

CASE NO.:
Appeal (civil) 6898 of 1994

PETITIONER:
HOTEL SEA GULL

Vs.

RESPONDENT:
STATE OF WEST BENGAL & ORS.

DATE OF JUDGMENT: 19/03/2002

BENCH:
V.N. Khare, Ashok Bhan & D.M. Dharmadhikari

JUDGMENT:

Bhan, J.

The appellant (writ petitioner before the High Court) being aggrieved by the Division Bench judgment of the High Court of Calcutta where under the Division Bench overturning the decision of the Single Judge has dismissed the writ petition has come up in this appeal.

On 19th January, 1990 Padima (II) Gram Panchayat sanctioned a plan to construct five stories (Ground floor + 4 floors) for the construction of Hotel Sea Gull through its owner Malay Kumar Guha under the West Bengal Panchayat Act, 1973. The Hotel comprising of ground floor and first floor constructed in pursuance of the said sanction is situated in Mouza Gobindabasan, District Midnapore, West Bengal. On 28th November, 1990 Government of West Bengal constituted Digha Planning Authority-respondent No. 2 for the planned development of Digha Township, District Midnapore, West Bengal. By a Notification of the even date Government of West Bengal brought Mouza Gobindabasan under Respondent No. 2. In February, 1991 Respondent No. 2 notified guidelines for the development in Digha Planning Area interim provisions under Section 56 of the West Bengal Town and Country (Planning and Development) Act, 1979 (hereinafter referred to as 'the 1979 Act') pending preparation of development plan for securing proper planning and development of Digha Planning Area.

On 7th June, 1991 Sushil Pal Chowdhuary and Dulal Pal Chowdhuary purchased the appellant Hotel (ground floor + 1st floor) from Malay Kumar Guha. In the first week of July, 1992 the appellant started construction of the second floor on the existing hotel building. Respondent No. 2 on 24th July, 1992 issued notice under Section 54 of the 1979 Act to the appellant requiring it to discontinue unauthorised construction of the building. In spite of service of the said notice the appellant did not stop further construction; so on 31st August, 1992, respondent No. 2, issued notice under Section 53 (1) of the 1979 Act to the appellant to demolish the construction of the second floor of the said building and to remove the same within one month from the date of receipt of the said notice. The appellant did not submit the report to the said notice to Respondent No. 2. On 4th

September, 1992 the appellant filed writ petition challenging the said notices before the Calcutta High Court. A Single Judge on 24th September, 1992 passed interim order permitting the appellant to complete construction of second floor on the condition that it will not claim any equity what so ever. On 22nd December, 1992 the Single Judge allowed the writ petition and set aside both the notices and permitted the appellant to construct as per sanctioned plan of Gram Panchayat. Respondent No. 2 filed the appeal challenging the judgment of the Single Judge.

On 20th March, 2002 the Governor of West Bengal accorded approval under Section 37 (1) of the 1979 Act to the Land Use and Development Control Plan (Development Plan) for Digha Planning Area.

By notice (Annexure A) under Section 54 the appellant was directed to discontinue further construction of the building forthwith and report compliance and if the construction was not suspended forthwith and compliance reported within 24 hours, it was stated that the competent authority would be compelled to remove the unauthorised constructions as per provisions of the 1979 Act. And, by the subsequent notice under Section 53 (1) the competent authority required the appellant to demolish the construction undertaken by it. It was stated in the said notice that it was mandatory to obtain permission in writing under Section 46 for undertaking development by way of construction on the existing Hotel building, and that the appellant did not desist from carrying on the work of construction despite notice to stop from doing so under section 54, necessitating the issuance of the subsequent notice under Section 53 (1). A combined reading of the two impugned notices under sections 54 and 53 (1) makes it amply clear that the said notices have been issued only on the ground that permission for development under Section 46, as required, had not been obtained by the appellant; and on no other ground.

