(2012) 07 CAL CK 0188

Calcutta High Court

Case No: A.S.T. 36 of 2012 with A.S.T.A. 36 of 2012

Ranjit Pal and Another	APPELLANT
Vs	
Howrah Municipal Corporation and Others	RESPONDENT

Date of Decision: July 18, 2012

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 177, 177(1), 28, 28(3)

Citation: (2012) 4 CALLT 123 : (2012) 4 CHN 492

Hon'ble Judges: J.N. Patel, C.J; Sambuddha Chakrabarti, J

Bench: Division Bench

Advocate: Saptangsu Basu, Mr. Anjan Bhattacharjee, for the Appellant;Smriti Kana Mukherjee, Advocate for the H.M.C., for the Respondent

Final Decision: Dismissed

Judgement

Sambuddha Chakrabarti, J.

This appeal against an order dated February 7, 2012, passed in W.P. No. 176(W) of 2012 by a learned single Judge of this Court raises a very important point of law. The appellants had obtained permission for construction of a residential complex both for their personal use as also for sale to outsiders. The plan was sanctioned by the Howrah Municipal Corporation (hereinafter referred to as the ''Corporation''). On a complaint by some local people regarding the construction made by them the appellants were called by the respondents authorities for a hearing regarding the unauthorized construction raised by them. They participated in the hearing wherein their stand was that they had already submitted a ''as-made'' plan. They have alleged that the respondents authorities in total derogation of the relevant provisions of the Howrah Municipal Corporation Act, 1980 (hereinafter referred to as the ''Act'') passed an order of demolition on December 9, 2011 of the unauthorisedly constructed portion within seven days from the date of receipt of the order.

2. The appellants filed a writ petition, inter alia, for an order setting aside the order of demolition and for a direction upon the Commissioner of the Corporation to reconsider the whole issue on the basis of the ''as-made'' plan submitted by them. The main grievance of the appellants was that the order impugned in the writ petition was issued by the Assistant Engineer, Borough-V and not the Commissioner of the Corporation who is the competent authority to take a decision for demolition of the building.

3. The learned Single Judge dismissed the writ petition. Against that order the present appeal has been filed.

4. It has been alleged by the appellants that the learned single Judge failed to appreciate the case of the petitioners as made in the writ petition. The petitioners maintained that the learned single Judge failed to appreciate that 17 flats in the said complex were occupied by respective owners who have been staying there for quite some time. The appellants had reiterated the point taken in the writ petition that u/s 177(1) of the Act the decision to demolish a building is to be taken by the Commissioner and the Assistant Engineer, Borough-V was not the competent person to issue an order of demolition. According to the appellants the concerned Assistant Engineer did neither have the authority nor was the power delegated to him to issue an order of demolition and the delegation of power in the present case is missing while the order for demolition was issued. According to them Section 177 of the Act gives enough scope to the Corporation to issue the order of demolition and at the same time to consider the issue of pending ''as-made'' plan. The appellants have also made a grievance that the learned single Judge should have appreciated that the order of demolition if effected would affect 17 flat owners. The other point taken by the appellants was that the learned single Judge erred in not appreciating that the deviation from the sanctioned plan has been done unintentionally and the petitioners have prayed for payment of penalty for such deviation.

5. The Assistant Engineer, Borough-V of the Corporation affirmed an Affidavit in the appeal. It was specifically mentioned in the said Affidavit that a building plan for construction of a three-storied residential complex was submitted before the competent authority of Borough-V of the Corporation. The sanctioned area of each floor was 323.233 square meter and on the staircase head room the sanctioned area was 27.332 square meter. The complaint received by the Corporation was referred to the Assistant Engineer, Borough-V. On June 21, 2011 the appellant was directed to contact the Sub-Assistant Engineer for the purpose of a joint inspection in respect of the unauthorised construction in the concerned premises. It was found that the appellants made construction in deviation of the plan and a proceeding under S. 177(1) of the Act was initiated. A notice to stop work was issued. Similarly, a show-cause notice was also issued directing the appellants and the complainant to appear before the said Assistant Engineer on November 18, 2011. The Affidavit

further mentioned that at the hearing on November 18, 2011 a copy of the report of the Sub-Assistant Engineer was produced which showed that on each of the three floors there was a deviation of 106.13 square meters and on the staircase head room the extent of deviation was 1.99 square meter. Thereafter, the appellants submitted an "as-made" plan and an application for regularisation of the unauthorised part of the construction. The total area of unauthorised construction was 320.38 square meter which the appellant had admitted. As the Borough Committee including the Assistant Engineer found that the appellants had made unauthorised construction to the extent of 320.38 square meters the Assistant Engineer on December 9, 2011 had recommended an order of demolition upon the appellants failing which the authorities would demolish the same. The said demolition order was subsequently placed before the Borough Committee, Borough-V and the Borough Committee unanimously approved the action taken by the Assistant Engineer and affirmed the order of demolition.

