

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice Subrata Talukdar
and**

The Hon'ble Justice Hiranmay Bhattacharyya

MAT 1308 of 2018

With

CAN 8612 of 2018

Somnath Dutta

Vs.

Howrah Municipal Corporation & Ors.

For the Appellant : Mr. Partha Pratim Roy
Ms. Shebatee Datta advocates

For the H.M.C. : Mr. N.C. Behani
Mrs. Papiya Banerjee Behani.....advocates

For the Respondent No.6 : Ms. Rakhi Shroff advocate

Heard on : 09.03.2021

Judgment on : 19.03.2021

Hiranmay Bhattacharyya, J.:-

The instant appeal is at the instance of the writ petitioner and is directed against an order dated September 17, 2018 passed by a Hon'ble Single Judge in WP No. 14240 (W) of 2018.

By the order impugned the writ petition was dismissed by the Hon'ble Single Judge upon holding that the petitioner is guilty of suppression of material fact and also that the petitioner did not come with clean hands.

The appellant herein claims that the respondent no. 6 is the owner of a premises which is adjacent to the premises of the petitioner on the western side. The appellant alleges that the respondent no. 6 is making construction without obtaining any sanction plan from the Howrah Municipal Corporation (for short "the HMC") and without leaving any open space on any side. The appellant submitted a representation dated May 24, 2018 before the HMC but the HMC did not take any action on the said representation. Accordingly, the instant writ petition was filed praying for demolition of the unauthorized construction at premises no. 4/2, Shibu Chakraborty Lane, Bally, District-Howrah allegedly raised by the respondent no. 6 herein.

The said writ petition was dismissed by the order dated September 17, 2018. Being aggrieved the writ petitioner preferred the instant appeal.

Mr. Partha Pratim Roy, the learned advocate for the appellant contended that mere non-disclosure of the fact of filing of the title suit no. 35 of 2013 by the appellant herein as well as the fate of such suit in the writ petition, cannot be said to be a suppression of material facts. He contended that the title suit was filed on the ground of actionable nuisance caused by the respondent no. 6

herein and the HMC was not a party to such suit. He further contended that the appellant herein has disclosed about the filing of such suit and the fate of such suit in the application for temporary injunction filed in connection with the instant appeal. He drew the attention of the court to the copy of the judgment and decree passed in such suit, a copy of which has been annexed to such interlocutory application filed in connection with the instant appeal. By referring to the averments made in the plaint and the reliefs prayed for in the suit, Mr. Roy, contended that the cause of action of the suit and the instant writ petition are entirely different and non-disclosure of such fact does not amount to a suppression of a material fact as the decision in the title suit cannot have any bearing in the adjudication of the instant writ petition.

Mr. Roy further drew the attention of this Court to an inspection report of the Sub-Assistant Engineer, HMC where in it was indicated that there is no sanction building plan in respect of the impugned construction. Mr. Roy, thus, contended that since it is evident on inspection that the two storied construction has been made without any sanction building plan, a direction should be passed to demolish the same.

Mr. Roy placed reliance upon the following judgments of the Hon'ble Supreme Court of India in the case of: (1) *S.J.S Business Enterprises (P) Ltd. vs. State of Bihar and Ors.* reported at (2004)7 SCC 166 and (2) *Arunima Baruah vs. Union of India and ors.* reported at (2007)6 SCC 120 in support of his contention that mere

nondisclosure of a fact cannot be a ground for dismissal of the writ petition unless such fact is a material one.

Mr. Bihani learned advocate for the HMC submitted that a stop work notice under Section 177 (1) of the Howrah Municipal Corporation Act, 1980 has already been issued directing the respondent no. 6 and one Gouri Bera to forthwith stop the construction work. Mr. Bihani contended that the HMC has taken steps in accordance with law after it came to the notice of the said authority that a construction has been made at the said premises without any sanction plan. Mr. Bihani further contended that the appellant herein approached the Civil Court for an identical relief and having failed in his attempt have now approached the Writ Court on the self same cause of action. He, thus, supported the order of dismissal of the writ petition passed by the Hon'ble Single Judge on the ground of suppression of material facts.

