

01. 09.02.2024
Court No.6
(Tanmoy)

MAT 208 of 2024

AMIT DHARA & ORS.

-Versus-

THE HOWRAH MUNICIPAL CORPORATION & ORS.

With

IA No: CAN/2/2024

Mr. Smarajit Roy Chowdhury, Adv.,
Mr. Kaustav Shome, Adv.

...for the appellants.

Mr. Sandipan Banerjee, Adv.,
Mr. Ankit Surekha, Adv.

...for the HMC.

Mr. Tanmoy Mukherjee, Adv.,
Mr. Souvik Das, Adv.,
Mr. K. Raihan Ahmed, Adv.,
Mr. Rudranil Das, Adv.,
Mr. Soumava Santra, Adv.

...for the respondent no.8.

Mr. Nilanjan Bhattacharjee, Adv.,
Mr. Arpan Guha, Adv.,
Mr. Saikat Dey, Adv.

...for the respondent no.9.

A judgment and order dated January 15, 2024, passed on a writ petition filed by the respondent no.9 herein (Soumitra Mukherjee), being WPA 14295 of 2023, is under challenge in this appeal. The appellants were not parties to the writ petition. We have granted them leave to appeal.

The matter relates to a building standing at premises no. 5/8/2, Kali Prasad Chakraborty Lane, Howrah, within the territorial limits of Howrah Municipal Corporation (in short, 'HMC'). An order of demolition was passed by HMC in respect of a portion of the said building, on February 22, 2022, since according to HMC, such portion was unauthorized and not supported by any sanctioned building plan. Soumitra

had challenged such demolition order by filing WPA 5939 of 2022. The writ petition was dismissed for default. The restoration application is pending.

Subsequently, the respondent no.8 herein, namely, Rajib Kumar Shaw, filed a writ petition being WPA 4792 of 2023, for implementation of the demolition order passed by HMC. A learned Single Judge disposed of such writ petition by a judgment and order dated April 17, 2023, by directing HMC to take steps for implementation of the demolition order in accordance with law, at the earliest.

Such order of the learned Single Judge was carried in appeal by Soumitra (respondent no.9 herein), by filing MAT 860 of 2023. A co-ordinate Bench, by an order dated May 17, 2023, noted that an application made by Soumitra for regularization of the unauthorized portion of the building was pending before HMC. The co-ordinate Bench disposed of the appeal with the following directions:-

“Be that as it may, let the Commissioner take a reasoned decision on the application of the appellant for regularization of the impugned construction after affording opportunity of hearing to the appellant, the writ petitioner, any other concerned party and/or their authorized representative. The Commissioner shall decide the application himself and not delegate his function to any other officer. The entire exercise shall be completed within a fortnight from the date of communication of this order to the Commissioner by either of the parties. This time period is peremptory. In the event, the Commissioner rejects the appellant’s application for regularization, naturally the Corporation shall immediately proceed to implement the demolition order in question.

We have not gone into the issue of whether or not the appellant's construction is capable of being regularized. The Commissioner is requested to take an independent decision in accordance with law.

Needless to say, till a decision is taken by the Commissioner in terms of this order, no coercive action be taken by the respondents in respect of the impugned construction."

Pursuant to such direction, hearing was granted by HMC and the application for regularization was rejected by an order dated June 7, 2023.

Challenging the aforesaid order of HMC rejecting the regularization application, Soumitra approached the learned Single Judge in the present round of litigation by filing WPA 14295 of 2023. The learned Judge recounted the factual background of the case. The learned Judge observed that HMC cannot regularize the construction of two additional floors without sanction treating them to be as minor deviation. The learned Judge also observed that HMC has already made its stand clear by mentioning that the construction cannot be treated as minor deviation and, therefore, refused the writ petitioner's prayer for regularization of the same. Her Ladyship further noted that a vacating notice dated January 9, 2024, has been issued by HMC calling upon the occupants of the unauthorized portion of the building to vacate the same so that the demolition order can be executed.

