduced by the petitioner. In the facts and circumstances of the present case and if the maintaining of such area of the mezzanine floor does not pose any threat to human life and property then in that event the respondent municipal authority will be required to withdraw its objection with regard to such area of the mezzanine floor at the site.

20. The learned counsel for the petitioner referred to a decision reported at Purusottam Lalji and Others Vs. Ratan Lal Agarwalla and Others, An emphasis was given by the petitioner's learned counsel to the following observations of the Supreme Court in paragraph 5 of the said reports:

5. ...Therefore, if in an appropriate case where it is found that there has been infraction of the rule, which cannot be relaxed or which has not been relaxed the parties show sufficient cause to the Commissioner for example that the infraction is of minor nature or has not in any way affected the sanitation or ventilation and the amenities of the building in question and other adjoining premises, then the Commissioner has the discretion not to order demolition.

21. The petitioner's learned counsel next cited a decision reported at Lalit Mohan Mitra and Others Vs. Samirendra Kumar Ghosh and Others, and referred to paragraph 7 of the said reports in support of his contention that even if the plan is sanctioned not strictly in accordance with the building rules the Commissioner can regularise the matter without ordering demolition of the building if the deviation from the building rules is not serious in nature.

22. The petitioner's learned counsel referred to another decision reported at Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, and by referring to paragraph 20 of the said reports submitted that this Court exercising jurisdiction under Article 226 of the Constitution of India has the power to pass orders and give necessary directions if this Court finds that the respondent Municipal authority has failed to exercise or has wrongly exercised the discretion conferred upon it by the statute or has exercised such discretion mala fide or on irrelevant considerations and/or by ignoring the relevant considerations.

23. The said learned counsel referred to another decision reported at *Rajatha Enterprises Vs. S.K. Sharma and Others*, and referred to paragraph 20 of the said reports in support of his submission that even if there are deviations from the sanctioned plan and/or the relevant building rules in the present case the respondent municipal authority should not be allowed to demolish any part of the According to the petitioner's learned counsel, such deviations do not pose any threat to public safety and also do not cause any inconvenience to any section of the public.

24. The next decision cited by the learned counsel for the petitioner is the one reported at 1991(2) CLJ 217 (*Ms. Land Bricks & Entertainments Ltd. & Anr. v. State of West Bengal & Ors.*) in support of his submissions that the respondent Municipal authority has the discretion of not insisting on an order of demolition of the building in question and the Municipal authority has the power to relax any rule for the purpose of exercising such discretion.

25. The learned counsel for the petitioner cited another decision reported at *In re: Bojoy Raj Jain and others*, in support of his submission that since the respondent municipal authority had sanctioned the plan concerned, the right of making construction according to sanctioned plan has accrued to the petitioner and it is not open to the respondent municipal authority to take any action against the petitioner in this regard as is now being sought to be taken by the respondent municipal authority against the petitioner. In this context it may be pertinent to note that in the facts and circumstances of the present case the petitioner himself has caused deviations from the sanctioned plan, as reported by the Special Officer, but the question is whether such deviations can be allowed to remain uncorrected.

26. The learned advocate appearing on behalf of the respondent municipal authorities submitted that the petitioner has considerably increased the height of the garage, and the height of the room on the mezzanine floor has also been increased beyond the sanctioned height. The said learned advocate submitted that even according to Special Officer's report the petitioner has caused deviations from the sanctioned plan. The said learned advocate has also referred to the deviations made by the petitioner from the sanctioned plan, as indicated at pages 7 and 8 of the said affidavit-in-opposition. The said learned advocate also submitted that if the petitioner had submitted a revised plan for sanction in respect of any intended deviations, the Commissioner of the respondent Municipal Corporation could have considered the same for sanction but such exercise is not possible at this stage when the petitioner has already caused the deviations.

27. In the present case the respondent municipal authority has not filed any affidavit-in-opposition against the writ petition and, therefore, one can argue that the doctrine of non-traversal should be applied in this case and the allegations made in the writ petition should be deemed not to have been denied by the respondent municipal authority. The doctrine of non-traversal could have been

applied fully if the Special Officer's report had not been on record. Since both the parties had agreed to the appointment of the Special Officer and were keen on having a Special Officer's (an enlisted Civil Engineer in the list of Engineers maintained by this High Court) report and the Special Officer, after necessary inspection, has already submitted his report, this Court is of the view that it will not be proper to decide the matter on the basis of doctrine of non-traversal. The Special Officer's report has not been challenged by the petitioner and the petitioner has not filed an affidavit against the said report. The affidavit filed on behalf of the respondent municipal authority has already been discussed above.

