

(2006) 11 CAL CK 0051**Calcutta High Court****Case No:** Writ Petition No. 7838 (W) of 2006

Victor Auto Agency and Others

APPELLANT

Vs

Rajpur Sonarpur Municipality
and Others

RESPONDENT

Date of Decision: Nov. 23, 2006

Acts Referred:

- West Bengal Land Reforms Act, 1955 - Section 4C, 4D
- West Bengal Municipal Act, 1993 - Section 203
- West Bengal Town And Country (planning And Development) Act, 1979 - Section 46

Citation: (2007) 2 CALLT 136**Hon'ble Judges:** Jyotirmay Bhattacharya, J**Bench:** Single Bench**Advocate:** Ajit Kumar Panja, Mr. Yasin Ali, Mr. Arindam Ghosh, for the Appellant; Jayanta Mitra, Samar Kumar Dutta, Mir Anuruzzaman for Municipality and Mr. Goutam Wilson for State, for the Respondent**Judgement**

J. Bhattacharya, J.

Refusal to grant sanction to the building plan submitted by the petitioners for construction of a multi-storied building (G+4) at holding No. 215, N.S. Road, Ward No. 16, by the Municipal authority of Rajpur-Sonarpur Municipality vide annexure "P-15" to this writ petition at page 83, is under challenge in this writ petition.

2. The said holding No. 215, N.S. Road consists of various plots of land, viz., Dag Nos. 179, 180, 181 and 186. The petitioners applied for the sanction of building plan for construction of a multi-storied building on the entire holding comprising of 16 cottah 20 chittak 4 sq.ft. of land.

3. Such prayer of the petitioners was not allowed by the Municipal authority on the following grounds:

(1) That the petitioners have not taken any permission for development as well as for change of use of the said land in question u/s 46 of the West Bengal Town and Country (Planning and Development) Act, 1979.

(2) All the owners of the said land have not signed in the said application.

(3) The petitioners have not submitted the approved site plan.

(4) The petitioners have not submitted all the papers and documents duly attested.

(5) The petitioners have not submitted the No Objection Certificate from the competent authority as defined in clause (d) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976.

(6) It appears from the soil test report that more or less 7 cottah of land in the said plot situated adjacent to N.S. Road has been filled up by the borrowed soil followed by muck of around 1.0m. thickness upto 3.7m. depth around BH-1 and BH-2 as shown in the said soil test report.

(7) It has been learnt that there was a pond adjacent to N.S. Road measuring about more or less 8 cottah which has been filled up by the agents/associates 3-4 years ago i.e. in the year 2001.

4. While rejecting the petitioners" prayer for grant of sanction to their said building plan, the Municipal authority by its letter dated 23rd July, 2005 being annexure "P-15" to this writ petition at page 83 directed the petitioners to restore the said pond immediately within 30 days from the date of receipt of the notice. It was also indicated therein that if the petitioners failed to comply with the said direction within the stipulated period, the Municipal authority will take appropriate steps in accordance with law without further reference to the petitioners.

5. The petitioners were, however, requested to modify their building plan in the light of the observations made by the Municipal authority, in its said letter and to submit the same by complying with all the formalities as indicated in the said letter at the earliest, so that the Municipal authority can reconsider the petitioners" prayer for such sanction afresh.

6. Mr. Panja, learned senior counsel, appearing on behalf of the petitioners, submitted that the refusal to grant sanction to the building plan submitted by the petitioners for construction of the multi-storied building at the said premises suffers from total non-application of mind by the Municipal authority.

7. Mr. Panja contended that most of the formalities which the petitioners were called upon to comply with, do not require further compliance as the petitioners had already complied with the requisite formalities at the time of submission of such plan. Mr. Panja further submitted that some of the formalities which the petitioners were called upon to comply with, are absolutely irrelevant for the purpose of processing the petitioners" plan for sanction.

