

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Appellate Side)

M.A.T. 434 of 2022

With

I.A. No. CAN/1/2022

Shri Prasanta Mondal & Anr.

Vs.

The State of West Bengal & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Rai Chattopadhyay

For the Appellants	: Mr. Sudipto Maitra, Sr. Adv. Mr. V. Verma, Adv. Mr. D. Biswas, Adv.
For the HMC	: Mr. Sandipan Banerjee, Adv. Mr. A. Surekha, Adv. Mr. S. Majumdar, Adv.
For the State	: Mr. Sanghamitra Nandy, Adv. Mr. P. Goswami, Adv.
Heard On	: 14.06.2022 & 29.06.2022
CAV On	: 29.06.2022
Judgment On	: 10.08.2022

Rai Chattopadhyay, J.:

1. Appellants/writ petitioners are aggrieved by and dissatisfied with the order dated 16.3.2022, delivered by the Learned Single Bench in W.P.A. No.4408 of 2022 (Sri Prasanta Mondal & Anr. Vs. The State of West Bengal

& Ors.) and thus have preferred this appeal being M.A.T No.434/2022 challenging the same.

2. Learned Single Bench vide its order dated 16.3.2022, has been pleased to dismiss appellant's writ petition as mentioned above. Appellants/writ petitioners had prayed therein for quashing the order of demolition of construction issued by respondent No.3, dated 04.03.2022 of the third and fourth floors of the appellant's abode.

3. Bereft of any unnecessary details, the factual background of the case may be narrated in a nutshell that the appellants/writ petitioners are the joint owners of premises No.14/2 Khagendra Nath Ganguly Lane, P.S:Golabari, Dist: Howrah, Pin Code No:711106. They got a plan of building sanctioned by respondent No.3/ Kolkata Municipal Corporation, for construction of a G+2 building in the said premises. However, at the material point of time, the respondent No.3 notified them about the unauthorised and illegal construction of 3rd and 4th floors in the said premises, which it says to be de hors the sanction of the competent authority, i.e, itself. Thereafter series of litigations went on between the parties, by which the appellants/writ petitioners ventured to get a court's order to quash the said demolition notice(s) by the respondent No.3, the present one being fourth of those, according to the serial. On earlier occasions the appellants could succeed in their endeavour, as the demolition order(s) issued by respondent No.3 were set aside by court and directions were issued to afford opportunity to the appellants for hearing.

Appellants were afforded such opportunity and ultimately the respondent No.3, stood firm on its stand of considering the 3rd and 4th floors of the said building to be an unauthorised construction, dehors the sanctioned plan with respect to the said premises. This prompted respondent No.3 to issue demolition order dated 04.3.2022, which was challenged in the writ petition, before Learned Single Bench being W.P.A No.4408 of 2022. However, appellant's challenge to the impugned order, as above, was set at naught by the Learned Single Bench upon elaborate discussion of the factual aspects being intertwined with the law as prevailing and their prayer was disallowed.

4. This has brought the writ petitioners/appellants before this appeal court, in this appeal being MAT No.434/2022, wherein they have challenged the legality and propriety of the impugned judgment and order dated 16.3.2022, in W.P.A No.4408 of 2022. In the impugned judgment and order dated 16.3.2022, Learned Single Bench has held that in view of the admitted facts, i.e, the 3rd and 4th floors of the building being constructed without a plan sanctioned for the same, the corporation has rightly held that these additional floors cannot be treated as "minor deviations", that the court cannot direct corporation to do something which is otherwise not permitted by law. The court was not satisfied with appellant's argument before it, that regularisation of unauthorised additional floors of a building, which were raised without any sanction, is permitted under law. Court decided that there would not be any further opportunity granted to the appellants/writ petitioners to try and protect the unauthorised floors and that unauthorised

construction cannot be allowed to remain. Hence, ultimately Learned Single Bench dismissed the writ petition of the appellants.