It appears that learned Advocate for the writ petitioner i.e. Soumitra, prayed for some time to have

the subject structure vacated. The learned Judge adjourned the matter to enable learned Advocate for the writ petitioner to file an affidavit mentioning the time period required for vacating the unauthorized structure.

Being aggrieved by the said order of the learned Judge, the appellants have come up before us.

Mr. Roy Chowdhury, learned Advocate appearing for the appellants, has strenuously argued that the appellants are the owners of flats in the building in question. The first three appellants owned flats in the unauthorized portion, while the other three appellants owned flats in the authorized portion of the building. However, these three i.e. 4th to 6th appellants are also concerned because demolition of the authorized portion of the building is very likely to affect the structural stability of the entire building.

Learned Advocate submitted that all the appellants are *bona fide* purchasers of flats in the building. It is not in dispute that they are in occupation of the flats. They belong to the middle income group. With their life savings they have purchased these flats. They should at least be given an opportunity of hearing by HMC before any coercive action is taken in respect of the building in question.

Learned Advocate also says that while disposing of the regularization application of Soumitra, HMC ought to have granted an opportunity of hearing to these

appellants also, in view of the direction of the Division Bench in the order dated May 17, 2023, passed in MAT 860 of 2023, to the effect that the Commissioner shall take a reasoned decision on the application of the appellant (Soumitra) for regularization of the impugned construction after affording opportunity of hearing to the appellant, the writ petitioner, **any other concerned party** and/or their authorized representative. Mr. Roy Chowdhury, argued that ‘any other concerned party’ would include the present appellants. However, the appellants were not even notified of the hearing before HMC pursuant to which the order dated June 7, 2023, was passed by HMC rejecting Soumitra’s regularization application.

Learned Advocate further submitted that Soumitra or his learned Advocate had no authority to make any submission in respect of vacating of the property in question, on behalf of the appellants. However, the learned Judge accepted the submission of learned Advocate appearing for Soumitra and this is the illegality in the order under appeal.

Learned Advocate for the appellants finally submitted that the flats have been mutated by HMC in the respective names of the flat owners and HMC has also accepted property tax. Therefore, today HMC cannot seek to demolish the flats on the ground that the same are unauthorized.

Mr. Mukherjee, learned Advocate appearing for the respondent no.8, drew our attention to the provisions of Section 177 of the Howrah Municipal Corporation Act, 1980 (hereinafter referred to as the 'HMC Act'), which reads as follows:-

“Order of demolition and stoppage of building and works in certain cases and appeal. – (1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in section 175C or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been completed within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to such person, as may be specified in the order:

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made :

Provided further that where the erection or the execution has not been completed, the Commissioner may by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within which an appeal against the order of demolition if made may be preferred under sub-section (3).

Provided also that the Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulations, regularize the minor unauthorized erection, or execution of any minor work without sanction under this Act, or minor deviation from the sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan under this Act or the rules and regulations made thereunder, as the case may be :

Provided also that the Commissioner may, by order, delegate his powers and functions under the first and the second proviso of this sub-section to the Special Officers, appointed by the Commissioner with the approval of the State Corporation, and the expenses for payment of such officers shall be borne on from the Municipal Fund.

Explanation I. – For the purpose of this section “minor unauthorised erection, minor work, or minor deviation” shall be such as may be determined by regulations.

Explanation II. – In this chapter, “the person at whose instance” shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done, including alternations or additions if any, or does it by himself.

(2) The Commissioner may make an order under sub-section (1), notwithstanding the fact that the assessment of such building has been made for the levy of the property tax on lands and buildings.

(3) Any person aggrieved by an order of the Commissioner made under sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under section 181.

