

Government of Odisha
Housing & Urban Development Department

No. 13088 /HUD, Bhubaneswar, dated 24.5.18
TP-(apl)-88/2015

From

Shri Akshaya Kumar Singh
Under Secretary to Government

To

The Planning Member/ Secretary, Cuttack Development Authority, Cuttack

Sub: Appeal Case No.88/2015 under section 91(2) of the Orissa Development Authorities Act, 1982 filed by Smt. Bhagyalaxmi Dhar-vrs-C.D.A., Cuttack.

Sir,

I am sending herewith the copy of the Order dated 21.05.2018 passed by the Appellate Authority i.e. the Special Secretary to Govt., Housing & Urban Development Department in the aforesaid appeal for favour of information and necessary action at your end.

You are further requested to furnish the copy of the said orders to the aforesaid appellants immediately.

Yours faithfully,

 23.5.18
Under Secretary to Government

Memo No. 13089 /HUD., dated the 24.5.18

Copy along with copy of the order forwarded to the Team Lead, OUSIP, Housing & Urban Development Department for information & necessary action.

He is requested to take necessary steps in order to make the said order available in the official website of this Department.

 23.5.18
Under Secretary to Government

Memo No. 13090 /HUD.,

Dated 24.5.18

Copy along with copy of the order forwarded to Smt. Bhagyalaxmi Dhar, At-Ananda Vihar, P.O. - Naya Bazar, P.S. - Chauliaganja, Cuttack for information and necessary action.

 23.5.18
Under Secretary to Government

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02.02.2018

The Planning Member of Cuttack Development Authority is present. But none appeared on behalf of the appellant.

Heard.

Reserved for order.

Sd/-

(P.K.Jha)

21.05.2018

The instant appeal has been filed under section 91 (2) of the Odisha Development Authorities Act, 1982 challenging the order dated 24.11.2014 passed by the Law Officer, Cuttack Development Authority in U.C. Case no.165 of 2012 wherein the appellant has been directed to remove all the structures within a period of 1 month from the receipt of this order failing which CDA will be constrained to demolish the same at the cost and risk of the appellant.

The learned advocate on behalf of the appellant submitted in the appeal petition that the appellant is the owner of the land bearing plot No.380/2571 under Khata No.650/1952 of mouza- Paisa, Unit -28 under P.S. Chauliaganj. She made an agreement with ATC India Tower Corporation Private Limited on 09.01.2012 for erection of a Ground Base Tower over the said land for Cellular Mobile Networking. After execution of the said agreement, the ATC India Tower Corporation obtained NOC from Cuttack Municipal Corporation for erection of such tower. Then, NOC from Cuttack Development Authority (CDA) was sought for by the said Company wherein CDA refused to grant NOC for construction of such tower since no guide line has been framed for granting NOC in the matter. While the matter stood thus, the unauthorised construction case bearing U.C. Case No.165 of 2012 was initiated against the appellant on the basis of allegation made by some persons and in terms of the provisions of the Odisha Development Authorities Act, 1982, notices were issued against the appellant for filing of show cause. In response to the said notice, the appellant filed her show cause interalia alleging therein that the Cuttack Development Authority has got no authority to initiate the said unauthorised construction case. He further submitted that some people of the locality challenged the said construction of Mobile Tower before the Hon'ble High Court in W.P. (C) No.18306 of 2012 which has been disposed of on 02.05.2014 with a direction to the Cuttack Development Authority to dispose of the U.C. Case No.165 of 2012 as expeditiously as possible within a period of six months. He again contended that in pursuance of the said order of the Hon'ble High Court, the Cuttack Development

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Authority issued notice against the appellant. In response to the said notice, the appellant filed show cause interalia stating that since CDA refused to grant NOC for construction of Ground Base Tower, initiation of the aforesaid unauthorised case by CDA is not justified rather the same is non-est in the eye of law and the same is the exercise of power not vested under the law. He further pointed out that Mobile Tower which has been constructed over the land of the appellant is a ground base Tower wherein no building permission is required. It is stipulated in Notification dated 16.08.2017 of Commerce & Transport Department that each urban local body shall have a single window system for giving license to the Telecom Service Providers. He further pointed out that the Telecommunication Infrastructure Tower shall be permitted for construction in the building roof tops or on the ground of open space within the premises. In the instant case, the Telecom Tower is a ground base tower and constructed obtaining NOC from Cuttack Municipal Corporation; no permission is required from CDA since the same has not been constructed over the building roof. But without considering aforesaid facts, the demolition order has been passed. Being aggrieved, the appellant challenged the said demolition order before the Hon'ble High Court in W.P. (C) No.25259 of 2014 wherein the Hon'ble High Court disposed of the said writ petition on 13.04.2015 with the following observation:-

