
(2009) 02 CAL CK 0026
In the Calcutta High Court
Case No : Writ Petition No. 28375 (W) of 2006

Sri Sital Chandra Bodhak	Vs	APPELLANT
Howrah Municipal Corporation and Others		RESPONDENT

Date of Decision : 24-02-2009

Acts Referred:

Howrah Municipal Corporation Act, 1980 — Section 177

Citation : (2009) 02 CAL CK 0026

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Subroto Bose, Mr. G. Chowdhury, Ms. Nabanita Pal and Mr. Sandipto Bose for the Petitioner in W.P. No. 28375 W of 2006 Mr. Ashok De and Mr. Himadri Sekhar Chakraborty for the petitioners in W.P. No. 4011 W of 2007, for the Appellant; Smritikana Mukherjee for HMC, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The petitioners in both these writ petitions are questioning a decision of the Commissioner of Howrah Municipal Corporation dated November 22, 2004 ordering demolition of the unauthorized portions of the buildings in question.

2. One Dibyendu Roy and his brother Subhendu Roy, entered into partnership and started carrying on business under the firm name M/s. Sridhar Housing and Consultant. They purchased the land in premises No.20/3, Benaras Road, Salkia, Howrah-6. Intending to erect buildings they submitted requisite plan to the Howrah Municipal Corporation seeking sanction. Sanction was given by the corporation on December 27, 2001. Thereupon they started erecting two buildings using the land. One Sital Chandra Bodhak is the owner of premises No. 20/1 in the same road. His property is adjacent to the property in premises No. 20/3. From his property Sital was running a factory. Sital complained to the corporation that Dibyendu and Subhendu were making unauthorised constructions. Then alleging inaction he moved W.P.No.9603 (W) of 2002. It was disposed of by an order dated July 16, 2002 directing the chief architect of the

corporation to look into the matter. Accordingly the assistant engineer of the building department of the corporation issued a notice No.AE/SC/83/02-03 dated July 30, 2002 under section 177 of the Howrah Municipal Corporation Act, 1980 calling upon Dibyendu to show cause why the unauthorised constructions should not be demolished. Finally the chief architect issued a demolition order dated October 3, 2002. Feeling aggrieved, Dibyendu and Subhendu moved W.P.No.17632(W) of 2002. It was allowed by an order dated July 15, 2003. The show cause notice dated July 30, 2002 and the demolition order dated October 3, 2002 were quashed. The corporation was given liberty to proceed afresh in accordance with law.

3. Feeling aggrieved, the corporation appealed to the Division Bench. By an order dated September 30, 2004 the stay application filed in the appeal was disposed of. Their Lordships were pleased to stay the operation of the order dated July 15, 2003. The corporation was restrained from demolishing the structure. Dibyendu and Subhendu were permitted to approach the corporation for two purposes: "(1) to seek regularisation of the deviations and (2) to prepare a complete plan of demolition of the unauthorised construction which is not permissible to retain." Their Lordships further observed as follows:

"The Corporation shall, before granting permission to the writ petitioners-respondents to retain the deviated portion, come to a specific finding that under by the Act or by Rules framed thereunder, it has power to do what the writ petitioners-respondents are seeking. Before any decision is taken to permit the writ petitioners-respondents to retain the deviated portion, a hearing should be given to the respondent No.2 by the appropriate authority of the Corporation. We make it clear that we have not been able to locate any power of the Corporation to permit retention of a construction not permissible by the Act or the Rules framed thereunder. But since we are not deciding the appeal, we have not concluded the matter and, accordingly, leave it to the Corporation to locate such power within the Act and the Rules framed thereunder."

In terms of the order the commissioner of the corporation heard Subhendu, who represented the firm, Sital, on whose complaint the demolition proceedings had been initiated, and others; and then gave the impugned decision dated November 22, 2004.

4. In the impugned decision the commissioner recorded that Sital had submitted that he was not directly affected in any way by the construction work, and that a civil suit was pending before the competent Court in respect to a dispute over a passage between the two properties. By a letter dated December 9, 2004 Sital informed the commissioner that these facts were incorrectly recorded by him in his decision dated November 22, 2004, because no submission was made by him that he was not directly affected in any way by the unauthorised constructions. By the representation he also called upon the commissioner to demolish the unauthorised constructions, since Dibyendu and Subhendu did not demolish them. He continued to make representations. The corporation's appeal in which

the order dated September 30, 2004 was made ultimately came up for final hearing on August 7, 2006 when it was disposed of recording that in view of the decision of the commissioner dated November 22, 2004 it lost its utility. Thereafter Sital took out W.P. No. 28375(W) of 2006 dated December 20, 2006 seeking mandamus commanding the corporation and its officials to demolish the unauthorised constructions, and to rescind the adverse observations. His writ petition was admitted by order dated February 1, 2007.

