

26.02.2024
Item No.1.
Court No.6.
AB

M.A.T. 293 of 2024
With
CAN 1 of 2024
CAN 2 of 2024

Col. (Dr.) Sunanda Majumdar (Retd.)
Vs
Brig. Arindam Mazumdar, VSM (Retd.) & Others

Mr. Suddhasatwa Banerjee,
Mr. Ratul Das,
Mr. Joyjeev Medhifor the Appellant.

Mr. Supriyo Bose, Sr. Adv,
Mr. Debojyoti Deb,
Ms. Somdyuti Parekh,
.....for the Respondent Nos.1 & 2/
Writ Petitioners.

Mr. Sirsanya Bandopadhyay,
Mr. Tirthankar Dey,
Mr. Arka Kumar Nagfor the BMC.

Affidavit of service filed in Court today, be kept
with the records.

In re : IA CAN 1 of 2024

This is an application for condonation of delay of
9 days in filing the appeal. Causes shown being
sufficient, the delay is condoned.

I A CAN 1 of 2024 is, accordingly, disposed of.

In re : MAT 293 of 2024, CAN 2 of 2024

A judgment and order dated December 14, 2023,
whereby the writ petition of the respondent nos.1 and
2 herein, being WPA 25945 of 2023, was disposed of
by a learned Judge of this Court, is the subject matter

of challenge in this appeal, at the instance of the respondent no.4 in the writ petition.

This is the third round of litigation between the parties. The appellant is the owner and occupant of a flat on the second floor of the building in question. The writ petitioners are the owners and occupants of a flat on the 3rd floor of the same building.

Initially, a complaint was lodged by the appellant with Bidhannagar Municipal Corporation (in short "BMC"), alleging unauthorized construction at the instance of the writ petitioners herein in their flat. With the grievance that her complaint was not receiving the attention of BMC, the appellant herein approached a learned Judge of this Court by filing WPA 3131 of 2021. The same was disposed of by an order dated March 12, 2021, directing BMC to dispose of the representation of the appellant herein by a reasoned order in accordance with law.

Pursuant to such order, BMC caused requisite local inspection to be made and found that there was unauthorized construction made by the writ petitioners herein. Accordingly, an order for demolition was passed by BMC on November 23, 2021.

Since the order of demolition was not being implemented, the appellant herein once again approached a learned Single Judge of this Court by filing WPA 4307 of 2023. By an order dated April 10,

2023, the learned Judge directed implementation of the demolition order.

The order of the learned Single Judge was carried in appeal being MAT 687 of 2023. Before the Division Bench, the appellants in that appeal, who are the writ petitioners herein, argued that the demolition order had been passed by a person not having jurisdiction to do so. To cut the matter short and also at the suggestion of the present appellant, the Division Bench relegated the matter to the Authority, which, according to the writ petitioners herein, had jurisdiction to pass the demolition order. This was done by a judgement and order dated 5.6.2023.

The said Authority being the Commissioner of BMC passed a fresh order of demolition on October 30, 2023, directing the writ petitioners herein to remove the unauthorized construction. Challenging such demolition order, the writ petitioners herein approached the learned Single Judge in the present round of litigation.

The learned Judge, after hearing the parties at length, came to a specific finding that there is no infirmity in the order of the Commissioner of BMC. There indeed is unauthorized construction at the instance of the writ petitioners. The learned Judge discussed the relevant Rules of the West Bengal Building Rules, 2007, including Rule 2(6) which defines 'alteration', Rule 2(10) which defines 'balcony',

Rule 2(15) which defines ‘chajja or cornice’, Rule 2(40) which defines ‘ledge’ or ‘tand’, Rule 2(43) which defines ‘loft’, Rule 110(1) which defines ‘projection’ and other relevant Rules and held that the impugned construction was in violation of such Rules. Certain decisions were relied upon by the writ petitioners and BMC before the learned Judge. The learned Judge duly discussed such decisions and held that the decisions cited by the writ petitioners did not advance their case as the cases cited were factually distinguishable.

Having recorded as above, the learned Judge disposed of the writ petition with the following observations and directions:

“The Court does not find any illegality in the impugned order which merits interference. However, as the petitioners have submitted that there are several similar constructions in the same housing complex in respect of which the BMC did not take any step for demolition, accordingly, the Commissioner, BMC is directed to cause inspection in the complex to find out whether there are similar such constructions made by other apartment holders in the said complex and whether or not the petitioners have been singled out by the complainant.

