

(2009) 10 CAL CK 0022
In the Calcutta High Court
Case No : Writ Petition No. 17013 (W) of 2007

Subhas Ranjan Ghosal

APPELLANT

Vs

The Howrah Municipal Corporation and Others

RESPONDENT

Date of Decision : 29-10-2009

Acts Referred:

Howrah Municipal Corporation Act, 1980 — Section 11, 11(2), 177, 28, 28(3)

Citation : (2009) 10 CAL CK 0022

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Amal Baran Chatterjee, for the Appellant; P.K. Dutt, S.K. Dutt and Piyali Sengupta for fifth and sixth Respondents and Smritikana Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—The petitioner in this writ petition dated August 7, 2007 is aggrieved by the decision of the Borough Committee of Borough-5 of the Howrah Municipal Corporation dated January 12, 2005(at p.40) communicated by one Abha Mukherjee, to the fifth respondent, Baby Ghosh, one of the persons responsible for erection of the unauthorised constructions. The decision written in Bengali says that after a detailed discussion in a meeting the borough committee decided (i) that the person responsible for erection of the unauthorised constructions should submit an affidavit from a first class judge that the person would not erect unauthorized constructions in future and would, at own expense, demolish the unauthorised constructions, if any, erected in future; (ii) that the decision to fine the person would be taken thereafter; and (iii) that on failure to deposit the fine within fifteen days from the date of receipt of the letter for the purpose, an order would be issued for demolition of the unauthorised constructions.

2. The petitioner lodged complaint that the fifth, sixth and seventh respondents were responsible for erection of the unauthorised constructions. Then alleging

inaction on the part of the corporation, he moved this Court by filing a writ petition that was disposed of directing the authority of the corporation to give appropriate decision dealing with the allegations. Alleging non-compliance with the order, the petitioner filed a contempt application. In the contempt proceedings the corporation filed an affidavit producing therewith the impugned decision dated January 12, 2005 permitting the fifth respondent to retain the unauthorised constructions on payment of fine and submission of an affidavit giving undertaking that she would not erect any other unauthorised construction in future. Questioning the decision the petitioner took out this writ petition. The corporation and the private respondents have entered appearance and they have filed their respective oppositions to which replies have been filed by the petitioner.

3. Mr Chatterjee, counsel for the petitioner, assails the decision saying that the borough committee had no jurisdiction to give the decision; that the unauthorised constructions could not be legalized; and that the decision is unreasoned and vitiated by total non-application of mind and extraneous considerations. Ms. Mukherjee, counsel for the corporation, submits that materials forming part of the records supplied to her would show that the petitioner cannot be considered a person aggrieved by the unauthorised constructions; that the commissioner, competent to give decision in the proceedings initiated on the basis of the petitioner's complaint, delegated his statutory power to the borough committee that has given the decision, and hence it cannot be said that the decision is vitiated by lack of jurisdiction; and that the provisions of Section 177 of the Howrah Municipal Corporation Act, 1980 empowered the commissioner to legalize the unauthorised constructions. Ms. Sengupta, counsel for the private respondents, has adopted Ms. Mukherjee's submissions, and has made submissions in justification of the decision.

4. The provisions of Section 177 of the Howrah Municipal Corporation Act, 1980 are as follows:

177. Order of demolition or stoppage of buildings and works.-(1) 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 there under, 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 of being heard in accordance with such procedure as may be prescribed.

(2) The Commissioner may make an order under Sub-section(1),

notwithstanding the fact that the assessment of such building has been made for the levy of the property tax on lands and buildings.

(3) Any person aggrieved by an order of the Commissioner made under subsection (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under this Chapter.

(4) No court shall have jurisdiction in any matter for which provision is made under this Chapter for appeal to the Municipal Building Tribunal.

(5) If a person fails to comply with a conclusive order of the Commissioner or the Tribunal, as the case may be, under this section, the Commissioner may himself cause the order to be carried out and recover the expenses thereof from such person as an arrear of tax under this Act.

(6) Notwithstanding anything contained in this Chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or any work being carried on in contravention of the provisions of this Chapter, it may, for reasons to be recorded in writing, cause such building or work to be demolished forthwith.

5. It is evident from the provisions of Section 177 that on the basis of the petitioner's complaint proceedings were to be initiated by the commissioner u/s 177 of the Howrah Municipal Corporation Act, 1980. There is no dispute that the proceedings were initiated, and that they were registered as BMR-147, Borough-5, 2003-04. The final decision in the proceedings was to be given by the commissioner, but the admitted position is that the impugned decision was not given by the commissioner, and that it was given by the borough committee concerned. In view of the fact that the decision was given by the borough committee, the question of the borough committee's authority to give the decision has arisen. Ms. Mukherjee has submitted that in view of the provisions of Section 28 the commissioner was empowered to delegate his powers conferred on him by Section 177, and that, accordingly, he delegated his power to the borough committee that was assisted by several engineers qua officers and employees of the corporation.

6. The provisions of Section 28 of the Howrah Municipal Corporation Act, 1980 are as follows:

28. Delegation of powers and functions.-(1) The Corporation may by resolution delegate, subject to such conditions as may be specified in the resolution, any of its powers or functions to the Mayor-in-Council.

