

01.03.2022
Court No. 19
Item no.06
CP

WPA No. 1631 of 2022

Syed Md. Aoun & ors.
Vs.
Board of Wakf, West Bengal & ors.

Mr. Rauf Rahim
Mr. Sayantan Bose
Ms. A. Banerjee

....for the petitioners.

Sk. Md. Galib
Mr. A. Siddique Mallik

.....for the Board of Wakf.

Mr. Sudipto Panda
Ms. Mun Mun Tiwary

.....for the State.

Mr. Suvodip Bhattacharya

....for the respondent no. 8.

The writ petition has been filed challenging not only the inaction of the Kolkata Municipal Corporation (hereinafter referred to as 'the corporation'), but also actions of the wakf board in permitting demolition of an Imambara and construction thereon, by the respondent no. 8.

The petitioner alleges that the corporation being an authority entrusted by law to ensure that no illegal and unauthorized constructions were carried on by any person, failed and neglected to take steps on the basis of the complaints of the petitioners. Allegations are that the statutory

authority has failed and neglected to exercise jurisdiction vested upon it by law and has also failed to preserve the religious and charitable institutions in which the petitioners have substantial interest. The complaints lodged before the corporation have been annexed to the writ petition as Annexures P-4, P-6, P-7 and P-8.

Mr. Bhattacharya, learned advocate appearing on behalf of the mutawalli of the said wakf estate, the respondent no. 8 herein, submits that the construction has been raised after obtaining permission from the wakf board. That unauthorized construction has not taken place and the allegations of the petitioners are false and frivolous. He also challenges the locus of the petitioners to maintain this writ petition.

Mr. Galib, learned advocate appearing on behalf of the wakf board, submits that the wakf board on the request of the mutawalli/respondent No. 8 had made an inquiry into the affairs of the said wakf estate and had thereafter allowed such construction in accordance with the provisions of law. He further submits that the Wakf Act, 1995, permits the wakf board to grant permission for development, transfer, lease etc. of a wakf estate. He further submits that if the petitioners are aggrieved by the decision of the wakf board to allow

construction on the said property which is situated at Premises Nos. 1 & 3, Circus Avenue, the remedy of the petitioners against any decision of the wakf board would be before the learned wakf tribunal. Reference is made to Section 83(2) of the Wakf Act, 1995.

Heard the learned advocates for the respective parties.

Point of locus is taken up first. The petitioners allege that they used to offer their prayers in the imambara which has been demolished and unauthorized constructions have been allegedly made.

It is a matter of practice that a court invokes the writ jurisdiction in cases where a legal wrong or a legal injury is caused. Unauthorized constructions are against public interest. They affect the environment and the rights of citizens to live in a planned and organized city. Moreover, silence of the Corporation amounts to perpetuation of such legal wrong. The Corporation by remaining silent on receiving such complaints, have failed to exercise their jurisdiction under the law and all citizens, in the opinion of the Court, who are tax payers to the Corporation, can bring such illegalities to the notice of the writ court and pray for a direction upon the Corporation to discharge its duties in accordance with law. It is the bounden duty of all to follow the

regulatory laws while making constructions, even on their private lands.

“In the matter of ***Supertech Ltd. v. Emerald Court Owner Resident Welfare Assn.***, reported in (2021) 10 SCC 1, the Hon’ble Apex Court discussed the duties of civic bodies and lamented the sorry state of affairs as under:-

“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] .”

In the matter of ***Supertech (supra)***, the Hon’ble Apex Court held as follows:-

“159. The rampant increase in unauthorised constructions across urban areas, particularly in metropolitan cities where soaring values of land place a premium on dubious dealings has been noticed in several decisions of this Court. This state of affairs has often come to pass in no small a measure because of the collusion between developers and planning authorities.

160. From commencement to completion, the process of construction by developers is regulated within the framework of law. The regulatory framework encompasses all stages of construction, including allocation of land, sanctioning of the plan for construction, regulation of the structural integrity of the structures under construction, obtaining clearances from different departments (fire, garden, sewage, etc.), and the issuance of occupation and completion certificates. While the availability of housing stock, especially in metropolitan cities, is necessary to accommodate the constant influx of people, it has to be balanced with two crucial considerations — the protection of the environment and the well-being and safety of those who occupy these constructions. The regulation of the entire process is intended to ensure that constructions which will have a severe negative environmental impact are not sanctioned. Hence, when these regulations are brazenly

violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Hence, illegal construction has to be dealt with strictly to ensure compliance with the rule of law.”