6. A further point mentioned in the Affidavit is that the construction made was not for personal use but for commercial exploitation. In total 17 flats have been constructed. All of them have been sold and transferred in favour of 17 persons. With regard to the appellants" challenge to the competence of the Assistant Engineer, Borough-V to issue the notice of demolition it has been stated by the said Assistant Engineer that the Commissioner of the Corporation had the authority to delegate his power to any officer of the Corporation in terms of S. 28(3) of the Act. In respect of the sanction of building plan and for taking steps in terms of S. 177 of the Act the Borough Committee and its Assistant Engineer have been vested with the power to take steps. There are five Borough Committees and construction of the instant G+2 building has been delegated to the concerned officer of the Corporation. The building plan in respect of the concerned premises was sanctioned by Borough-V. The appellants received notice, appeared before Borough-V and participated in the hearing. It is to this authority that the appellants had made a representation for regularization of the unauthorised construction. Thus, the appellants had admitted the authority of the concerned Assistant Engineer, Borough-V. It is undisputed that the appellants had constructed in deviation is of great magnitude and the same has been done in commercial exploitation. The extent of the unauthorised construction shows that it was made deliberately and the same cannot be cured by imposing penalty.

7. At the hearing of the present appeal Mr. Basu, learned Senior Counsel for the appellants, submitted that S. 177(1) of the Act has given discretion to the Commissioner to demolish or not to demolish any unauthorised construction and there is no mandatory provision for issuing an order of demolition of an unauthorized construction. According to him the intention of the legislature was that the Commissioner would apply his mind to each and every case to arrive at a conclusion that the nature of unauthorised construction is required to be demolished. Such conclusion should be backed by reasons. A party aggrieved by an

order of the Commissioner has a right to prefer an appeal and this right becomes illusory if the order does not disclose any reason. It is obligatory on the part of the Commissioner to consider each and every case before coming to a decision for demolition of an unauthorised construction.

8. The other point of challenge of the appellants was that the order does not disclose the extent of deviation and which portion of the construction has to be demolished. As such the appellants have no clue about the extent of deviation which prompted the Corporation to issue the order of demolition.

9. Section 28(3) of the Act empowers the Commissioner to delegate any of his powers or functions to any other officer or an employee of the Corporation. In the notice dated February 22, 2011 issued by the Assistant Engineer, Borough-V of the Corporation to the appellant no. 1 the delegation of authority upon him by the Municipal Commissioner in exercise of the power u/s 28 of the Act has been specifically mentioned. It appears that the Municipal Commissioner had specifically delegated upon the Assistant Engineer to invoke jurisdiction u/s 177(1) and in view of such delegation the Assistant Engineer was empowered to issue notice for stoppage of work, show-cause notice and to hear the same. After mentioning the delegation of authority as made in his favour the Assistant Engineer, Borough-V had issued notice to the appellant no. 1 to show-cause why the unauthorised construction shall not be demolished and directed them to stop further work. Mrs. Mukherjee, learned Advocate appearing for the respondents authorities had produced the relevant records in Court. Wherefrom it appears that the Commissioner specifically directed the Assistant Engineer, Borough-V to cause an enquiry into the ''matter'' i.e., the complaint received with regard to the unauthorised construction, and if it appeared that the construction was illegal, the said Assistant Engineer was directed to give a hearing and to send a self-demolition notice by giving seven-days'' time. The said Assistant Engineer was also delegated with the power to go in for demolition if the notice was not complied with.

10. As such the contention made by the appellants that the Assistant Engineer is an incompetent authority to issue the notice is a misconceived one. On the other hand the further grievance of the appellants that the authority of the Commissioner to issue notice of demolition has not been delegated to the said Assistant Engineer in the present case or that such delegation of authority is missing is also without any substance. The Commissioner has also specifically delegated his power in favour of the Assistant Engineer and he was directed to issue the requisite notice and order, if necessary. The contention of the appellants on this point, therefore, must fail.

11. It further appears that while issuing the notice to the appellants the subject-matter of dispute was very specifically mentioned. The notice specifically mentioned the unauthorised construction with specific reference to the plot on which the said unauthorised construction was made. Therefore, the appellants had knowledge about the reasons for the issue of notice and for holding the hearing. It

is true that an administrative authority has an obligation to pass a reasoned order so that the party affected by it may take further steps accordingly. However, when the appellants knew the precise purpose for which a proceeding has been initiated against them and when the notice asking them to appear at a hearing specifically mentioned the reason for initiating the proceeding and the appellants had themselves admitted to have made the unauthorised construction the non-mentioning of reasons for the order of demolition is not fatal.

12. Mrs. Mukherjee has pointed out that the Act does not contain any provision for regularisation of an unauthorised construction and as such the prayer of the petitioners in the writ petition cannot be allowed which would be de hors the provisions contained in the Act. In the case of Priyanka Estates International Private Limited and Others -Vs.- State of Assam and Others, reported in 2010(2) SCC 27 the Supreme Court had observed:

55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings.....