8. By referring to various Annexures to this writ petition. Mr. Panja pointed out that the requisite formalities were all complied with by the petitioners. By referring to Annexures "P-8" and "P-9" to this writ petition at pages 71 and 72 respectively, Mr. Panja pointed out that permission u/s 46 of the West Bengal Town and Country (Planning and Development) Act, 1979 has already been granted by the Municipal authority for development of the said land. As such, compliance of the said formality as indicated in the first ground of objection is redundant.

9. With regard to the second ground of objection, Mr. Panja submitted that the petitioner No. 1 is a partnership firm. According to Mr. Panja, anyone of the partners of a partnership firm is competent to submit an application seeking sanction of the building plan from the Municipal authority. Mr. Panja further submitted that the application for sanction is not required to be signed by all the partners of the partnership firm.

10. Mr. Panja, however, ultimately submitted that such a defect is a curable defect and as such if the Municipal authority insists upon signing of the said application form by all the partners, the remaining partners may sign the said application form for curing the said defect. As such, Mr. Panja submitted that the grant of sanction ought not to have been refused on account of such defect.

11. With regard to the third ground of objection as indicated in the said communication, Mr. Panja pointed out from annexure "P-9" to this writ petition at page 73 that his clients submitted an approved site plan before the Municipal authority. The Municipal authority while pointing the said defect, overlooked the said approved site plan submitted by the petitioners along with its application for sanction.

12. With regard to the fourth ground of objection, Mr. Panja referred to various Annexures to this writ petition to show that the petitioners submitted the attested copies of the requisite documents.

13. With regard to the fifth ground of objection, Mr. Panja submitted that since submission of No Objection Certificate from the competent authority as defined in clause (d) of section 2 of the Urban Land (Ceiling and Regulation), Act, 1976 is not a condition for grant of sanction to a building plan under the West Bengal Municipal Act, 1993, the Municipal authority cannot insist upon production of such a document as a pre condition for grant of such sanction to the building plan submitted by the petitioners.

14. With regard to the sixth ground of objection, Mr. Panja submitted that the soil test report which was submitted by the petitioners, does not indicate that construction in the said holding is unsafe and/or insecure and/or is not feasible. By referring to the said soil test report, Mr. Panja submitted that the conclusion of the experts which was arrived at by the engineer shows that construction in the said holding is feasible. The details of the measures which are required to be taken for

construction of building on the said land, have also been indicated in the said report.

15. Mr. Panja further contended that the building plan which was submitted by the petitioners was drawn strictly in conformity with the suggestion given by the engineer in the soil test report. As such, resubmission of the said plan, as suggested by the Municipal authority in the said order of rejection, is not at all required.

16. With regard to the seventh ground of objection, Mr. Panja submitted by referring to various documents such as the record of rights, the mutation certificates, the information granted by the Land Reforms department that there was no existence of any pond in either of the plots comprising in the said holding.

17. Mr. Panja pointed out from those documents that the plots in question were recorded as bastu, danga or bagan in the finally published R.S. Record of Rights published in 1955. Mr. Panja further pointed out from the mutation certificates as well as the site plain that even the Municipal authority certified that those plots of land were either bastu, bagan or danga.

18. Mr. Panja further submitted that no material has been placed before this Court by the Municipal authority to show the existence of any pond on any of the said plots of land comprising in the said holding. By referring to sections 4C and 4D of the West Bengal Land Reforms Act, Mr. Panja submitted that even no proceeding has been initiated by the competent authority for such alleged unauthorised conversion of user of the land in question till date. As such, it cannot be said that the petitioners have converted the pond into solid land by filling it up.

19. Mr. Panja also submitted that when the Chairman himself asserted that he personally knew that there was a pond, he being a witness, ought not to have considered and/or rejected the petitioners" application for grant of sanction, as it is settled principle of law that a witness cannot be judge for a cause, as it is opposed to the principles of natural justice. In support of such submission, Mr. Panja relied upon a decision in the case of Ashutosh Das Vs. State of West Bengal and Another .