5. The nineteen petitioners in W.P.No.4011(W) of 2007 dated January 9, 2007, are also questioning the decision of the commissioner dated November 22, 2004. Their case is that during the period from 2003 to 2006 they purchased the flats in the two buildings constructed by Dibyendu and Subhendu using the land in premises No. 20/3, Benaras Road, Salkia, Howrah-6; that the commissioner gave the decision dated November 22, 2004 without hearing them; and that the commissioner did not examine the question whether, on the facts, it was a fit case for ordering regularization of the unauthorised constructions. Their writ petition was also admitted by the order dated February 1, 2007 when an interim order staying the operation of the demolition order dated November 22, 2004 was made. The interim order is still in force. The parties have exchanged their affidavits and the two writ petitions have been argued before me for final disposal.

6. Mr Basu has appeared for Sital. In support of Sital's writ petition his submissions are that since the corporation has not filed any opposition, it should be held that the commissioner wrongly recorded in his decision that Sital submitted before him that he was not personally affected by the unauthorized constructions. His further submission is that there is no valid reason why the demolition order, not yet enforced by the corporation, should not be enforced.

7. As to W. P. No. 4011(W) of 2007 his submissions are these. The petitioners therein have no right to question the decision of the commissioner dated November 22, 2004. The decision ordering demolition, in view of the provisions of section 177, could be challenged, if at all, only by Dibyendu and Subhendu who made the unauthorised constructions. Since the petitioners are not, and cannot be considered, the persons responsible for erection of the unauthorized constructions, they are not entitled to question the demolition order. In the ordinary course of things the person aggrieved by the demolition order was required to appeal to the tribunal. But since the admitted position is that the tribunal has not been set up, the person aggrieved by the decision may be entitled to approach the writ Court. But since the petitioners cannot be considered the persons aggrieved by the decision, they could not appeal against it to the tribunal, and hence they cannot question it before the writ court as well. Dealing with almost identical provisions contained in the Calcutta Municipal Corporation Act, 1951, a Division Bench of this Court gave the decision in Ram Awatar Agarwal & Ors. v. Corporation of Calcutta & Ors., 1982(1) CLJ 409. It was clearly held there that the demolition order made by the corporation concerned

could not be challenged by the 60 writ petitioners who were tenants in the premises and as such not responsible for erection of the unauthorized constructions.

8. According to Mr Basu, the petitioners in W.P.No. 4011(W) of 2007, some of them purchasing the flats even after the decision of the commissioner dated November 22, 2004, are not entitled to contend that the commissioner was under an obligation to give them an opportunity of hearing. His further submission is that since the corporation was not empowered to regularize the unauthorised constructions, the commissioner was under no obligation to consider to question whether, on the facts, it was a fit case for examining the question of regularization of the unauthorized constructions. His argument is that the expression "may" used in section 177 should be read as "shall", and hence if the corporation was of the view that the constructions in question were unauthorised, there was no scope for it to order their regularisation, they were simply to be demolished. He has said that the question whether the corporation possesses requisite power to order regularisation of any unauthorised construction should be authoritatively decided by this Court.

9. Mr De, counsel for the petitioners in W.P.No. 4011(W) of 2007, has argued that in view of the provisions of section 177, the directions given by the order of the Division Bench dated September 30, 2004, the resolution of the corporation dated May 28, 2004, the statement of the petitioners made in para 47 of the writ petition that unauthorised constructions made by Sital were also regularised, the fact that it is not Sital's case stated anywhere that he is in any manner affected by the unauthorised constructions, and the fact that no opportunity of hearing was given to the petitioners in W.P.No. 4011(W) of 2007, it must be held that the corporation not only possessed necessary power to order regularisation of the unauthorised constructions, but was also under an obligation to examine the question very closely, especially because of the nature of the deviations and the findings recorded by the commissioner that demolition of the unauthorised parts of the buildings would amount to demolition of the whole of the two buildings, the substantial parts whereof are admittedly not constructions made unauthorisedly. According to him, the petitioners being seriously affected by the impugned decision are entitled to question it by filing the writ petition, even if it is held that they were not entitled to appeal against it to the tribunal. His submission is that, on the facts, the Division Bench decision in Ram Awatar Agarwal has no manner of application to the case of the petitioners in W. P. No. 4011 (W) of 2007. To show what is a binding decision, he has cited to me the The Regional Manager and Another Vs. Pawan Kumar Dubey, .

