

24.03.2022
Sl. No. 24
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W.P.A. 14 of 2022

Pradip Kumar Das

Vs.

The State of West Bengal & ors.

Mr. Debojyoti Deb
Mr. Sanjoy Kumar Das
... for the petitioner

Mr. Maloy Singh
Ms. Neelam Singh
... for the State

Mr. Ankit Agarwala
Ms. Alotriya Mukherjee
Mr. Rabin Basu
... for the respondent nos.6 & 7

Mr. Suman Basu
... for the Corporation

The petitioner has challenged inaction on the part of the Chandernagore Municipal Corporation in implementing the order of demolition, which was passed by the Administrator and Commissioner of Chandernagore Municipal Corporation.

The unauthorised construction was raised by the respondent nos.6 and 7. Upon the hearing the parties, the concerned authorities had arrived at a conclusion that an unauthorised and illegal construction was detected at holding Nos.1487 and 1538, situated at Ward No.14, Borough 2 within the jurisdiction of Chandernagore Municipal Corporation.

The extent and nature of unauthorised construction upon holding no.1487 was a construction

of a garage cum car parking space. The Corporation came to the conclusion that apart from the unauthorized construction, a business of storage of packaged drinking water was going on from the said car parking space. It has been further held that construction of a C.I. shed over brick walls in holding no.1538, was also unauthorised.

Thus, having found the aforementioned illegalities and having given an opportunity to the concerned respondents who were responsible for such construction, the competent authority passed an order in accordance with law. The respondent no.3 asked the persons responsible to remove the unauthorised structures within seven days from the date of the order, failing which the Corporation reserved its right to demolish and remove all the unauthorised construction and also seize the materials. It was further found that the business going on at holding no.1487, was also unauthorised.

A detailed order of demolition has been passed with reasons, upon hearing the parties. Submissions and documents which were produced by the respondents Nos.6 and 7 have been dealt with by the Commissioner. Admittedly, there has not been any challenge to the order of demolition.

Thus, the contention of the petitioner is that the Corporation must act and proceed in accordance with

law, and demolish the unauthorized structures. The petitioner is the complainant, at whose instance the proceedings had been initiated.

Mr. Agarwalla, learned Advocate appearing on behalf of the respondent nos.6 and 7 submits that upon receipt of the order of demolition, an application for regularisation of the unauthorised construction had been filed by the said respondents and the Corporation must be directed to dispose of the same.

Although, the Kolkata Municipal Corporation Act and the Howrah Municipal Corporation Act have been amended by which the Corporations have reserved to itself a discretion to retain/regularise minor deviations, but no such provisions are available in the West Bengal Municipal Corporation Act, 2006.

Learned Advocate appearing on behalf of the Corporation submits that the application for regularisation cannot be considered by the Corporation in view of the fact that the law does not empower the Commissioner to allow retention or regularization of minor deviations, unlike the other two corporations.

The reliance placed on the decision of ***Purusottam Lalji v. Ratan Lal Agarwalla*** reported in ***AIR 1972 Cal 459 (FB)*** by Mr. Agarwalla, is not accepted by this Court in view of the subsequent decisions in this regard. The Hon'ble Apex Court in several decisions has observed that if unauthorized constructions were

allowed to stand or are given a seal of approval of the court, it would affect the public, at large.

In the present case, the petitioner applied for regularization of the unauthorized structures after the order of demolition was passed. The law does not permit regularization of unauthorized structures. No discretion or power has been vested upon the commissioner and/or other authorities of the Chandannagar Municipal Corporation, to permit regularization or retention of deviations, whether major or minor.

The decision of the Hon'ble Full Bench of this Court in Purusottam Lalji (supra) is distinguishable.

The principles of law laid down in the decision Purusottam Lalji (supra) are not applicable as the High Court therein while dealing with the power and discretion enjoyed by the Commissioner under section 414 of the Calcutta Municipal Act, 1951 and Rules framed there under, particularly with regard to Rules 30 and 31 came to a conclusion, as follows:-

"It appears to us that the Section 414 vests upon the Commissioner a discretion. The discretion is, for the purpose of facilitating the scheme and the object of the Calcutta Municipal Act, 1951. That discretion must be used bona fide and not on any extraneous ground. The section also enjoins that the Commissioner should exercise discretion quasi judicially, that is to say, by giving the parties an opportunity to show cause".

Their Lordships found that the Commissioner did not act in excess of his jurisdiction, in passing an

order of regularization and in not ordering demolition of a very small infraction.

