

(1992) 12 CAL CK 0018
Calcutta High Court
Case No: CO. No. 10579 (W) of 1992

MS. Hotel Sea Gull and
Others

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision: Dec. 22, 1992

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 144
- Land Acquisition Act, 1894 - Section 3(a)
- West Bengal Town And Country (planning And Development) Act, 1979 - Section 1, 137, 2(12), 2(7), 3(a)

Citation: 97 CWN 690

Hon'ble Judges: Susanta Chatterjee, J

Bench: Single Bench

Advocate: Sakti Nath Mukherjee, Asoke Banerjee and Asim Mukhopadhyay, for the Appellant; Asok Maiti, Pinaki Ranjan Mitra and Parimal Pahari, Bhabes Chandra Biswas for the State, for the Respondent

Final Decision: Allowed

Judgement

Susanta Chatterjee, J.

Pursuant to the order of the Hon'ble Supreme Court, the matter has been listed and as suggested and agreed by both sides and as per directions of the Division Bench of this Court the matter is taken up for final hearing. It appears from the materials on record that the writ petitioners viz., the partners of the business under the name and style M/s. Hotel Sea Gull at Digha in the district of Midnapore have come to this Court seeking the reliefs viz., (a) for issuance of a writ of mandamus commanding the respondents concerned to act in accordance with law and to rescind, recall and/or withdraw the notice (Annexure "B" to the writ petition) and to withdraw the police picket and permit the petitioners to raise construction as per the sanctioned plan, (b) issuance of a writ in the nature of certiorari directing the respondents to

produce the records of the case so that on perusal of such records the notice u/s 54 of the Act (Annexure "B") and illegal order of stopping of construction may be set aside, quashed and/or conscionable justice may be done between the parties, (c) for issuance of a Rule Nisi in terms of prayers (a) and (b), (d) for issuance of any other appropriate writ, order and/or direction; (e) praying for making the Rule absolute after hearing the causes shown, if any, (f) for passing such other or further order or orders as the Court may seek fit and proper and (g) praying for a grant of an interim order restraining the respondents from making any disturbance in the construction work of the petitioner and also directing the respondents to withdraw the police pickets immediately and not to give any effect or further effect of the notice (Annexure "B") till the disposal of the application and/or Rule.

2. It is stated in details that in terms of the sanctioned building plan granted by the appropriate authority the petitioners started to develop the existing building by raising further floors above the existing construction with two floors. The respondent No. 2, Executive Officer, Digha Planning Authority, Midnapore issued a notice u/s 54 of the Town and Country Planning Act by Memo No. 238/XXX-24/DPA/92 dated 27.7.92 directing the petitioners to discontinue further construction of the building in the lands situated on plot No. 240(1) in Mouza Gobindabasan and further informed the petitioners that if the construction is not suspended forthwith the respondents will be compelled to remove the workmen from the site and/or arrange for removal of the unauthorised construction as per the provisions of the Act. Immediately after the issuance of the said notice, the petitioners were served another notice in connection with Misc. Case No. 151 of 1992 from the Court of the Sub-divisional Executive Magistrate, Contai, wherefrom it would appear that the respondent No. 2 reported that the petitioners are about to commit breach of the peace in connection with the starting of the illegal construction of the hotel building without prior permission of the Digha Planning Authority and the petitioners were asked to appear before the said Magistrate and to show cause on 25th August, 1992, as to why the proceedings u/s 144 of the Code of Criminal Procedure should not be drawn up. It is placed on record that the Town and Country Planning Act has not been given any retrospective effect and the acts and/or cause to have been done by the respondents are not lawful and there (sic) in Section 54 of the said Act which would authorise the respondent No. 2 to stop construction of the building which is being carried on as per the plan sanctioned by the Panchayat which is the competent authority. It is stated further that the petitioners have completed up to the roof level and they have spent huge amount of money to secure the building materials and they would be wasted unless the petitioners are directed to complete the construction in terms of the sanctioned plan. Upon all those facts, as stated, the petitioners have sought for the reliefs, as indicated above, on the grounds that the Town and Country Planning Act does not permit the respondents to challenge the acts of the petitioners to raise construction strictly in terms of the sanctioned plan.

3. The said writ petition is opposed by the respondent No. 2 by filing a comprehensive affidavit-in-opposition and also by filing a supplementary affidavit.

