

5 & 6.
09-04-2024
(Ct. no.06)
debajyoti

**IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE**

**MAT 690 of 2024
+
IA NO:CAN/1/2024**

**Javed Hossain
Vs.
The Bidhannagar Municipal Corporation & Ors.**

**W I T H

MAT 685 of 2024
+
IA NO:CAN/1/2024**

**Imtiyaz Ahamed
Vs.
The Bidhannagar Municipal Corporation & Ors.**

Mr. Ayan Banerjee,
Mr. Md. Aqib Badr,
Mr. Shakti Shivam,
Mr. Vishal Prasad
... For the Appellant in MAT/690/24
& Respondent No.9 in MAT/
685/24.

Mr. Kallol Basu,
Mr. Imtiaz Akhtar,
Mr. Md. Jawwad,
Mr. Amit Ranjan Pati,
Mr. Samik Sarkar,
Ms. Atreya Chakraborty
... For the Appellant in MAT/685/24
& Respondent No.9 in MAT/
690/24.

Mr. Sirsanna Bandopadhyay,
Mr. Arka Kumar Nag,
Mr. Tirthankar Dey
... For Bidhannagar Municipal
Corporation.

Mr. Srijib Chakraborty,
Mr. Sumitava Chakraborty,
Ms. Ipsita Ghosh
... For Respondent No.8/Writ
Petitioner.

By consent of the parties, these two appeals and the connected applications are taken up together for hearing and disposal.

The two appeals are directed against the same judgment and order dated April 03, 2024 passed by a learned Judge of this Court in WPA 11753 of 2023, being a writ petition filed by the respondent no.8 in MAT 690 of 2024 (Panchibala Polley). The two appeals arise from the same set of facts and involve the same points of law and, therefore, are being disposed of together.

Panchibala approached the learned Single Judge with the grievance that her representation dated March 30, 2023, made to Bidhannagar Municipal Corporation (in short 'BMC'), regarding illegal construction raised by the respondent nos.8 and 9 in the writ petition (who are the two appellants in the two appeals before us, and hereinafter referred to as Javed and Imtiyaz), was not being considered by the Corporation Authorities. An order was initially passed on October 17, 2023, by a learned Judge recording that although the building in question is not backed by any sanctioned plan, since the purchasers of flats in that building come from a financially weak section of the society who might have spent their life savings in purchasing the flats, the Mayor and Commissioner of the Corporation should sit and find a solution to the problem. In other words, keeping in view the plight of the purchasers of the flats, the learned Judge's intention was that the Corporation should not demolish the building, but should find some avenue of saving the building so that the purchasers and occupiers of the flats in the building are not rendered homeless.

Pursuant to the said order, it appears that a meeting was held wherein the Mayor of BMC, the Commissioner, the concerned Councillor and also learned advocate for BMC participated. The minutes of that meeting is annexed at page 86 of the stay petition in Javed's appeal. It may be helpful to reproduce the relevant portion of the minutes of the said meeting herein:

" The directions and observations contained in the order dated 17th October 2023 has been meticulously read over and understood to by all the participants. The history of the case, nature of construction and the socio-economic problems faced by the occupiers of the building in question has been discussed.

BMC is guided by the Municipal Corporation Act, 2006 and the West Bengal Building Rules, 2007. Neither the Act nor the Rules framed there under nor the law governing the field provide for regularisation of a building constructed beyond the sanctioned plan or authorising an unauthorized construction. Such provision cannot be inserted by the parties of this meeting and has to be left to the competent authority being the legislature.

On that note, the committee is tasked to find out a solution to save the occupiers of the building in question who are very poor and living almost a sub-human life. These occupiers have been duped either by the co-sharers/owners or by the developers, enticing them to buy property for a better living. Caught unaware of the myriad of laws, these occupiers have purchased flats sans the knowledge of the law or the requirements thereunder. Due diligence may not be in their dictionary when day to

day survival is a challenge to most. These persons have wrung their life's saving to buy a property to have and give a decent way of living to themselves and their family. In the teeth of such a situation, demolition has not been discussed on a humanitarian ground as the same will leave these hapless people under the open sky. A sympathetic approach has been discussed with right earnest.

In order to resolve the issue it is expedient to investigate the structural stability of the building, to give it a glimmering hope of retention of the structure, already brought up. The structural stability, both from the technical/theoretical as well as practical aspect is of utmost importance since it is a matter of public safety. However, the same is an arduous and time-consuming process, let alone that the costs involved in it may be quite high. If the building is structurally stable, BMC may, as a one time measure, allow the occupiers to retain the building with or without modifications and/or corrections and/or alterations and/or additions and/or reduction of load, subject to approval of the appropriate authority.

