



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

PIL No. 39/2009

1. Mrs. Achala Bora,
Retd. Principal of Tezpur College, Kacharigaon,
Tezpur.
2. Sri Bhabananda Das,
Ex-Ward Commissioner (Tezpur Municipal Board),
S/o. Late Nabin Das,
Kacharigaon, Tezpur, Sonitpur, Assam.
3. Sri Manik Chandra Bora,
Superintendent of Food & Civil Supply (Retd.),
S/o. Late Chandra Bora,
Kacharigaon, Tezpur, Sonitpur, Assam.
4. Dr. Charu Mohan Nath (Retd.),
S/o. Late Ghendu Ram Nath,
Kacharigaon, Tezpur, Sonitpur, Assam.

..... Petitioners.

-Versus-

1. The State of Assam,
Represented by the Secretary to the Govt. of Assam,
Town & Country Planning Department, Dispur, Ghy-6.
2. The Director,
Town & Country Planning Department, Dispur,
Guwahati-781006.
3. Tezpur Development Authority,
Sonitpur, Tezpur, represented by its Chairman.
4. The Member Secretary & Town Planning Officer,
Tezpur Development Authority, Sonitpur, Tezpur.
5. The Deputy Commissioner,
Sonitpur, Tezpur, Assam.
6. The Pollution Control Board, Assam,
Represented by its Chairman,
Having its Head Officer at Bamunimaidam,
Guwahati-781021.
7. The Pollution Control Board,

Represented by its Regional Officer,
Regional Laboratory cum Officer,
Tezpur West, Darrang College Road, Tezpur.

8. M/s. K.R.C. & S.R. Associates,
Kacharigaon, Tezpur, Dist. Sonitpur, Assam,
Represented by its partner Sunil Saraf.
9. Vishal Mega Mart,
Tezpur, Represented by its Administrative Manager,
Kacharigaon, Tezpur, Dist. Sonitpur, Assam.
10. Tezpur Municipal Board,
Tezpur, Dist. Sonitpur, Assam.

...Respondents.

BEFORE
THE HON'BLE MR. JUSTICE HRISHIKESH ROY
THE HON'BLE MR. JUSTICE PARAN KUMAR PHUKAN

For the Petitioners: Mr. I. Choudhury,
Ms. R.S. Choudhury &
Mr. M. Das,Advocates.

For the Respondent Nos.1, 2 & 5: Mr. T.C. Chutia, Addl. Sr. Govt. Advocate.

For the Respondent No.8: Mr. G.N. Sahewalla, Sr. Advocate,
Md. Aslam, Advocate.

Date of hearing: 02.01.2017 & 03.01.2017.

Date of Judgment : *3rd January, 2017*

JUDGMENT AND ORDER (ORAL)

[*Hrishikesh Roy, J.*]

Heard Mr. I. Choudhury, the learned counsel appearing for the petitioners. The respondent Nos.1, 2 & 5 are represented by Mr. T.C. Chutia, the learned Addl. Senior Govt. Advocate, Assam. The learned senior counsel Mr. G.N. Sahewalla appears for *M/s K.R.C. & S.R. Associates* (respondent No.8). The *Tezpur Development Authority* have filed their counter affidavit but their counsel is not present during hearing.

2. This PIL is filed by the residents of the *Kacharigaon* locality of Tezpur Town and their grievance relates to the illegal expansion of the high rise building, constructed in the *Kacharigaon* area, by the 8th respondent. According to the

petitioners, the builders have usurped the ground floor parking space in the commercial building where a hotel and a shopping mall (*Vishal Mega Mart*) are operating and have also constructed two extra floors, in violation of the conditions incorporated in the building permission, granted on 28.02.2008 (Annexure-1), by the *Tezpur Development Authority*.

3. The permission for construction of the multi storied building, consisting of G+5 floors was granted on 28.02.2008, inter alia, with the following conditions:

“.....
3. Parking area should be reserved as per drawing.
4. Front set back = 20’—0”, Rear set back 13’—0”.
.....”