On the pleadings of the parties, the perusal of the impugned notices under Sections 54 and 53 (1) and the arguments addressed at the Bar the Division Bench concluded that two points emerged for consideration. Firstly, whether the permission under Section 46 of the Act is required for development of the existing building or for development of vacant land only; and secondly, whether permission for development under Section 46 of the Act was required even in the absence of the development plan.

The Division Bench accepted the appeal and set aside the judgment of the Single Judge. Both the points were decided against the appellant. While setting aside the order of the Single Judge the Division Bench directed that the appellant be given an opportunity to apply for permission under Section 46 of the 1979 Act for making further construction upon the existing building in terms of the plan sanctioned/approved by the then Competent Authority, Pudima II Gram Panchayat, if the same is still in force. If such an application is made the concerned Authority would dispose of the same in accordance with law by passing a reasoned order after giving the appellant reasonable opportunity of being heard. The appellant would be at liberty to take all points pleaded in the writ petition and any other relevant points before the concerned authority. That respondent No. 2 would not give effect to notice under Section 53 (1) of the 1979 Act for a period of eight weeks from the date and the appellant would preserve status quo in respect of existing Hotel building during the aforesaid period. On failure of the appellant to apply for permission under Section 46 of the 1979 Act within the said period, the concerned authority was permitted to proceed with the matter in accordance with law. The appellant thereafter filed the

special leave petition. While issuing notice on 3rd December, 1993 this Court forbade the appellant to construct over and above the second floor of the building in question. Later on leave to file the appeal was granted, and the interim order directed to continue.

Before advertng to the arguments addressed before us it would be useful to refer to the relevant provisions of the 1979 Act. Section 46 (1) provides as under:

"S.46. Permission for development. (1) 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."

Sub-section (2) provides that on the filing of such application and on payment of the development charge as may be assessed under Chapter IX of the Act the Planning Authority or the Development Authority may pass an order granting permission unconditionally or granting permission subject to such conditions as it may think fit or refusing to grant the permission. Sub-section (3)(i) provides that the concerned authority in dealing with the application for permission shall have regard to:

"(a) the provisions of the development plan, if it has come into operation; and

(b) the regulations, if any, made under Section 139 and applicable to the land on which the development is intended to be carried out, the building rules, if any, of a Panchayat or a Municipality in so far as they are not inconsistent with the regulations as aforesaid and are applicable to such land, the provisions of Land Use and Development Control Plan as forwarded to the State Government under Section 31 or as modified thereafter, and any other material consideration. "

Section 2 (7) of the 1979 Act the word "Development" has been defined to mean:

"'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."

Section 2 (3) of the 1979 Act provides that "building operations" includes amongst other things:

- "(a) erection or re-erection of a building or any part of it,
- (b) roofing or re-roofing a building of any part of a building or an open space,

- (c) any material alteration or enlargement of any building,
- (d) xxx
- (e) xxx"

Section 2 (12) of the 1979 Act provides that "land" shall have the same meaning as in the Land Acquisition Act, 1894 and shall include land covered by water. Section 3(a) of the Land Acquisition Act, 1894 expresses that land includes benefits to arise out of the land, and things attached to the earth or permanently fastened to anything attached to the earth.

Section 51 gives the power to the planning authority of revocation and modification of permission to development in terms thereof. Sub-sections (1) and (2) of Section 51 which are the relevant provisions thereof read as under:

"S.51. Power of revocation and modification of permission to development. - (1) If it appears to the Planning Authority or the Development Authority that it is expedient, having regard to the development plan prepared or under preparation or to be prepared and to any other material consideration, that any permission to develop land granted under this Act or any other law, should be revoked or modified, the Planning Authority or the Development Authority may, by order, revoke or modify the permission to such extent as appears to it to be necessary:

Provided that-

- (a) where the permission relates to the carrying out of building or other operations, no such order shall,-
 - (i) affect such of the operations as have been previously carried out;
 - (ii) be passed after these operations have been completed;
 - (b) where permission relates to a change of use of land, no such order shall be passed at any time after the change has taken place.
- (2) When permission is revoked or modified by an order made under sub-section (1), if the owner claims from the Planning Authority or the Development Authority within thirty days from the date of revocation or modification, an amount for the expenditure incurred in carrying out the works after the grant of permission and in accordance with such permission, which has been rendered abortive by the revocation or modification, the Planning Authority or the Development Authority shall, after giving the owner a reasonable opportunity of

hearing by an officer appointed by it in this behalf, and after considering the officer's report, assess and offer such amount to the owner as it thinks fit."