The matter is more of equipment, that that of expertise. Though both are equally necessary and supplemental to each other. The same may not be conducted by individuals, but by institutions. The institutions which may be entrusted to assess the structural stability are the Civil Engineering Department of IIT Kharagpur, Jadavpur University or IEST Shibpur. The participants of this meeting have however not been able to reach a consensus with regard to, who shall bear the cost of this technical assessment of this legacy building.

In the context of the aforesaid it was further discussed that BMC is in no way promoting unauthorized constructions. It is only as a one time measure that such avenues have been ventured into, till a competent authority takes a decision. BMC has been making public announcement through miking about unauthorized construction to spread awareness, letters to banks have been sent so that no home loan is sanctioned without verifying the papers through the Corporation, notifications have also been published in reputed news papers for generating awareness among public to alert the intending buyers about the threats in purchase of properties in BMC area. CESC & WBSEDCL have also been requested not to give electricity connection without verifying whether the construction is authorised. In a short past, over 100 such requests of Banks and WBSEDCL has been thoroughly checked and then approved. The goal is to stop the menace of unauthorized construction.

The participants thus conclude on the way forward, however, the following may be adjudicated by the Hon'ble Court-

- (i) Who shall adjudge the structural stability?
- (ii) Who shall bear the cost of such assessment?
- (iii) Any other directions of the Hon'ble Court as deemed fit and proper.

The Mayor, BMC, thanked everyone for their valuable time and requested the minutes to be drawn up and circulated to all the participants. The Ld. Advocates were requested to submit the same before the Hon'ble Court for kind consideration. ”

When the matter subsequently appeared before another learned Judge of this Court, the order dated April 03, 2024 was passed, which is impugned in these two appeals. In effect, the learned Judge held that since the impugned structure is not supported by any sanctioned building plan, the same must be demolished. The learned Judge passed, *inter alia*, the following directions:

“ The respondent no.11 that is the Station Manager (South), WBSEDCL is directed to immediately disconnect the electricity connection to the subject premises.

The Bidhannagar Municipal Corporation shall forthwith disconnect the water supply, if any, to the flats at the subject premises.

The Bidhannagar Municipal Corporation is directed not to permit the respondent nos.8 and 9 to continue with any construction work within the jurisdiction of the Bidhannagar Municipal Corporation without valid sanction plan.

The respondent nos.8 and 9 are directed to deposit a sum of Rs.1,00,000,00/- (one crore) only with the learned Registrar General of this Court within April 12, 2024 as security deposit.

The Corporation is directed to take steps against the respondent nos.8 & 9 for acting contrary to the provisions of the Act of 2006 and the Act of 1993 and particularly in accordance with Section 13A of the Act of 1993.

The occupiers of the construction in question are directed to vacate the subject property within a period of thirty days so that the Corporation can proceed with the work of demolition of the same.

The respondent nos.8 & 9 are directed to file separate affidavit before this Court disclosing their bank accounts and income tax details. the list of assets owned by them shall also be indicated in the affidavit to be filed by the respondent nos.8 & 9. The said respondents are restrained from selling/transferring or alienating any of their personal properties without the leave of the Court.

The Bidhannagar Municipal Corporation is directed to affix notices at the conspicuous places in and around the subject property mentioning that the structure is an illegal and unauthorized one and will be demolished soon. ”

The matter has been made returnable by the learned Single Judge on April 18, 2024.

Being aggrieved, the two developers of the building being Javed and Imtiyaz have come up by way of these two appeals.

Appearing for Imtiyaz, Mr. Kallol Basu, learned Counsel, submitted that Section 266 of the West Bengal Municipal Corporation Act, 2006, empowers the Commissioner of the Corporation to pass an order of demolition. This the Commissioner should do only after granting an opportunity of hearing to the person responsible. Although such requirement is expressly not there in the statute, it must be read into the statute. Natural justice has now been recognized as a part of Article 14 of the Constitution of India. The power to order demolition under the statute is not of the Court. The statute provides for a procedure to deal with unauthorized constructions. The Writ Court should not usurp such power of the Competent Authority and should allow that authority to exercise the statutory power in accordance with law. The Commissioner should grant an opportunity of hearing

to the appellants in the two appeals. If the appellants are aggrieved by the order that the Commissioner passes, they have a right of statutory appeal. The machinery contemplated under Section 266 of the 2006 Act should be allowed to operate.