4. However the respondent No.8 constructed two extra floors beyond the G + 5 floors and also located the hotel reception area and a restaurant in the ground floor (earmarked exclusively for parking). That is how, the petitioners contend that the builders have made unauthorized construction and usurpation of designated parking area for unauthorized usage. It is the further case of the petitioners that the *set-backs* required to be maintained in the front and rear side of the building, have not been maintained. Therefore they seek direction for *demolition* of all the unauthorized constructions/extension made by the respondent No.8.

5. After noticing the illegal construction, the residents of the *Kacharigaon* area gave written complaint to the Chairman of the *Tezpur Development Authority* and the Director of the Town & Country Planning Department but since the complaints have remained unheeded, the aggrieved petitioners have filed this PIL to protect the public interest.

6. Representing the builders (respondent No.8), the learned senior counsel Mr. G.N. Sahewalla submits that many commercial establishments have come up in the *Kacharigaon* area and accordingly the counsel contends that another commercial establishment, can't be a cause for legally enforceable grievances, for the residents of the locality. The senior counsel refers to the *Zoning Regulation*, notified under *Section 10(2)* of the *Assam Town & Country Planning Act, 1959* (hereinafter referred to as 'the *Town Planning Act*') to argue that the building satisfies the stipulated norms. He justifies the vertical expansion beyond the 5th floor as one covered by the *deemed permission*, under *Section 13(4)* of the *Town Planning Act*.

7. The parties do not dispute that the 1st and 2nd floor of the commercial building comprises a shopping mall (let out by the builder) and in the upper floors of the building, the *K.R.C. Palace Hotel & Restaurant* (operated by the builder), is functioning.

8. According to the additional affidavit filed by the *Tezpur Development Authority* on 28.03.2012, the building consists of seven floors, out of which the 1st and 2nd floors house the *Vishal Mega Mart*, for retail business. The rest of the building including the ground floor, is used as a hotel, its reception area and restaurant, by the name *K.R.C. Palace Hotel & Restaurant*. The affidavit of the regulatory authority suggests that the commercial building has failed to maintain the front and the rear *set-back*, in reference the measurements stipulated by the *Tezpur Development Authority* in the permission accorded on 28.02.2008 to the builder. Moreover two extra floors were constructed beyond the permitted five floors. That apart, a staircase from the 1st floor to the ground floor landing is illegally constructed and thus the builder has violated the stipulated front *set-back* norms. The ground floor area which was required to be kept free for parking, now mostly comprises the Restaurant and the reception counter of the hotel. Therefore the petitioners contend that unauthorized addition and usage were deliberately made by the builder, in defiance of the building permission.

9. The *Zoning Regulation* provides for the extent of *set-back* to be maintained for buildings. When a shopping mall and a hotel is comprised in the building, the necessity of providing adequate parking space for such establishments with heavy footfalls, can hardly undermined. The *Clause 3.15* stipulates that *off street parking* should be provided to the extent of vehicles specified in *Table-1* of the *Zoning Regulation* and that is how when the building permission was given on 28.02.2008, the entire ground floor area was ordered to be kept reserved, as parking area only.

10. What is seen now is that the builders have encroached on a major portion of the ground floor parking area, which currently comprises the restaurant and the reception area of the hotel. To justify the usurption of the designated parking area Mr. G.N. Sahewalla, the learned Sr. counsel submits that since alternate parking space at a distance of 120 Meters of the building is provided, the same should be considered to have met the requirement of *off street parking* space, for the

commercial building. In support of this contention, the senior counsel refers to *sub-clause (e) of clause 3.15 of the Zoning Regulation*.

11. In the above context, the *clause 9.2.1 of the Zoning Regulation* speaks of the *non-compoundable* items, which will warrant *demolition*. The violation of parking norms and construction of extra floors are covered amongst the *non-compoundable* items in the *Zoning Regulation*. Therefore it cannot be accepted that the alternate *off street parking* at a distance of 120 Meters from the building, will satisfy the requirement of parking, for the hotel and the shopping mall complex, which attracts customers in large numbers.