Ms. Shroff learned advocate for the respondent no. 6 seriously disputed the contentions raised by Mr. Roy. She contended that the appellant filed the Title Suit no. 35 of 2013 before the learned Civil Judge (Junior Division) First Court at Howrah for declaration and permanent injunction. Such suit was dismissed by the Learned Civil Judge. She contended that the appellant herein filed the instant writ petition with an oblique motive by totally suppressing the fact of filing of a title suit and the dismissal thereof by the Civil Court. She contended that such fact was a material fact and the Hon'ble Single Judge was justified in dismissing the instant writ

petition on the ground of suppression of material fact. She submitted that the instant appeal is liable to be dismissed and the appellant herein is not entitled to any relief as he is guilty of suppression of material facts.

We have heard the learned advocates for the respective parties and perused the materials placed before us.

The appellant herein filed the Title Suit no. 35 of 2013 alleging that the respondent no. 6 herein is making construction in violation of the Municipal Building Rules and Regulations. The appellants further alleged therein that the respondent no. 6 did not leave adequate space on four sides as per the building rules. It was also alleged that as a result of such illegal and unauthorised construction the appellant is deprived of free flow of air and light into his premises.

The specific allegation of the appellant in the writ petition is that the respondent no. 6 is making illegal construction without leaving any open space on any sides, in accordance with the Howrah Municipal Corporation Building Rules. It was, further, alleged that the said construction was being raised without any sanction plan. It was also alleged that the illegal construction raised by the respondent no. 6 is diminishing the passage of air and light into the appellant's premises.

Thus, it is evident from the averments made in the plaint that the cause of action for filing the suit is same and identical with that of the writ petition.

The suit filed by the appellant was dismissed by a judgment and decree dated January 15, 2018. Long thereafter the writ petition was filed sometimes in August, 2018. In the writ petition the appellant herein has suppressed the fact of filing of such suit and also that the same was dismissed.

The judgment and decree passed in such suit has a material bearing upon the adjudication of the instant writ petition. Suppression of such fact by the appellant herein disqualifies him from obtaining any relief in the instant writ petition as rightly observed by the Hon'ble Single Judge in the order impugned. Such guilt cannot be wiped off by the appellant herein merely by producing a copy of the judgment and decree passed in such suit at the appellate stage.

In *S.J.S Business Enterprises (supra)* the Hon'ble Supreme Court held that suppression of the fact of filing of the suit cannot be said to be a suppression of material fact as in the said reported case the suit was withdrawn prior to the date of hearing of the writ petition.

In *Arunima Baruah (supra,)* the application for withdrawal of the suit was filed prior to the date of preliminary hearing of the writ petition and the order permitting withdrawal of the suit was passed

immediately after direction for issuance of notice in connection with the writ petition was passed. On such facts also the Hon'ble Supreme Court of India while upholding the judgments of the Learned Single Bench and the Division Bench of the High Court held that in a case of such nature the court's jurisdiction under Article 226 of the Constitution of India may not be invoked but in the event a fresh writ petition is filed disclosing all the facts, the same may be considered on its own merit.

However, in both the aforesaid decisions cited by Mr. Roy, the suits were withdrawn prior to the hearing of the writ petition and as such there was no adjudication on merits in the suits concerned.

In the instant case, the suit filed by the appellant herein was dismissed on a contested hearing thereby conclusively determining the rights of the parties in such suit. Thus, the aforesaid judgments cited by Mr. Roy do not have any manner of application to the facts of the instant case.

It is trite law that a court can refuse to exercise its discretionary jurisdiction if a party is guilty of suppression of material facts. This Court is of the considered opinion that the filing of a Title Suit and its decision are material facts for the purpose of adjudication of the instant writ petition. A person invoking the discretionary jurisdiction of the Court cannot be allowed to approach it with a pair of dirty hands.

For the reasons as aforesaid this court is of the view that the impugned order does not suffer from any infirmity. **MAT 1308 of 2018** thus stands **dismissed**. **CAN 8612 of 2018** also stands **disposed of** accordingly. There shall, however, be no order as to costs. It is, however, clarified that the dismissal of the instant appeal shall not preclude the parties including the Howrah Municipal Corporation from taking further steps in accordance with law with regard to the impugned construction at premises no. 4/2, Shibu Chakraborty Lane, Bally, Dist- Howrah 711 201.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Subrata Talukdar, J.)

(Hiranmay Bhattacharyya, J.)