20. Under such circumstances, Mr. Panja submitted that the impugned order cannot be sustained.

21. Mr. Mitra, learned senior counsel appearing on behalf of the Municipal Authority, in his usual fairness submitted that he will restrict his submission to justify the ground Nos. 6 and 7 which were mentioned in the letter dated 23rd July 2005 issued by the Chairman, Rajpur-Sonarpur Municipality being annexure P-15 to this writ petition. Mr. Mitra, thus, submitted very fairly that the petitioner's prayer for grant of sanction to the said building plan, cannot be rejected on any of the grounds as mentioned in the ground Nos. 1 to 5 in the order impugned as those are mostly curable defects which the petitioner can be called upon to cure.

22. By referring to the Soil Test Report, Mr. Mitra pointed out the description of Stratification of the soil in different levels upto 20.60 meters to support the ground Nos. 6 and 7 of the impugned order. Mr. Mitra submitted that the soil test report itself is an evidence to show the existence of a pond and the filling up the same by borrowed soil followed by muck of around 1.0 m thickness upto 3.70m depth around BH-1 and BH-2 as shown in the said Soil Test Report. Mr. Mitra, thus, submitted that when the petitioner in its own document, viz. Soil Test Report has shown the existence of the pond, the petitioner cannot be permitted to construct on the said portion of the land.

23. Mr. Mitra further submitted that filling up of a pond by the petitioner is also offence under the West Bengal Inland Fisheries Act, 1984. As such, the Municipal Authority was justified in directing the petitioner to restore the tank into its original position.

24. Mr. Mitra further contended that apart from ground Nos. 6 and 7, the building plan which was submitted by the petitioner was not drawn in accordance with the provisions as contained in Rule 47 of the West Bengal Municipal Building Rules, 1996 which provides that the maximum permissible ground coverage in respect of the said plan should not be more than 40% of the total land area. Mr. Mitra further pointed out that since the petitioner applied for sanction for raising construction covering ground area of 93.296 sq. meters, which is more than 40% of the total land area, sanction as prayed cannot be granted.

25. Mr. Mitra, thus, fairly submitted that in the event, the petitioner submits a fresh building plan in accordance with Rule 47 of the West Bengal Municipal Building Rules, 1996, for constructing the proposed multi-storied building in the said premises excluding the portion of the tank filled up land, then the Municipal Authority will consider the said plan again and will take the ultimate decision thereon in accordance with law.

26. In reply to Mr. Mitra, Mr. Panja, learned senior counsel for the petitioner submitted that violation of Rule 47 of the West Bengal Municipal Building Rules, 1996 was not complained of by the Municipal Authority in the order impugned. As such, the Municipal Authority cannot add any ground in its affidavit, which was absent in the order impugned. Mr. Panja, however, submitted that the plan which was submitted by the petitioner was drawn strictly in terms of the Rule 47 of the said Building Rules. As such, re-submission of the plan by the petitioner as suggested by Mr. Mitra is an absurd proposition.

27. Heard the learned Advocates of the respective parties. Considered the materials on record.

28. Let me now consider the submission of the learned counsel of the respective parties one after another.

29. The grounds on which the sanction was refused have already been noted above.

30. Let me now consider the said grounds one after another.

31. Ground number 1 - The permission for development as well as for charge of user of the land in question which was issued by the Municipal Authority u/s 46 of the West Bengal Town and Country (Planning & Development) Act, 1979 has been disclosed by the petitioner in this writ petition. On perusal of the said document being annexure P-7 to this writ petition at page 70, this Court has no hesitation to hold that the Municipal Authority acted illegally by refusing to grant sanction to the petitioner's plan on total non-application of mind. In fact, the Municipal Authority itself granted the said permission in favour of the petitioner after realising a sum of Rs. 20,500/- from the petitioner towards the fees for grant of such permission.

