

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :-

The Hon'ble Justice PARTHA SARATHI SEN

WPA 10777 of 2022

Sri Subhas Chandra Banerjee and Anr.

-Vs-

The Howrah Municipal Corporation and Ors.

For the Petitioners: Mr. Debjit Mukherjee, Adv.,
Ms. S. Chatterjee, Adv.,
Mr. Kaustav Bhattacharjee, Adv.,
Ms. Priyanka Jana, Adv.

For Howrah Municipal Corporation: Mr. Sandipan Banerjee, Adv.,
Mr. Ankit Sureka, Adv.,
Mr. Sobhan Majumder, Adv.

For the respondent nos. 9,10 & 11: Mr. Tanmoy Mukherjee, Adv.,
Mr. Souvik Das, Adv.,
Mr. Tapas Chatterjee, Adv.,
Mr. K.R Ahmed, Adv.,
Mr. Rudranil Das, Adv.
Mr. Soumava Santra, Adv.

Hearing concluded on: 25.06.2024.

Judgment on: 27.06.2024.

PARTHA SARATHI SEN, J. :-

1. In this writ petition the writ petitioner is aggrieved with the action of the respondent no.1/Howrah Municipal Corporation (hereinafter referred to as the 'Corporation' in short) in allowing the private respondent nos. 9 to 11 to retain the floor beyond G+1 structure in premises no.53, Gopal Banerjee Lane, P.S Shibpur, Ward No.26, District Howrah, PIN 711101.

2. In support of the instant writ petition Mr. Debjit Mukherjee, learned advocate for the writ petitioner at the very outset draws attention of this Court to page no.20 of the writ petition. It is submitted that pursuant to the queries as made by the writ petitioner under RTI Act, 2005 the respondent no.1/Corporation under cover of its letter dated December 19, 2020 communicated that in respect of holding no.53 Gopal Banerjee Lane, Ward no.26, P.S Shibpur, District Howrah, (hereinafter referred to as the 'said premises') sanction was granted on 11.10.2002 for construction of a G+1 residential building. It is submitted on behalf of the writ petitioner that on receipt of such communication, the writ petitioner under cover of its letter dated November 09, 2021 addressed to the Commissioner of the said Corporation informed that an additional floor has been constructed over the G+1 building of the said premises which is not only illegal but is also totally unauthorized.

3. Since the respondent no.1/ Corporation and its officials sat tight over the matter the writ petitioner approached this High Court by filing WPA 18562 of 2021 and by an order dated January 03, 2022 a Co-ordinate Bench of this High Court while disposing the said writ petition directed the Corporation to pass a reasoned order on the representation of the writ petitioner with a further direction to the Corporation to answer as to whether the information as provided by the said Corporation under cover of its letter dated December 19,2020 was issued upon consulting the relevant records, whether any revised plan was sanctioned by the said Corporation in 2004 but subsequently cancelled and whether the

contentions of the private respondent nos. 9 to 11 as raised in the said writ petition were correct. The respondent no.4 being the Assistant Engineer , Borough IV of the said Corporation under cover of its memo dated 26.04.2022 passed the reasoned order in the following manner :-

“Hon’ble Court in the judgment & order dtd: 03.01.2022 after giving a decision on the following three issued-

- (a) Whether the letter dated: 19-12-2020 being annexure P4 to the writ petition was issued upon consulting the records?*
- (b) Whether the revised plan was sanctioned by the authority in the year 2004 but subsequently cancelled.*
- (c) Whether at all the contentions of the respondent nos.-9 to 11 were correct?*

In dealing with the issues (a), I would like to state that this letter is given in reply to the information sought for under RTI Act, 2005 vide letter date: 16-10-2020 and not the letter under RTI Act, 2005, dtd:10-10-2018 so annexed as annexure P3. The petitioner deliberately suppressed the same. The information sought for in the said letter dtd: 16-10-2020, has been categorically dealt in within the letter dtd:19-12-2020.

(b) in dealing with the issue no.-(b) it is stated that the revised plan can never be sanctioned and accordingly it was not sanctioned but the floor was retained after accepting requisite fees.