(4) Where an appeal is preferred under sub-section (3) against an order made under sub-section (1), the Municipal Building Tribunal may stay the enforcement of the order on such terms, if any, and for such period, as it may think fit :

Provided that where the erection of any building or the execution of any work has not been completed at the time of the order made under sub-section (1), no order staying the enforcement of the order made under that sub-section shall be made by the Municipal Building Tribunal unless a surety, sufficient in the opinion of the said Tribunal, has been given by the appellant for not proceeding with such erection or work pending the disposal of the appeal.

(5) Save as provided in this section, no court shall entertain any suit, application or other proceeding for injunction or other relief against the Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this section.

(6) Every order made by the Municipal Building Tribunal on appeal and, subject to such order, the order made by the Municipal Commissioner under sub-section (1) shall be final and conclusive.

(7) Where no appeal has been preferred against an order made by the Commissioner under sub-section (1) or where an order under that sub-section has been confirmed on appeal, whether with or without modification, the person against whom the order has been made shall comply with the order within the period specified therein, or as the case may be, within the period, if any, fixed by the Municipal Building Tribunal on appeal, and on the failure of such person to comply with the order within such period, the Commissioner may himself cause the building or the work to which the order relates to be demolished and the expenses of such demolition shall be recoverable from such person as an arrear of tax under this Act.

(8) Notwithstanding anything contained in this Chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or a work being carried on in contravention of the provisions of this Act or the rules and regulations made thereunder, it may, for reasons to be recorded in writing, cause such building or work to be demolished forthwith.”

Mr. Mukherjee submits that Section 177(2) of the HMC Act makes it clear that a demolition order may be made by the Commissioner in respect of unauthorized construction notwithstanding that assessment of such construction has been made for levy of property tax.

Mr. Mukherjee further submitted that under Section 180B of the HMC Act, the Commissioner is empowered to order vacating of a building for the purposes mentioned in the Section. No hearing is necessary before issuance of such order. Section 180B reads as follows:-

“180B. Power to order building to be vacated in certain circumstances. – (1) The Commissioner may, by order in writing, direct that any building, which in his opinion is in a dangerous condition or is not provided with sufficient means of egress in case of fire or is occupied in contravention of section

175C or section 178, be vacated forthwith or within such period as may be specified in the order :

Provided that at the time of making such order, the Commissioner shall record a brief statement of the reasons therefor.

(2) If any person fails to vacate the building in pursuance of such order, the Commissioner may direct any police officer to remove such person from the building and the police officer shall comply with such direction.

(3) The Commissioner shall, on the application of any person who has vacated or has been removed from any building in pursuance of any order or any direction, as the case may be, under this section, reinstate such person in the building as soon as the circumstances permit.”

Mr. Banerjee, learned Advocate appearing for HMC, says that his client will carry out whatever order this Court may pass.

It is not in dispute that the portion of the building in respect whereof the demolition order has been issued is unauthorized. It is not supported by any sanctioned building plan. Pursuant to demolition proceedings, a demolition order was issued by HMC. Although such order was sought to be challenged by way of a writ petition by the developer i.e. Soumitra, the writ petition was not seriously followed up. It stood dismissed for default. We are told that the restoration application is pending. That is neither here, nor there. As on date, the demolition order is in force.

Section 177(1) of the HMC Act contemplates giving an opportunity of showing cause to the person responsible for the unauthorized construction before issuance of any demolition order by the Commissioner.

This is obviously to comply with the principles of natural justice. The appellants say that they also have a right to be heard before any coercive action is taken in respect of the portion of the building that they have occupied. We are unable to agree. They are not persons responsible for construction of the illegal structure. We see no reason to read the term 'persons responsible' in an expansive manner. This would make it very difficult for HMC to proceed effectively against unauthorized constructions. Today the appellants say that they as occupants are entitled to be heard. Tomorrow they may put somebody else in occupation and that person would claim such a right. This may go on *ad infinitum* frustrating the object of the HMC Act.