"Since an alternative remedy is available under law, this court is not inclined to entertain this writ petition. Accordingly, the same is dismissed. It is open to the petitioner to file an appeal before the appellate authority, if she so likes."

Hence the appeal stands.

The Planning Member, Cuttack Development Authority submitted that the unauthorised construction case was initiated on the basis of complain petition of some of residents of Ananda Vihar, Chauliaganja, Cuttack. As per verification, the Amin of the concerned area reported that the appellant has constructed a Telephone Tower and the structure has reached up to 20 ft height. Then notice was issued against the appellant under section 91(1) of the Odisha Development Authorities Act, 1982 for filing of show cause and order was also issued under section 92(1) of the Odisha Development Authorities Act, 1982 for discontinuing further construction at the site. But the appellant did not respond for which the case was adjourned for a number of times. Thereafter, the IIC, Chauliaganj Police Station was also requested to discontinue further development at the site. He further submitted that the appellant appeared in person on 22.09.2012 and filed time petition which was allowed up to

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05.01.2013. While the matter stood thus, the aforesaid complainants agitated the matter before the Hon'ble High Court in W.P. (C) No.18306 of 2012 challenging the construction of said Mobile Tower which was disposed of on 02.05.2014 by the Hon'ble High Court with a direction to the CDA to dispose of the U.C. Case No. 165 of 2012 within a period of six months. In pursuance of the order of the Hon'ble High Court, the appellant was noticed for hearing of the matter and the appellant submitted final show cause on 01.11.2014. He further pointed out that in course of hearing, the learned advocate for the appellant claimed that the initiation of the proceeding under section 91 of the Odisha Development Authorities Act, 1982 by CDA is without jurisdiction in view of the Government order dated 30.03.2010 after 74th Constitutional Amendment. On the other hand, the complainants also produced letter of the C.M.C. addressed to M/s ATC India Tower Corporation regarding deviation noticed in respect of leaving of 3 mtr. space from the edge of the G.T.B. site. On verification of records, the construction of A.T.C. Tower found to be not in conformity with the provisional permission granted by the C.M.C. Accordingly, the entire construction of tower along with additional structure on the plot No.380 /2571 is treated as unauthorised and demolition order has been passed.

In view of the above submission and perusal of records as submitted, it is revealed that the appellant has undertaken the construction of tower along with additional structure on the plot No.380/2571 without obtaining permission from the competent authority. Further the construction of tower is not in conformity with NOC granted by the Cuttack Municipal Corporation for which the construction in question is unauthorised. The learned Advocate representing the appellant in appeal also raised a constitutional point relating to power to be exercised by the urban local bodies as per the 74th Constitutional Amendment Act, which includes urban planning and town planning and regulation of land use and construction of buildings and also protection of environment and promotion of ecological aspects. Based on this, he contended that the exercise of planning function by CDA was bereft of legal authority. But the issue of non-transfer of planning functions as envisaged in the 74th Amendment Act is a much larger issue, which is beyond the competence of this court. However, it is noted that with a view to complying with the mandatory reforms prescribed under JnNURM scheme, the State Government had issued a notification on 30.3.2010 directing all the Development Authorities of the State to delegate the functions of urban planning, including town planning functions and regulation of land use and construction of buildings to urban local

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bodies concerned under Section 111 of the Odisha Development Authorities Act, 1982. Since the same has not yet been transferred, the planning function lies with CDA. Since the appellant has undertaken the construction of tower along with additional structure on the plot No.380 /2571 without obtaining permission, the same is unauthorised and illegal. Hence the appeal is dismissed.

Sd/-
(P.K.Jha)