(c) in dealing with issue no. (c) , it is stated that the contentions of the Ld. Advocate for the respondent no.- 9 to 11 is not correct in as much as revised sanction plan was never issued in favour of them. Only they were allowed to retain the floor beyond G+1 structure after accepting the requisite fees in respect of BMR No.-153/B-III/02-03. This is

my reasoned order in compliance with the judgment and order dtd:03-01-2022 passed in the said writ petition.”

4. At this juncture Mr. Debjit Mukherjee, learned advocate appearing on behalf of the writ petitioner draws attention of this Court to Sections 174 and 177 of the Howrah Municipal Corporation Act, 1980 (hereinafter referred to as the said ‘Act of 1980’). It is submitted by Mr. Mukherjee, learned advocate for the writ petitioner that Section 174 of the said Act of 1980 clearly postulates that every person who intends to erect a building within the territory of the said Corporation shall have to apply for sanction by giving notice in writing of his intention to the Commissioner.

It is submitted further that Section 177 of the said Act authorizes the Commissioner to demolish any erection of any building which has been done without or contrary to the sanction granted by the said Corporation after giving the person at whose instance such illegal construction have been made a reasonable opportunity of showing cause.

5. Drawing attention to the third proviso of Section 177 (1) of the said Act it is however submitted by Mr. Mukherjee, learned advocate for the writ petitioner that in case of minor deviation, the legislatures have empowered the Commissioner to regularize such deviation on payment of requisite fees. Mr. Mukherjee, learned advocate for the writ petitioner contended that by no stretch of imagination it can be said that unauthorized construction of an additional floor upon a G+1 building comes under the purview of minor deviation and therefore the

Commissioner of the said Corporation is duty bound to exercise its power of demolition under Section 177 (1) of the said Act. It is submitted further that from the reasoned order dated April 26, 2022 it would reveal that the Commissioner of the said Corporation /respondent no.3 herein had acted contrary to law in allowing the private respondents to retain the additional floor beyond G+1 structure at the said premises after accepting requisite fees. It is further submitted on behalf of the writ petitioner that within the four corners of the said Act of 1980 and/or its Building Rules there is no provision for retaining an illegal construction as has been done by the private respondents.

6. On behalf of the writ petitioner reliance has been placed upon the following two decisions namely:-

i. MAT 617 of 2017; Sri Sanjay Kumar Gupta & Ors. vs. Howrah Municipal Corporation & Ors.

ii. Tanmoy Moshat vs. The State of West Bengal & Ors. reported in 2017 SCC Online Cal 9621: (2017) 4 CHN 754.

7. It is thus submitted on behalf of the writ petitioner that in view of the facts and circumstances, an appropriate order may be passed for quashing the decision of the Corporation for regularizing the illegal construction over the said premises as made by the private respondents with a further direction to the said Corporation and its officials to proceed against the private respondents in accordance with law.

8. Per contra, Mr. Tanmoy Mukherjee, learned advocate for the private respondents also places his reliance upon the order dated January 03,

2022 as passed in WPA 18562 of 2021 by a Co-ordinate Bench. Mr. Tanmoy Mukherjee, also draws attention of this Court to the reasoned order as passed by respondent no.4 on April 26, 2022 and to Annexure P7 at page nos. 28 and 29 of the writ petition. It is submitted by Mr. Tanmoy Mukherjee, learned advocate for the respondents that though the respondent no.4 under cover of his reasoned order dated April 26, 2022 recorded that no sanction was granted in respect of an additional floor upon G+1 building of the said building but from annexure P7 being the photo copies of the two plans it would reveal that the said Corporation granted sanction plan for G+1 building on 17.10.2002 and for the additional floor over the said G+1 building, further sanction was granted on 13.08.2004.

