

CASE NO.:
Appeal (civil) 12984 of 1996

PETITIONER:
Friends Colony Development Committee

RESPONDENT:
State of Orissa & Ors.

DATE OF JUDGMENT: 01/11/2004

BENCH:
CJI R.C. Lahoti & Ashok Bhan

JUDGMENT:
J U D G M E N T

R.C. Lahoti, CJI

The Friends Colony Development Committee, the appellant before us, is a society registered in the year 1982 under the Societies Registration Act, 1860. One of its objects is to oversee development of the residential area known as 'Friends Colony' in Cuttack city. M/s Modern Méchatech Housing Ltd., the respondent No. 2, is a company incorporated under the Companies Act, and engaged in building activity. Pratap Kumar Biswal, respondent No. 3, is its Managing Director. The other parties impleaded in this appeal are the State of Orissa, through the Commissioner-cum-Secretary, Housing and Urban Development Department, and Cuttack Development Authority (hereinafter the 'Authority' for short). The property involved in this litigation is a six storeyed apartment situated in Friends Colony and known as 'Kalyani Apartment'.

The background facts leading to the present appeal are briefly stated hereinafter. The property belonged to one Abhiram Panda. He gave a power of attorney to the builder (respondent No. 2 and 3) for construction of a multi-storeyed apartment on the said land. On an application made by the builder, the Authority accorded sanction on 3.3.1993 for construction of a four storeyed building in accordance with the building plans sanctioned by the Authority. The construction commenced and when the building came up it was found to have been built up grossly in excess of the sanctioned plan on all the floors. Though the sanction accorded by the Authority permitted only four stories but even a fifth floor had also come up. On 7.2.1994, the Authority initiated proceedings under Section 92 of the Orissa Development Authorities Act (hereinafter referred to as 'the Act', for short) against the builder calling upon it to show cause why the offending portions be not demolished. The stand taken by the builder in its response was that the deviations were very minor ones calling for a sympathetic view and compounding of the deviations instead of being demolished. On 25.9.1994 the appellant made a representation to the Authority complaining of the offending construction and submitting that the deviations from the sanctioned plan damaged the environment and endangered life and safety of not only the occupants of the building, but also of other inhabitants of the locality. The representations by the appellant were made not only to the Authority, but also to the Cuttack Municipality, the Pollution Control Board and the State Government.

By order dated 8.11.1994, the Authority directed 5th floor of the building to be demolished as also the unauthorized projections of 605 sq. ft. on each floor to be demolished. In respect of certain deviations which were compoundable, the Authority permitted compounding on payment of Rs. 2.09 lakhs by the builder. A notice-cum-order for securing compliance of the order dated 8.11.1994 of the Authority was issued on 30.11.1994 to the builder.

On 2.12.1994 the builder filed an appeal before the appellate authority which granted interim stay of demolition as directed by the Authority, but subject to the condition that the builder shall stop all further constructions. However, the builder proceeded with the building activity by defying the conditions incorporated in the order of the stay granted by the appellate authority. The appellant's representations inviting attention of the Authority did not serve any purpose.

On 5.12.1994 the appellant filed a writ petition in public interest in the High Court of Orissa which was registered as OJC No. 8128/94 laying challenge to the illegal, unauthorized and dangerous construction in the building and seeking demolition to the extent necessary. The appellant also sought for its impleadment in the appeal filed by the builder which was pending before the appellate authority. The impleadment was allowed, though opposed by the builder.

By order dated 28.6.1995 the appellate authority directed the builder's appeal to be dismissed. The appellate authority found inter alia that the offending construction was a threat to the environment and, if not demolished, it would encourage other builders to make similar violations much to the detriment of the planned development of the city. Laying challenge to the order of the appellate authority, the builder filed a writ petition in the High Court which was registered as OJC No. 4995/95. Though the appellant was a party before the appellate authority, it was not joined by the builder as a party in the writ petition filed by him. However, the appellant moved for its impleadment in the writ petition and filed a counter affidavit controverting several averments made and pleas raised by the builder. The appellant also prayed for the writ petition filed by it in public interest being taken up for hearing along with the writ petition filed by the builder so that all the issues relating to the said building could be heard and decided together. However, the writ petition filed by the builder was taken up for hearing, while the writ petition filed in public interest by the appellant remained pending.

By its judgment dated 16.4.1996 the Division Bench held that the appellant had no right to participate in the hearing; it was neither a necessary nor a proper party; it was not entitled to be heard in the writ petition filed by the builder, and the remedy, if any, of the appellant was to file a civil suit for protection and enforcement of its rights, if any. Having said so, the High Court proceeded to examine, on merits, the pleas urged by the builder in his writ petition.