Section 56 provides for interim provision pending preparation of development plan, the same reads as under:

"S.56. Interim provision pending preparation of development plan.- 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 be required to be included for securing the proper planning of the concerned area."

Section 52 of the 1979 Act provides for penalty for unauthorised development or for use otherwise than in conformity with the development plan. In terms of the said provision any person commencing, undertaking or carrying out development, amongst other circumstances, without permission as required under the Act is liable for punishment in terms thereof. Section 53 of the Act provides for notice regarding unauthorised development or use otherwise than in conformity with the development plan, requiring, amongst other things, "demolition or alteration of any building or works" in terms of sub-section (2)(a) thereof. Section 54 of the Act empowers the concerned authority to stop unauthorised development in terms thereof. Section 55 as well empowers the concerned authority to require removal of unauthorised development or use having regard to the development plan prepared, or under preparation or to be prepared and to any other material consideration in terms thereof.

It would be pertinent to refer to Section 137 of the Act which provides for overriding effect in terms thereof. Sub-sections (1) and (2) thereof read as follows:

"S.137. Overriding effect.- (1) The provisions of this Act and the rules and regulations made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law.

(2) Notwithstanding anything contained in any other law-

(a) when permission for development in respect any land has been obtained under this Act, such development shall not be deemed to be unlawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under any other law for such development has not been obtained; this shall not, however, be construed as exemption to application for permission and of payments of such fees and charges as required by such other law.

(b) When permission for such

development has not been obtained under this Act, such development shall not be deemed to be 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. "

Shri Venugopal, learned senior advocate appearing for the appellant contended that when a new law regarding the regulation of building operations is brought into force, the question arises as to what is the fate of planning permissions granted prior to the new law being made applicable. According to him Section 46 provides for planning permission being obtained only to new constructions to be made on vacant plots or additions or alterations to be made to the existing buildings where no planning permission has already been obtained. It has no application whatsoever to cases where planning permissions have already been obtained prior to the new law coming into force. That the continuance of building operations pursuant to planning permission already obtained is governed by Section 51. If a development plan has come into operation or an interim plan is in existence, it is open to the planning authority to revoke or modify the existing planning permission granted under the 1979 Act or under the planning permission granted under any other law. If it revokes or modifies, it will have to pay compensation to the extent that the owner has suffered loss on account of the expenditure incurred in carrying out the works after the permission was granted. That it is the duty of the planning authority to ascertain and take steps by issuing a notice to the owner before revoking or modifying the planning permission already in existence, no duty is cast upon the owner to intimate the planning authority about the existence of his planning permission and then leave it to the planning authority to decide whether to initiate steps to revoke or modify or not to revoke or modify the planning permission. That principles of natural justice have to be read in Section 51 and the authority was required to provide an opportunity to the appellant before issuing notices under sections 53 and 54. That section 56 of the interim measures would have no application as Section 51 is self-contained in regard to a planning permission which has already been obtained under any other law. Section 137 would also have no application as the main provision itself provides for the provisions of the Act overriding where the provisions of any other law are inconsistent with the provisions of 1979 Act. Section 137(2)(b) has nothing to do with planning permission obtained under any other law prior to 28th November, 1990 (i.e. before the Digha was declared as planning area) as otherwise the entirety of Section 51 which requires a modification or revocation to render the planning permission already obtained under any other law to be ineffective would be rendered otiose and nugatory.

