

APOT/47/2023
WITH
WPO 3279 OF 2022
I.A. NO: GA 1 OF 2023

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

MD. EHTESHAM UDDIN
VS
THE KOLKATA MUNICIPAL CORPORATION & ORS.

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE
The Hon'ble JUSTICE APURBA SINHA RAY
Date : 20TH FEBRUARY, 2023

Appearance:

Mr. Abhrotosh Majumdar, Sr. Advocate
Mr. Arif Ali, Advocate
Mr. Sarban Bhattacharjee, Advocate
....for appellant

Mr. Ranajit Chatterjee, Advocate
Ms. Piyali Sengupta, Advocate
....for KMC

Mr. Debjit Mukherjee, Advocate
Ms. Susmita Chatterjee, Advocate
..for State

THE COURT: An interim order dated January 18, 2023 passed in the appellant's writ petition being WPO/3279/2022 is the subject matter of challenge in this appeal.

The appellant approached the learned Single Judge with the grievance that unauthorized construction was being raised on a particular plot of land.

On December 19, 2022, when the writ petition was moved, it was submitted before the learned Single Judge, on behalf of Kolkata Municipal Corporation (for short “KMC”) that the writ petitioner may be a part of an extortion racket involved in the real estate market.

The learned Judge directed the Executive Engineer (Civil)/Building Department, KMC to cause an inspection to ascertain the veracity or otherwise of the writ petitioner’s allegation and to file a report before the learned Judge. The Officer-in-Charge, Narkeldanga Police Station was directed to “enquire about the antecedents of the petitioner to ascertain as to whether he is involved in any criminal activity or whether he has any track record of being involved in any extortion racket in the field of construction or real estate. The source of income to the petitioner shall also be enquired and report shall be filed by the Officer-in-Charge, Narkeldanga Police Station before this Court on the adjourned date.”

The said order was carried in appeal by the writ petitioner. This Bench, by an order dated December 21, 2022, disposed of the appeal with the following observations :

“We have recorded the submissions made by learned advocates for the parties. However, we are not inclined to interfere since the order appealed

against is only an interim order and the matter is pending before the learned Single Judge for final disposal. We would not like to go into the merits presently.

We request the learned Single Judge to decide the writ petition on merits, if necessary by calling for affidavits.

In the event the writ petitioner makes an application for modification/clarification/recall of the order under appeal, we request the learned Single Judge to decide such application on merits without being influenced by the fact that we have not interfered with the order.”

Pursuant to such order of the Division Bench, the writ petitioner filed an application being GA/1/2022 for recalling of the order dated December 19, 2022, in so far as the same related to directions against the writ petitioner. The said application was dismissed by the learned Single Judge by the order dated January 18, 2023, which is assailed before us in the present appeal.

After dismissing the recalling application of the writ petitioner, the learned Single Judge observed as follows:

“The petitioner is again directed to cooperate in the enquiry to be conducted by the police.

Let the writ petition appear in the list once again on 20th February, 2023. A further report be filed by the police on the adjourned date.

Report filed by the Executive Engineer (Civil)/Building Department, Borough-III, Kolkata Municipal Corporation signed on 14th January, 2023 and the report filed by the Officer-in-Charge, Narkeldanga Police Station signed on 18th January, 2023 be retained with the records.”

Appearing for the appellant, Mr. Majumdar, learned senior counsel, submitted that there was no pleading in the writ petition which warranted passing of the impugned direction against the writ petitioner. In the absence of pleadings, no such direction could be passed. Mr. Majumdar relied on the decision of the Hon'ble Supreme Court in the case of *Bharat Singh And Others Versus State of Haryana And Others*, reported at (1988) 4 SCC 534. In particular learned counsel relied on paragraph 13 of the reported judgment, which reads as follows:

“13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence

in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us PG NO 1060 by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit.”

Mr. Majumdar also relied on the decision of the Hon’ble Supreme Court in the case of *Divine Retreat Centre Versus State of Kerala And Others*, reported at (2008) 3 SCC 542. In particular learned counsel relied on paragraph 46 of the reported judgment, which reads as follows:

“46. On a careful perusal of the order passed by the learned Judge, we find that the learned Judge initiated suo motu proceedings without even examining as to whether the contents of the anonymous letter and material sent along with it disclosed any prima facie case for ordering an investigation. The question is: can investigation be ordered by the High Court in exercise of its inherent jurisdiction under Section 482 of the Code based on such vague and indefinite allegations made in unsigned petition without even arriving at any prima facie conclusion that the contents thereof reveal commission of any cognizable offence? Whether such directions could have been issued by the High Court even in exercise of its jurisdiction under Article 226 of the Constitution of India?”