(2) The Mayor-in-Council may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to the Mayor or to the Commissioner. (3) Subject to such standing orders as may be made by the Mayor-in-Council in this behalf,

(a) The Mayor may by order delegate, subject to such conditions as may be

specified in the order, any of its powers or functions to the Deputy Mayor or to the Commissioner;

(b) the Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to any other officer or any employee of the Corporation; and

(c) any officer of the Corporation other than the Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to any other officer subordinate to him.

(4) Notwithstanding anything contained in this section, the Mayor-in-Council, the Mayor, the Commissioner, or the other Officer referred to in clause(c) of Sub-section (3) shall not delegate-

(a) any of its or his powers or functions delegated to it or him under this section, or

(b) such of its or his powers or functions as may be prescribed.

7. It is true that in view of the provisions of Section 28(3)(b) the commissioner may by order delegate his powers conferred on him by Section 177. The question is whether he can delegate his such powers to a borough committee. A borough committee is constituted according to the provisions of Section 11 of the Howrah Municipal Corporation Act, 1980. Section 11 provides as follows:

11. Borough Committee.-(1) The Corporation shall, at its first meeting after the election of members thereto or as soon as may be thereafter, group the wards of the Corporation mentioned in Schedule II into five boroughs so that each borough consists of ten contiguous wards, and constitute a Borough Committee for each borough.

(2) Each Borough Committee shall consist of the Councillors elected from the wards constituting the Borough.

(3) A member of the Borough Committee representing a constituent ward shall hold office till he ceases to be the Councillor representing such ward.

(4) The members of each Borough Committee shall elect from amongst themselves one member to be its Chairman, who shall not be a member of the Mayor-in-Council or the Chairman of the Corporation.

(5) The Chairman may at any time resign his office by giving notice in writing to the Mayor and the resignation shall take effect from the date of its acceptance by the Mayor.

(6) A borough Committee shall, subject to the general supervision and control of the Mayor-in-Council, discharge, within the local limits of the borough, the functions of the Corporation relating to collection and removal of garbage house connections for water supply and sewerage, removal of accumulated water on streets and public places due to rain or any other causes, health immunization

services, improvement of bustee and such other functions as the Corporation may require it to discharge or as may be specified by regulations, and the officers and employees of the Corporation working within the local limits of the borough shall carry out the directions of the Borough Committee given in this behalf.

(7) The manner of transaction of business of the Borough Committee shall be such as may be determined by the Corporation by regulations.

8. It is evident from Section 11(2) that a borough committee consists only of the councillors elected from the ten wards constituting the borough. Here the ward concerned is Ward - 44 and the borough concerned is Borough-5. There is absolutely nothing to show that anyone other than an elected councillor can be a member of a borough committee. In the absence of a provision permitting inclusion of any person other than an elected councillor in a borough committee, the inclusion of any such person in a borough committee will just be illegal. In view of the provisions of Section 28(3)(b) the commissioner is empowered to delegate his powers conferred on him by Section 177 only to any other officer or employee of the corporation. None of the councillors included in the borough committee as a member thereof is an officer or an employee of the corporation. Hence I am unable to see how in exercise of his power u/s 28(3)(b) the commissioner could delegate his powers conferred on him by Section 177 to the borough committee that gave the impugned decision. Simply because the borough committee was assisted by several engineers who acted qua officers and employees of the corporation, the decision of the borough committee that hijacked the powers of the commissioner cannot become legal. The borough committee had no authority to give decision in the matter. The impugned decision is, therefore, liable to be set aside on the ground that it was given by a body that had no jurisdiction to give it.

9. Even otherwise, the impugned decision cannot be sustained. Mr. Chatterjee is fully justified in criticizing the decision. The matter was disposed of by a cryptic decision from which one cannot ascertain the nature of the complaint, character of the unauthorized constructions, and the provision empowering any authority to legalize the unauthorised constructions. The decision has been given by elected councillors qua members of the borough committee. In view of the nature of the decision and the blatant usurpation of the commissioner's powers by the borough committee, I am of the view that Mr. Chatterjee is justified in advancing an argument that the decision was given by a few politicians on extraneous considerations with a view to achieving political gains. In my view, the decision, grossly vitiated by non-application of mind, extraneous considerations and lack of jurisdiction, is liable to be set aside.

10. For these reasons, I allow the writ petition, set aside the impugned decision and order as follows. The commissioner is directed to give a fresh decision in the proceedings initiated on the basis of the petitioner's complaint that the private respondents are jointly and severally responsible for erection of the unauthorised

constructions at the premises in question. The parties shall be given reasonable opportunity to adduce evidence in proof of their respective cases. After giving reasonable opportunity of hearing to all concerned and considering evidence adduced by the parties, the commissioner shall give a reasoned decision. The decision shall be communicated to all concerned including the petitioner within three days from the date it is given. The commissioner shall give decision in compliance with this order within eight weeks from the date of communication of this order. There shall be no order for costs.

11. 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.