

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Appellate Side)

MAT 1239 OF 2022
With
I. A. No. CAN 1 of 2022

Dibyendu Ghosh

Vs.

Saibal Kumar Acharyya & Ors.

Before:

**The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray**

For the Appellant : Mr. Srijib Chakraborty, Adv.
Mr. Sabyasachi Chatterjee, Adv.
Mr. Akashdeep Mukherjee, Adv.
Mr. Pintu Karan, Adv.
Mr. Pritam Chatterjee, Adv.
Mr. Soummyadeep Nag, Adv.

For the respondent No. 1 : Mr. Subir Sanyal, Adv.
Mr. Biswabrata Basu Mallik, Adv.
Mr. Tarun Kumar Das, Adv.
Mr. Sujit Bhunia, Adv.
Mr. Pradip Paul, Adv.
Mr. Arka Bhattacharya, Adv.

For the respondent No. 3 : Mr. Sankha Subhra Ray, Adv.
to 5

For the State respondents : Ms. Jayeeta Sinha, Adv.
Mr. Ranjit Rajak, Adv.

CAV On : 06.09.2022

Judgment On : 14.11.2022

Apurba Sinha Ray, J. :-

1. The present appeal is directed against an order dated 01.08.2022 passed by the Learned Single Judge in connection with WPA No. 13005 of 2022.

2. Mr. Srijib Chakraborty, the Learned Counsel appearing on behalf of the appellant, has submitted that the Learned Judge disposed of the writ petition by an order dated 28.07.2022 passed in connection with the property in question and further was pleased to pass another order on 01.08.2022 at the instance of the respondent No. 1 of the present appeal and in the absence of the present appellant in gross violation of the principles of natural justice. Learned Counsel has pointed out that when by the order dated 28.07.2022, the Learned Judge disposed of the writ petition being WPA No. 13005 of 2022, the Hon'ble Court became functus officio and could not pass the order dated 01.08.2022 without recalling its earlier order dated 28.07.2022.

3. Learned Counsel, Mr. Subir Sanyal appearing on behalf of the respondent No. 1 has submitted that when the Court passed an order on the basis of fraudulent representation made on behalf of a party, the Hon'ble

Court can pass an order modifying its earlier order and in that event the court cannot be treated as functus officio. In this connection Learned counsel has relied on the following decisions: **State of U.P. Vs. Ravindra Kumar Sharma reported in 2016(3) CHN (SC) 229, M.M. Thomas Vs. State of Kerala and Anr. reported in (2001) 1 Supreme Court Cases 666, Ram Chandra Singh Vs. Savitri Devi & Ors. reported in (2003) 8 Supreme Court Cases 319, Union of India & Ors. Vs. Ramesh Gandhi reported in (2012) 1 Supreme Court Cases 476.**

4. The backdrop of the present appeal may be narrated hereunder.
5. The allegation against the present appellant in the relevant writ petition was that he was making unauthorized construction on the land in question and for which the Kamarhati Municipality had directed him to demolish the unauthorized construction but without paying any heed to such direction, the present appellant was continuing with his unauthorized construction and consequently, the writ petitioner/ the respondent No. 1 herein was compelled to file the Writ Application No. 13005 of 2022. During hearing, the Learned advocate appearing on behalf of the present appellant submitted that a Municipal Appeal had been preferred against the demolition order dated 18.07.2022 being Misc. Appeal No. 5 of 2022 before

the Learned Civil Judge (Junior Division), 2nd Court at Barrackpore and the Learned counsel, as per the observation of the Hon'ble Single Judge, submitted before the Hon'ble Court that an application for stay was pending for consideration. The Hon'ble Single Judge disposed of the Writ Application by order dated 28.07.2022. The operative portion of the said order is as follows:-

“.....As it appears that the order of demolition is an appealable one and an appeal has been preferred, accordingly, it will be open for the petitioner to contest the appeal before the aforesaid forum.

In the meantime, the Municipality is to ensure that no further construction is being carried on in the said premises.

The Officer-in-Charge, Dakshineswar Police Station is directed to keep strict vigil over the property to ensure that no construction in any manner whatsoever is carried on in the said premises till a decision is arrived at by the appellate forum in this regard.

The report filed by the Municipality is taken on record.

The writ petition stands disposed of.”

6. Though the aforesaid order dated 28.07.2022 in the said writ petition was passed in presence of the Learned Counsels of both the parties, on 29.07.2022 the Learned Counsel appearing on behalf of the writ petitioner mentioned the matter ex-parte before the Hon'ble Single Judge and submitted that there was fraudulent misrepresentation on behalf of the

respondent No. 8 of the said writ petition and the Learned counsel further submitted before the Hon'ble Single Judge that though the Learned counsel of the respondent No. 8 therein submitted on 28.07.2022 that one stay petition was pending for consideration in the relevant Municipal Appeal in the Civil Court at Barrackpore, but in reality, the said stay petition had been rejected by the Learned Civil Judge (Junior Division) Barrackpore. It was also alleged that though the Learned counsel appearing for the respondent No. 8 therein had tried to impress upon the court that the said Municipal Appeal was filed against the demolition order dated 17.05.2022 passed by the Kamarhati Municipality but in fact the respondent No. 8 challenged the letter of reminder dated 18.07.2022 issued by the Chairman Kamarhati Municipality in the said municipal appeal.