12. The building permission granted by the *Tezpur Development Authority* allowed a G+5 floor structure, extending to a height of 17.7 Meters, whereas the builders have constructed a building of 22.5 Meters height, with two extra floors. Mr. G.N. Sahewalla, the learned Sr. counsel tries to justify vertical expansion with the plea that building permission was applied for the 6th floor and there was no refusal within the permitted one month, by the *Tezpur Development Authority*, to the builder's application. On this projection, the addition of the extra floors is contended to be covered under *deemed permission*, under *Section 13(4) of the Town Planning Act*. In support of his submission, the counsel cites *Golap Sarma Vs. Guwahati Metropolitan Development Authority* reported in 1995(2) GLT 365, *Kula Prasad Gogoi Vs. State of Assam* reported in (2008)2 GLR 786 and *Live Oak Resort (P) Ltd. Vs. Panchgani Hill Station Municipal Council* reported in (2001)8 SCC 329.

13. To decide on the above submission, the *Section 13(4) of the Town Planning Act* will have to be considered and the same is extracted:-

"13(4) The Authority shall not refuse the permission except on the ground of contravention of proposals contained in the Plan or the Regulations and unless the permission has been refused within a period of one month from the receipt of the application or such other information as may be called for the Authority under sub-section (3), it shall be presumed that the permission has been given."

14. What is of prime significance here is that the builder opportunistically applied for permission for the 6th floor on 13.09.2008, only when the *stop construction* notice(s) were served upon them by the *Tezpur Development Authority*. It was specifically mentioned in the notice of 04.09.2008 that the builder had made additional construction in violation of *Section 13(1) of the Town*

Planning Act and they were asked to *stop the construction*, in defiance of the approved plan. The illegal staircase in front of the RCC building was also alluded to, in the first order of 04.09.2008, issued by the *Tezpur Development Authority*. However, no heed was paid to the *injunction order* and then the 2nd notice was issued on 06.09.2008, whereby the builder was asked to stop further construction of the 6th floor and all other constructions. In fact, the Officer-in-charge of the *Kacharigaon Police O.P.* was requested to stop the builder from carrying out the illegal construction. From these dates, it is obvious that the builder had applied for permission to construct the 6th floor on 13.09.2008 only when they were confronted with the *stop construction* orders. Hence this can't be construed to be a regular application to attract the *deemed* permission under *Section 13(4)*.

15. On the issue of *deemed* permission under *Section 13(4)* of the *Town Planning Act*, the legal presumption should be drawn only for a bonafide applicant, who may be denied the timely response from the regulatory authorities on the building permission application. The objective of the legal consequence is to protect the genuine applicant from the procrastination of the authorities and likely abuse of power by them. In such situation the fictional permission envisaged by *Section 13(4)* can benefit the bonafide applicants. But what is seen here is an unscrupulous builder who started vertical construction without permission and when the *Tezpur Development Authority* ordered them to stop the ongoing illegal construction, the builder on the wrong side of law, gave the opportunistic application to allow construction of the 6th floor in the building, where permission was accorded only for G+5 structure. The construction plan was approved in 28.02.2008, specifying the surrounding *set-backs*, parking space etc. as because, the norms would barely justify a G+5 building with the given *set-back* measurements. When the building height is to be raised, commensurate upscaling of the *set-back* measurements will be needed for the higher structure, to conform to the building norms. But when the 5 storied building is already constructed, the *set-back* margins can't naturally be increased for the already standing structure and therefore construction of extra floors couldn't have been allowed in the present case.