4. It is disclosed, inter alia, that by a notification dated 28th November, 1990 under sub-section (3) of Section 1 of the West Bengal Town and Country (Planning and Development) Act, 1979, the Governor has been pleased to appoint 28th November 1990 as the date of which the aforesaid Act came into force in Gobindabasan which is included within the area of Digha Planning Authority. It is contended further that sub-clause (c) of sub-section (1) of Section 52 provides that any person who at his own instance or at the instance of any other person commences, undertakes or carries out development or changes, use of any land or building must obtain permission of the Development Authority. Clause (b) of sub-section (2) of Section 137 of the Act Provides that when permission for such development has not been obtained under this Act such development shall not be deemed to have been lawfully undertaken or carried out by reason only of the fact that permission approval or sanction required under such other law for such development has been obtained.

5. It is also contended that the building plan purported to have been approved by the Gram Panchayat is of no avail to the writ petitioners and the disputed storey under construction cannot be completed without taking proper permission and without compliance with the provisions of clause (c) read with sub-section (1) of Section 52 as is necessary to obtain fresh permission from the Digha Planning Authority in view of the aforesaid provisions of clause (b) of sub-section (2) of Section 137.

6. A supplementary affidavit has been filed by the said respondent No. 2 and it is submitted that from the provisions of Sections 51, 55 and 56 of the Town and Country Planning Act it is clear that the provisions of the Act will come into operation and the Authorities under the Act can direct when the development is prepared or under preparation to be prepared and to any other material consideration. The planning Authority is legally competent to issue notices u/s 54 for discontinuance of the unauthorised construction of the second floor followed by notices of demolition of the second floor u/s 53 of the said Act. In the supplementary affidavit it is further disclosed that the notification issued under the Environment protection Act has been referred to but could not be annexed for shortage of time and the said notifications dated 15th December, 1990 and 19th February, 1991. annexed collectively, confer further rights upon the respondent No. 2 to take such action against the petitioners since the petitioners have not obtained any permission as envisaged u/s 45(a) and Section 46 of the Act failing which the petitioners will come under the mischief of Section 52(1)(a)(b)(c).

7. Mr. Saktinath Mookherji appearing with Mr. Asoke Kumar Banerjee, learned Advocates for the writ petitioners, has strongly contended that the petitioners having obtained a duly sanctioned building plan are taking effective steps to raise

construction above the existing first floor of the building. A substantial portion has been completed. At this stage, the respondents have issued the impugned notices and have taken steps, as indicated above, which are not just and (sic) and the petitioners have been compelled to invoke the writ jurisdiction of this Court, seeking the reliefs, as indicated above.

8. Mr. Mookerji has developed his submission in two-fold ways. He has first argued that the provisions of the West Bengal Town and Country (Planning and Development) Act are not attracted in the facts of the present case and the steps taken by the respondents are contrary to and inconsistent with the provisions of law. Secondly, he has submitted that the respondents cannot take any step under the Environment Pollution/Protection Act as the impugned notification, as referred to by the respondent No. 2, has not been given effect thereof and such notification is wholly unwarranted and uncalled for, so far as the facts of the present case are concerned. In developing his argument he has drawn the attention of the Court to definition to Section 2(7) of the West Bengal Town and Country (Planning and Development) Act, 1979. Section 2(7) refers to "development" with its grammatical variations means the carrying out of building, engineering, mining or other operations, in, on, over, or under land or the making of any material change in any building or land or in the use of any building or land and includes division of any land. According to him there is specific compartmentalisation as to the development. There is reference of the development of the land, there is also reference on the change of the building and there is reference of the use of any building wants to develop the existing building it does not relate to development of the land, rather it relates to development of the building by making any material change of the existing building, as referred thereto. He has further developed his submission that Section 46 of the said Act which indicates, inter alia, for permission of development, refers that any person or body (excluding a department of the Central or the State Government or any local authority) intending to carry out any development on any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form and containing such particulars and accompanied by such documents and plans as may be prescribed. In Section 46, there is also specific reference of development of land. It does not refer to development of the existing building. According to the submissions of Mr. Mookerji, it may be appreciated by this Court that the scope of Town and Country (Planning and Development) Act is for the overall planning of the existing lands of the total periphery, and with regard to the restriction, regulation and development of the existing building, there must be other appropriate authorities. Accordingly, the petitioners have obtained the duly sanctioned building plan and the same cannot be regulated and/or restricted by seeking the provisions of the West Bengal Town and Country (Planning and Development) Act in the manner as sought to be done by the respondent authority in the instant case. Mr. Mookerji has submitted further that Section 52 of the Act refers to penalty for

unauthorised development or for use otherwise than in conformity with the development plan. It is provided that any person who, whether at his own instance or at the instance of any other person, commences, undertakes or carries out development, or changes use of any land or building.