A learned Co-ordinate Bench in the matter of Smt. ***Banasri Mondal vs State Of West Bengal & Ors*** (WPA 740 of 2021) held as follows:-

“The contention of the private respondents that the petitioner does not have any locus standi to move the instant writ petition is not acceptable. It is the bounden duty of all citizens to abide by the laws of the country and take all necessary steps to act in accordance with law. Any responsible citizen is always free to draw the attention of the concerned statutory authority seeking prevention of commission of any illegal activity including, unauthorized construction being carried on in a given premises. It is the noble duty of a law abiding citizen to intimate the controlling authority as regards any illegal act being committed or in the process of being committed. It is practically impossible for statutory authorities to keep track of all activities that are going on in the society. The general public acts as the eyes and ears of the authorities. On receipt of any information alleging commission of an illegal or arbitrary act, the authorities should verify the same and then act according to law. An objection raised by a stranger, alleging unauthorized construction will be maintainable to a limited extent only to check whether there has been any unauthorized construction, provided the same is not mala fide and not tainted with malice. Law is well settled that the Corporation may even take steps suo

motu if any unauthorized construction is detected by them. Accordingly, the objection raised by the private respondents challenging the locus standi of the petitioner in filing the instant writ petition stands overruled.”

In the matter of **Supertech (supra)**, the Hon’ble Apex Court held as follows:-

“162. In *K. Ramadas Shenoy v. Town Municipal Council, Udipi* [*K. Ramadas Shenoy v. Town Municipal Council, Udipi*, (1974) 2 SCC 506] , A.N. Ray, C.J. speaking for a two-Judge Bench of this Court observed that the municipality functions for public benefit and when it “acts in excess of the powers conferred by the Act or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess”. This Court also held : (SCC p. 513, para 27)

“27.... The right to build on his own land is a right incidental to the ownership of that land. Within the Municipality the exercise of that right has been regulated in the interest of the community residing within the limits of the Municipal Committee. If under pretence of any authority which the law does give to the Municipality it goes beyond the line of its authority, and infringes or violates the rights of others, it becomes like all other individuals amenable to the jurisdiction of the courts. If sanction is given to build by contravening a bye-law the jurisdiction of the courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye-laws made by that authority is illegal and inoperative. (See *Yabbicom v. R.* [*Yabbicom v. R.*, (1899) 1 QB 444]).”

This Court held that an unregulated construction materially affects the right of enjoyment of property by persons residing in a residential area, and hence, it is the duty of the municipal authority to ensure that the area is not adversely affected by unauthorised construction.”

This writ petition is entertained only for the purpose discussed hereinabove. The petitioners who go to the Imambara have a right to point out the illegalities in the construction being made in the same premises.

Dipak Kumar Mukherjee v. Kolkata Municipal Corpn. Reported in (2013) 5 SCC 336 is a case where a writ petition was filed before a learned single bench by an enlightened citizen of Calcutta had been entertained and orders of demolition was passed. The Division Bench reversed the order of the single Judge , and the Apex Court set aside the order of the Division Bench, entertained the appeal filed by a third party and ordered demolition, payment of fine etc. Thus, the question of locus is not relevant at all, before the Hon'ble Apex Court. The relevant paragraph is quoted below:

“10. The appellant is an enlightened resident of Kolkata. He succeeded in convincing the learned Single Judge of the Calcutta High Court to order demolition of unauthorised construction of multi-storeyed building by Respondent 7, M/s Unique Construction on the plot owned by Respondent 8, Sarjun Prasad Shaw but could not persuade the Division Bench to affirm the order of the learned Single Judge and this is the reason why he has approached this Court.”

The Hon'ble Apex Court directed as follows'-

“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.

30. In the result, the appeal is allowed and the impugned judgment is set aside. With a view to ensure that the illegal construction raised by Respondent 7 is pulled down without delay, we issue the following directions:

30.1. Within three months from today, Respondent 7 shall pay the price of the flats, etc. to the purchasers with interest @ 18% per annum from the date of payment.

30.2. The occupiers of illegal/unauthorised construction shall vacate such portions of the building within the next one month.

30.3. Within the next one month, the Corporation shall demolish unauthorised construction after taking adequate precautionary measures.

30.4. Respondent 7 shall pay costs of Rs 25,00,000 for brazen violation of the sanctioned plan and continuance of illegal construction despite "stop-work notice". The amount of cost shall be deposited with the Kolkata State Legal Service Authority within three months and the same be utilised for providing legal aid in deserving cases.

