

Swapan Ghosh and ors. Vs. Cuttack Development Authority and ors.

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Court : Orissa

Decided On : Apr-30-2010

Judge : B.P.Das; B.K.Nayak, Jj.

Acts : Orissa Development Authorities Act - Section 15 (1) C Clause-(2).

Appeal No. : W.P.(C). No.1742 OF 2010.

Appellant : Swapan Ghosh and ors.

Respondent : Cuttack Development Authority and ors.

Advocate for Def. : M/s. D.Mohapatra, M.Mohapatra; G.R.Mohapatra; S.P.Nath; B.K.Nayak & D.K.Mohanty; M/s.Basudev Mishra ; B.L.Tripathy; M/s. Srikanta Kumar Nayak, Advs.

Advocate for Pet/Ap. : M/s. B.P.Satpathy, B.K.Nayak, A.K.Sahoo; J.Pradhan, Advs.

Judgement :

1. In this writ application, the petitioners have prayed for issuance of direction to the opposite parties for removal/demolition of the telephone tower illegally constructed on the roof of the house situated over Plot Nos. F/401 and F/402 in Sector- 7, C.D.A., belonging to opposite party no.7.

2. Admittedly, the petitioners are lessees under the Cuttack Development Authority (in short 'C.D.A.'), who have been allotted with different 'F' type plots in Sector-7,

C.D.A. and have been staying with their families over those plots by constructing houses. Opposite party no.7 and his wife have also been allotted with Plot Nos. F/401 and F/402 near the house of the petitioners and the said opposite party no.7 constructed a house over those two plots. Opposite party no.7 took up construction of a telephone tower on the roof of his house unauthorisedly and apprehending danger to their life, health and property that may result from such unauthorised construction of the tower, the petitioners submitted applications (Annexures-1 and 2) to opposite party no.1, the C.D.A. authority with a request to stop the unauthorised construction undertaken by opposite party no.7. On receipt of the applications, the Asst. Town Planner, C.D.A. (opposite party no.2) issued a letter to Inspector-in-charge of Markatnagar Police Station, C.D.A., (opposite party no.5) under Annexure-3 requesting to ensure discontinuance of the construction work. It is also indicated in Annexure-3 that notice had been issued to opposite party no.7 to discontinue the construction. It is further alleged by the petitioners that due to some political interference opposite party no.5 failed to take steps, as a result of which opposite party no.7 proceeded with illegal construction of the tower and has let out the same to mobile phone companies, but the tower has not been made operational since electricity connection has not been provided. It is alleged by the petitioners that for the illegal and unauthorised construction of the tower, the petitioners being adjoining house owners are apprehending danger to their life, safety and property. It is also alleged that because of illegal construction undertaken by opposite party no.7, house of petitioner no.1 which adjoins to plot no.F/402 on one side has already developed cracks.

3. During the course of hearing of the writ petition, it came to light that Essar Telecom Infrastructure Pvt. Ltd. (in short 'Essar Telecom') has undertaken the construction of the tower on the roof top of house of petitioner no.7 by entering into an agreement with him. Therefore, the Cuttack Municipal Corporation and Essar Telecom were impleaded as opposite party nos. 8 and 9 respectively and notices were issued to them.

4. Opposite party nos.7 and 9 have filed separate counter affidavits taking almost identical stands. It is stated by them that the construction of the telephone tower in question is coming within the meaning of 'operational construction' as defined in