Unauthorized construction has become a serious problem in the city of Howrah. Illegal structures are springing up like mushrooms any and everywhere. This does not only affect the planning of the city but puts undue pressure on the civic amenities. The Hon'ble Supreme Court, in numerous cases including that of ***Dipak Kumar Mukherjee v. Kolkata Municipal Corporation & Ors.***, reported at **(2013) 5 SCC 336** has sufficiently emphasized the need to deal with illegal constructions very strictly. Citizens who have scant regard for law and put up structures without obtaining prior sanction from the Competent Authority as is required by law, do not deserve any sympathy or

leniency from the Court of law, far less a Court of equity which the writ Court is.

Mr. Roy Chowdhury's contention that the appellants are entitled to be heard by reason of the observation of the Division Bench in the order dated May 17, 2023, which has been quoted above, is also not acceptable to us. That order was passed in the context of the regularization application made by the developer (Soumitra). The appellants could have had no concern or connection with such application. Hence, the words 'any other concerned party', in our view, would not include the appellants herein.

As regards the appellant's being *bona fide* purchasers of the concerned flats, we may have full sympathy for them. Possibly they were taken for a ride by the developer. They have full liberty and right to proceed against the person who sold them the flats in question and recover damages if the law so permits. However, sympathy cannot be the basis for passing an order which the law does not permit.

Mr. Roy Chowdhury relied on a decision of Full Bench of this Court in the case of ***Purusottam Lalji & Ors. v. Ratan Lal Agarwalla & Ors.***, reported at **AIR 1972 CAL 459**. The said decision pertains to Section 414 of the Calcutta Municipal Act, 1951 (hereinafter referred to as the '1951 Act'). The Full Bench, while answering a reference made to it, held that under

Section 414 of the 1951 Act, the Commissioner had an absolute discretion to make or not to make an order of demolition. We do not see what relevance such decision has in the facts of our case. Further, that decision has been dealt with by the Hon'ble Supreme Court in **Dipak Kumar Mukherjee's** case (supra).

Mr. Roy Chowdhury further relied on a decision of the Hon'ble Supreme Court in the case of ***M/s. Rajatha Enterprises v. S.K. Sharma & Ors.***, reported at **AIR 1989 SC 860**. In the peculiar facts and circumstances of that case, the Hon'ble Supreme Court set aside an order of a Division Bench of the High Court directing demolition of the 6th floor of the building in question as the same was unauthorized. The Hon'ble Court made certain arithmetical calculations and came to the opinion that the deviation from the sanctioned plan was not considerable and further the property which was being used as a school, had vested in the Government. In the facts and circumstances of the case, the Hon'ble Supreme Court observed that it was not necessary to demolish the unauthorized portion of the building. This case also, in our respectful opinion, does not advance the case of the present appellants in any manner.

The law has come a long way since 1980s. It has evolved meaningfully. The Hon'ble Apex Court has repeatedly emphasized the need for combating the menace of unauthorized constructions at the instance of

unscrupulous and dishonest builders. We would expect the Officers of HMC to be more vigilant and proactive in ensuring that unauthorized constructions are not put up. After all, HMC is the civic authority, statutorily incorporated, entrusted with the duty of ensuring that illegal constructions are not raised in the city of Howrah.

For the reasons afore-stated, we are unable to grant any relief to the appellants. We see no infirmity in the order under appeal which we affirm.

In the result, this appeal and the connected application fail and are dismissed.

The appellants have made a prayer for some time to vacate the premises in question. Since the writ petition is pending before the learned Single Judge, it may be appropriate for the appellants to make such prayer before the learned Single Judge. Only for that purpose, we add the appellants herein as party-respondents in the writ petition that is pending before the learned Single Judge.

Urgent photostat certified copy of this order, if applied for, be made available to the parties, upon compliance with all requisite formalities.

(Arijit Banerjee, J.)

(M.V. Muralidaran, J.)