The plea of the builder was that in spite of the construction having come up, it could yet move a fresh application and submit revised plan for approval in respect of construction already undertaken and then it will be for the Authority to consider and approve or not to approve the same. It seems to have been urged before the High Court by the learned counsel for the builder, as noted in the judgment of the High Court, that at different points of time the Planning Member and Vice-

Chairman of the Authority had suggested certain courses of action which would obviate difficulties of the builder while not making any departure from the requirements of law and such suggestions were, by and large, accepted by the builder. However, from the records we find that this was only an oral submission made, not supported by any documents, and the judgment of the High Court also does not make reference to any document or affidavit filed by or on behalf of the Authority or any of its officials in support of the plea urged by the builder. The High Court disposed of the writ petition by directing that if the builder made a fresh application and/or submitted a revised plan for approval in respect of construction already undertaken by it, the Authority should deal with the same in accordance with law. The learned counsel for the builder undertook before the High Court to maintain status quo and not to make any further construction till a decision was taken by the Authority on re-submission of the application accompanied by plans for sanction as permitted by the High Court. The High Court allowed one month's time from the date of its judgment for filing a written undertaking by the builder incorporating the oral undertaking given before the High Court and also for filing the application and plan for sanction before the Authority. The High Court left the question of deviations already made open for consideration and to be dealt with in accordance with law after the Authority had taken decisions on such application.

Feeling aggrieved by the judgment of the High Court this appeal has been filed by special leave.

By order dated 7.10.1996 leave was granted and, at the same time, this Court directed the operation of the impugned judgment of the High Court to remain stayed. 30 occupants of the apartment have sought for intervention at the hearing in this Court. On 5.5.1997, in the presence of the parties, this Court directed the order of stay made on 7.10.1997 to be confirmed and clarified that no demolition of the construction already made would be done during the pendency of this appeal, but the unauthorized portion would not be permitted to be occupied and no third party interest would be created therein in the meantime. After 5.5.1997 the appeal came up for hearing before this Court on 6.11.2003. Having noticed that it was a case of unauthorized constructions made by a builder in a multi-storeyed building and the High Court had permitted the possibility of regularization of unauthorized constructions to be explored afresh as per law, this Court made the following directions :-

(i) The respondents Nos. 5 and 6 shall have a plan of the existing structure prepared through their architects/engineers. The authority shall consider in accordance with the existing building bye-laws/regulations as to how much of the unauthorized construction can be regularized and if so then subject to what terms and conditions. The Plan showing in different colours, the sanctioned construction, the unauthorized construction and the construction to the extent to which it can be regularized shall be filed.

(ii) The terms and conditions on which the regularization can take place shall also be filed.

(iii) The status of the area which cannot be regularized shall be stated, i.e., whether it is occupied or unoccupied."

The compliance by the Authority was directed to be reported within eight weeks along with plans and statement as above being filed duly supported by affidavit.

On 14.1.2004 another two week's time was sought for by the Authority for reporting compliance with the order dated 6.11.2003. However, the learned counsel, who is appearing in this court for the builder, pointed out that his client, that is the builder, was not responding to his communications. The notices of hearing issued by the Registry of this Court to the builder company and its Managing Director were returned with postal remarks 'refused'.

Later, on 10.2.2004 the Managing Director of the builder company was present in Court on having been served and pointed out that during the pendency of these proceedings he has shifted his residence to Bangalore. The Court directed him to remain present in person on all the dates of hearing unless otherwise permitted by this Court and also to keep his counsel and this Court informed of his address and his availability thereat.

On behalf of the Authority affidavit in compliance with the order dated 6.11.2003 was filed. Shri S.M. Patnaik, the Planning Member in the Authority was also present in person. The plan filed by the Authority showed the authorized and unauthorized constructions and also the extent of unauthorized constructions which could be regularized subject to terms. This Court directed as under :-

"The Cuttack Development Authority shall file an additional affidavit pointing out how much of the unauthorized construction though not available for regularization as per the existing law can still be tolerated without any loss of public interest and how much unauthorized construction must necessarily go in public interest. The Authority shall also state and suggest the terms on which the builder should be placed for the purpose of regularization of the permissible unauthorized construction and the terms on which the builder should be placed for tolerating the extent of unauthorized construction though not available for regularization.

Compliance in six weeks."

The builder was also allowed the liberty of filing a statement on affidavit incorporating such relevant facts and information as would enable the Court to arrive at a just and equitable decision. That further affidavit has been filed.

