

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

IN THE MATTER OF :

An application under Article 226
of the Constitution of India ;

And

IN THE MATTER OF :

Appropriate writ and/or writs in
the nature of Mandamus
Certiorari and Prohibition ;

And

IN THE MATTER OF :

Howrah Municipal Corporation
Act, 1980 and the rules and by
laws made thereunder ;

And

IN THE MATTER OF :

Notice dated 4th July, 2006 under
Section 177(1) of the Howrah
Municipal Corporation Act, 1980 ;

And

IN THE MATTER OF :

Letter dated 8th July 2006 issued
by the Howrah Municipal
Corporation asking not to erect
construction ;

And

IN THE MATTER OF :

Letter No. 36/A/E/P-IV/2006-07
dated 8th July 2006 ;

And

IN THE MATTER OF :

Memo No.44/Cmmr./2006-07
dated 23rd June 2006 issued by
the Municipal Commissioner,
Howrah Municipal Corporation,
Howrah.

And

IN THE MATTER OF :

1. Howrah Mills Company Limited a company incorporated within the provisions of the Companies Act, 1913 having its Registered office at 'Howrah House' 135, Foreshore Road, Howrah.

2. Sitangsu Banerjee, Manager, Howrah Mills Company Ltd., having his office at 135, Foreshore Road, Howrah.

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Petitioners

-Versus-

1. Howrah Municipal Corporation a body corporate incorporated under the Howrah Municipal Corporation Act, 1980 having its office at 4, M.G. Road, Howrah- 711 101.

2. Municipal Commissioner,
Howrah Municipal Corporation,
having his office at 4, M.G. Road,
Howrah - 711 101.

3. Assistant Engineer, Borough
Committee -IV, Howrah Municipal
Corporation having his office at 4,
M.G. Road, Howrah - 711 101.

4. Chief Architect; Howrah
Municipal Corporation, having his
office at 4, M.G. Road, Howrah -
711 101.

...Respondents

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :

The Hon'ble Justice Jyotirmay Bhattacharya

W.P. No. 18735 (W) of 2006

Howrah Mills Company Limited & Anr.

Versus

Howrah Municipal Corporation & Ors.

For the Petitioners : Mr. Samaraditya Pal

Mr. Utpal Majamdar,

Mr. Pushan Kar.

For the Howah : Mr. D.P.Mukherjee

Mrs. Smritikana Mukherjee

Mr. Debjit Mukherjee

Judgment on : 21.09.2006

For revival of the petitioner no.1 which is a sick company the surplus land belonging to the petitioner no.1

measuring about 5,326 sq.mt. at premises no. 160 G.T. Road (South) Shibpur, Howah was permitted to be transferred to the highest bidder M/s. Vendant Tradrs Pvt. Ltd. at a price of Rs. 458 lakh in a proceeding under BIFR as per the recommendation of the Assets Sale Committee.

The land which is proposed to be sold to the said highest bidder has already been earmarked.

When the petitioner took step to construct a boundary wall around the land proposed to be sold, the petitioner was obstructed and as a result the petitioner had to file a writ petition before this Court seeking issuance of a writ of mandamus directing the State and the police authorities to give necessary police protection, so that the petitioners can raise boundary wall around the land proposed to be sold. The said litigation went up to the Hon'ble Supreme Court giving rise to Civil Appeal No. 2639 of 2006 which was ultimately disposed of by the Hon'ble Supreme Court on 12th May, 2006 with a direction upon the State authorities, viz. the respondent nos. 4 to 7 therein to continue to give the requisite protection to the petitioners herein in respect of the property of the petitioner company and also to give necessary protection to enable the company to repair or renovate its boundary walls as also for construction of

separate boundary wall for the plot of land proposed to be sold under the supervision of BIFR.

In spite of the said order being passed by the Hon'ble Supreme Court, the Municipal authority of Howrah Municipal Corporation restrained the petitioners from raising the boundary wall by issuing a notice under Section 177(1) of the Howrah Municipal Corporation Act, 1980 directing the petitioner to stop further work of construction of boundary wall above two metres in height at premises No. 160, G.T. Road (South).