31. Reports showing compliance with the aforesaid directions be filed by the Corporation and Respondent 7 in the Registry of the Calcutta High Court within six months. Thereafter, the matter be placed before the learned Single Judge who had passed the order dated 28-7-2010 [Dipak Kumar Mukherjee v. Kolkata Municipal Corpn., WP No. 13815 of 2010, order dated 28-7-2010 (Cal)] . If the learned Single Judge finds that any of the aforesaid directions has not been implemented then he shall initiate proceedings against the defaulting officers and/or Respondent 7 under the Contempt of Courts Act, 1971 and pass appropriate order."

Thus the contention of Mr. Bhattacharya with regard to the locus of the petitioners is not accepted for the reasons stated hereinabove.

This court is of the opinion that these proceedings shall be restricted to the failure of the corporation to take cognizance of the complaints lodged by the petitioners. The decision of the wakf board, the decision of the mutawalli to develop the said property cannot be the subject matter for adjudication by the writ court sitting under the present determination. The corporation in the opinion of the court as a public authority is duty-bound to ensure there are no unauthorized constructions. If any complaints are lodged bringing such unauthorized construction to the notice of the corporation, the corporation is duty-bound to act and proceed in accordance with law.

This court has not expressed any opinion about the claims of the petitioners with regard to their connection with the concerned Imambara or their right to offer prayers in the said Imambara. These issues shall be decided in a different proceeding by the appropriate forum.

The decision in the matter of Popcorn Entertainment & anr. vs. City Industrial Development Corpn., reported in (2007) 9 SCC 593 does not help the petitioners in view of the fact that

the said decision was rendered under different circumstances when a contract was cancelled unilaterally by a corporation without granting an opportunity to the persons aggrieved to contest the proceedings before the authority. The writ court relegated the persons aggrieved to a suit as the dispute was with regard to a contractual matter. The Hon'ble Apex Court was of the opinion that in view of the violation of the principles of natural justice and in view of the fact that even in contractual matters the writ court could intervene under special circumstances, the High Court ought not to have relegated the persons aggrieved to a suit. The said judgment was rendered under the different facts and circumstances and does not have any bearing in this proceeding. Thus with regard to the reliefs against the wakf board and the mutwalli, the remedy of the petitioner would be before the appropriate forum.

On the contrary, the decision cited by Mr. Galib, learned advocate appearing on behalf of the wakf board, in the matter of Radha Krishan Industries vs. State of Himachal Pradesh, reported in (2021) 6 SCC 771 is relevant. The Hon'ble Apex Court categorically held that if there was an effective alternative remedy, the persons aggrieved must be directed to exhaust such alternative remedy and the writ court shall refrain from interfering in such

matters. The Hon'ble Apex Court further held that when a right had been created by a statute, which itself provided a remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution.

This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

In this case, the court does not find that the principles of natural justice has been violated. This court sitting under the present determination can only adjudicate disputes which fall within the ambit of Group – V of the classification list of the writ rules of this court.

Moreover, the Hon'ble Apex Court has time and again held that all disputes involving wakf properties must be adjudicated by the learned Wakf Tribunal.

The writ petition is disposed of by directing the competent authority of the corporation to act and proceed in accordance with law by adhering to the following procedure:

- a) An inspection of the site shall be conducted. Such inspection shall be held in the presence of the parties, with 48 hours advance notice to the petitioners, the wakf board and the respondent no. 8.

- b) The report of the inspection shall be prepared along with the sketch map indicating the extent of deviation, if any.
- c) Such report shall be handed over to the petitioners, the wakf board and the respondent no. 8.
- d) A hearing shall be given to the petitioners, the wakf board and the respondent no. 8. The parties must also be allowed to furnish their written objection/version to the said report and adduce oral and documentary evidence in support of their contentions before the competent authority.
- e) A reasoned order shall be passed and communicated to the parties. On the basis of what transpires at the hearing and during inspection, the proceedings shall be reached to its logical conclusion in terms of the statute.
- f) The parties will be entitled to be supplied with the relevant documents which shall be placed by each other in the proceeding before the corporation.

The court has not gone into the merit of the claims and counter-claims of the parties and the issues shall be decided independently.

The entire exercise shall be completed within a period of four months from the date of communication of this order.

Under such circumstances, the writ petition is disposed of with the directions as stated hereinabove.

The petitioners will be at liberty to pursue their other remedies before the appropriate forum.

As affidavits are not called for, the allegations are deemed to be denied.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)