It appears that private dispute in between the parties might have led to the filing of the complaint which culminated in the order of demolition. The BMC ought to apply the Building Rules uniformly in respect of all inhabitants in the said complex and ought not to encourage discrimination by picking out the petitioners only because a complaint has been lodged. If such incidents are encouraged, then private disputes of the parties would be brought to the fore and government authorities would be misused for settling private scores.

In the absence of any supporting law the BMC will not be in a position to regularise the unauthorized

constructions, but at the same time BMC will not enforce the order of demolition till complete survey of the complex is made to ascertain whether there are similar such constructions. If BMC does not take steps against the other offending structures, if any, then no coercive steps will be taken against the petitioners. In the event other similar structures are demolished, then the unauthorized structures of the petitioners will suffer the same fate.”

Being aggrieved, the respondent no.4 in the writ petition has come up by way of this appeal.

Appearing for the appellant/respondent no.4, Mr. Suddhasatwa Banerjee, ably assisted by Mr. Ratul Das, learned Advocates, argued that once the learned Judge came to a finding that there is no infirmity in the demolition order passed by the Commissioner of BMC, the learned Judge ought to have simply directed BMC to carry out the said order. There was no warrant for the learned Judge to direct a fresh local inspection to find out whether or not other flat owners have also made similar unauthorized constructions and the learned Judge ought not to have directed that unless action is taken against other flat owners, who might have made similar unauthorized constructions, no action will be taken against the writ petitioners. Negative equality is not a concept contemplated by Article 14 of the Constitution of India. A wrongful act will not become a rightful act by other persons committing similar acts. Hence, the order under appeal should be suitably modified leaving it open for BMC to implement the demolition order.

Mr. Bose, learned Senior Counsel appearing for the respondents/writ petitioners, says that the learned Judge did not take into consideration the exceptions provided in the 2007 Building Rules. Had Her Ladyship did so, she would have found that the impugned construction made by the writ petitioners is covered by the exceptions and does not require removal as per the applicable law and the Building Rules.

The writ petitioners have not preferred any appeal or cross objection. They have, therefore, accepted the order of the learned Single Judge. We cannot permit their learned Counsel to argue from the Bar that the order under appeal suffers from any deficiency.

We agree with learned Advocates for the appellant that once the learned Single Judge came to the conclusion that the demolition order passed by BMC does not warrant any interference as there is no illegality therein, the learned Judge ought not have passed the directions with which the appellant is aggrieved and which have been extracted above. Indeed, if BMC has found illegal construction in the flat of the writ petitioners, given the admitted position that the West Bengal Municipal Act, 2006 or the Building Rules framed thereunder do not provide for regularization of an unauthorized construction, the only way to go ahead is to permit BMC to implement

the demolition order. It is of no consequence if other flat owners have also made similar unauthorized constructions. That would not render legal the illegal construction made by the writ petitioners.

Accordingly, we modify the order of the learned Single Judge to the extent that BMC will proceed to implement the concerned demolition order passed by the Commissioner of BMC at the earliest, in accordance with law. It will be open to BMC to carry out an inspection to find out whether or not there are other unauthorized constructions in the building in question at the instance of other flat owners. If any other illegal construction is detected, BMC shall take steps in accordance with law.

Mr. Bose, learned Senior Counsel representing the writ petitioners says that his clients were getting prepared to file a cross objection against the order impugned in this appeal. However, since this appeal is being disposed of, such cross objection cannot be filed any more. His clients would file a cross appeal against the order assailed in this appeal and that may be permitted.

We do not think any permission is necessary. The writ petitioners are always at liberty to file an appeal against the order, which is assailed in the present appeal. If such an appeal is filed, the same will be disposed of in accordance with law. However, unless any interim order is obtained by the appellant

in such proposed appeal, just the filing of the same will not operate as a stay of operation of the present order.

Mr. Bose further says that his clients have lodged a complaint with BMC pointing out certain unauthorized constructions made by other flat owners in the complex in question. Since BMC did not apply its mind to such complaint, a writ petition has been filed before a learned Single Judge praying for appropriate relief. He says that BMC may be directed to dispose of the representation of the writ petitioners herein.

We find the request of Mr. Bose to be reasonable. We direct BMC to dispose of the representation/complaint that the writ petitioners say they have lodged with BMC on 28.11.2023, in accordance with law, by passing a reasoned order, within a period of six weeks from the date of communication of this order to the relevant Officer in BMC, after affording opportunity of hearing to all concerned parties, who may be affected by any order that the BMC may pass on such representation. Depending on the order that BMC will pass, further action may be taken by BMC.

The appeal and the connected application stand disposed of.

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

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after compliance with all the necessary formalities.

(Arijit Banerjee, J.)

(Gaurang Kanth, J.)