As against this, counsel for the respondents Shri Raj Kumar Gupta argued that raising a further construction over the existing first floor of Hotel Building amounts to building operations and thus development in, on, over the land in question, more particularly, when the same amounts to material alteration and enlargement of the existing building and roofing of the same within the meaning of Section 2 (3), (7), (12) and Section 46(1) of the Act. That being so, permission under section 46 would clearly be required for development of existing Hotel Building. That Respondent No.2 had notified in February, 1991 the Guidelines for Development in Digha Planning Area Interim Provisions under Section 56 of the Act pending preparation of development plan for securing proper planning and development of Digha Planning Area. Para 2 of Part II of the said interim provision speaks that no person or body shall commence to carry out any development and change of use of land including sub

division or lay out of plots without obtaining the permission of the authority in writing in terms of section 46 of the Act. Para 8(1) of the said interim provision provides:

"Para 8(1): No development shall be permitted within five hundred meters from the high tide line of sea and all along the boundary line of the Planning Area provided that the existing building including buildings under construction with the approval of the Authority may be allowed to continue."

That the building in question falls within five hundred meters from the high tide line of sea and thus violative of interim provisions. Interim provision under Section 56 of the Act was made to check sporadic, haphazard and unplanned development in the Digha as the development plan was under preparation. According to him Section 46 would apply even in the absence of development plan, when the same is under preparation or to be prepared and the appellant was legally bound to seek permission under section 46 of the Act from respondent No.2 before raising further construction of second floor on the existing Hotel Building. That there is no conflict between Section 51 and Section 137(2)(b) of the Act. Both are applicable in two separate areas without interfering with each other. That Section 137(2)(b) has a overriding effect. Even if it is presumed that there is a conflict between section 51 and section 137(2)(b) then the latter would prevail.

In terms of Section 46(1) any person or body intending to carry out any development on any land is required to make an application in writing to the planning authority or development authority for permission in such form containing such particulars and accompanied by such documents and plans, as may be prescribed. Under Section 2(7), the word "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 changes in any building or land or in the use of any building or land and includes division of any land. Building operations includes erection or re-erection of a building or any part of it, roofing or re-roofing a building of any part of a building of an open space. It also includes any material alteration or enlargement of any building. The definition of the word "land" in the Land Acquisition Act which has been made applicable to the 1979 Act as well expresses that land includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

A combined reading of the above provisions leaves no manner of doubt that the raising of further construction over the existing first floor of the hotel building clearly amounts to "building operations", and is thus "development" in, on, over, the land in question. More particularly, when the same amounts to material alteration and enlargement of the existing building and roofing of the same within the meaning of sub-sections (3), (7) and (12) of Section 2 and Section 46 of the Act. That being so, permission under section 46 is clearly required for development of the existing hotel building.

In the instant case, admittedly, development plan had not been notified when the impugned notices were issued. The development plan has now been notified on 20th March, 2002. No notification for levy of development charges under section 102 of the Act had also been issued. But undeniably, the Act came into force in the area in question, being Mouza Gobinda Basun, J.L. No.89, P.S.Digha, District Midnapore with effect from 20th November, 1990 under a notification issued therefor. The development plan in respect of the said area was under preparation which has been admitted by the

appellant in paragraph 9 of its affidavit in reply before the High Court. Respondents as well in their Supplementary affidavit supported by annexures filed before the High Court as well as before this Court have asserted that steps were being taken to complete the outline development plan on or before 19th October, 1993, and all necessary statutory steps had been taken for preparation of the plan and imposition of development charges in the manners stated therein. In section 46(1) of the Act, it has clearly been provided that any person or body intending to carry out any development of any land shall make an application for permission in terms thereof. There is no indication in the said section that the section would not apply in the absence of a development plan. Sub-section 3(i) of section 46 provides that the concerned authority in dealing with an application for permission would have regard to the provisions of the development plan, if it has come into operation and any other material consideration. [Clause (b) of section 46(3)(i) has now been substituted by Act No.26/94].

