

S/L 7
24.02.2022
Court. No. 19
GB

W.P.A. 13617 of 2021

Shadab Jahan Begum & Ors.
VS
The Kolkata Municipal Corporation & Ors.

*Mr. Rauf Rahim,
Mr. Anirban Majumder.*

...for the Petitioners.

*Mr. Biswajit Mukherjee,
Mr. A.S. Chatterjee.*

...for the K.M.C.

*Mr. Shanti Sanyal,
Mr. Shahana Naznin.*

...for the Respondent No.12.

*Mr. Arindam Banerjee,
Mr. Arif Ali,
Mr. Yusuf Ali Mirza.*

...for the Respondent Nos.13 to 16.

The petitioners claim to be peace-loving, law-abiding citizens and members of a registered body called 'Anjuman', who espouse the cause of the Shia community. The petitioners have prayed for a direction upon the corporation to proceed against the respondent nos.13 to 16 for having constructed illegally at premises Nos. 123 Karl Marx Sarani, Kolkata – 700 023.

It is stated that the petitioners used to offer their prayers in an Imambara/Mosque standing on Premises No.123, Karl Marx Sarani, Kolkata-700023. Reliance is placed on a Wakfnana in order to demonstrate that the wakf was created as a public wakf and the members of the Shia community regularly offered their prayers in the said Imambara.

It is alleged that some residential complexes and a shopping complex under the name and style 'Golden Arcade' had been erected in the said premises without any sanction from the Kolkata Municipal Corporation. It is further alleged that despite several complaints lodged before the Kolkata Municipal Corporation, the Corporation did not take any steps. Reliance is placed on a communication received under the Right To Information Act, to the effect that, no sanction had been granted for erection of a building at Premises no. 123, Karl Marx Sarani, Kolkata-700023. The complaints lodged before the Executive Engineer, Building Department, Borough-IX of the Kolkata Municipal Corporation, are also on record. The dispute is with regard to the market complex, named and styled as Golden Arcade.

Mr. Banerjee, learned advocate appearing on behalf of the respondent nos.13 to 16 raises a preliminary objection about the maintainability of the writ petition. Reliance has been placed on a decision of this Court passed in C.O. 2066 of 2010 in the matter of ***Rizwan Danish Hussain & Anr. versus Mussamat naseem Ara Begum & Ors.*** in order to demonstrate that this Court, in another proceeding, refused to grant an injunction in favour of the petitioners in a civil revision on two-fold grounds. First, that the petitioners therein failed to establish on the basis of the Wakfnama, that the said Imambara was a public wakf and secondly, the petitioners before the said Court had failed to establish that the Shia community regularly offered their prayers in the said Imambara.

Thus, Mr. Banerjee submits that in a suit with regard to the self-same Imambara neither had the rights of the Shia community nor the nature of the wakf being a public wakf been upheld by the High Court. Mr. Banerjee further submits that in view of the above decision of this court, the petitioners did not have a locus to maintain the writ petition. Legal rights of the petitioners had not been affected. Mr. Banerjee further submits that when the petitioners have no interest in the property and also in the Imambara as per the decision of this High Court, this writ petition would not be maintainable at the instance of the petitioners.

Reliance has been placed on a decision of the Hon'ble Apex Court in the matter of ***Vinoy Kumar versus State of U.P. & Ors.*** reported in **(2001) 4 Supreme Court Cases, 734**. Paragraph 2 of the said judgment is quoted below for convenience.

“Generally speaking, a person shall have no locus standi to file a writ petition if he is not personally affected by the impugned order or his fundamental rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired interests have been violated ignoring the applicable rules. The relief under Article 226 of the Constitution is based on the existence of a right in favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of habeas corpus or quo warranto or filed in public interest. It is a matter of prudence, that the court confines the exercise of writ jurisdiction to cases where legal wrong or legal injuries are caused to a particular person or his fundamental rights are violated, and not to entertain cases of individual wrong or injury at the instance of third party where there is an effective legal aid organisation which can take care of such cases. Even in cases filed in public interest, the court can exercise the writ

jurisdiction at the instance of a third party only when it is show that the legal wrong or legal injury or illegal burden is threatened and such person or determined class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief.”

The next contention of Mr. Banerjee is that the petitioners have falsely stated on oath that the private respondents have made certain unauthorized construction and perpetuated illegalities in the housing complexes where the petitioners reside. This, according to Mr. Banerjee, was reason enough for the writ petition to be dismissed in limine. Mr. Banerjee further submits that a sanction was received by the said respondents for erection of the said market complex from the Kolkata Municipal Corporation. Information received under the Right To Information Act on October 25, 2021 confirming the said fact has been placed on record. The decision passed in the civil revision, has also been taken on record.

Mr. Banerjee further relies on a decision of this Court in the matter of ***Sanjay Mehta & Ors. versus The Kolkata Municipal Corporation & Ors.*** reported in ***2006 SCC OnLine Cal 571***, in order to substantiate his argument on locus and says that this Court has time and again held that none other than the persons who claim responsibility for the construction should be heard. He submits that on the basis of the above decision, the petitioners do not have any right of audience before the Kolkata Municipal Corporation on the issues raised.