10. Ms Mukherjee has appeared for the corporation and its officials, who have not filed any opposition. Her submission is that decisions have been taken from time to time by the corporation to regularise unauthorised constructions, but in the present case the commissioner did not consider the question of regularisation of the unauthorised constructions in question, since no proper application was

filed for the purpose by anyone before the commissioner. She, however, found little to say when her attention was drawn to what was said and observed in the Division Bench order dated September 30, 2004.

11. In the facts and circumstances of the case, and in view of the submissions made by counsel for the parties, I find that the fate of the writ petitions is dependent upon the fate of W.P. No. 4011(W) of 2007. If the petitioners in this writ petition fail, it is almost as a matter of course that appropriate relief will be granted to Sital in his writ petition. His first prayer is to command the corporation and its officials to rescind the observation of the commissioner that he submitted at the time of hearing that he was not personally affected by the unauthorized constructions in question. This relief, it seems to me, he is entitled to get. By the letter dated December 9, 2004 he informed the commissioner that the commissioner wrongly recorded the fact in his decision. The same allegation he has made in his writ petition, and the allegation has remained uncontroverted. Therefore, the situation leads to the conclusion that the commissioner made the observation incorrectly, and hence it should be rescinded. The other relief also will be available to him, if the petitioners in W. P. No. 4011(W) of 2007 fail. If the demolition order is sustained, and when the persons responsible for erection of the unauthorised constructions have declined to carry out the direction, in view of the provisions of section 177, it will be a statutory obligation of the corporation to enforce the demolition order. Therefore, what has to be seen is whether the petitioners in W.P. No. 4011(W) of 2007 are entitled to any relief.

12. The first issue that requires decision in W.P. No. 4011 (W) of 2007 is whether the nineteen petitioners therein are entitled to take out the writ petition questioning the decision of the commissioner dated November 22, 2004.

13. Admittedly they were not parties to the proceedings before the commissioner. Their case is that they purchased nineteen out of the twenty flats in the two buildings, small parts whereof were unauthorisedly constructed by Dibyendu and Subhendu. Hence it cannot be disputed that if the demolition order is enforced and consequently the two buildings are demolished, they will be seriously affected. But simply because they will be seriously affected if the demolition order is enforced, it cannot be said that they are entitled to question the demolition order. This is so because of the provisions of section 177. The provisions confer right to question the demolition order only on a person aggrieved, and in the context of the provisions a person aggrieved is he who is responsible for erection of the unauthorised constructions. In Ram Avatar Agarwal provisions identical with the ones in section 177 were considered and the position of law was clearly explained. In that case the sixty tenants in the premises in which unauthorized constructions were made filed the writ petition contending that if the demolition order was enforced they would be seriously affected. Finding that they were not the persons responsible for erection of the unauthorised constructions this Court turned down their contention that they

were entitled to question the demolition order. But here the questions are in what capacity and on what grounds the petitioners in W.P. No. 4011 (W) of 2007 are questioning the demolition order and what relief they really want.

14. Dibyendu and Subhendu are admittedly the persons responsible for making the unauthorised constructions in the premises, and they did so in the capacity of joint owners of the entire property including the land. The demolition proceedings were initiated against them by the show cause notice dated July 30, 2002. During pendency of the demolition proceedings, which they were contesting, they sold all the twenty flats constructed by them in the premises using the entire land. The petitioners in W.P. No. 4011 (W) of 2007 are the persons who purchased nineteen out of the twenty flats. Thus they became not only owners of their respective flats, but also owners of their respective proportionate shares in the entire land using which the two buildings were constructed. As a matter of fact, they have simply stepped into the shoes of Dibyendu and Subhendu, the erstwhile owners of the land and the buildings constructed thereon. Dibyendu and Subhendu contested the demolition proceedings till the final decision dated November 22, 2004 was given by the commissioner.

15. The petitioners in W.P. No. 4011 (W) of 2007 purchased the nineteen flats during the period from 2003 to 2006. May be it is their misfortune that they did not take sufficient care to ascertain whether they were purchasing legally constructed flats. But the question is whether as purchasers of the flats, not apparently responsible for making the unauthorised constructions, they have acquired any right to question the demolition order. What they are actually doing is taking forward the legal battle started by Dibyendu and Subhendu questioning the show cause notice of the corporation dated July 30, 2002. In reality, they have simply substituted themselves for Dibyendu and Subhendu who have in the meantime taken a back seat. They are parties to the present writ petitions, but have disappeared from the scene leaving the purchases of the flats to fend for themselves. They are not contesting the present writ petitions. It is evident that they are no longer interested in anything.