It is clear from the aforesaid section that the concerned authority while dealing with an application for permission is to have regard to the provisions of the development plan, if it has come into force, if not, then any other material consideration, obviously implying that Section 46(1) would be applicable even when development plan has not come into operation.

Apart from this, Section 56 of the Act provides for interim provisions pending preparation of development plan. In terms of the aforesaid provisions the authority concerned while exercising the powers under the Act is required to have regard to the provisions of development plan before such development plan has become operative or which in its opinion would be required to be included for securing the proper planning of the concerned area implying thereby that the powers and functions therein are to be exercised by the concerned authority under the Act pending preparation of development plan in terms of the aforesaid provisions. Section 51(1) also indicates that power of revocation and modification of permission is with regard to "development plan" already prepared or "under preparation" or to be prepared and to any other material consideration implying thereby that the permission to develop under the Act would be required even when the development plan is under preparation or to be prepared. It does not indicate that the permission under section 46 would not be required in the absence of a development plan in a particular area.

Para 8(1) of the interim provisions says that no development shall be permitted within five hundred meters from the high tide line of sea and all along the boundary line of the planning area provided that the existing buildings including buildings under construction with the approval of the authority may be allowed to continue. Construction of the second floor over the existing first floor of the hotel building clearly amounts to building operations and is thus development in, on, and over the land in question. Section 46 makes it clear that the authority while dealing with an application for permission is required to have regard to the development plan if it has come into operation or any other material consideration. Section 56 provides for interim provisions. If that be so, then if any building operation is to be carried out which is against the interim provisions of the development plan and then the building operations or development is being carried out which falls within five hundred meters from the high tide line could be permitted only with the approval of the authority and not otherwise. For this reason the appellant was required to take permission before carrying out building operations/development of the second floor over the existing first floor of the hotel building.

Under Section 51 the planning or the development authority has been clothed with the power to revoke or modify a development plan prepared or under preparation, to the extent it is necessary, if it appears and is expedient to do so. The circumstances and the reasons under which the plan can be revoked or modified have not been spelt out. It is left to the discretion of the authority. The expression 'Expedient' employed is the key word in this Section. The word 'expedient' has not been defined under the Act. According to Webster's Encyclopedic Unabridged Dictionary of the English Language 'expedient' means 'tending to promote some proposed or desired object'; 'fit' or 'suitable for the purpose'; 'proper under the circumstances'. In the Words and Phrases (Permanent Edition) Volume 15A Evidence-Eyewitness, the word 'expedient' has been described as when used as an adjective as 'apt' and 'suitable to the end in view'; 'furthering, or adapted to further, what is purposed'; practical and efficient; as, an expedient change of policy; an expedient solution of a difficulty; hence, advantageous. The word 'expedient' occurring in the statute authorising modification, revocation under the circumstances would comprehend whatever is suitable and appropriate for any reason for the accomplishment of the specified object.

Mr. Venugopal is right in his submission that under Section 51 no duty is cast upon the owner to intimate the planning authority about the existence of his planning permission and then leave it to the planning authority to decide whether to initiate steps to revoke or modify or not to revoke or modify the planning permission. It is the duty of the planning authority to ascertain to take steps by issuing a notice to the owner before revoking or modifying the planning permission already in existence. But present is not the case where the planning authority in exercise of its power under Section 51 seeks to revoke or modify the permission already granted because of expediency in achieving the objects of the Act. It is being done because the construction being put up was against the interim provisions of the development plan under preparation.

Section 51(1) talks of revocation or modification of the permission which is in accordance with the provisions of the 1979 Act or any other law and not to the cases where the development is being carried out in contravention of a development plan or a development plan under preparation. Para 8(1) of the interim provisions specifically says that no development can be permitted or allowed from the high tide line of sea and in the case of existing building any further development could be permitted to continue only after taking approval from the authority. Section 51 does not talk of the building operation or development which is contrary to the development plan or to interim provisions of development plan under preparation. In this case the notice was issued as soon as the construction of second floor commenced. Notices have not been issued for the demolition of the ground and first floor. Proviso to Section 51 (1) would therefore not apply. Sub-clause (2) of Section 51 would also not apply because in terms of the such provision when any such permission is revoked or modified, the expenditure incurred in carrying out the works has to be assessed and offered to the owner from the public exchequer only if the owner suffers any loss due to any expenditure incurred in carrying out the works after the grant of permission which had been rendered abortive by reason of modification or revocation. If the planning authority had asked the appellant to demolish the ground and the first floor then it was liable to pay compensation to compensate the owner under Section 51 (2), if at all, and not where the notice has been issued asking the owner to stop the unauthorised construction which was being put up.