Furthermore, the petitioners prayer for sanction of the building plan for erection of a four-storeyed building for educational and commercial purpose on the land proposed to be sold at premises no. 160, G.T. Road (South) was rejected by the Commissioner of the Howrah. Municipal Corporation and such rejection was communicated to the petitioners by the Commissioner of the said Corporation vide his letter dated 23rd June, 2006 being Annexure 'P-3' to this writ petition. The grounds for rejection as mentioned in the said letter are as follows :-

a) Holding No. 160 G.T. Road (South) on which the building is intended to be erected is, as per information

available at this end, under Order of sale by the Department of Industrial Reconstruction, Govt. of West Bengal at the instance of decision of BIFR, at a consideration price of Rs. 458 lacs to M/s. Vedant Traders Pvt. Ltd.

b) It is also learnt that the sale is to be executed under the supervision of Industrial Reconstruction Deptt. And the Mills authority would extend all help for transfer of the property.

c) The sale Order of this holding (160 GT Rd) along with that of another Holding (493/C/A GT Rd), both belonging to your client was issued by the competent authority of the Government as stated in the earlier paragraph under the prevalent rule for your client's committed resurrection and revival of the Mill for the benefit of, among others, its over 6000 employees with the sales proceeds of the property.

d) That the land is under Order of Sale of Govt. Intervention finds corroboration in the text of the Judgment of the Supreme Court of India in the Civil Appeal No- 2639 of 2006.

e) Hence your client's right to erect building at the Holding No.160 GT Rd(s) stands eclipsed at this stage and placement of plan stands unwarranted.

f) You will, I believe, surely appreciate that in the position above, your client's application for sanction of plan for erecting building at such a premises cannot be entertained by this Civic Body.

The plan which was submitted by the Municipal authority for its sanction was returned to the petitioners by the Municipal authority.

Hence the instant with petition was filed seeking appropriate reliefs.

Mr. Pal, learned Senior Counsel, appearing for the petitioners, challenged the jurisdiction of the Municipal authority to issue the stopwork notice under Section 177(1) of the said Act for restraining the petitioners from raising boundary wall above two metres in height though raising of such boundary wall upto three metres in height without sanction, is permissible under the Howrah Municipal Corporation Act, 1980. By referring to Section 2 (1A) of the said Act, Mr. Pal submitted that building as defined in the

said Act does not include the boundary wall not exceeding three metres in height.

Mr. Pal, thus, submitted that since the petitioners have neither raised the boundary wall exceeding three metres nor the petitioners have any intention to raise such boundary wall above three metres, the petitioners cannot be restrained by the Municipal authority from raising the boundary wall upto three metres in height.

In reply to the said submission of Mr. Pal Mr. Mukherjee appearing for the Howah Municipal Corporation submitted by referring to Rule 3(2)(a) of the Howah Municipal Corporation Building Rules 1991 that erection, re-erection addition to or alteration of a boundary wall not exceeding two metres in height is permissible without sanction from the Municipal Authority.

Mr. Mukherjee thus contended that construction of boundary wall exceeding two metres in height without sanction is prohibited under the said Rules. Mr. Mukherjee thus, supported the said action of the Municipal authority, as the petitioners were raising the boundary wall exceeding two metres in height.

Let me now consider the respective submissions of the Counsel of the parties to examine the justification and/or legality of the impugned notice issued under Section 177(1) of the said Act by the Municipal authority vide annexure 'P-5' at page 52.

The Municipal authority does not dispute the petitioners' right to raise boundary wall around the land preposed to be sold at premises No. 160, G.T. Road (South) and/or to repair and/or reconstruct the existing damaged/broken boundary wall around the rest portion of the land at premises No. 160 G.T. Road (South). The only dispute is with regard to the height of the boundary wall upto which boundary wall can be raised without any sanction from the Municipal authority.

Section 174 of the said Act provides that every person who intends to erect a building shall apply for sanction by giving notice in writing of his intention to the Commissioner in such form and containing such information or document as prescribed. The procedure for obtaining sanction from construction and/or to make any addition or alteration to an existing building has been prescribed in Rule 4 of the said Rules.

Since the right of a person to raise construction of a building without any sanctioned plan is prohibited, the definition of building as given in Section 2 (1A) of the said Act has great significance. Section 174 of the said Act makes it clear that permission is necessary for erection and/or re-erection of any building. There is no other provision in the Act which prohibits erection of any construction which is not a building within the meaning of the "building" as defined in the said Act.

For appreciation of the meaning of the expression "building" the definition of the building as given in the said Act is set out hereunder :-

Sec. 2(1A) - 'building' includes a house, outhouse, stable, privy, urinals, shed, hut, walls (other than a boundary wall not exceeding 3 metre in height) and any other structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever, but does not include a hogla or other similar kind of temporary shed erected on ceremonial or festive occasions.

The said definition of the "building" gives a clear indication that building does not include a boundary wall upto three metres in height. If that be so, then no

permission is necessary under Section 174 of the said Act for raising boundary wall upto three metres in height.