9. In course of his argument Mr. Tanmoy Mukherjee, learned advocate for the private respondents draws attention of this Court to page no.16 of the affidavit-in-opposition filed by his client. It is submitted that on March 11, 2004 the private respondent has also paid the requisite fees for obtaining sanction plan for and /or retaining such additional floor. It is further submitted on behalf of the private respondents that from Annexure R4 of the affidavit-in-opposition it would reveal that a civil suit is pending between the writ petitioner and the private respondents over the self same properties wherein the Corporation is also a party. It is thus submitted that the property dispute between the two neighbours can be best decided by a Civil Court by trial on evidence and thus it is not

desirable on the part of a Writ Court to enter into a private dispute in exercise of its jurisdiction under Article 226 of the Constitution of India.

10. On behalf of the private respondents reliance was placed upon the case of ***Dr. Ranbeer Bose and Anr. vs. Anita Das and Anr. arising out of SLP (Civil) No(s) 7071 of 2024*** as decided by the Hon'ble Supreme Court on May 03, 2024.

11. In course of his argument Mr. Sandipan Banerjee, however contends that the memo dated April 26, 2022 contains right information as directed to be provided by a Co-ordinate Bench of this court in WPA 18562 of 2021.

12. This Court has meticulously gone through the entire materials as placed before this Court. This Court has also perused the reported and unreported decisions cited from Bar. This Court has also gone through the relevant provisions of the said Act of 1980. This Court has given its anxious considerations over the submissions of the learned advocate for the contending parties.

13. For effective adjudication of the instant lis the provisions of Section 174 and Section 177 required to be looked into:-

“Section 174. Application for sanction for erection of building.- Every person who intends to erect a building shall apply for sanction by giving notice in writing of his intention to the Commissioner in such form and containing such information or document as may be prescribed.”

“177. Section Order of demolition and stoppage of buildings 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 or the 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 Government on such terms and conditions as may be determined by the 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 alterations or additions if any, or does it by himself.

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14. Keeping in mind the aforesaid legislative provisions if I look to the materials as placed before this Court it would reveal that it is the

contention of the writ petitioner that over the existing G+1 structure of the said premises the private respondents have constructed an additional floor without obtaining any sanction plan from the said Corporation.

15. This Court finds sufficient merit in such allegation from the reasoned order dated April 26, 2022 wherein the respondent no.4 categorically stated that no revised sanction plan was issued in favour of the private respondents in respect of the floor which has been constructed beyond G+1 structure.

16. Though Mr. Tanmoy Mukherjee, learned advocate for the private respondents in course of his submission places strong reliance upon page no.28 of the writ petition being the alleged sanction of the Corporation dated August 13, 2004 in respect of the additional floor upon the existing G+1 structure of the said premises however it would reveal from the said plan that the entire second floor measuring about 191.975 sq.m is totally unauthorized and therefore *post facto* retention approval was given by the said Corporation.

17. At this juncture it is required to be decided as to whether the Corporation and its officials are within their right to regularize such illegal construction and grant post facto retention approval upon acceptance of retention fees of Rs.92,403/-. It is further required to be decided as to whether the construction of an additional floor measuring about 191.957 sq.m tantamounts to minor deviation within the meaning third proviso of Section 177 of the said Act of 1980.

18. In course of their argument none of the counsels appearing either for the private respondents or for the Corporation and its officials could show any relevant provisions of the said Act and /or any Building Rules which says that such construction comes under the purview of minor deviation.

19. In the reported decision of **Tanmoy Moshat (supra)** a similar question arose regarding power of Commissioner of the Corporation wherein a Co-ordinate Bench expressed the following view:-

“20. By no stretch of imagination one can hold that the conjoint reading of the provisions contained under Section 177 and Section 220 of the Act gives the Commissioner an unfettered power to pass an order for regularization or retention of the illegal and unauthorized construction nor does it confer any power on the corporation or its authority to impose any charges or fees for such retention and/or regularization of the illegal construction.

21. The genesis of the corporation is the Howrah Municipal Corporation Act, 1980. The statutory authorities cannot travel beyond the periphery of the statute and their actions must be strictly in conformity with the provisions thereof. Any attempt to travel beyond the circumference of the statutory powers would amount to an action in futility warranting the interference by court.