7. After taking serious note of such submission the Hon'ble Single Judge, after getting the disposed of writ petition listed, passed the order dated 01.08.2022, the material portion of which may be reproduced herein below:-

“.... It appears that the private respondent is adopting sharp practice and trying to play with the order passed by the Court and ignoring the direction passed by the Municipality continuing with the construction work.

In view of the submissions made in Court today, the Court is constrained to pass the following directions for ends of justice.

The Kamarhati Municipality is directed to put bold signage on the said premises clearly mentioning that the building in question is “unauthorized construction”.

The Kamarhati Municipality is restrained from providing any services to the said premises including sewerage and drinking water connection.

The Officer-in-Charge, Dakhineswar Police Station is directed to put a padlock on the main gate of the said premises so that the private respondent cannot take any step to sell out and transfer the said property in favour of any other person. The padlock be put immediately upon communication of the order to the Officer-in-Charge, Dakhineswar Police Station today itself.

The Court is compelled to pass such order with the view to prevent the prospective buyers to be cheated and duped by the private respondent in purchasing a property which has been constructed unauthorisedly and is facing an order of demolition.

As the building in question is yet to be completed and the completion certificate cannot be issued, accordingly, none can be permitted to occupy any portion of the said constructed area.

Learned advocate for the petitioner will be at liberty to take steps for impleading the petitioner in the proceeding that is pending before the Learned Court below.

Learned advocate for the State respondents who is present in Court shall immediately communicate this order to the Officer-in-Charge, Dakhineswar Police Station for implementation of the order passed herein.

The Court takes serious note of the fact that at the time when the hearing of the matter was in progress, the Learned advocate for the respondent No. 8, without taking the leave of the Court has simply left the Court room and a different Learned advocate took up the matter therefrom. The same is not the practice of the High Court and the Learned advocate for the private respondent ought to

maintain the dignity of the Court at the time of addressing the same.”

8. In the present appeal the above order dated 01.08.2022, inter alia, was challenged by the present appellant/respondent No. 8 in the writ petition, on the ground that the Hon’ble Single Judge could not pass the order dated 01.08.2022 without recalling the earlier order dated 28.07.2022 and also without calling for affidavit from the present appellant. Learned Counsel has relied on the decision in the case of Vinod Kumar Singh Vs. Banaras Hindu University & Ors. **reported in (1988) 1 Supreme Court Cases 80** in support of his contention. On the other hand, Learned counsel appearing on behalf of the present respondent No. 1/writ petitioner has submitted that fraud and justice never dwell together and any order passed on the basis of fraudulent misrepresentation is non-est. As there is serious suppression of material facts before the Hon’ble Single Judge, the Hon’ble Judge could modify her earlier order without calling for affidavit from the present appellant.

9. After considering the above submissions of the parties and also the case laws cited above, we have no hesitation to opine that fraudulent misrepresentation made to the Court would certainly entitle it to

modify/recall its earlier order, if the said fraudulent misrepresentation attacks the core issues involved in the matter and compels the Court to arrive at a decision which is not otherwise desirable in the factual matrix of the case. In this case, it transpired that the relevant order dated 28.07.2022 was passed in presence of counsels of both the parties, but unfortunately on that day the Learned counsel for the writ petitioner was unable to highlight the alleged fraudulent misrepresentation made on behalf of the respondent No. 8 before the Hon'ble Judge. The record shows that it was only on 29.07.2022 that the Learned counsel for the writ petitioner pointed out the alleged misrepresentation made on behalf of the respondent No. 8 on 28.07.2022. In our view, had he been able to point out the same even on 28.07.2022, the order dated 28.07.2022 may not have been otherwise.

10. The order dated 01.08.2022 shows that though Learned counsel for the respondent No. 8 in the writ petition submitted that the order of demolition issued by the Kamarhati Municipality was the subject matter of municipal appeal pending before the Civil Judge (Junior Division) at Barrackpore, in fact, it was the letter of reminder dated 18.07.2022 issued by the Chairman Kamarhati Municipality which was the subject matter of the said appeal. The above materials on record show that there might have

been a mistake on behalf of the Learned counsel of the respondent No. 8 in the writ petition in submitting the case of his client before the Hon'ble Court. Astonishingly, it is found that in the present memo of appeal also, he has again stated before us the same thing at Ground No. (XI):-

“For that the Single Judge erred in law did not consider that a Municipal Appeal No. 05 of 2022 is pending before the Learned Civil Judge (Junior Divn.) 2nd Court, at Barrackpore challenging the order passed by the Chairman Kamarhati Municipality”.