Mr. Mukherjee, learned advocate appearing on behalf of the Corporation submits that there are two contrary documents, both issued by the Kolkata Municipal Corporation with regard to grant of sanction in respect of the construction in question. Mr. Mukherjee submits that a further probe is necessary for the Corporation to ascertain which of the communication received by the parties is the correct representation of facts. He submits that the question of *locus standi* cannot be raised at this stage as it has been settled by various decisions that anybody can complain of an illegality in a construction work before the Corporation and it is the duty of the Corporation to ascertain the correctness of such statement.

Point of locus is taken up first. In this case, some persons who claim to be worshipers at a local Imambara have raised an objection alleging some unauthorized construction in a market complex situated at the same premises as the Imambara. These persons are citizens and taxpayers and they brought some illegalities to the notice of the Corporation. Their challenge is inaction of the Corporation and the failure of the Corporation to act and proceed in accordance with law. Allegations are that the corporation has not been discharging its duties as per the provisions of the statute. Even if, the petitioners are not substantially interested in the construction of the market complex, the petitioners can, as citizens, bring such illegalities to the notice of the Corporation. Time and again when complaints have been lodged with the corporation by

third parties alleging unauthorized constructions, the courts have interfered in such proceedings by issuing a Mandamus upon the corporation to act and proceed in accordance with law and have even directed demolition.

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] .”

Some of these decisions were rendered in public interest litigations, but that should not be a ground for this court to refuse to issue directions upon an authority which has failed to discharge its statutory functions. This writ petition has been filed alleging illegalities committed by the

statutory authority in allowing construction of buildings without proper sanction plan and/or in deviation of the rules. The Corporation despite receiving complaints did not act on those letters. The Corporation is duty bound to at least enquire, inspect and decide as to whether there has been any illegality in the construction. Such inaction of a public body can be challenged by way of a writ petition. The fact that the petitioners have brought this to the notice of the Court, does not confer any right upon the petitioners as such. Their contention with regard to their right, to worship in the Imambara is not decided in this proceeding. They are persons who have complained of illegalities committed by the builders and the corporation has a duty to ensure that no unauthorized construction takes place.

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 decision cited by Mr. Banerjee in Vinoy Kumar (supra), it has been held that generally speaking, a person shall have no *locus standi* to file a writ petition if he is not personally affected. The Hon'ble Supreme Court however observed that an exception to the general rule would be in cases where the writ applied for is either a writ of habeas corpus or quo warranto or filed in 'public interest'.

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 (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.”

Reliance on Sanjay Mehta (supra), is not relevant in this case. The said judgment was rendered under different facts and circumstances where the tenants of a building which was directed to be demolished had come up before this Court challenging denial of their right of audience in the demolition proceedings. This Court held by referring to the statute that the tenants who did not claim any responsibility for such construction, were not required to be heard in the demolition proceeding on the ground that each and every occupier and person interested in the property which was otherwise illegal and unauthorized need not be heard.

With regard to the discrepancies in the answer under the Right To Information Act as to whether there is a sanction plan for the erection of the market complex under the name and style “Golden Arcade”, the court feels that the corporation being the permission granting body, shall decide

the issue. With regard to the point as to whether the writ petition should be dismissed *in limine* on the ground of misstatement in paragraph 1, this Court is of the opinion that the correctness of the allegations need not be assessed. The writ petition is entertained only to the limited extent as discussed above. The corporation must be directed to act and proceed in accordance with law. The contentions of the petitioners and the truth and veracity of the same are not decided in this proceeding. The factual aspect will be gone into by the Corporation at the relevant point of time when the Corporation disposes of the issues raised by the parties.

Under such circumstances, the writ petition is disposed of with a direction upon the competent authority of the Corporation to dispose of the complaint dated February 9, 2021 which is Annexure P/3 at Page 33 of the writ petition.

While disposing of the complaint of the petitioners, the competent authority of the Corporation shall adhere to the following procedures:-

a) An inspection shall be conducted of the market complex. Such inspection shall be held in the presence of the petitioner no.1, the representative of the respondent nos.13 and 16 and the wakf board within three weeks. Advance notice of the inspection shall be served upon the petitioner no.1 and the respondent nos.13 and 16. If the parties are not available to accept notice, the authorities shall affix the notice of hearing and inspection at conspicuous places in their respective premises.

b) In case, it is found on preliminary inspection that there may be reasons to believe that the construction was without permission and was continuing, the authorities may take such interim measures by stopping such construction.

c) The report of such inspection shall be prepared along with the sketch map, indicating the extent and nature of unauthorized construction, if any.

d) Such report shall be handed over to the parties.

e) The enquiry of the Corporation will be restricted to whether the premises named and styled as “Golden Arcade” has been constructed in accordance with a building plan and the building rules. No other dispute with regard to the rights of the parties, the nature or usage of the Imambara, etc., shall be gone into.

f) A hearing shall be given to the petitioner no.1 and the respondent nos.13 and 16 and the wakf board. 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. All points raised by either party, will be decided.

g) 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. The court has not gone into the

merits of the claims and counter claims and the issues involved shall be decided independently.

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

This order shall not be construed as a recognition of the rights of the petitioners as worshipers of the Imambara or as a society upholding the right of the community. These are not issues to be decided by a writ court. Except for the limited purpose as discussed above, no other issues with regard to the rights of the petitioners in relation to the Imambara and the nature of the Imambara (public or private wakf) have been decided. This order shall not be used as a foundation for establishing the rights of any person or community.

Accordingly, the writ petition is disposed of.

There will be however no order as to costs.

All parties are directed to act on the basis of server copy of this order and/or the learned advocate's communication.

(Shampa Sarkar, J.)