22. In the instant case, this court fails to find out a single provision from the parent Act as well as the Rules and Regulations which permits the filing of "as made plan" so that the deviation and/or illegal construction can be allowed to be retained or regularized upon payment of some charges or the fees.”

20. In the unreported decision of **Sanjoy Kumar Gupta(supra)** while dealing with the said Act and the Building Rules of the Howrah Municipal Corporation observed the following:-

“By the order dated January 4, 2016 the respondent no. 2 directed the Law Officer of the respondent no. 1 Corporation to justify by virtue of a relevant order and judgment of relevant Courts whether acceptance of retention fee by the corporation is legal or illegal. From the order dated January 20, 2016 passed by the respondent no. 2 it is evident that the Law Officer of the respondent no. 1 could not submit any relevant order or judgment of any Court of law to substantiate that acceptance of retention fee by the respondent no. 1 from the respondent no. 7 is lawful. Even in the said order dated January 20, 2016 the respondent no. 2 has not referred to any provision of the HMC Act, 1991 or to any Rule of the HMC Building Rules or any other legal provision to justify the impugned actions of itself or of the respondent no. 3 to regularise the admitted unauthorised construction of the 5th and 6th floor of the said building at the said premises, by the respondent no. 7 upon payment of retention fee by the latter. Accordingly, in view of the settled principle of law as laid down by the Supreme Court in the cases of Mohinder Singh Gill (supra) and Dipak Babaria (supra) we find that the learned Single Judge clearly erred in law to hold that the respondent no. 2 was within its jurisdiction to regularise the admitted unauthorised construction of the 5th and 6th floors of the two buildings by the respondent no. 7 upon payment of retention fee by the latter and to uphold the order dated January 20, 2016 passed by the respondent no. 2 only on the grounds urged by the respondent no. 7 in its affidavit-in-opposition.

Further and in any event, the purported decision of the respondent no. 2 to regularise the admitted unauthorised construction of 5th and 6th floor of the said building., without any notice or opportunity of hearing to the present appellants, the admitted owners of the various flats of the said building, is void.

For all the foregoing reasons, we find that the decision of the respondent no. 2, the competent authority to regularise the admitted unauthorised construction of the additional 5th and 6th floors of the three buildings at premises no. 295/2 G.T Road (North) Salkia, Howrah was illegal.”

21. This Court also finds no force in the submission of Mr. Tanmoy Mukherjee, learned advocate for the private respondents that the dispute as arose before this Court is a neighbour dispute in which the common law forum is the appropriate forum and prior to the initiation of the instant writ petition the private respondents have already filed Title Suit no.32 of 1986 against the writ petitioner and the Corporation before the jurisdictional civil court.

22. This Court has meticulously gone through the plaint of the said suit and it appears that the subject matter of the said suit materially differs from the instant lis inasmuch as in the said suit the private respondents have sought for declaration of their title and recovery of possession of the B Schedule Property of the plaint which according to the private respondents have been wrongfully encroached by the defendants who are the writ petitioners herein.

23. In this writ petition, however the action and/or inaction on the part of the Corporation and its officials have been challenged and there is no dispute that the Corporation is an authority i.e. 'State' within the meaning of Article 12 of the Constitution of India and is thus amenable to the writ jurisdiction.

24. In view of the discussion made hereinabove this Court finds sufficient merit in the instant writ petition and the same is hereby allowed.

25. Consequently, the respondent no. 3 i.e. the Commissioner of Howrah Municipal Corporation is hereby directed to initiate a proceeding under Section 177 of the Howrah Municipal Corporation Act, 1980 against the respondent nos. 9 to 11 in respect of the said premises within a month from the date of communication of this order and shall after giving sufficient opportunity of being heard both to the writ petitioner and the private respondents shall come to a logical conclusion of the same within three months from the initiation of such proceeding and the Commissioner of Howrah Municipal Corporation is further directed to communicate its decision to the writ petitioner and the private respondents within a week thereafter either through mail or by speed post.

26. Parties to the instant writ petition including the Commissioner of the Howrah Municipal Corporation are directed to act on the server copies of the order.

27. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(PARTHA SARATHI SEN, J.)