11. Actually, what the Learned Counsel wanted to mean by the aforesaid statement is not clear. Whether he meant the demolition order dated 17.05.2022 or the letter of reminder dated 18.07.2022 issued by the Chairman, Kamarhati Municipality is a matter of debate. However, it may be said that issue of demolition of the property in question as reminded by the said letter was under challenge before the Learned Court at Barrackpore. But the question is whether failure to mention specifically that the Municipal Appeal relates to the letter dated 18.07.2022 reminding the Appellant to demolish the unauthorized construction, instead of his submission that such appeal was filed to challenge the order of demolition dated 17.05.2022, or failure to mention the stay petition was rejected tantamounts to material misrepresentation or not.

12. If we peruse the materials on record we shall find that the entire building in question is not an unauthorized construction. It is revealed that extent of the unauthorized construction is 2' (two feet) each in front side and back side cantilever projections and the appellant was directed to remove the same within 15 days. Therefore, as the unauthorized construction is in respect of cantilever projection in both the front and back sides of the construction only, it cannot be said that the entire building is the result of unauthorized construction and beyond the sanctioned plan.

13. After considering the entire materials on record we think that even, had the Learned advocate for the respondent No. 8 in the writ petition conceded during hearing of the writ petition that the stay petition had been rejected and the municipal appeal before the Learned Civil Judge (Junior Division) at Barrackpore was pending against the letter of reminder dated 18.07.2022 for demolition of the unauthorized construction and not the order of demolition dated 17.05.2022, there would not have been any further scope for the Hon'ble Single Judge to pass more appropriate order than the relevant operative portion of the order dated 28.07.2022. The operative portion of the relevant of the order as aforesaid was all pervading and comprehensive, even had the alleged submission of the Learned advocate for

the respondent No. 8 been made in accordance with the factual matrix of the case.

14. We would like to conclude by saying that the operative portion of the order dated 28.07.2022 passed by the Hon'ble Single Judge would still hold good, even if the Learned advocate for the respondent No. 8 in the writ petition could have submitted that the stay petition was rejected and the subject matter of the municipal appeal was in respect of the letter dated 18.07.2022. Therefore, in our view, even in the changed circumstances, as depicted in the order dated 01.08.2022, we do think that the operative portion of order dated 28.07.2022 still holds good and as such we would like to restore the operative portion of the order dated 28.07.2022 passed by the Hon'ble Single Judge in connection with W.P.A No. 13005 of 2022, which has been extracted in paragraph 5 hereinabove. Moreover, as the building in its entirety is not an unauthorized one the order dated 01.08.2022 is required to be set aside. Thus, the same is hereby set aside.

15. We should briefly dilate also on the point raised by the appellant that having become *functus officio* upon disposing of the writ petition by the order dated 28.07.2022, the Learned Judge did not have jurisdiction to pass any further order on the writ petition without first recalling the order dated

28.07.2022. Mr. Sanyal, Learned Advocate for the respondents submitted that if an order is obtained by practising fraud on Court, the Court would have inherent jurisdiction to recall the order upon such fraud being discovered. There can possibly be no dispute with the said proposition. Fraud unravels everything. A person who obtains an order from Court by making fraudulent misrepresentation, cannot be permitted to enjoy the benefit of such order.

However, in the present case, without recalling the earlier order, the Learned Judge went on to pass further directions in a disposed of writ petition. This could not have been done. The Supreme Court decision in ***Vinod Kumar Sing (supra)*** and the decision of a Special Bench of this Court in ***Mallikarujan Rao & Ors. v. The State of West Bengal reported in 2016 SCC OnLine Cal 3952*** are authorities for the proposition that once a judge dictates a judgment and signs it, the Judge loses jurisdiction over the lis in question. Without restoring the matter on valid grounds following due process of law, no order can be passed in a matter which has been disposed of. This is also a ground on which we are inclined to allow the appeal and set aside the order dated 01.08.2022.

16. We have noted above that a Municipal Appeal at the instance of the appellant herein is pending before Learned Civil Judge (Junior Division), 2nd Court at Barrackpore. It appears that instead of challenging the demolition order, the appellant in such Municipal Appeal has challenged a reminder letter issued by the concerned municipality calling upon the appellant to comply with the demolition order. Whatever it be, the issue of demolition is pending before the aforesaid Court in the municipal appeal. We are of the view that the municipal appeal should be disposed of on an early date. We accordingly direct Learned Civil Judge (Junior Division), 2nd Court at Barrackpore to dispose of Municipal Appeal No. 05 of 2022 as expeditiously as possible and positively within a period of 6 months from the date of a copy of this order being placed before the Learned Court. Needless to say, the Municipal Appeal will be decided in accordance with law and relevant rules/regulations, if any, observing the principles of natural justice. If the Respondent no. 1/writ petitioner has not been added as a party in the municipal appeal by the appellant herein, the Learned Court below shall add

the Respondent no. 1/ writ petitioner herein as a party respondent in the Municipal Appeal and shall allow him to participate in the appeal proceedings.

17. The appeal and the connected application are hereby disposed of.

18. 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.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)