Whereas, in the instant case, there is already a finding of unauthorized construction of a garage, car parking spaces and CI shed structures over brick walls which were erected sometime in February 2017 or even prior to that. A stop work cum show cause notice was served upon the person responsible, based on an enquiry held by the borough office. The person responsible did not respond to either the stop work notice or the show cause notice. Thereafter, several notices were issued upon the respondents no. 6 and 7. The respondent No. 7 during the hearing admitted that the structures which were found to be unauthorized and from which a business was being run, was not a part of the sanctioned building plan. This finding of facts have never been disputed by the respondent no. 6 and 7 and this court cannot sit in appeal over such findings of the authorities. The decision in ***Purusottam Lalji (supra)*** was noticed and distinguished in the matter of ***Sri Raju Chanda And Another versus State of West Bengal And others [WP 18259 (w) of 2009]*** and also in the decision of ***Ghanashyam Das versus The Kolkata Municipal Corporation And Others*** reported in ***2014 SCC Online Cal 15980***. This court held that the decision of the Full Bench was passed while discussing Section 414 of the Calcutta Municipal Act, 1951 and the

Municipal Commissioner had the power to exercise discretion, but such proposition of law shall not be applicable in cases where the municipal commissioner has been divested of such power or has not been vested with such power under the law. The High Court held that unless there were statutory provisions permitting regularization, the corporation cannot allow such regularization. The amendments to the Kolkata Municipal Corporation Act, 1980 came after such decisions were rendered.

In the decision of ***Sk. Soleman v. State of West Bengal*** reported in **2012 (2) CHN 83** this court held as follows:-

“Once the demolition order was passed under section 400(2) of said Act, there is no other statutory provision under the four corners of the Kolkata Municipal Act, 1980 vesting power to the Municipal Commissioner to allow retention regularization of major unauthorized construction, which have already suffered order of demolition passed by the competent authority,.....”, (paragraph 26) however, the attention of the Court was not drawn to the statutory provisions under Chapter XXII of the 1980 KMC Act, such as sections 392, 393, 400(1) and (8) which make it explicit that there is no provision for regularizing anunauthorised construction – be it called minor or major, at any stage of the proceedings. In view of the clear statutory framework, the principles of law laid down in *Umed v. Raj Singh*: AIR 1975 SC 43, in *M/s/ Rajatha Enterprises v. S. K. Sharma*: AIR 1989 SC 860, in *AI Champdany Industries Ltd. v. Official Liquidator*: (2009) 4 SCC 486 and *Priyanka Estates Internal (P) Ltd. v. State of Assam*: (2010) 2 SCC 27 are not applicable. The judgment in *M/s.. Land and Bricks*

and Entertainment v. State of West Bengal: 1991(2) CLJ 217 is inapplicable for similar reasons.”

In ***Ghanashyam Das (supra)*** this court held as follows:-

‘Therefore, as I find that the concept of post facto sanction or regularization is alien to the provisions of the 1980 KMC Act, any “building” or a “part” of it erected without sanction of the Municipal Commissioner is illegal. Hence, as the language in sections 392 and 393 is clear and explicit, regularizing an unauthorized construction even on payment of fees or fine or penalty, as contended, is contrary to 1980 KMC Act. Thus, in view of the mandate in sections 392 and 393, any Rule or notification or order or circular or budgetary provision issued or made by the Corporation which speaks of post facto sanction or regularization of a “building” or a “part of a building” erected without sanction, even on payment of an amount, be it called charges or fees or penalty or fine, is not warranted in law and void and, therefore, illegal and cannot be acted upon. Accordingly the Circular No. 37 of 2010-2011 permitting regularisation of unauthorised construction, relied on by the KMC authorities while adjudicating some of the matters, is patently de hors the provisions of law and is thus set aside and quashed.”

The Court further went to hold as follows:-

“As seen from the impugned orders, though statutory provisions were breached with impunity and there is no statutory provision permitting legalising an unauthorised construction, yet stereotyped and blanket orders were issued by the Special Officers (Building) or by the authorities of the KMC or HMC permitting retention either on the ground that the construction was minor in nature or it was within the FAR or on “moral point” or on the ground it was within the sanctioned area or on the ground that it was a hospital. Though it is immaterial whether

there is a complainant and it is the statutory duty of the Municipal authorities to ensure a building is raised in accordance with law, yet in some cases absence of complainant was a ground for passing an order of retention. In other cases regularisation was directed on the basis of a Circular no. 37 of 2010-2011 issued by the Municipal Commissioner, having no statutory support, quashed by this judgment. Little did the quasi judicial authorities realise, that in the absence of statutory provision, the orders allowing retention or regularisation, even on payment of money – be it called fee or penalty or charges – is a nullity. In the absence of legal sanction even acceptance of municipal taxes cannot validate such building or a part of it, and it continues to remain illegal. It is clear from the trend of cases that violation of the building rules and the so-called legalising an unauthorised construction have virtually become a rule and raising constructions with prior building permit is an exception. Therefore, I hope and trust that with the law as discussed, the authorities of KMC and HMC shall endeavor to give purposeful interpretation of the Statute and the Rules and shall follow the statutory provisions in their letter and spirit for planned development of the cities of Kolkata and Howrah.”

In the matter of ***Dipak Kumar Mukherjee v. Kolkata Municipal Corpn.*** reported in ***(2013) 5 SCC 336*** too the application for regularization was filed after the unauthorized construction was completed. The Hon’ble Apex Court held as follows:-

“24. In view of the pleadings filed before the High Court and the affidavits filed before this Court, there is no escape from the conclusion that Respondent 7 had raised construction in violation of the plan sanctioned under Section 396 of the 1980 Act and continued with that activity despite the order of the Mayor-in-Council. In the prevailing

scenario, the representative of Respondent 7 might have thought that he will be able to pull strings in the power corridors and get an order for regularisation of the illegal construction but he did not know that there are many mortals in the system who are prepared to take the bull by horn and crush it with iron hand.