(a) in contravention of any development plan;

(b) without obtain in a certificate regarding development charge under clause (a) of Sec. 45.

(c) without permission as required under this Act;

(d) in contravention of any condition subject to which such permission has been granted;

(e) after the permission for development has been revoked u/s 51; or

(f) in contravention of the permission which has been modified u/s :

shall be punishable with simple imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees or with both and in the case of a continuing offence with a further fine which may extend to five hundred rupees for every day during which the offence continues.

9. Section 53 refers to notice regarding unauthorised development or use otherwise than in conformity with the development plan and Section 137 as already been referred to, which is consequent thereof.

10. Mr. Mookerji has tried to highlight that the petitioners who wanted to develop the existing building and who have obtained a properly sanctioned building plan by the competent authority have no other obligation to seek the permission u/s 46 of the West Bengal Town and Country (Planning and Development) Act.

11. With regard to the Environment Pollution/Protection Act, Mr. Mookerji has referred to the supplementary affidavit filed by the respondent No. 2 at page 7 of the supplementary affidavit. There is reference to notification dated 15th December, 1990 issued by the Central government at page 12 of the selfsame supplementary affidavit and there is a communication by the Ministry of Environment and forests, Government of India to all the State Governments to prepare their own guidelines and send them for approval. The second notification dated 19th February, 1991 is co-related and since nothing has been disclosed as to the formulation of the guidelines of the State Government the respondents are not free to refer to Environment Pollution/Protection Act and to restrain the petitioners from raising further construction as sought to be done in the present case.

12. Mr. Asoke Kumar Maity, learned Advocate for the respondent No. 2, has very strongly argued and submitted, inter alia, that the steps taken by the respondent No. 2 are well justified. He has submitted that definition Section 2(12) of the West

Bengal Town and Country (Planning and Development) Act will have the same meaning as in the Land Acquisition Act, 1894 and shall include land covered by water. He has drawn the attention of the Court to the definition of the land in the Land Acquisition Act, 1894. Section 3(a) expresses that the land includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. True it is, whenever this refers to any land in the West Bengal Town and Country (Planning and Development) Act, the land should be construed within the definition of Section 3(a) of the Land Acquisition Act. He has submitted that when the land includes anything attached thereby, the petitioners cannot avoid the concept of Section 46 of the West Bengal Town and Country (Planning and Development) Act. Section 46 is an enabling provision and unless the petitioners comply with thereof consequences will follow and in the present case, admittedly, the petitioners have not obtained any permission u/s 46 of the Act, and the acts caused to have been done by the respondent No. 2 cannot be deemed to be irregular and illegal and the writ petition is thus thoroughly misconceived. He has tried to argue that the Environment Pollution/Protection Act may be attracted in this case in view of the guidelines framed by the Central Act. Since the same was forwarded to the Development Authority by the State Government, the respondent No. 2, Executive Officer, Digha Planning Authority, proceeded thereby. The respondent No. 2 has no information as to whether the State has formulated the guidelines or not and whether the same guidelines were approved by the State Government.

13. The learned Advocate for the State Government pleads his helplessness as he has no instructions. Previously there was appearance and the State Government has not filed any affidavit, nor the learned Advocate for the State is endeavouring to enlighten this court as to whether any guidelines have been prepared by the State Government pursuant to the notification of the Central Government dated 15th December, 1990 and as to whether there is any approval by the State Government in the manner as indicated in the communication dated 24th April, 1991, as will appear from page 12 of the supplementary affidavit filed by the Respondent No. 2.

14. With great anxiety, this Court has heard the learned Advocates for the respective parties at Length and upon perusal of the materials on record, it appears that, admittedly, under the West Bengal Town and Country (Planning and Development) Act, 1979, development plan has not been prepared by the Digha Planning Development Authority.

15. The attention of the Court has been drawn to Sec. 56 of the Act which provides interim provision pending preparation of development plan. It is indicated that where the Planning Authority or the Development Authority, in the exercise of its functions and powers with respect to any area under it, is required to have regard to the provisions of development plan before such development plan has become operative, the concerned authority shall have regard to the provisions which, in its

opinion, will required to be included for securing the proper planning of the concerned area.