16. On these facts, I am of the opinion that the nineteen petitioners in W.P. No. 4011 (W) of 2007 are entitled to step in and question the demolition order dated November 22, 2004 only on those grounds on which Dibyendu and Subhendu could question it. By purchasing the flats they have not acquired any right to question the demolition order on any ground which was not available to Dibyendu and Subhendu, the two persons responsible for erection of the unauthorised constructions. Questioning the demolition order on the available grounds, in my opinion, the persons taking out W.P. No. 4011 (W) of 2007 were entitled to appeal to the tribunal, provided it was established and functioning. As a result, it must be held that they are also entitled to take out this writ petition. The decision in Ram Avatar Agarwal does not apply to this case for the simple reason that the sixty petitioners therein asserted an independent right of hearing

before the demolition order was made by the corporation. There the petitioners concerned were not taking the battle of the persons responsible for erection of the unauthorised constructions further. There the persons responsible lost the battle, and a new battle was started by the tenants in the premises by filing the writ petition. That is not the case here. Here the petitioners in W.P. No. 4011 (W) of 2007 have simply taken the place of the persons responsible for erection of the unauthorised constructions.

17. The next question that requires decision is whether the petitioners in W.P. No. 4011 (W) of 2007 are entitled to say that the decision of the commissioner dated November 22, 2004 is liable to be set aside on the ground that no opportunity of hearing was given to them.

18. I have no doubt that on this ground they are not entitled to question the decision. Dibyendu and Subhendu both were represented before the commissioner by Subhendu who was duly heard. At that time interests of the persons who purchased the flats were looked after by Dibyendu and Subhendu, the erstwhile owners of the properties. The persons purchasing the flats could be substituted in the proceedings before the commissioner. But the question did not assume significance, since perhaps only some of the today's flat owners purchased the flats by the time the commissioner gave the final decision dated November 22, 2004. The persons who purchased the flats after this date could not be substituted for Dibyendu and Subhendu, and hence the argument that they were entitled to get an opportunity of hearing before the commissioner is fallacious. I am therefore of the view that the persons taking out W.P. No. 4011 (W) of 2007 are not entitled to say that since the commissioner did not give them an opportunity of hearing, the impugned decision is bad in law.

19. The last question is whether there was any scope for the commissioner to examine the question of regularisation of the unauthorised constructions. The question whether the commissioner possessed the requisite power to order regularisation has been hotly debated before me and Mr Basu has invited me to give an authoritative decision on the question. For the reasons I am going to state presently, I do not think it will be appropriate to give a decision on the question in this case. It is necessary to note here that Mr Basu has also wanted to rely on certain authorities in support of his contention that in the face of the provisions of section 177 it cannot be said that the commissioner possessed any power to examine the question of regularization of the unauthorized constructions.

20. From the Division Bench order dated September 30, 2004 it is apparent that their Lordships permitted Dibyendu and Subhendu, the erstwhile owners of the properties in question, to approach the corporation seeking regularisation of the unauthorised constructions made by them. While according to Mr De, the expression "may" used in section 177 of the Howrah Municipal Corporation Act, 1980 means that it is not a matter of course in every case that the corporation is bound to order demolition of every kind of unauthorised constructions, according

to Mr Basu, it is a mandatory requirement to order demolition, since the expression "may", in the context of the provisions, must be read only as "shall".

21. Mr De has heavily relied on the resolution of the Mayor-in-Council of the corporation dated May 28, 2004. This document leaves no doubt that the corporation regularizes unauthorised constructions on payment of prescribed charges. According to Mr Basu, the resolution, never given retrospective effect, cannot be of any help since the unauthorized constructions in question had been made long before it was adopted by the corporation. It is manifest from the resolution that by it the corporation only rearranged the existing rates of charges payable for the various purposes including regularisation of unauthorised constructions. The previous resolution or circular or instruction or order has, however, not been produced before me. The corporation has not filed any opposition as well stating whether it possessed power to order regularisation of the unauthorised constructions. On the contrary, Ms Mukherjee, its counsel, has said that regularisation of unauthorised constructions has always been ordered by the corporation in fit cases, but in the present case the question was not examined by the commissioner, since no one appropriately approached the corporation for the purpose.