5. In this appeal court, Ld. Advocate for the appellants has approached the issue through quadruple dimensions.

6. The first point he argued was that the respondent authorities were to act in accordance with law, adhering to the principle of natural justice and regard been had to the equality before law and equal protection of law. Appellant's grievance is that by the impugned act of the respondent authorities by issuance of demolition order with respect to the 3rd and 4th floors of their building, they have been treated discriminately, though being a bonafide tax payer to the respondents. Such alleged discrimination has been sought to be substantiated with the further fact that in cases of other residents within the vicinity and locality of the appellants, the respondents, in exercise of its power have regularised constructions, pending sanction of plan, for the same. On behalf of the appellants, it was envisaged that they are similarly circumstanced with those other residents of the locality and denial of such benefit to them by the respondent authorities and issuance of the demolition order against them, would amount to depriving them of their vital right of equality, as enshrined under the Constitution of India.

7. Next is that the respondent authority issuing demolition order dated 04.3.2022 lacked jurisdiction to do so at the relevant point of time. Hence the order is perverse. It has been argued that the power of delegation as

bestowed in law upon the Commissioner, is only in respect of regularisation of a plan/proposal but shall not apply in case of an order for demolition of a building or part thereof, as in this case.

8. Thereafter the appellants say that respondents are instrumental for violation of the principles of natural justice as they have issued the demolition order without even considering the “as made plan”. They are aggrieved that appropriate and sufficient opportunity of hearing has not been afforded to them, by the respondent authorities.

9. Finally, the appellants are also aggrieved that the purported action of the respondent authorities in issuance of the demolition order dated 04.3.2022, is in absolute defiance and violation of the notification(s) issued by the Mayor in Council, Building, H M C, by dint of which the guidelines for regularisation of unauthorised constructions have been prescribed.

10. It was submitted that the rights of the appellants have been severely injured and their interests are prejudiced by the purported act of the respondent authorities who issued demolition order against them, which the Learned Single Bench has erred in not considering. Thus, according to the appellants, the impugned judgment is liable to be varied, quashed or set aside by this appeal court.

11. On behalf of the appellants, reliance have been placed on the judgment reported in **AIR 1989 SC 860 (M/s Rajatha Enterprise vs**

S.K.Sarma & Ors) to submit that the Hon'ble Apex Court has been pleased to hold in that case, regarding demolition order of construction in excess of permissible area that in absence of any evidence of public safety being in any manner endangered or inconvenience caused by reason of such construction and when there is no evidence of dishonesty or fraud or negligence on part of the builder, the demolition order cannot be sustained.

12. The appellants have further relied on a judgment reported in **AIR 2007 SC 38 (Muni Suvrat Swami Jain SMP Sangh vs Arun Nathuram Gaikward & Ors)** wherein the Hon'ble Apex court has been pleased to hold that mere departure from authorised plan or putting up of a construction without sanction does not ipso facto justify demolition of the structure and that discretionary power to issue the order of demolition rests with the commissioner only and the High Court cannot impede the exercise of that discretion by issuance of a mandatory order.

13. Respondents are represented, including the State. The main answering respondents have, however supported the judgment impugned and sought to persuade this court regarding absence of any ground to interfere with the same. According to them, the present appeal is liable to be dismissed being devoid of any merits. It was submitted that respondent's acts are within the limit of the prescribed law and that neither any relevant law nor the principles of natural justice, have been violated by it while issuing the demolition order dated 04.3.2022.

14. On behalf of the respondents reliance has been placed on an unreported Division Bench judgment of this court dated 18.7.2012 i.e, **Ranjit Pal & Another vs Howrah Municipal Corporation & Others (AST 36 OF 2012)**, in which on identical fact situation the Division Bench has been pleased to uphold the impugned demolition order.

15. The other case relied on by the respondent is **Dipak Kumar Mukherjee v. Kolkata Municipal Corpn.** reported in **(2013) 5 SCC 336**, wherein the Hon'ble Supreme Court has been pleased to hold as follows :-

“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.”

16. This judgment has been discussed by the Learned Single Bench along with the other judgment as mentioned below, which set the guidelines on the points relevant in this appeal :-

First is **State of U. P & Ors vs. Harish Chandra & 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 legal duty by the party against whom the mandamus is sought and 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 on 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.”

