

16.03.2022
Court No. 19
Item no.06
CP

W.P.A. No. 4408 of 2022

Shri Prasanta Mondal & anr.
Versus
The State of West Bengal & Ors.

Mr. Sudipto Maitra, Sr. Advocate
Mr. Vijay Verma
Mr. Dwaipayan Biswas
...for the Petitioners.

Mr. Sandipan Banerjee
Mr. Ankit Sureka
...for the H.M.C.

The subject matter of challenge in the writ petition is the order of demolition dated March 4, 2022 wrongly dated at the top as 2021, passed by the Assistant Engineer, Howrah Municipal Corporation.

This is the fourth attempt of the persons responsible who have made some unauthorized constructions, to resist implementation of a demolition order.

It is also a matter of record that a contempt proceeding is pending against the Howrah Municipal Corporation (hereinafter referred to as 'the corporation'), with regard to the demolition of the unauthorized constructions on the premises situated

at 14/2, Khagendra Nath Ganguly Lane under Ward No. 12, Police Station – Golabari, District – Howrah.

On two earlier occasions, two writ petitions being WPA 342 of 2022 and WPA 1480 of 2022 were disposed of by this court, with a direction upon the competent authority of the corporation to hold a fresh hearing, by taking into consideration the submissions of the persons responsible for the alleged unauthorized constructions. The demolition orders were set aside, with reasons. The court directed that the prayer for regularization must be considered in accordance with law, upon taking into consideration the cases of similarly situated persons.

Those two orders of demolition were set aside by this court by orders dated January 19, 2022 and February 8, 2022 on the ground of violation of the principles of natural justice and arbitrary exercise of jurisdiction.

The court directed by order dated February 8, 2022 passed in WPA 1480 of 2022, that the submissions of the writ petitioners shall be considered and documents filed shall also be taken note of. It was further directed that if the petitioners were not similarly situated with those persons whose deviations had been regularized, then reasons shall be disclosed.

The court had specifically recorded that the order dated February 8, 2022, passed in WPA 1480 of 2022, shall not be treated either as a direction to regularize or as an opinion on the eligibility of such construction, to be granted regularization. The court had specifically recorded that equality could not operate in the negative.

Pursuant to the above directions, the order of demolition has been passed on March 4, 2022, which is the subject matter of challenge before this court.

The order impugned, records the submissions of the petitioners. It mentions that the petitioners had prayed that the 'as made plan' be accepted and regularized, upon imposition of fine. Reference made to similar holdings, namely, 3, Kalitola Lane and 7/2 Shyama Charan Choudhury Lane, has been recorded.

According to the respondents, the developers had constructed a G + 4 storeyed building in the premises in question. Two additional floors and some deviations had been detected. The said constructions were without a plan and in violation of the Building Rules of the Kolkata Municipal Corporation, which has been adopted by the Howrah Municipal Corporation, vide notification No. 43/MA/O/C-4/1A-5/2010, dated February 15, 2011.

The authority has recorded, that there had been rampant construction of similar unauthorized floors, within the territorial jurisdiction of the corporation. It has been specifically stated that retention of deviations in other buildings had been allowed by the erstwhile Board of Councillors. Section 177, Explanation 1 should have been followed while regularizing only minor deviations. However, the authority held that two additional floors could not qualify as minor deviations and, as such, the corporation denied retention of the floors in the construction of the petitioners. The petitioners were asked to remove the unauthorized construction themselves, failing which, coercive measures would be taken by the corporation.

Mr. Maitra, learned senior advocate for the petitioner, submits that the 'as made plan' of other two buildings were regularized and two or three floors had been permitted to be retained and, as such, similar orders must be passed by the Corporation in this case as well. Thus, it is prayed that the construction of the petitioners must also be allowed to be retained. It is alleged that the Corporation cannot discriminate. He submits that the order of this court had been flouted. Reasons as to how the petitioner's case was not at par with the other buildings, had not been disclosed in the

demolition order. Apart from the above issue, the petitioners have not assailed the order of demolition, on any other ground.

It is an admitted position, that the two floors constructed by the petitioners along with the deviations are unauthorized, i.e., without a sanction. In the opinion of the court, the corporation has rightly held that these additional floors cannot be treated as minor deviations. The previous Board may have allowed retention of three or four additional floors, but such action of the erstwhile Board, is not before this court, for a decision.

Even if the earlier Board of the corporation, had indulged in arbitrary regularizations/retentions of the additional floors, the court cannot direct the corporation to do something which is not otherwise permitted by law. The petitioners have failed to satisfy the court that the law permitted regularization of unauthorized additional floors, which were raised without any sanction. The corporation has the discretion to regularize minor deviations as per the regulations. At the moment, there are no regulations in place and usually, the commissioner or his delegatee exercises a discretion and regularises minor deviations. Retention/regularization cannot be claimed as a matter of right.

In the matter of **Dipak Kumar Mukherjee v. Kolkata Municipal Corpn.** reported **in (2013) 5 SCC 336**, 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 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:-

“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.

In ***Friends Colony Development***

Committee v. State of Orissa reported in **(2004) 8 SCC 733**, the Hon'ble Apex Court dealt with a case where the builder had exceeded the permissible construction under the sanctioned plan and had constructed an additional floor on the building, which was unauthorised. The Apex Court held as follow:-

“24. Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and

other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.