16. The builder must have been aware of this position and that is why they didn't apply for permission for the 6th floor but commenced construction illegally. Only when they were asked to stop the illegal works on 04.09.2008 and

06.09.2008 respectively, the opportunistic application was made to the authority on 13.09.2008. The question to be asked then is whether such kind of unscrupulous builder should get the protection of law envisaged by *Section 13(4)* of the *Town Planning Act* and the ratio enunciated in *Golap Sarma (supra)*, *Kula Prasad Gogoi (supra)* and *Live Oak Resort (P) Ltd.(supra)*, cited by the respondent. Upon due consideration, we are sure that the benefits of law is not intended for those who trample upon the law. Therefore we hold that in the present facts, the decisions in *Golap Sarma (supra)*, *Kula Prasad Gogoi (supra)* and *Live Oak Resort (P) Ltd.(supra)*, cited by Mr. Sahewalla, are inapplicable and they can't help to protect the illegal additions beyond what was permitted by the *Tezpur Development Authority* in 2008.

17. Next we have to consider another plea of the builder to justify the additional construction. They contend that the constructed height of the building stands at 22.5 meters, whereas the maximum permissible height for such building is 24.9 meters. Thus it is argued that the vertical construction is within the permissible height. But this plea must be rejected since construction of extra floors is *non-compoundable*, under *Clause 9.2.1* of the *Zoning Regulation*. Dealing with a similar situation of vertical construction, the Supreme Court in *Priyanka Estates International Private Limited Vs. State of Assam* reported in (2010)2 SCC 27 ordered for *demolition* of the extra floors as the constructions are in absolute violation of the approved plans and is covered under the *non-compoundable* category. The ratio of this decision of the Apex Court squarely applies to the facts of the present case.

18. That apart, we cannot also be oblivious of the fact that when permission was granted for a building with 17.7 meters height, the *set-back* norms were in the context of the permitted height specified by the *Tezpur Development Authority*. When the building height is raised thereafter to 22.5 meters, there must be corresponding increase of the side and rear *set-backs* for the building, under *Note to Table-II* of the *Zoning Regulation*. Therefore the legality of the vertical construction must be judged on the *set-back* specification provided at the time of initial construction and it will be wrong to determine the issue on the basis of the maximum permissible height, as may be contemplated, for high rise buildings. According to us, if the construction of the extra floor is to be construed as a legal construction, then additional *set back* must be provided beyond what was

stipulated in the original building permission and this is not possible in the already standing structure.

19. The respondent builder has described the front staircase as an ornamental projection, providing access to the building and we are surprised to find that in the first affidavit filed by the *Tezpur Development Authority*, they supported the outside staircase. But in the additional affidavit filed by the Regulatory Authority on 28.03.2012, it is clearly stated that the front staircase is an illegal construction, as it has been built to connect the 1st floor and has directly encroached on the front *set back* space, where there was a stipulation to maintain 20 ft. from the boundary. To justify the staircase, Mr. Sahewalla has referred to such staircases being left undisturbed elsewhere. On this submission all we can say is that existence of illegal staircase in other buildings, will not lend legitimacy to the illegal construction in the building of the respondent No.8. It is well known that two wrongs do not make a right, as was observed in *State of Haryana Vs. Ram Kumar* reported in (1997)3 SCC 321.

20. That apart, on the northeast corner of the building a separate room has been illegally constructed for storage of LPG cylinders and this in turn has affected the side *set back* of the building. Therefore it is obvious the *set-back* norms stipulated in the building permission, have been defied in the building constructed by the respondent No.8. Storage of the inflammable LPG cylinders in such haphazardous manner also raise concern for public safety.

21. Similar illegal construction was the subject matter of consideration in *Esha Ekta Apartments Cooperative Housing Society Limited Vs. Municipal Corporation of Mumbai* reported in (2013)5 SCC 357. In this case, the Supreme Court cautioned the authorities against arbitrary regularization of illegal construction by way of compounding and otherwise. Moreover, since that case involved few innocent purchasers, the Court observed that the builder must compensate the sufferers. Referring to the earlier decision in *Friends Colony Development Committee Vs. State of Orissa* reported in (2004)8 SCC 733, the Apex Court commented that although municipal law may permit deviation through *compounding*, this must be the exception and not the Rule. In fact, it was specifically observed that deliberate deviation does not deserve to be condoned and *compounded*.