17. 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.”

18. 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.

19. 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.”

20. 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.

21. In **Esha Ekta 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”.

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.”

22. In a most recent decision of **Supretech 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.”*

23. Thus, we are mindful of the principles enunciated as to how a construction, without prior sanction of the competent authority must be dealt with by a court of law.

24. Appellants have not denied, rather admitted in this appeal regarding constructing two floors of their premises, de hors any sanction from the competent authority. Prior to that they obtained sanction of a plan to construct a G+2 building. However, without stopping within the limit permitted in the said sanctioned plan, they went on to construct two additional floors, i.e, 3rd and 4th floors. The vigilant respondent immediately

issued demolition order, of those two additional floors though at the initial stage, they were directed by the court *to take steps regarding demolition, if at all, after affording opportunity of hearing to the appellants*. Respondents in their report (in the form of affidavit) have asserted to have complied with the court's order as above.

25. Appellant's plea is that the respondent No.7, who has issued the demolition order, was not empowered under law, to do so. Hence the order itself is perverse.

26. Section 28 of the Howrah Municipal Corporation Act, 1980 provides for "*Delegation of powers and functions*". Section 28(3) (b) of the Act, provides in this regard as under:-

"The Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to any other officer or any employee of the Corporation."

Again Section 28(3)(c) of the Act, reads as under:-

"Any officer of the Corporation other than the Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to any other officer subordinate to him."

27. Respondent Corporation has relied on a Memo (No.32/COMM/4/10—11) dated 25.5.2010, by dint of which the then Commissioner, Howrah Municipal Corporation, issued an order that following the Howrah

Municipal Corporation Act, 1980, (as amended upto-date) under Section 28(3)(b), the Commissioner is empowered to delegate any of its powers or functions to any other officer or any employee of the Corporation and in para 1 of the said letter dated May 25, 2010, the Commissioner has empowered the Assistant Engineer (Building Department), Howrah Municipal Corporation to do any act under Section 177(1) of the said Act of 1980. The said order of delegation is still in force as section 28(3)(b) and 28(3)(c) of the Howrah Municipal Corporation Act, 1980 is still in force.

28. Appellants have further pleaded of infringing of their constitutional right of equality. They have cited reference to two other independent cases of the locality when the respondent authorities have sanctioned post facto, the construction of the additional floors in a building. They say that being bonafide tax payer and similarly circumstanced with those persons, they cannot be treated discriminately by the respondents. Here the appellants have tried to impress upon the court by referring to provisos “third” and “fourth” of section 177(1) of the Act, which were introduced vide the Howrah Municipal Corporation Amendment Act 2017 (w.e.f 20.9.2017). It is argued that the judgment of **Ranjit Pal & Another vs Howrah Municipal Corporation & Others (AST 36 OF 2012)**, relied on in this appeal was delivered prior to promulgation of the Amendment Act of 2017, i.e, in the year 2012, and that after coming into effect of the amended provision, the proposition thereof cannot be sustained. Per contra, the respondents say that question of treating the appellants differently or infringing their constitutional right, does not arise at all insofar as, in this context, it is stated that retentions of the buildings

earlier done by the erstwhile Board, were done on the basis of the decision that those cases fell under the category of having 'minor deviations'. In some cases, the Board allowed retention of floor deviations to some extent after perusal of the structural stability report of the buildings and in such cases, the building had already been completed and additional floor owners had entered into the building long before and were residing there since long. But, presently, there is no Board to pass any order regarding the same. In the present case, the original sanction was given for G+2 storied building and, thereafter, two extra floors have been erected and no structural stability certificate has been submitted by the appellants/writ petitioners herein.

29. The deviation in the sanctioned G+2 building by constructing additional two floors is not only major deviation but also can cause serious fatal accident to the residents in the building and also public at large in the adjacent buildings.