the Orissa Development Authorities Act,1982 (in short "the Act") and, therefore, no permission from the C.D.A. under Section 15 of the Act is required. It is also stated that for the purpose of removal of the construction in question, which has been undertaken without permission, C.D.A. has already initiated proceeding bearing U.C. Case No.2 of 2010 against opposite party no.7 and issued notice to him and in view of pendency of the proceeding the petitioner is not entitled to any relief in this writ petition. It is additionally stated in the counter of opposite party no.9 that Essar Telecom has brought necessary license from the Telecom Regulatory Authority of India (in short 'TRAI') to operate through out the country and to meet the need of mobile telephone service in the Markatnagar locality in the Cuttack City, opposite party no.9 entered into an agreement with opposite party no.7 and his wife and took up the construction of the telephone tower. It is also stated that by virtue of notification dated 16.8.2007 issued by the Commerce and Transport Department, Government of Orissa (Annexure-I/3) the Cuttack Municipal Corporation is the competent authority to issue no objection certificate for construction of the telephone tower and that opposite party no.9 has already made application to the Cuttack Municipal Corporation for grant of no objection. Opposite party no.9 has ensured adequate protection against heavy velocity wind and cyclonic weather and other safety measures like lightening arrester and there is absolutely no apprehension or risk to life and property.

In their counter affidavit, the C.D.A. authorities (opposite party no.1 and 2) have stated that having received information about the construction of mobile tower unauthorisedly and without permission on the roof of the house of opposite party no.7 and on the report submitted by Field Staff of C.D.A., U.C. Case No.2 of 2010 has been initiated against opposite party no.7 and notice has been issued to him to show cause as to why the unauthorised construction shall not be demolished. Notice was also sent to opposite party no.7 directing him to stop further construction of the tower. It is further stated that though the construction of the tower in question may be treated to be "operational construction", opposite party nos.7 & 9 are not exempted from taking permission from C.D.A. as per proviso-(c) of Clause-(ii) of sub Section (1) of Section 15 of the Act inasmuch as the construction is not undertaken by any Department of Central or State Government or a local authority or a body corporate constituted under any law. It is also stated

that Government notification dated 16.8.2007 under Annexure-B/1 (which has also been filed by opposite party no.9 as Annexure-I/3) provided for obtaining no objection certificate from the concerned local body in case of construction of towers though such notification does not bar the requirement of permission from the Development Authority. Lastly, it is stated that proceeding for removal/demolition of unauthorised construction of the tower has already been started against opposite party no.7 by the C.D.A. which shall be disposed of following due process of law. Opposite party no.6, the S.D.O., Electrical, Sub-Division(6), C.D.A. has stated in his counter affidavit that application was received for giving power supply to the mobile telephone tower in question and that since no permission has been received from C.D.A. for the construction, the application has not been processed as yet.

5. No counter affidavit has been filed on behalf of the Cuttack Municipal Corporation. Even though vide order no.6 dated 10.3.2010 it was directed that the Secretary to Government, Commerce and Transport Department shall file an affidavit on the next date indicating his competency to issue notification dated 16.8.2007 and a copy of the writ petition was served on learned State Counsel for that purpose, no affidavit on behalf of the State has been filed.

6. Under Section 15(1) of the Act permission from the Development Authority in writing is necessary to institute or change the use of any land or building or for undertaking or carrying out any development in any building or in or over any land. However, the proviso (a) (b) (c) carve out certain exceptions where permission from the development authority is not required. While contesting opposite party nos. 7 and 9 take the stand that the construction of the telephone tower in question comes within the meaning of 'operational construction' as defined in the Act and, therefore, the same is exempted from permission in accordance with proviso (c) under Sub section (1) of Section 15, the C.D.A. authorities (opposite party nos.1 and 2) contend that though the construction of the tower is said to be an 'operational construction', opposite party nos. 7 and 9 cannot claim the exemption as they are not coming within any of the categories of persons or authorities as described in proviso (c).