22. According to Mr Basu this could not be the position, since in terms of the Division Bench order dated September 30, 2004 the commissioner was not required to wait for an approach to consider the question. According to him, in view of the Division Bench order the commissioner was required to examine the question of ordering regularisation, and since the commissioner has ordered demolition, it should be presumed that he examined the question and exercised his discretion against ordering regularisation of the unauthorised constructions. As to the case stated in para.47 of W.P. No. 4011 (W) of 2007 he has said that it has been incorrectly alleged that unauthorized constructions made by Sital were regularised by the corporation. Once again it is to be noted that the corporation has not dealt with the correctness of the allegation.

23. On these facts, I am of the view that it will not be appropriate to decide in these cases whether the corporation possessed the requisite power to order regularisation of the unauthorised constructions in question. It is not a clear case where it can be said without any doubt that the corporation did not possess the power to order regularisation. I am unable to accept the contention that since the commissioner ordered demolition of the unauthorised constructions, it should be held that he examined the question of ordering regularisation, but decided to exercise his discretion against ordering regularisation. A discretion vested in a statutory authority cannot be exercised by implication. It must be exercised expressly and judiciously, the authority is under the obligation to examine all relevant facts and record reasons why he is inclined or not inclined to exercise it in favour of granting relief.

24. In the present case, in his decision dated November 22, 2004 the commissioner indicated the deviations which resulted in the unauthorised

constructions. The deviations are as follows:

"1) Front open space at South side is 0.9m to 1.6m against 1.2m to 1.9m as in sanction plan (violates Rule 21 of H.M.C. Building Rules.)

2) Side open space at East side is 1.2m to 1.45m against 2.4m to 2.276m as in sanction plan.

3) Rear open space at North side is 2.0M to 3.048M against 3.0M as in sanction plan (violates Rule 22 of H.M.C. Building Rules.)

4) Height of building is 14.09M against 13.49M as in sanction plan (violates Rule 35 of H.M.C. Building Rules.)

5) Joint open space of two block is 2.6M against 3.0M as in sanction plan."

After noticing the nature of the unauthorised constructions the commissioner said as follows:

"From the details of the unauthorised construction as examined from the records and after scrutinising the same, the petitioner have admittedly caused deviation from the sanction plan to the extent mentioned in the above referred paragraph of the said building plan are in contravention to the provision of sub-section (1) of section 177 of H.M.C. Act, 1980 and the H.M.C. Building Rules 1981 amended till date. The deviated construction made is admittedly unauthorised but it is very much difficulty to demolish the total deviated structure where upon inspection it was found some of the columns has been constructed maintaining structural stability and the seismic load of the entire structure of the said building upon which the slabs are casted and set forth to give the complete shape of building in a habitable construction thereof."

After considering the nature of the deviations, expressing his opinions and considering the submissions made by Sital that under no provision of law regularisation would be permissible, the commissioner lastly said as follows:

"In the instant case as it reveals from the records without touching the structural stability and the seismic load stability of the said building resting upon the Pillar, Columns, frame works from the sub soil level to the sky level can not be touched because it will effect the stability of the entire building and the slabs have to be demolished which has been casted with said pillar frame work of the different floors in the deviated unauthorised portion and the said slabs of the building is to be demolished and open to the sky level and also other components of construction which are attached to the said deviated portion of the building are also to demolish by the said petitioner. The petitioner is guilty of making the deviated unauthorised construction and as such the petitioner is directed to demolish the unauthorised portion within 15th December, 2004."

25. From what the commissioner himself noticed, recorded and said in his decision dated November 22, 2004, in my opinion, it cannot be said that there was absolutely no scope for him to consider the question of ordering

regularization, if he possessed the requisite power to order regularisation of unauthorised constructions. Even in the absence of a specific application submitted by Dibyendu and Subhendu seeking regularisation of the unauthorised parts of the two buildings, in my opinion, the commissioner was under an obligation to consider the question, especially when the Division Bench in its order dated September 30, 2004 mentioned the aspect specifically. Since the question was not examined, I think it is necessary to make an appropriate order directing him to examine the question.

26. For the foregoing reasons, I am of the view that the impugned decision of the commissioner dated November 22, 2004 should be set aside. Accordingly, I set it aside and dispose of both the writ petitions ordering as follows. The commissioner shall give a fresh decision in the demolition proceedings which were initiated by the show cause notice dated July 30, 2002. The petitioners in these two cases shall be given reasonable opportunity to present their respective cases by submitting detailed representation and making oral submissions. If the parties want to be represented by advocate, the commissioner shall permit it. All questions raised by the parties shall be specifically examined, dealt with and decided by the commissioner. The final decision shall be a reasoned one and it shall be communicated to all concerned without any delay. There shall be no order for costs.

Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.