30. The building situated at Holding No.14/2, Khagendra Nath Ganguly Lane, Ward No.12, Police Station-Golabari, Howrah-711106 was initially sanctioned for construction of G+2 storied masonry building where the concerned LBS submitted the foundation detail in the structural drawing for transfer of all types of loads as specified in IS CODE for the G+2 building. But, the appellants/writ petitioners had constructed building thereby deviating from the sanctioned plan as sanctioned for G+2 storied masonry building. Moreover, the appellants/writ petitioners constructed additional

two floors without getting any sort of sanction and/or approval from the Howrah Municipal Corporation. The Building Engineers, Howrah Municipal Corporation visited the premises in question and found the structure completely unstable in terms of the recommendation as specified in IS Code vide No.IS 1562000,IS 875 (part I & PART II) 1987, IS 875 (part III) 2015, IS 1893 2016 & NBC 2016 for the unauthorized construction that has been carried out by the appellants/writ petitioner. Expert's report as above cannot be lost sight of which may have the probability to endanger the life of the structure itself, its occupants or people in the vicinity. Therefore, in this regard the appellants cannot take shelter of the **1989 Supreme Court** verdict, as mentioned above, the same being factually distinguishable from the present case.

31. Appellants have endeavoured to put forward the point that the portion or construction additionally built up by them beyond the sanctioned plan, should be considered as "minor deviations" which we are unable to concur with, in view of the disclosures made by respondents in their report (in the form of affidavit). Appellant's plea by relying on Rule 62 of the Howrah Municipal Corporation Buildings Rules, that, the authorities are only to consider the accumulated height of the building and not the number of floors, Which in their case has been stated to be within the permissible limits – appears to be a misconceived one as from the expert's report one can find that the deviations said to have occurred could not leave the premises free from the threat of probable perilous outcome. There is hardly

any material before this court to doubt or negate the technical disclosures made in the said report.

32. Over and above this, one should not be oblivious of the trite law, that the court cannot deliver an order to justify or uphold negative equality. Learned Single Bench has also dealt with this point very categorically in its judgment as impugned in this appeal. Decision of the authority may vary on the basis of the facts and circumstances of each case. That is why the Commissioner and/or delegate is bestowed with the immense discretionary power to analyse each case objectively before issuing any order of demolition. So far as the appellants' case is concerned, they have admitted construction of floors without prior sanction of any plan. How adversely the same may and would affect the building and the adjacent area, is evident in the report (in the form of affidavit) of the respondent authority. Under such circumstances, the decision of the respondent authority to demolish the unsanctioned additional floors, cannot be termed as unjustified or even discriminatory, in view of the factual differences of the cases in question.

33. Hence, so far this point is concerned, we find no infirmity in the decision of Learned Single Bench.

34. Appellants have argued that their "as made plan" has not been considered by the authorities and natural justice has been denied to them. In view of the facts and circumstances of the case as discussed above, such contention of the appellants is not found to be sustainable in so far as in

compliance with the court's directions they have been afforded opportunity of hearing regarding their grievance before the respondent authority.

35. Respondent's report (for an affidavit) is sufficiently showing the reasons and rational behind its actions. Learned Single Bench has very appropriately held that there is no procedural irregularity or violation of law by the respondents in issuing the demolition order, which we too concur with. Appellant's plea of their rights being jeopardised, in view of post facto sanction given to the others in locality is also not found to be sustainable as the records have sufficiently shown about the blatant violation of rules, regulations and sanctioned plan by the appellants in constructing addition floors in their house which otherwise entails imminent danger to the building itself and to the locality also and how factually differently appellant's case stands from that of the others.

36. Hence, no doubt, in this case, the appellants have failed to establish that they had a legal right and due to non-performance of the respondent authorities of their duties, the appellant's rights were jeopardised. Learned Single Bench has duly appreciated that and dismissed the writ petition.

37. We do not find any reason to interfere with the judgment and order impugned. Therefore, the judgment and order dated 16.3.2022, delivered by the Ld. Single Bench in W.P.A. No.4408 of 2022 (Sri Prasanta Mondal & Anr. Vs. The State of West Bengal & Ors.) is affirmed and the appeal being MAT No.434/2022 is dismissed.

38. Interim order if any stands vacated and connected application/s if any, is/are disposed of. There will be no order as to costs.

39. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Arijit Banerjee, J.)

(Rai Chattopadhyay, J.)