22. In the present matter, as earlier noted, the builders were issued *stop construction* notice(s) on 04.09.2008 and 06.09.2008, but they constructed the

extra floors in the teeth of the notice(s). Dealing with a similar situation in *Royal Paradise Hotel (P) Ltd. Vs. State of Haryana* reported in (2006)7 SCC 597, the Supreme Court held that when illegal constructions are put up in defiance of lawful direction, such violation cannot be *compounded*. In fact, the Court expected the message to be conveyed that those who defy the law, would not be permitted to reap the benefit of their defiance and furthermore it is the duty of the Courts to ensure that such defiers of law, are not rewarded.

23. Taking guidance from the above ratios, what is found here is that the respondent No.8 has encroached the ground floor and had failed to keep aside the earmarked area for parking, where the restaurant and the hotel reception are now located. Thus a multistoried commercial building comprising a shopping mall and a hotel (with heavy footfalls) is operating with hardly any parking facility. Such usurption of the parking area by the builder is not a *compoundable* violation, under the *Zoning Regulation*. The provision of alternate site at a distance of 120 meters, envisaged under *Clause 3.15(e)* cannot be invoked here as that is an exceptional situation, which is not attracted in a case where there is a deliberate usurption of the earmarked parking space of the commercial building.

24. Moreover, the vertical construction beyond the 5 floor limit stipulated by the building permission, is wholly unauthorized as the constructions were made in defiance of the injunction order(s) issued by the Regulatory Authority. In the teeth of the prohibitory orders issued on 04.09.2008 and 06.09.2008, the subsequent application to construct the 6th floor, we have already held, cannot lead to a *deemed permission* under *sub-section (4) of Section 13* of the *Town Planning Act*.

25. The *deemed permission* clause in the *Town Planning Act* is a product of legal fiction and the same can't be invoked to perpetrate any illegality, as was committed in the present case by the builder. When the maximum height of the building is specified in the building permission with certain *set-back* measurements, the height of the building cannot be arbitrarily raised without additional *set-backs* for the building and therefore it is a clear case of illegal construction in the teeth of the injunction orders, issued by the *Tezpur Development Authority*. That apart, within the shelter of *deemed permission*, the building norms can't be flouted, to make illegal construction.

26. In this case the builder has unauthorizedly usurped the ground floor parking space to run a restaurant and to locate the hotel reception area. Since

provision for parking is mandatory for such establishment, the designated parking space on the ground floor must be cleared as the building houses a hotel and a shopping mall, where need for *off-road parking* is of absolute necessity. That apart, the extra floors constructed illegally beyond the permitted 5th floor can't remain as such expansion is *non-compoundable* under the *Zoning Regulation*. The front staircase must also be cleared, as the constructed structure diminishes the front *set back* measurements, specified in the building permission. The haphazard storage of LPG cylinders also raise the concern for public safety for the inmates and the neighbours.

27. As the illegal construction not only violate the *Town Planning Act* and the *Zoning Regulation* and also impacts public interest, we direct the authorities to take steps for *demolition* of those unauthorized structures. The builder may voluntarily remove the illegal constructions or alternately, the unauthorized structures be demolished by the authorities, at the cost of the builder. The necessary exercise for *demolition* must however be carried out in the next 3(three) months and it is ordered so accordingly.

28. In so far as the non-adherence to the stipulated *set back* measurements in the building's front, side and rear faces, we order a verification exercise by the *Tezpur Municipal Board* (respondent No.10), which has now replaced the *Tezpur Development Authority*. This should be a joint process of all the parties along with the engineers of the PWD(Building) Department, to ensure unbiased assessment. If infringement of the *set-back* measurements (as was stipulated in the building permission of 28.02.2008) is found, appropriate steps in this regard should be lawfully taken by the competent authority. This should be done in the next 8(eight) weeks.

29. With the above direction, the case stands allowed in the manner indicated by leaving the parties to bear their respective cost.

JUDGE

JUDGE

Barman/Roy