7. The provisions of Section 15 (1) of the Act, in so far as they are relevant for the purpose of the case, are quoted hereunder:

"15. Prohibition of development without permission- (1) Notwithstanding anything contained in any other law, after the constitution of an Authority for any development area under Sub-section (2) of Section 3, no person including a department of the central or a State Government or a local authority or a body corporate constituted under any law shall within the development area- (i) subdivide any land for utilising, selling, leasing out or otherwise disposing it of unless he, after obtaining written permission from the Authority, lays down and makes a street or streets giving access and right of way to all the plots into which he intends to subdivide the land so as to connect them with an existing public or private street and also provides amenities, if any, specified by the development plan in: operation or regulations pertaining to planning or building standards made in this behalf;

(ii) institute or change the use of any land or building or undertake or carry out any development in any building or in or over any land without obtaining permission in writing from the concerned Authority:

Provided that no such permission shall be necessary for-

(a) Operational construction by a department of Central or a State Government or a local authority or a body corporate constituted under any law."

8. It is seen from the aforesaid proviso (c) under Sub Section (1) of Section 15 that 'operational construction', which is undertaken by any Department of the Central or a State Government or a local authority or a body corporate constituted under any law is only exempted from obtaining permission from the Development Authority. While opposite party no.7 is an individual, opposite party no.9 is a Company registered under the Indian Companies Act, 1956. A company registered under the Companies Act, though a legal person, is not a body corporate constituted under a law. The expression "body corporate constituted under any law" occurring in proviso (c) under Section 15(1) of the Act would only mean a corporation, which is otherwise called a statutory corporation. A company registered under the

Companies Act cannot be said to be a statutory corporation. Opposite party nos.7 and 9, therefore, cannot claim exemption under proviso (c) of Section 15 (1) of the Act.

9. The other plea taken by opposite party no.9 is that the State Government in the Commerce and Transport Department have issued notification dated 16.8.2007 (Annexure I/3), by virtue of which the Cuttack Municipal Corporation and not the Cuttack Development Authority is to issue no objection certificate for construction of the telephone tower, and that opposite party no.9 has already made application to the Cuttack Municipal Corporation for grant of no objection. A bare perusal of the Government notification dated 16.8.2007 reveals that it is not one authorizing the Urban Local Bodies to issue no objection certificate for erection of telephone tower, but it is with regard to formulation of detailed guidelines for levy of uniform license fee for installation of telephone towers and for laying optical fibre cables in different Urban Local Bodies in the State. The Orissa Municipal Act, 1950 and the Orissa Municipal Corporation Act, 2003 empower the Urban Local Bodies to levy fees for granting license for different types of user of private properties as well as properties belonging to the Urban Local Bodies within the Urban area. In particular, Section 194 of the Orissa Municipal Corporation Act, 2003 empowers the Municipal Corporation to levy fees for issue of Corporation license for various non-residential use of land and building. Where a particular land or building comes within the jurisdiction of an Urban Local Body and also within a Development area under the Provisions of the Orissa Development Authorities Act, there the provisions of both the Orissa Development Authorities Act and the Orissa Municipal Act or the Municipal Corporation Act, as the case may be, shall apply. The application of both the Acts is not alternative but simultaneous. This is amply made clear from the non-abstante clause appearing in sub Section (1) of Section 15 of the Act as seen above. Therefore, issuance of Government Notification dated 16.08.2007 which merely formulates guidelines for collection of uniform license fees by Urban Local Bodies would not exempt opposite party nos. 7 & 9 from obtaining permission from the Cuttack Development authority for construction of the telephone tower in question.

10. Admittedly, no permission from Cuttack Development Authority has been obtained for construction of the telephone tower in question on the roof of the house of the opposite party no.7, for which the Authority has already initiated U.C. Case No.2 of 2010 and issued notice to opposite party no.7 to show cause as to why the unauthorised construction shall not be demolished. Having regard to the allegations made by the petitioners it is desirable that the Authority should dispose of the proceeding early. We, therefore, direct opposite party nos.1 and 2 to take appropriate action and dispose of U.C.Case No.2 of 2010 in accordance with law within a period of four months from the date of communication of this order.

11. The writ application is accordingly disposed of. The parties shall bear their own costs. Writ petition disposed of.

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