

(2006) 09 GAU CK 0050**Gauhati High Court****Case No:** None

Sujata Pathak

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision: Sept. 27, 2006**Citation:** (2007) 2 GLR 371 : (2007) 1 GLT 132**Hon'ble Judges:** B. Sudershan Reddy, C.J; Brojendra Prasad Katakey, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

B.P. Katakey, J.

The petitioner by the present writ petition has challenged the notice dated 28.7.2006 issued by the Commissioner, Guwahati Municipal Corporation asking her to show cause within 30 days as to why unauthorized construction/deviation mentioned in the said notice should not be demolished: The case of the petitioner is that she is the owner of the land, over which the said building has been constructed pursuant to the no objection certificate issued by the Corporation for construction of the ground as well as first and second floor. According to the petitioner though, third floor has been constructed without there being any approved plan and the deviation mentioned in the said notice dated 28.7.2006, both being not in violation of the building bye law of the corporation, such unauthorized construction /deviation from the approved plan ought to have been regularised. According to the petitioner necessary direction therefore to be issued to regularise such unauthorized construction and deviation, by setting aside the impugned notice dated 28.7.2006.

2. We have heard Mr. Talukdar, learned Counsel for the petitioner as well as Mr. Samaria, learned Counsel appearing on behalf of the Corporation.

3. Mr. Talukdar, learned Counsel for the petitioner has submitted that the building permission for construction of the ground, first and second floor was granted by the Corporation vide order dated 14.12.1990 and thereafter the permission for

construction of the third floor was granted to her husband and accordingly the third floor was also constructed. It has further been submitted that the said fact was brought to the notice of the corporation in the reply submitted by the petitioner to the impugned notice dated 28.7.2006, but the corporation in spite of submission of such show cause reply did not withdraw the notice. Mr. Talukdar has further submitted that even if there is no permission granted by the Corporation for the purpose of construction of the third floor, the building having been constructed over the land belonging to the petitioner, the said construction being not in violation of building bye-law and the said third floor having been assessed to tax by the Corporation, the Corporation cannot, issue notice of demolition as has been done in the instant case, as the Corporation is estopped from issuing such notice. Regarding the construction made deviating from the approved plan, the learned Counsel has submitted that such deviation being within the compoundable limit under the bye law, the Corporation is bound to compound such violation for which the petitioner is ready to pay any amount that may be necessary to be paid under the building bye laws.

4. Mr. Samaria, learned Counsel appearing on behalf of the Corporation relying on the affidavit-in-opposition, filed, has submitted that the permission for construction of the building was granted for ground as well as first and second floor and no permission for construction of third floor was ever granted, which is apparent from the approved plan annexed to the writ petition. It has further been submitted that apart from unauthorized construction of the third floor, certain other deviations were bound in respect of the building, however, some of such deviations are compoundable and some non-compoundable under the provision of the building bye laws of the Corporation. Mr. Samaria, therefore, submits that there is no illegality in issuing the impugned notice dated 28.7.2006.

5. Though the petitioner has contended that the permission for construction of the third floor of the building was granted by the Corporation, the petitioner could produce only the building permission relating to the ground, first and second, floor together with the approved plan. To ascertain as to whether any building permission for construction of the third floor was granted, the Corporation was asked to file the affidavit in that regard and consequently the Joint Commissioner of the Corporation on 8.9.2006 filed the affidavit stating that the no objection certificate for construction of the ground, first and second floor was granted and no permission was granted to the petitioner for construction of third floor. It has further been stated in the said affidavit that upon receipt of the public complaint against such construction, the stop construction notice dated 31.3.2005 was issued, against, which though a written reply was submitted, the same; was rejected and thereafter the impugned notice dated 28.7.2006 was issued, against which the petitioner has submitted, an application requesting regularization of unauthorized construction. The affidavit, apart from the said unauthorized construction of the third floor, also discloses that there are certain other deviations while constructing

the ground, first and second floor, deviating from the approved plan, some of which are compoundable and some are not.

6. The petitioner in the re-joinder affidavit filed on 16.9.2006 has not denied the assertion made by the Corporation regarding non-issuance of No Objection Certificate for construction of the third floor of the building. In view of the aforesaid position, the contention of the petitioner that the building permission was granted for construction of the third floor of the building cannot be accepted and hence rejected. Therefore, the construction of the said third floor of the building is unauthorized, which is also non-compoundable, being without permission, in view of Appendix III to the building bye law of the Corporation and as such has to be demolished.

7. The other contention of the petitioner is that since the corporation has assessed the said third floor of the building to tax and realized such tax from the petitioner, the Corporation cannot demolish the third floor, but has to regularise such unauthorized construction. The said contention cannot be accepted for the reason that for construction of a building, the no objection certificate has to be obtained from the competent authority, in this case from the Corporation and the structural plan has to be approved. In the absence of such permission and approved plan no construction can be made. Building bye laws of the corporation do not authorize the Corporation to regularise any unauthorized construction. More over assessment of a building to tax cannot legalize an unauthorized construction. Such assessment of tax cannot operate as estoppel against the Corporation from proceeding against the petitioner for demolition of any unauthorized construction as there cannot be any estoppel against the law.

8. Regarding the construction of the ground, first and second floor, deviating from the approved plan, the petitioner in the re-joinder affidavit has admitted such deviations but contended that such deviations being within the permissible limit under the building bye laws of the Corporation, those have to be regularised. The petitioner though in the writ petition originally took the stands that there are no deviations, changes her position in the re-joinder affidavit filed regarding deviations from the approved plan. The corporation in the affidavit, as discussed above, has stated that some of the deviations are compoundable and some are not, according to the building bye law.

9. Hence the Corporation is directed to pass necessary order, within 7 (seven) days from today relating to the request for compounding the deviation permissible under the bye law and thereafter proceed to take further action towards demolition of the non compoundable deviation.

10. In view of the aforesaid discussions we are of the view that no illegality has been committed by the Corporation in issuing the notice dated 28.7.2006. The Corporation is directed to proceed with such proceeding and to take necessary

action in that regard, in terms of the directions made hereinabove in this judgment. However, it is also made clear that there being no permission for construction of the third floor of the building, the Corporation shall also proceed with the demolition of the said portion of the building together with the uncompounded deviations, if the petitioner does not demolish the same within a period of 4 (four) weeks from today.

11. In view of the above, the writ petition is dismissed with the aforesaid observations and directions. No costs.