25. Rule 25 of the Rules, on which reliance was placed by Respondent 7 for seeking regularisation of the illegal construction, reads as under:

‘25. Deviation during execution of works.—(1) No deviation from the sanctioned plan shall be made during erection or execution of any work.

(2) Notwithstanding anything contained in sub-rule (1), if during erection or execution of work any internal alterations or external additions which do not violate the provisions of the Act or these Rules is made, the Municipal Commissioner may without prejudice to any action that may be taken against the person at whose instance such alteration or additions have been made, allow the person referred to in sub-rule (1) of Rule 4 to submit, in accordance with the provisions of these Rules, a revised plan showing the deviation and may sanction such plan.

(3) Any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the provisions of the Act and these Rules and shall be dealt with accordingly.’

26. A reading of the plain language of Rule 25(1) makes it clear that a person, who erects any structure or executes any work is not entitled to deviate from the sanctioned plan. Rule 25(2) which contains a non obstante clause and provides for sanction of revised plan to be submitted by the person engaged in erection of building or execution of work lays down that if during erection or execution of work, any internal alterations or external additions which do not violate the

provisions of the Act or the Rules is made, the Municipal Commissioner can, at an application made in that behalf sanction the revised plan showing the deviation. Rule 25(3) is declaratory in nature. It lays down that any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the Act and the Rules shall be dealt with accordingly.

27. In our view, Respondent 7 cannot take benefit of Rule 25 because the disputed construction was in clear violation of the sanctioned plan and the notices issued by the competent authority of the Corporation and also because the application was made after completion of the construction.

28. Before parting with the case, we consider it necessary to observe that Respondent 7 is guilty not only of violating the sanctioned plan and the relevant provisions of the 1980 Act and the Rules framed thereunder but also of cheating those who purchased portions of unauthorised construction under a bona fide belief that Respondent 7 had constructed the building as per the sanctioned plan. With the demolition of unauthorised construction some of such persons will become shelterless. It is, therefore, necessary that Respondent 7 is directed to compensate them by refunding the cost of the flat, etc., with interest. Respondent 7 must also pay for raising construction in violation of the sanctioned plan.

29. It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorised construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings

becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the public authorities concerned not only to demolish such construction but also impose adequate penalty on the wrongdoer.”

In ***Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai*** reported in **(2013) 5 SCC 357**, the Hon’ble Apex Court observed as follows:-

“8. At the outset, we would like to observe that by rejecting the prayer for regularisation of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the appellate authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed by them have given a hope to the law-abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it.”

In the matter of ***Supertech Ltd. v. Emerald Court Owner Resident Welfare Assn.***, reported in **(2021) 10 SCC 1**, the Hon’ble Apex Court held as follows:-

“167. The Court further observed that an unauthorised construction destroys the concept of planned development, and places an unbearable burden on basic amenities provided by public authorities. The Court held that it was imperative for the public authority to not only demolish such constructions but also to impose a penalty on the wrongdoers involved. This lament of this Court, over the brazen violation of building regulations by developers acting in collusion with planning bodies, was brought to the forefront when the

Court prefaced its judgment with the following observations : (Esha Ekta Apartments case [Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai, (2013) 5 SCC 357 : (2013) 3 SCC (Civ) 89] , SCC p. 363, para 1)

“1. In the last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc. have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise.”

168. Finally, the Court also observed that no case has been made out for directing the municipal corporation to regularise a construction which has been made in violation of the sanctioned plan and cautioned against doing so. In that context, it held : (Esha Ekta Apartments case [Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai, (2013) 5 SCC 357 : (2013) 3 SCC (Civ) 89] , SCC pp. 394-95, para 56)

“56. ... We would like to reiterate that no authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The courts are also expected to refrain from exercising equitable jurisdiction for regularisation of illegal and unauthorised constructions else it would encourage violators of the planning laws

and destroy the very idea and concept of planned development of urban as well as rural areas.”

169. These concerns have been reiterated in the more recent decisions of this Court in Kerala State Coastal Zone Management Authority v. State of Kerala [Kerala State Coastal Zone Management Authority v. State of **Kerala, (2019) 7 SCC 248]**, **Kerala State Coastal Zone Management Authority v. Maradu Municipality [Kerala State Coastal Zone Management Authority v. Maradu Municipality, (2021) 16 SCC 822 : 2018 SCC OnLine SC 3352]** and **Bikram Chatterji v. Union of India [Bikram Chatterji v. Union of India, (2019) 19 SCC 161]** .”

Under such circumstances, the writ petition is allowed. There shall be no order as to costs.

The Corporation is directed to take steps in accordance with law within four weeks from the date of communication of this order.

The police authorities shall cooperate with the Corporation for effecting the order of demolition, in accordance with law.

(Shampa Sarkar, J.)