According to the Stability Report submitted by the Structural Analysis & Design Cell to the Planning Member of the Authority the following facts have been reported about the

Kalyani Apartment :-

"(1) It is a framed structure building having partial parking area in the ground floor and five floors above it along with the access to the terrace with the load of overhead water tanks and headrooms.

(2) There is a 5 feet width Cantilever used as living areas such as toilet, Kitchen & bedrooms projected to all sides in each floors.

(3) The peripheral walls are of 10" width K.B. brick masonry wall and all internal walls are 5" width.

(4) 1" thick mosaic tiles are laid in all floors as flooring materials.

(5) Average width of building is 41'-8" feet and average height of building is 58 feet.

(6) Soil condition is sandy loamy type.

(7) There was no sign of any sinking of foundation in the static load at present.

(8) There was no scope to check the actual foundation provided in the building.

(9) Size of all existing column are 10" x 15" where as the size is 12" x 24" in the drawing approved in CDA.

(10) I have considered the column 'C 5' (Column Lay-out drawing is attached) for example, to calculate all the loads in it to check the stability of the said column. The detail calculation of the column 'C 5' is as follows."

Calculations and analysis data and documents have been made available. In Calculations it is stated as under :-

"As per the above Calculations and observations it is observed that this building is unsafe for the ground plus five floors along with cantilever in all sides because the section of column is not adequate. It is also noticed that during the structural design of this building the wind load calculation has not taken into consideration. Also the seismic load consideration has not been included in it though this area comes under seismic zone-III.

To make the building structurally stable the load in the building should be reduced. The load can be reduced by removing the fifth floor in total. The load can also be reduced by removing the cantilever portion in all sides of each floor. A strong impact load may affect the main building during the breaking of cantilevers but if we break the top floor no

such impact load may not affect the structure in the lower floors."

In the subsequent affidavits filed the builder has pointed out and relied on certain changes in the regulations framed by the Authority in support of his plea that all deviations in the building are compoundable. The builder has also sought to contend that there are several other buildings with more or less similar deviations which have either been compounded or not proceeded against. On such averments the builder has sought for the deviations being condoned and regularized.

On the other hand, the affidavit sworn in by Shri Gupteshwar Acharya, Law Officer of the Authority, filed on 2.2.2004 with the plan of the building specifically and separately setting out the deviations ? compoundable and non-compoundable, as also the calculation sheets have been filed. It is stated inter alia:-

(1) that the floorwise coverage and deviation are set out in detail in the chart annexed to the present affidavit. From a perusal of the said chart it is submitted that as per draft CDA regulations dated 29.12.1994 the case was considered for regularization etc. After detailed examination it was found that the entire 5th floor which was constructed without prior permission covering the area 4009.5 sq. ft. was beyond the permissible norms for regularization / compounding and hence the same has to be demolished. On account of operation of stay order from this Hon'ble Court the demolition work could not be carried out.

(2) that from the remaining unauthorized construction area a total area of 5735.5 sq. ft. could be compounded upon payment of Rs. 2,09,160/- as per the then prevailing fee. It is relevant to mention that the said amount till date has not been deposited and therefore in the absence of the said amount being deposited the said compounding also has not been carried out and the area is liable for demolition.

(3) that with effect from 13.12.2001 the Cuttack Development Authority (Planning & Building Standard) Regulation, 2001 has come into force. Under the said 2001 Regulation more stringent condition in respect of highrise building pertaining to setbacks etc. have been laid down. Applying the standards laid down in the Regulation, 2001 the permissible compounding area of unauthorized construction would be far less than what was offered under the earlier draft regulation.

(4) that since the offer for regularization / compounding had already been made under the regulation then applicable the Authority can consider compounding / regularization of

an area of 5735.5 sq. ft. subject to payment of Rs. 2,09,160/- with interest as deemed fit and proper by this Hon'ble Court.

(5) that upon site inspection and personal visit carried out by the Planning Member and the technical staff it is noticed that all the floors are in occupation."

The pleadings, documents and other material brought on record disclose a very sorry and sordid state of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffer unbearable burden and are often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the design of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.

The conduct of the builder in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built up area on each floor but also added an additional fifth floor on the building, and such a floor was totally unauthorized. In spite of the disputes and litigation pending he parted with his interest in the property and inducted occupants on all the floors, including the additional one. Probably he was under the impression that he would be able to either escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed thereunder.

Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter-meddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of over-crowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot-area regulations authorize the municipal authorities to regulate and restrict the height, number of stories and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building. [For a detailed discussion reference may be had to the chapter on Zoning and Planning in American Jurisprudence, 2d, Vol.82.]

Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and

done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into under hand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.

The application for compounding the deviations made by the builders should always be dealt with at a higher level by multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of staff which is supposed to keep a watch on building activities should be suitably increased in the interest of constant and vigilant watch on illegal or unauthorized constructions.

In the facts and circumstances of the present case, we are of the opinion that the controversy should not have been brought to an end by the High Court merely by directing reconsideration of the application of revised building plans submitted by the respondent builder. The matter needs a further probe and hearing in public interest.

The appeal is allowed. The impugned judgment of the High Court is set aside. The writ petition filed by respondents Nos. 2 and 3 herein shall stand restored on the file of the High Court to be taken up for hearing along with the writ petition filed by the appellant. The present status of the writ petition filed by the Friends Colony Development Committee & the appellant before us, is not known as to whether it is pending or has been disposed of and, if so, with what result. Be that as it may, even if the writ petition filed by the appellant has been disposed of, the hearing therein shall be reopened and the hearing in the two petitions shall proceed in the High Court in such manner as the High Court may deem fit but keeping in view the following directions :

(1) Both the petitions, that is, the writ petition filed by respondents No. 2 and 3 herein registered as OJC No. 4995 of 1995 and the writ petition filed by the appellant herein registered as OJC No. 8128 of 1994 shall be taken up for hearing together.

(2) The following documents which have come up on the record of this Court during the course of hearing and pursuant to directions issued from time to time by this Court shall be sent to the High Court to be taken up in consideration at the hearing of the writ petitions :-

(i) Affidavit of compliance on behalf of Cuttack Development Authority and Planning Member dated 2.2.2004 along with enclosures.

(ii) Additional affidavit of compliance on behalf of the Planning Member, Cuttack Development Authority, respondent No. 6 herein filed on 5.4.2004.

(iii) Further affidavit on behalf of respondent Nos. 2 and 3 herein dated 25.3.2004 along with enclosures.

(iv) Copy of the report submitted by the Planning Member, Cuttack Development Authority.

(v) Reply to the further/additional affidavit dated 6.4.2003 filed on behalf of respondent Nos. 2 and 3.

(vi) Reply on behalf of respondent Nos. 2 and 3 to the additional affidavit dated 5.4.2004 filed on behalf of the Cuttack Development Authority, respondent No. 6 herein with copy of the structural stability certificate, copies of photographs of the site, copy of sketch map showing the main storm water channel, copy of letter issued by the Project Engineer, Orissa Water Supply and Sewerage Board and copy of the order dated 17.4.2003 passed by the High Court, Orissa in Writ Petition (c) No. 3310 of 2003.

(vii) The Stability Report submitted by the Structural Analysis & Design Cell to the Planning Member, Cuttack Development Authority on 18.3.2003.

Photocopies of the documents transmitted to the High Court shall be retained on the record of this Court.

(3) The High Court shall find out and determine how much deviation can be regularized and subject to what terms. If any part of the construction found to be illegal has to be demolished and/or any of the occupants are liable to be displaced, the High Court shall take appropriate steps for their rehabilitation and compensation at the cost of the builder.

(4) Present address at which respondent No. 3 is available, as furnished by him to this Court, shall also be sent to the High Court. During the course of hearing respondent No. 3 shall remain personally present in the High Court unless exempted from personal appearance.

(5) Any non-compliance of the orders of the Court by respondent Nos. 2 and 3 shall be construed as contempt of the orders of the Court and they shall be liable for the legal consequences.

(6) The builder must deposit the compounding fee of Rs. 2,09,160/- within such time as the High Court may allow in this behalf. This deposit shall be treated as a provisional payment of compounding fee subject

to adjustment against such amount as the High Court may ultimately arrive at. During the pendency of these proceedings, we are told that new Regulations of the year 2001 \026 more stringent in nature, have come into force replacing the preceding Regulations. We do not propose to decide the general question \026 whether in the matter of determining and compounding deviations it is the law as on the date of such decision which would apply or the one as was prevailing on the date of commission of the illegal act would apply. Leaving that question open, in the facts and circumstances of the present case, we direct that the present case shall be determined by reference to the regulations as were prevailing prior to the coming into force of the Cuttack Development Authority (Planning and Building Standard) Regulations, 2001.

(7) The High Court, if it feels that illegal/unauthorized building activities in Cuttack are so rampant as to be noticed judicially, may suo motu register a public interest litigation and commence monitoring the same by issuing directions so as to curb such tendency and fixing liability and accountability.