

(2013) 07 CAL CK 0010

Calcutta High Court

Case No: Writ Petition No. 10000 (W) of 2011

Kamalakshi Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: July 30, 2013

Citation: (2013) 4 CALLT 463 : (2013) 4 CHN 597

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: Udayan Roy, for the Appellant; Manjuli Chaudhuri and Mekhla Sinha for the Respondent Nos. 2, 3 and 4, for the Respondent

Judgement

Soumitra Pal, J.

As prayed for, leave granted to the petitioner to amend the cause title so far as it relates to the respondent No. 1. As prayed for, leave granted to the petitioner to add Howrah Zilla Parishad as party respondent. Let the cause title be amended. Since Mrs. Chaudhuri, learned advocate for the respondent Nos. 2, 3 and 4 accepts service of notice on behalf of the added respondent, no further copy of the petition need be served.

2. In the writ petition the petitioner has prayed for a direction upon the authorities of the Howrah Zilla Parishad to take steps against the construction raised by the private respondent Nos. 5 and 6 on the ground that it is without sanctioned plan. Yesterday when the matter was taken up, leave was granted to the petitioner to file supplementary affidavit annexing the order dated 21st February, 2012 passed by the District Engineer, Howrah Zilla Parishad, Howrah, the respondent No. 3 directing regularisation of the unauthorised construction on payment of development fees and fine.

3. Heard learned advocates for the petitioner and the Howrah Zilla Parishad. There is no dispute, as evident from the order dated 21st February, 2012, that an unauthorised construction has been raised by the private respondent Nos. 5 and 6.

However, the issue is whether it can be regularised on payment of fees and/or fine as postulated under Bye Law 15 under Chapter IV of Bye Law 2005 of the Howrah Zilla Parishad. In this regard it is appropriate to set out Bye Law 15 which is as under:--

15. If any building is being constructed without Sanction from this Parishad before this byelaw comes into force or without any permission from Panchayat level, the applicant may regularise the said case from this Parishad by submitting as made plan with development fees or fines or both, as below.

(a) For residential building @ Rs. 30/- m² (fine only)

(b) Industrial or Commercial building @ Rs. 50/- m² with a fine of Rs. 60/- m².

If deviation is made in construction as stated in byelaws (FAR, clearance etc.) after coming into force of this byelaw, a fine of Rs. 600/- m² is to be imposed on deviated portion (i.e. F.A.R., clearance) etc. If any residential building is constructed without sanction from this Parishad after implementation of this bye law, a development fee of Rs. 30/- m² with a fine of Rs. 30 m² is to be paid by the applicant.

4. On a query it is submitted by Mrs. Chaudhuri, learned advocate for the Howrah Zilla Parishad that since plot of land in the area in question was under the jurisdiction of the Panchayat as well as under the KMDA, by memo dated 28th July, 1987 issued by the authorities regulation of construction was entrusted upon the Zilla Parishad. It is to be noted that the West Bengal Town and Country (Planning and Development) Act, 1979 was enacted in the public interest to provide for the planned development of rural and urban areas in West Bengal. Chapter VII of the 1979 Act, which contains sections 44 to 56, deals with the control of development and use of land. Section 44 stipulates that no person shall use or be permitted to use any land or carry out any development in that area otherwise than in conformity with such Land Use and Development Control Plan. While section 45 of the 1979 Act postulates that no development, institution or change of use of any land shall be undertaken or carried out in that area without obtaining permission in writing, section 46 speaks with regard to permission of development. Though section 46 lays down that regulations can be made u/s 139 and be made applicable to the land on which the development is intended, however, the building Rules of Panchayat or Municipality should not be inconsistent with the regulations under the 1979 Act. u/s 52 if any person whether at his own instance or at the instance of any other person commences or carries out development or changes use of any land or buildings without permission as required under the Act he is liable to be punished and in that event the authority concerned can issue notice u/s 53 for taking stops which may be either for demolition or alteration of any building or works. Besides section 54 empowers the authority to stop unauthorised development. Section 55 empowers the authority for removal of unauthorised development. During submission it was fairly submitted on behalf of the Zilla Parishad that there is no provision

empowering the authorities in the 1979 Act, be it Panchayat or Municipality or any other authority of the State, to regularise an unauthorised construction on payment of fees. In my view, as the 1979 Act has been enacted for planned development and power has been granted to issue stop work notice if it is found that construction is carried out beyond sanctioned plan and as authorities have been empowered to impose penalty, Bye Law 15 empowering the authorities to regularise construction on payment of development fee or fine or both is ultra vires the 1979 Act as it is alien to the object of the Statute. Therefore, if a building is regularised on payment of fee or fine under Bye Law 15, as has been done by the impugned order dated 21st February, 2012 issued by the District Engineer, Howrah Zilla Parishad, it is not only a retrograde step and shall not only negate the object of the 1979 Act, but shall also encourage unscrupulous builders raising construction without any sanction and then having it regularised on payment of fee and/or fine. Keeping this proposition of law in mind I hold that Bye Law 15 directing regularisation of unauthorised construction on payment of development fee and/or fine or both cannot be made enforceable and thus, directed to be made unenforceable. Hence the order dated 21st February, 2012 directing regularisation of the building on payment of fee and fine is set aside and quashed. The writ petition is allowed. Accordingly, I direct the Principal Secretary, Department of Panchayat and Rural Development, the respondent No. 1 to direct the Pradhan of the concerned Gram Panchayat to demolish the building within eight weeks from the date of presentation of a copy of the certified copy of this order. The Howrah Zilla Parishad is directed to refund the amount paid, if any, by the respondent Nos. 5 and 6 for regularisation within four weeks from the date of communication of this order. In view of the principles of law discussed, the Howrah Zilla Parishad may in its wisdom delete Bye Law 15 under Chapter IV from the Bye Law 2005.

5. No order as to costs.

6. The Registrar General is directed to send a copy of this judgement to the Principal Secretary, Department of Panchayat and Rural Development, West Bengal, the District Magistrate, Howrah, the Howrah Zilla Parishad, the Sabhadipati, Howrah Zilla Parishad, Howrah, the District Engineer, Howrah Zilla Parishad, Howrah and the Assistant Engineer, Howrah Zilla Parishad, Howrah within a fortnight from the date of sending down the records. Urgent photostat certified copy of this order, if applied for, be furnished on priority basis.