Under the circumstances, either of the sub-clauses (1) or (2) of Section 51 would not be applicable and come into operation in the

present case. Section 51 operates in a totally different field.

Section 137 has an overriding effect. It provides that the provisions of the Act and the rules and regulations made thereunder would have effect notwithstanding anything inconsistent therewith contained in any other law. Sub-section (2) also starts with a non-obstante clause "notwithstanding anything contained in any other law". Clause (b) of sub-Section (2) of Section 137 provides that when permission for such development has not been obtained under the Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under any other law for such development has been obtained. The case of the appellant is that they have obtained permission from the Panchayat under the Panchayat Act and therefore permission continues to be valid even after the coming into force of the 1979 Act. We do not agree with this submission. After the applicability of the Act to Mouza Gobinda Basan with effect from 20th November, 1990, any sanction obtained from the Panchayat which ran contrary to the interim provisions of the development plan under preparation could not continue by reason only of the fact that permission, approval or sanction under any other law for the development had been obtained. Fresh approval was required to be taken. Otherwise it would be negation of provisions of clause (b) of sub-section (2) of Section 137.

There is no conflict between Section 51 and section 137(2) as has been contended by the counsel for the appellant. They operate in two separate fields without interfering with each other.

The High Court had also examined the case in the context of certain other provisions of the 1979 Act, but since no arguments have been addressed on those provisions and findings recorded by the High Court thereon, we are not dwelling on the same. For the reasons stated above we do not find any merit in this appeal and dismiss the same in terms of the order passed by the High Court, which is quoted below. Wherever the words 'writ petitioner' occurs in the quoted order the same may be read as the appellant.

". . .in the interest of justice, should be given an opportunity to apply for permission under Section 46 of the Act for making further construction upon the existing hotel building in terms of the plan sanctioned/approved by the then competent authority, Pudima II Gram Panchayat, if the same is still in force. If any such application is duly and properly filed by it before the concerned authority, the latter shall dispose of the same according to law by passing reasoned order after giving the writ petitioner all reasonable opportunity of being heard. The writ petitioner shall be at liberty to take all the points pleaded in the writ petition and any other relevant points it likes before the concerned authority, would deal with the same according to law. We, however, make it clear that we have not expressed any opinion about the merits of the writ petitioner's contentions in the writ application.

In order to enable the writ petitioner to avail itself of the opportunity granted hereunder, the concerned authority shall not

give effect to the impugned notice under Section 53 (1) of the Act for a period of eight weeks from date. The writ petitioner shall also preserve status quo in respect of the existing Hotel building during the aforesaid period. On the failure of the writ petitioner to apply for permission under Section 46 of the Act in terms of the opportunity granted hereunder within the aforesaid period, the concerned authority shall be at liberty to proceed with the matter according to law. If any such application for permission is filed by the writ petitioner within the aforesaid specified period in terms of this order, the authority concerned must ensure that the writ petitioners might be in a position to make payment of development charge as may be assessed under Chapter IX, if not already assessed if payable for the purpose for consideration of the same under Section 46 (2) and for carrying on development by way of further construction on the existing Hotel building in terms of Section 45 of the Act, in case permission is granted therefore under Section 46 (1) of the Act."

The above directions would become applicable w.e.f. 1st April, 2002.

..J.
(V. N. Khare)

..J.
(Ashok Bhan)

..J.
(D.M.Dharmadhikari)

March 19, 2002