Appearing for Javed, Mr. Ayan Banerjee, learned Counsel, submitted that Section 268 of the 2006 Act as also Section 287 thereof, are relevant. Both the said sections, the former pertaining to power of the Commissioner to order demolition of buildings, dangerous, ruinous or unfit for human habitation, and the latter pertaining to unauthorized construction, contemplate grant of opportunity of hearing to the person responsible before passing of any demolition order. Hence, the learned Judge ought to have relegated the matter to the Commissioner instead of Her Ladyship straightaway directing demolition of the impugned structure.

Mr. Srijib Chakraborty, learned advocate, appearing for the respondent/writ petitioner, i.e., Panchibala, submitted that the learned Judge did not exercise the power under Section 266 of the 2006 Act. Noticing that the entire building in question is not backed by any sanctioned building plan, the learned Judge passed the demolition order in exercise of high prerogative writ jurisdiction. It was an order *de hors* the statute. The learned Judge did not exercise any statutory power. Therefore, it cannot be said that the learned Judge usurped the power of the Commissioner of BMC.

Mr. Chakraborty also referred to Section 384 of the 2006 Act, which pertains to penalties that may be imposed for contravention of the provisions of the Act. With reference to Schedule V to the Act, Mr.

Chakraborty pointed out that the penalty prescribed for unauthorized erection of a building is a fine that may go upto Rs.2500/- and/or imprisonment that may be for a period upto six months. The appellants herein admittedly have not bothered to obtain sanctioned plan before constructing the building in question. They are, therefore, guilty of offences under Section 384 of the 2006 Act. They deserve no hearing before any authority.

Mr. Chakraborty also submitted that in view of the stand of BMC as reflected in the minutes of the meeting dated November 29, 2023, which has been referred to hereinabove, it will be a futile exercise to relegate the matter to the Commissioner of BMC. In any event, what possible explanation can the appellants herein furnish for not obtaining prior permission of the Competent Authority for construction of the building in question, exclaimed Mr. Chakraborty!

Mr. Bandopadhyay, learned advocate, appearing for BMC, submitted that it should not be understood by anybody that BMC is supporting the unauthorized structure or is minded to condone the lack of a sanctioned plan in support of such structure. The discussions held at the meeting dated November 29, 2023, as would appear from the minutes thereof, were in the context of and to comply with the learned Single Judge's order dated March 17, 2023. It was not a final decision. The last paragraph of the minutes of the meeting would show that no decision could be taken by BMC. Had BMC not explored the avenue of saving the unauthorized construction in question, it could have been held to be guilty of contempt of court. BMC does not tolerate any unauthorized construction. This Court may pass

appropriate orders as the facts and circumstances of the case may warrant.

Having given our anxious consideration to the rival contentions of the parties, we are of the view that Mr. Basu and Mr. Banerjee, appearing for the appellants, may have a point. In contemplation of unauthorized construction being raised by a builder, the legislature included Section 266 in the 2006 Act. It empowered the Commissioner of the Corporation to take appropriate action in respect of a construction made without any sanctioned plan or in deviation from a sanctioned plan. We are of the view that the statutory authority should be allowed to exercise such power in accordance with law and normally, the courts should not pass an order which the statute authorizes the Commissioner to pass.

We are also of the opinion that if the Commissioner exercises power under Section 266(1) of the 2006 Act, the same shall entail granting an opportunity of hearing to the person responsible. This will, of course, not be the case if the Mayor-in-Council exercises the emergency power under Section 266(8) of the 2006 Act.

Accordingly, we direct the Commissioner, BMC, to grant an opportunity of hearing to the appellants in the two appeals, i.e., Javed and Imtiyaz, as also to Panchibala, or their authorized representatives and take a reasoned decision in the matter in accordance with law by April 17, 2024. To avoid all confusion and controversies, we fix the meeting in the chamber of the Commissioner, BMC, on April 15, 2024, at 12-00 noon. No further notice of the meeting shall be served on the parties. This order shall operate as such notice. We, however, make it clear that this

order will not prevent the Mayor-in-Council of BMC from invoking its powers under Section 266(8) of the 2006 Act in the event the Mayor-in-Council is of the opinion that the same is necessary. The Commissioner shall take a decision in the matter in terms of this order without being influenced by anything recorded in the minutes of the meeting dated November 29, 2023 or in the order of the learned Single Judge dated October 17, 2023.

Excepting the aforesaid modification, the other portions of the order of the learned Single Judge will remain in operation.

The appeals and the connected applications are, accordingly, disposed of.

Affidavits not having been called for, the allegations in the stay petitions shall be deemed not to have been admitted by the respondents.

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)