32. With regard to second ground of objection, this Court, after looking into the plan, which was submitted by the petitioner before the Municipal Authority, found that the said application for sanction was signed by one of the partners of the petitioner's firm. However, when an objection was raised by the Municipal Authority in this regard, the other partners of the petitioner firm, by their letter dated 7th December, 2005 being annexure P-16 to this writ petition, intimated the Chairman of the said Municipality that the said building plan was submitted by one of the partners with the consent and approval of all the partners.

33. Be that as it may, any one of the partners of a partnership firm is authorised to act on behalf of other partners unless exercise of any particular act by any of the partners, is restricted in the partnership deed itself. There is nothing on record to show that the partner who signed the application form was not authorised and/or incompetent to sign the said application and/or to submit the same before the Municipal Authority.

34. In such view of the matter, this Court holds that the said ground of objection is meritless, particularly in view of the letter written by all the partners being annexure P-16 to this writ petition as aforesaid.

35. The objection, which was raised by the Municipal Authority in ground No. 3, is absolutely contrary to record as the approved site plan, was submitted by the petitioner before the Municipal Authority. A Xerox copy of the approved site plan, which was submitted by the petitioner, has also been annexed to this writ petition as annexure P-9 at page 73. As such, this Court does not find any substance in the said ground of objection.

36. With regard to the ground No. 4, this Court holds that the said ground is absolutely vague and indefinite. The Municipal Authority has not specified any particular document, which the petitioner submitted without proper attestation. In any case, it is made clear that in the event any further attested document is required by the Municipal Authority, the Municipal Authority will specify those documents

which are required by them for grant of such sanction so that the petitioner can supply those documents to the Municipal Authority with due attestation.

37. Production of no objection certificate as pointed out in ground No. 5 of the said ground of objection is, in my view, not at all necessary, as the petitioner did not purchase vacant land from its vendor. The site plan as well as the Municipal Assessment record being annexure P-9 and P-6 respectively show that the land which the petitioner purchased consisted of building and/or various constructions of different nature and as such, production of no objection certificate, in my view, is not required for grant of approval to the said plan u/s 203 of the West Bengal Municipal Act.

38. With regard to ground No. 6, this Court finds that both the petitioner as well as the Municipal Authority referred to and relied upon the Soil Test Report to support their respective contentions as recorded hereinabove. It is no doubt true that the Soil Test Report is a vital document, which requires careful consideration as the feasibility of construction can be ascertained from such report. In this regard the summary and conclusion which were reported by the Geotechnical Engineers Consortium is set out hereunder:

1. Field and laboratory tests reveal that the subsurface stratification is of poor quality i.e. filled up borrowed soil followed by muck of around 1.0m thickness upto 3.70m depth around BH-1 and BH-2. Below that virgin soil exist. In remaining area, topsoil is good to place shallow foundation. For this area, allowable bearing capacities are given in Bearing Capacity Table-1. So, foundation depth, type and sizes are to be chosen carefully.

2. For design of foundations, always take Allowable Bearing Capacities from table for permissible settlement potential of 75mm. If one desire to restrain settlement potential lesser than 75mm, linear interpolation of settlement potential corresponding to safe bearing capacity is admissible.

3. As alternative of shallow foundations, RCC piles may be adopted. Pile capacities for different length and diameters are given in Table 2 & 3. Alternative of pile is application of ground improvement technique.

39. On careful consideration of the said document, this Court holds that the construction on the portion of the land, which according to the Municipal Authority, is tank filled up land, is feasible. However, certain measures are required to be taken for construction on the said portion of the land. If the experts opine in favour of the petitioner's contention regarding feasibility of such construction, this Court cannot discard the said conclusion of the expert particularly when nothing has been produced by the Municipal Authority to challenge the veracity of the said exports report.

40. In such view of the matter, this Court holds that the petitioner's prayer for grant of sanction cannot be refused on the ground as mentioned in ground No. 6 in the impugned order.