It is no doubt true that Rule 3(2A) provides that no sanction is required for construction of boundary wall upto two metres in height. The said Rule gives an indication that construction of boundary wall exceeding two metres in height without sanction is not permissible.

Let me now consider the legality of the said Rule. It is settled principle of law that the provision contained in the Rules cannot override the statutory provision. Statute will always prevail over the Rules, in case of conflict between them.

Following the said principle, this Court has no hesitation to hold that no sanction is required to be taken from the Municipal authority for raising boundary wall upto three metres in height.

That apart, even the building Rules of 1991 does not provide the procedure to be adopted for obtaining sanction for construction of boundary wall beyond two metres in height. The authority who can accord such sanction has also not been prescribed in the said Building Rules. The statute

is also silent on this score. In the absence of any provision in the statute and the Rules framed thereunder, the Municipal authority cannot insist upon the petitioners for obtaining sanction from the Municipal authority for erection of boundary wall upto the height of three metres.

Under such circumstances, this Court holds that the Municipal authority exceeded its jurisdiction to issue the impugned notice being annexure 'P-5' to this writ petition at page 52. Accordingly the impugned notice stands quashed so far as it relates to the construction of the boundary wall is concerned.

The petitioners are, thus, permitted to raise boundary wall around the land proposed to be sold at premises No. 160, G.T. Road (South) and/or to repair and/or in construct the broken and/or damaged portion of the boundary wall around the rest portion of the said premises upto three tetras ihetres in height without obtaining any section from the Municipal authority.

The Municipal authority is, thus, restrained from creating any obstruction in raising the said boundary wall and/or repair and reconstruct thereof upto the height of three metres. The petitioners are also restrained from raising

the boundary wall above three metres without obtaining sanction from the Municipal authority.

With regard to the other challenge of the petitioner regarding the legality of the order of perusal to grant sanction to the Building Plan submitted by the petitioners for the proposed construction of a four storeyed building at the said premises, this Court feels that the legality of such order which was communicated to the petitioners by the Commissioner of Howrah Municipal Corporation by the letter dated 23rd June, 2006 being annexure 'P-3' to this petition, need not be gone into in great details in view of the submission of Mr. Mukherjee that his client is agreeable to reconsider the petitioner's application for sanction of the Building Plan afresh in the light of the direction passed by the BIFR as contained in the letter dated 12.9.2006 issued by the Deputy Direction (M), BIFR addressed to the Commissioner, Howrah Municipal Corporation being annexure 'P-11' to the supplementary affidavit filed by the petitioners.

Accordingly, this Court directs the petitioners to re-submit the Building Plan to the Municipal authority and the Municipal authority is directed to consider the said Building Plan afresh in the light of the communication made by the

BIFR authority to the Howrah Municipal Corporation vide its letter dated 12.9.2006 and take the ultimate decision regarding grant of sanction to the said Plan in accordance with law, positively within a period of six weeks from the date of submission of the Building Plan by the petitioners to the Municipal authority.

Needless to mention here that in the event, the Municipal authority decides not to grant sanction to the said Building Plan, then the Municipal authority is required to supply its reasons in support of its conclusion. The concerned authority is also directed to communicate its decision to the petitioners within a week from the date of taking such decision.

Be it mentioned here that agreement for sale does not create any title in favour of the proposed transferee and as such the title and/or ownership of the petitioner no.1 in the said property remains unaffected until such property is transferred to the proposed purchaser by a registered deed of conveyance.

Thus, so long as the petitioner no.1 retains the ownership of the said land, its right to apply for sanction of a building plan and/or to obtain sanction thereto in terms of

the provision of Section 174 of the said Act, cannot be denied notwithstanding the agreement entered into between the petitioner no.1 and the proposed purchaser for sale of a part of premises no. 160, G.T. Road (South). That apart , it is also disclosed in the letter dated 12.9.2006 written by the BIFR to the Howrah Municipal Corporation being annexure 'P-11' to the supplementary affidavit that an obligation to obtain a Sanction Plan from the Corporation was imposed upon the petitioners as a condition for completion of sale of the said property.

Under such circumstances, this Court holds that the Municipal authority refused to grant sanction to the Building Plan submitted by the petitioners without proper application of mind. The impugned decision of the Municipal authority in this regard which was communicated to the petitioners vide annexure 'P-3' to this petition stands quashed.

The writ petition, thus, stands allowed.

Since this writ petition is disposed of at the motion stage without inviting any affidavit from either of the parties, let it be recorded that the allegations made by the

petitioners in this writ petition are deemed to be not admitted by the respondents.

Urgent Xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, but positively within three days from the date of compliance of the formalities by the parties in this regard.

(Jyotirmay Bhattacharya, J.)