56. Even though on earlier occasions also, under similar circumstances, there have been judgements of this Court which should have been a pointer to all the builders that raising unauthorised construction never pays and is against the interest of the society at large, but, no heed has been given to it by the builders. Rules, regulations and by-laws are made by Corporations or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

13. Mr. Basu, the learned Advocate for the appellants has submitted that if one considers carefully the provision contained in Section 177 of the Act it becomes obvious that the legislative intent was to authorise the Commissioner to apply his mind to each and every case of unauthorised construction and to arrive at a conclusion that the unauthorised construction is really required to be demolished. Such conclusion in its turn must be backed by reasons. He has relied upon the decision of Commissioner, Corporation of Calcutta -Vs.- Sailendra Nath Banerjee and Others reported in 1977(2) CLJ 505 for a proposition that the Commissioner has

discretion u/s 414 to demolish any unauthorised construction but such discretion has to be exercised quasi-judicially. The Section 177 gives power to the Commissioner to issue an order of demolition of an unauthorised construction. In the present case the Commissioner has exercised his discretion by issuing an order of demolition. The question relevant for our consideration is not whether the Commissioner had the power. The Commissioner most certainly did have the power and he exercised his discretion accordingly. As such the judgement has no application to the facts of this case.

14. Mr. Basu has next referred to ORYX Fisheries Private Limited Vs. Union of India (UOI) and Others, and Sant Lal Gupta and Others Vs. Modern Co-operative Group Housing Society Ltd. and Others, for a proposition that furnishing reasons is fundamental to the exercise of power by an administrative authority. Mr. Basu submitted that this is all the more so because the party aggrieved has a right to prefer an appeal and unless reasons for the order impugned is provided the right becomes an illusory one. The principles laid down therein are far too well-known and have been reiterated in various judgements times without number.

15. This principle, however, cannot be applied to the case to nullify the order impugned in the writ petition. We have already found that non-mentioning of reasons in the facts of the present case is not fatal to the sustenance of the order. More importantly, the appellants have admitted to have made the unauthorised construction. The authorities had directed the unauthorized construction to be demolished. That the order of the demolition was passed for the construction unauthorisedly made by the appellant is quite obvious. As such the appellants at this stage cannot be heard that no reason were furnished in the order impugned. The whole purpose of insisting on reasons by an administrative authority is to ensure that the person affected thereby will not be in the dark about why such order has been passed. When the basis of the said order is obvious a separate elaborate reason for that should not be insisted upon.

16. Mr. Basu has also relied on the decision of Purusottam Lalji and Others Vs. Ratan Lal Agarwalla and Others, , for a proposition that even when exercising the power conferred under the Act a Commissioner has power to direct retention of a building even in case of a non-relaxable statutory rule. The Full Bench judgement of this Court however, does not help the appellants. That judgement was passed in the context of Section 414 of the then Calcutta Municipal Act, 1951. The chief question that fell for consideration was whether a Commissioner could refuse to make an order where there has been an unauthorised construction infringing the rules which may be relaxable or may not be so. It was in this context that the Full Bench was of the view that Section 414 of the said Act vests upon the Commissioner a discretionary power. In that case it was found that as there was very small infraction the authorities did not pass an order of demolition and it was held by the Court that in such cases where the deviation was of a minor nature the Commissioner had

discretion not to order demolition. The appellants cannot draw any support from this judgement. In the reported case the Commissioner had relaxed a non-relaxable provision. His action was thus brought into question. Here the Commissioner did not go against the statute. We cannot direct the Commissioner in a given case to relax the rules which is not provided in the Act. The Commissioner had no reason to relax the relevant rules.

17. In the case of V.M. Kurian Vs. State of Kerala and Others, the Supreme Court had held that observance and compliance with the rules are for public safety and convenience and there cannot be relaxation of the rules which are mandatory in nature and cannot be dispensed with especially in the case of a high-rise building. The Supreme Court had taken into account that in some cases of minor deviation public safety and convenience is not affected. In this case it cannot be said that the deviations made by the present appellants on each floor are minor in nature and as such the appellants cannot ask for any relaxation of the rules or exercise of any discretion in their favour.

18. Mr. Basu has again relied on the judgement of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, for a proposition that the order of demolition did not specify the extent of deviation from the sanctioned plan. This submission has no force of law. What the appellants were directed to do was to demolish the illegally/ unauthorisedly constructed portion. The appellants know the portion unauthorisedly constructed by them, the extent of deviation from the sanctioned plan and the portion of the building so improperly constructed. They cannot now be heard that the order cannot be implemented for want of specific details. The order passed by the authority cannot be faulted on grounds of vagueness.

19. Mrs. Mukherjee has referred to an unreported judgement passed by a Division Bench of this Court. The Division Bench in its judgement and order dated February 28, 2012 passed in the case of Sital Chandra Bodhok -Vs.- Howrah Municipal Corporation and Others (FMA 1194 of 2009) had clearly held that the Howrah Municipal Corporation has no power to regularise an unauthorized construction. There also a similar point was taken on behalf of the owners of the building that the use of the word "may" makes the Commissioner"s power to order demolish discretionary. The Division Bench following the Supreme Court judgements rejected such contention.

20. Thus all the contentions raised in the appeal fail. The appeal is dismissed.

21. The respondents will be at liberty to further proceed in accordance with law.

22. There shall, however, be no order as to costs. Urgent photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

I agree.

J.N. Patel, C.J.