28. The Special Officer's report clearly indicates that the petitioner has made deviations from the sanctioned plan. The Special Officer has reported that the petitioner has made sub-division of the mezzanine floor which should not be allowed. The petitioner has to undo such wrong and do away with such sub-division of the mezzanine floor. There is another thing which requires mention : the petitioner has made the area of the mezzanine floor more than that which is permissible under the law but not exceeding the area shown in the sanctioned plan. The Special Officer has opined that such mistake could have been avoided at the time of sanctioning of the plan. Thus the fault has to be attributed to the respondent municipal authority. The respondent municipal authority cannot now turn around and say that the petitioner is solely responsible with regard to the area of the mezzanine floor found at site. The petitioner's learned counsel has cited Lalit Mohan Mitra's case (supra) as already indicated above. Therefore, the respondent municipal authority should not be allowed to compel the petitioner to make any changes in the area of the mezzanine floor, which does not deviate from the sanctioned plan, unless the respondent municipal authority can clearly come to the conclusion, on valid basis, that if such area of mezzanine floor is allowed to be maintained then in that event it will remain to be a threat to human life and/or property. In this regard, Bojoy Raj Jain's case (supra) may be referred to.

29. The petitioner's learned counsel has laid emphasis on his submission that in each and every case of deviation from the sanctioned plan the municipal authority is not compulsorily bound to issue order of demolition the Commissioner has the discretion of not passing an order of demolition. The said learned counsel submitted that the deviations shown in the special Officer's report are not serious in nature and such deviations can be regularised. He further laid emphasis on his submission that the deviations from the sanctioned plan in question do not pose any threat to public safety and also do not cause any inconvenience to any section of the public. As already indicated above, the said learned counsel has cited some reported cases in this regard. The Purusottam Lalji's case (supra), M/s. Rajatha Enterprises' case (supra), and Ms. Land Bricks & Entertainments Ltd.'s case (supra) may be referred to.

30. From a perusal of the provisions of law and the reported cases referred to at the Bar, this Court is of the view that the Commissioner of the respondent

Municipal Corporation is not compulsorily bound in each and every case of deviation from the sanctioned plan to pass an order of demolition. This Court is of the further view that if the respondent municipal authority concerned finds that the deviations from the sanctioned plan are not serious in nature and that such deviations do not pose any threat to human life and/or property and do not cause any threat to public safety and/or inconvenience to any section of the public, the respondent municipal authority has the discretion of not passing any order of demolition but take any other action as may be found reasonable and permissible under the law. It has to be also borne in mind that municipal laws exist for proper and orderly building activities and also for proper health and sanitation.

31. In the present case the respondent Municipal Corporation did not have the occasion to consider the Special Officer's report while passing the order of demolition dated 29.10.2007. This Court is of the view that the respondent Municipal Corporation should now consider the matter afresh on the basis of the Special Officer's report and in the light of the observations made above.

32. In view of the discussions made above, the writ petition is disposed of by setting aside the impugned notice dated 29.09.2007 u/s 177(1) of the said Act of 1980 being annexure P-18 to the writ petition and also the order of demolition dated 29.10.2007 issued by the respondent Municipal Corporation being annexure "X" to the supplementary affidavit affirmed by the petitioner on 21.11.2007 and by directing the respondent No. 5 to consider the matter afresh by taking into consideration the aforesaid Special Officer's report and in the light of the observations made above in this order. While considering the matter afresh the respondent No. 5 shall give proper opportunity of hearing to the petitioner and the said respondent No. 5 shall decide the matter afresh, as aforesaid, by passing a reasoned order within a period of six weeks from the date of communication of this order to the respondent No. 5. The order of the respondent No. 5 shall be petitioner and/or the person(s) two weeks from the date of passing of such order.

33. It appears that by an order dated 19.12.2007 an Hon''ble single Judge of this Court had directed that the parties shall maintain status quo as regards the nature and character of the construction in question until further orders. Let such order of status quo continue for a period till the end of one week from the date of communication of the order of the respondent No. 5 to the petitioner.

34. It may be recorded here that the petitioner's learned counsel submitted in course of his submissions that the petitioner has paid all the expenses of the Special Officer in terms of the bill raised by the Special Officer as per the directions contained in the order dated 19.12.2007 passed in the present writ proceedings.

35. The writ petition stands disposed of. There will, however, be no order as to costs.

Urgent Xerox certified copy of this order, if applied for, be given to the parties on compliance of usual formalities.

Writ petition disposed.