Learned counsel also submitted that there is no prayer in the writ petition warranting passing of an order of investigation against the writ petitioner.

Mr. Majumdar then submitted that the Writ Court cannot supervise a police investigation. The Court should not express any opinion which may tend

to influence the investigation by police. The learned Single Judge in the impugned order has observed :

“Upon perusal of the documents placed before this Court, the Court is convinced that the petitioner is involved in some type of criminal activity.”

Learned counsel said that such observation would amount to pre-judging a trial. The same may also influence the investigating authority to file a report in a particular manner. In support of his submission that although the Writ Court may monitor a criminal investigation, it cannot supervise an investigation, reliance has been also placed on the decision of the Hon’ble Supreme Court in the case of *Manohar Lal Sharma Versus Principal Secretary And Others*, reported at (2014) 2 SCC 532. In particular learned counsel relied on paragraphs 38 and 39 of the reported judgment, which read as follows:

“38. *The monitoring of investigations/inquiries by the Court is intended to ensure that proper progress takes place without directing or channelling the mode or manner of investigation. The whole idea is to retain public confidence in the impartial inquiry/investigation into the alleged crime; that inquiry/investigation into every accusation is made on a reasonable basis irrespective of the position and status of that person and the inquiry/investigation is taken to the logical conclusion in accordance with law. The monitoring by the Court aims to lend credence to the inquiry/investigation being conducted by CBI as premier investigating agency and to eliminate any impression of bias, lack of fairness and objectivity therein.*

39. *However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/inquiry.*

To supervise would mean to observe and direct the execution of a task whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such “Court-directed” or “Court-monitored” cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression “Court-monitored” has been interchangeably used with “Court-supervised investigation”. Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference.”

Appearing for the State Mr. Mukherjee, learned advocate, submitted that the appellant has an extremely dubious track record. Six criminal cases are pending against him, particulars whereof have been recorded by the learned Judge in the impugned order. He is in the habit of filing writ petitions in respect

of constructions for the purpose of extracting money from the builders. The learned Judge rightly directed the police to hold investigation against him. He should cooperate with the police.

We enquired of Mr. Chatterjee, learned advocate representing the KMC as to whether or not the allegation of the writ petitioner has been found to be correct by the officer of the Corporation who inspected the impugned construction and filed report before the learned Single Judge. Mr. Chatterjee told us that unauthorized construction has been found as complained by the writ petitioner. Proceedings have been initiated for demolition of the unauthorized construction. He, however, says that given the notorious antecedent of the appellant, he was not entitled to maintain a writ petition at all. Mr. Chatterjee further submitted that in a criminal contempt case instituted against the appellant, he was produced in Court under arrest. He is not a person who deserves any sympathy from a Court of equity.

We have given our anxious consideration to the rival contentions of the parties. We notice that till date no affidavits have been filed before the learned Single Judge. We are of the view that without calling for affidavits the learned Judge ought not to have passed an order directing investigation against the appellant. There should be material before the learned Judge by way of affidavit on the basis whereof the learned Judge to direct police investigation against the appellant.

We set aside the order impugned in appeal and allow the recalling application filed by the appellant before the learned Judge. The effect of the

aforesaid is that the order impugned dated December 19, 2022, stands recalled in so far as the same directed police investigation against the appellant herein.

The respondents in the writ petition shall be at liberty to file affidavit in opposition before the learned Single Judge within three weeks from date (13.03.2023). Reply thereto, if any, be filed within a week thereafter (20.03.2023).

The parties would be at liberty to mention the matter before the learned Single Judge after exchange of affidavits.

The respondents may well be right in their grievance that the appellant is a trouble-monger. However, in the present case the appellant's complaint has been found to be justified and the KMC has initiated proceedings for removal of the illegal construction. It may well be that the learned Judge, upon considering the affidavits, come to a prima facie conclusion that the appellant is indeed involved in criminal activities which would warrant police investigation and lodging of FIR against him. We are in no manner requesting the learned Judge to decide the writ petition one way or the other. The learned Judge would be at liberty to pass a fresh order for police investigation if the materials disclosed before Her Ladyship, by way of affidavit, satisfy Her Ladyship that police investigation is warranted in this matter.

The appeal and the connected application (GA/1/2023) are disposed of accordingly.

We have not gone into the merits of the case. All points including point of maintainability of the writ petition and the point as to whether police

investigation can be directed in a writ petition, are left open to be agitated before the learned Single Judge for Her Ladyship's consideration and decision.

Since we have not called for any affidavits, allegations made in the stay application are deemed not to have been admitted by the respondents.

(ARIJIT BANERJEE, J)

(APURBA SINHA RAY, J.)

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