Noting that the private interest of landowners stands subordinate to the public good while enforcing building and municipal regulations, the Apex Court issued a caution against the tendency to compound violations of building regulations :

“25. ... The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.”

Unauthorised floors have been held to be a burden on general welfare and to be dealt with strictly.

In **Priyanka Estates International (P) Ltd. v. State of Assam** reported in **(2010) 2 SCC 27** the Hon'ble Apex Court, observed as follows:-

“55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder.”

The Apex Court observed that if unauthorised constructions were allowed to stand or are “given a seal of approval by Court”, it was bound to affect the public at large.

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 (Supra)**, the Hon'ble Apex Court discussed the duties of the 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 same decision ***Supertech (Supra)***, the Hon’ble Apex Court concluded as follows:-

“172. For the reasons which we have indicated above, we have come to the conclusion that:

172.1. The order passed by the High Court for the demolition of Apex and Ceyane (T-16 and T-17) does not warrant interference and the direction for demolition issued by the High Court is affirmed.

172.2. The work of demolition shall be carried out within a period of three months from the date of this judgment.

172.3. The work of demolition shall be carried out by the appellant at its own cost under the supervision of the officials of Noida. In order to ensure that the work of demolition is carried out in a safe manner without affecting the existing buildings, Noida shall consult its own experts and experts from Central Building Research Institute Roorkee (“CBRI”).

172.4. The work of demolition shall be carried out under the overall supervision of CBRI. In the event that CBRI expresses its inability to do so, another expert agency shall be nominated by Noida.

172.5. The cost of demolition and all incidental expenses including the fees payable to the experts shall be borne by the appellant.

172.6. The appellant shall within a period of two months refund to all existing flat purchasers in Apex and Ceyane (T-16 and T-17), other than those to whom refunds have already been made, all the amounts invested for the allotted flats together with interest at the rate of twelve per cent per annum payable with effect from the date of the respective deposits until the date of refund in terms of Part H of this judgment.

172.7. The appellant shall pay to the RWA costs quantified at Rs 2 crores, to be paid in one month from the receipt of this judgment.”

Having discussed the decisions of the Hon’ble Apex Court and the strong stand taken towards unauthorized construction, the court does not think that any further opportunity is required to be granted to the petitioners to try and protect the unauthorized floors. There is no denial of the fact that the two floors have been constructed without any permission. In the opinion of the court, unauthorized construction cannot be allowed to remain. Article 14 does not envisage negative equality. One wrong committed by the Board of Councillors, cannot be perpetuated and this court cannot direct the authorities to commit the same mistake over and over again.

In the decision of ***In Basawaraj and another v. Special Land Acquisition Officer***, reported in

(2013) 14 SCC 81, the Hon'ble Apex Court held as follows:-

“8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality, but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated.”

In the decision of **State of U.P. and Ors. v. Harish Chandra and Ors.** reported in **(1996) 9 SCC 309**, the Apex Court held as follows:-

“10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition....

(c) In the decision reported in (2004) 2 SCC 150 (Union of India v. S.B. Vohra) the Supreme Court considered the said issue and held that 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself. Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

In the decision of **Oriental Bank of Commerce v. Sunder Lal Jain** reported in **(2008) 2 SCC 280**, the Hon'ble Apex Court held as follows:-

“11. The principles on which a writ of mandamus can be issued have been stated as

under in *The Law of Extraordinary Legal Remedies* by F.G. Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It

is in every case a discretion dependent upon all the surrounding facts and circumstances. Note 206.- ... The correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.

12. These very principles have been adopted in our country. In Bihar Eastern Gangetic Fishermen Coop. Society Ltd. v. Sipahi Singh after referring to the earlier decisions in Lekhraj Sathramdas Lalvani v. N.M. Shah, Rai Shivendra Bahadur (Dr.) v. Nalanda College and Umakant Saran (Dr.) v. State of Bihar this Court observed as follows in para 15 of the Reports (SCC): (Sipahi Singh case, SCC pp. 152-53)

15. ... There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.... In the instant case, it has not been shown by Respondent 1 that there is any statute or rule having the force of law which casts a duty on Respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that Respondent 1 was not entitled to apply for grant of a writ of mandamus under Article 226 the Constitution and the High Court was not competent to issue the same.

Therefore, in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the

performance of some statutory duty cast upon the authorities...."

The authority has recorded that if the erstwhile Board of Councillors had regularized similarly situated premises, the same should have been done in terms of Section 177 of the Howrah Municipal Corporation Act 1980. Clearly, the present establishment has not been taken any responsibility for such retentions granted earlier. However, the corporation is now under a Board of Administrators and the competent authority has taken a decision not to allow retention of additional floors upon holding that those are not minor deviations. Such reasons appear to be rational and proper. There is no procedural irregularity in the decision making process. The law has been followed. Regularizations granted to some other unauthorized constructions cannot vest the petitioners with a right to get the additional floors regularized. Illegalities, if any, committed in the past, cannot be a ground for regularization or retention of the unauthorized constructions.

The notification appearing as Annexure-P9 does not apply in this case, in view of the above-mentioned discussion. Whether the parameters stated therein shall apply in this case, was never

urged or pleaded in this case. Mr. Banerjee submits that the said decision was not made applicable in case of rampant unauthorized construction of floors.

The writ petition is, thus, dismissed. There shall be no order as to costs. The order of demolition is not interfered with.

Parties are to act on the server copy of this order, as also on the learned Advocate's communication.

(Shampa Sarkar, J.)