16. True it is, this has to be carried out strictly in terms of the statute. No word can be added, nor any Act can be subtracted, nor can there be any inference.

17. Section 46 of the aforesaid Act clearly lays down the scope for permission for development. It clearly lays down that any person or body intending to carry out any development on any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form and containing such particulars and accompanied by such documents and plans as may be prescribed.

18. The statutory expression is very clear and unambiguous as to development on any land. In the whole Act. if the land is only referred and the definition of land" is looked into Sec. 2 (12) of the West Bengal Town and Country (Planning and Development) Act, 1979 read with Sec. 3(a) of the Land Acquisition Act, the same will be of equal force. Anything embedded on land should be included, but unfortunately, in the provisions of the West Bengal Town and Country (Planning and Development) Act, 1979. there are expressions of "building" and "land" separately.

19. Section 2(7) of the Act refers to necessary development of land. There is reference of development as to making of any material change; there is also reference of development with regard to use of any building or land including division of any land.

20. There are specific expressions of land and building separately to be construed a different meaning thereby. In all other sections, there are clear indications of lands and buildings separately. Whenever there are separate expressions of lands and building it should not be construed that the land includes land burdened with structure of anything embeded on earth. True it is, this is of no avail. The development plan has been prepared, but the respondents authorities seeking to invoke the right as envisaged u/s 56 of the Act. as mentioned above, will have to act strictly in terms of the Statute.

21. In the present case, this Court finds that already there is existing building with two floors held by the petitioners. The petitioners are, no doubt, bound by the sanctioning authority as to regulation, restriction and/or raising further constructions strictly in terms of the sanctioned plan. Admittedly, the petitioners have obtained the plan duly sanctioned by the appropriate and competent authority. It is to be construed as to whether the petitioners are bound to obtain any permission u/s 46 of the West Bengal Town and Country (Planning and Development) Act, 1979. Looking to the scope of the Act and to all provisions as quoted above, this Court finds that, regard being had to the materials on record, and facts and circumstances of the case, the petitioners having the existing building and for the purpose of development of the said building, the petitioners will not

have to seek further permission u/s 46 of the Act. apart from the sanction granted by the appropriate and competent authority having lawful right to regulate the nature of the building and to permit the petitioners to raise further construction. Since this Court is of the view that no such permission under Sec. 46 is required, all other subsequent provisions, as referred to by the respondent No. 2 referring to Sections 51, 52 and 53 are of no avail to the respondent No. 2.

22. Considering this aspect, this Court finds that the steps taken by the respondent No. 2 to stop further construction of the petitioners, pursuant to Sections 52, 53 and 137 of the Act, have no force in law and this cannot be sustained.

23. Regarding the violation of the Environment Pollution Protection Act. the State has not been to satisfy this Court as to whether any guideline has been prepared in terms of the notification dated 15th December, 1990, by the Central Government. The respondent No. 2 has also not been able to satisfy this Court as to whether the State Government has formulated any guideline and the same has been approved by the Central Government. Since it was submitted that the respondent No. 2 has acted upon the communication forwarded by the State Government, it cannot be appreciated by this court to act keeping its eyes blind and consequently any guideline prepared by the Central Government asking the State Government to prepare its own guidelines and obtain approval thereof have not been followed. There is no force of application of the Environment Pollution Protection Act with regard to the facts of the present case.

24. For the foregoing reasons, this court finds that there is no impediment to grant reliefs to the petitioners in the manner as prayed for.

25. The writ petition is, therefore, allowed, without any order as to costs. Appropriate writs do issue commanding the respondents not to give effect or further effect to the impugned notices asking the petitioners to stop construction for not obtaining permission as envisaged in Section 46 of the aforesaid Act.

26. Before parting with this writ petition, it is made clear that the petitioners are only entitled to raise construction strictly in terms of the sanctioned plan and comply with other provisions in accordance with law.

27. On the prayer of Mr. Maiti learned advocate appearing on behalf of the respondent No. 2, and considering the submissions of Mr. Banerjee, learned Advocate for the writ petitioners, the operation of this judgment is stayed for a fortnight from this date. Let a xerox copy of this order be made available to the learned Advocate on record for the writ petitioners on his usual undertaking and upon compliance with necessary formalities.