41. On perusal of the ground No. 7, this Court simply ignores the said ground, as hearsay evidence is no evidence in the eye of law. The petitioner has submitted the C.S. Record of Rights, and R.S. Record of Rights. Mutation Certificate, Assessment Register of the concerned holding have also been produced by the petitioner along with this writ petition. All these voluminous documents show that the character of the land in question was bastu, danga or bagan. The record of rights may not be a document of title but entries in the record of rights are no doubt evidence regarding the possession and character of the land in question. Of course such evidence is rebuttable but no better document has come forward from the side of the Municipal Authority to controvert the presumption attached to the entries in the record of rights relating to the nature of the land in question.

42. As such, this Court is unable to hold that there was a pond adjacent to N.S. Road covering about more than 8 cottahs which was filled up by the petitioner 3-4 years ago i.e. in the year 2001 as referred to in the said objection.

43. Furthermore, the Chairman who imported his personal knowledge regarding the existence of the pond in question as an witness ought not to have played the role of a judge to consider the legality of the building plan submitted by the petitioner.

44. Mr. Panja rightly pointed out that a witness cannot be a Judge as it is opposed to the principles of natural justice.

45. The decision, which was cited by Mr. Panja in the case of *Ashutosh Das v. State of West Bengal & Anr.* (supra), in my view, squarely supports such contention of Mr. Panja. The relevant paragraph of the said decision is set out hereunder:

The question as to whether the enquiring officer can rely on his own evidence is a matter which I have considered in several cases, viz. "Bejoy Chandra v. State of West Bengal", 58 Cal WN 988(A); "Shiva Nandan Sinha v. State of West Bengal," 59 Cal WN 794 (B); and [Amiya Prosad Das Gupta Vs. Director of Procurement and Supply and Another](#). In some of these cases, the enquiring officer had actually given evidence but in others he had relied on his own testimony.

I have held that this is contrary to the Rules of natural justice, because a man who is entrusted with the enquiry cannot both be a judge and a witness. It is, therefore, unnecessary to reiterate the principles laid down in the above cases viz. that while there was no objection to an official having personal knowledge of the matter being entrusted with the enquiry, he cannot be permitted to import his personal knowledge and treat it as evidence in deciding the matter.

46. In the aforesaid circumstances, this Court also does not find any substance in the said ground of objection.

47. With regard to the alleged violation of the provision of Rule 47 of the West Bengal Municipal Building Rules, 1996, as pointed out by Mr. Mitra, this Court finds that the said ground of objection was not referred to and/or taken by the Municipal Authority in the order impugned. It is no doubt true that an objection, which was not taken in the ground of objection, cannot be taken by the respondents as an additional ground to support its decision, but still then, when such an objection has been raised by the Municipal Authority, this Court cannot ignore the said ground altogether as sanction cannot be granted to any plan which has not been drawn in accordance with the Building Rules.

48. As such, this Court directs the petitioner to justify its stand to the effect that the building plan was submitted in accordance with Rule 47 of the Building Rules before the Municipal Authority. In the event the petitioner succeeds in establishing that the plan was drawn in conformity with the Rule 47 of the said Rules, the Municipal Authority will accord sanction to the building plan and will communicate its decision to the petitioner within two weeks from the date of communication of this order.

49. In the event, however, it is found that the building plan was not submitted in conformity with the Rule 47 of the said Rules, then the petitioner will re-submit the building plan in conformity with the said rule, before the Municipal Authority and the said authority is also directed to consider the legality of such plan afresh and to take the ultimate decision regarding grant of such sanction thereto positively within a period of four weeks from the date of submission of the said building plan to the Municipal Authority.

The Municipal Authority is also directed to intimate its decision to the petitioner within a week from the date of taking such decision.

The writ petition is, thus, disposed of.

There will be, however, no order as to costs.

Urgent Xerox certified copy of this Judgment, if applied for, be given to the parties, as expeditiously as possible.

Writ petition disposed of.