

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

WPA 15641 of 2014

**Dilip Kumar Ghosh & Ors.
Vs.
The State of West Bengal & Ors.**

Mr. Sukumar Ghosh
Mr. Sandip Ghosh
Ms. Moumita Ghosh

...for the petitioners

Mr. Ayan Banerjee
Ms. Debasree Dhamali
Ms. Riya Ghosh

...for the Bally Municipality

Heard on : 29.01.2024

Judgement on : 29.01.2024

Saugata Bhattacharyya, J.:

In the writ petition the order dated 31st January, 2014 is under challenge whereby the concerned authority of Bally Municipality passed an order based on the report of Municipal Engineering Directorate in connection with the construction made by private respondent no. 7 at 23/9, Hazra Para Lane, Bally, Howrah.

Learned advocate representing the petitioners submits that the grievance of the petitioners are two-fold, one is renovation of common passage and construction of drain which impacts the right of other occupants of the adjoining buildings on the said common passage as well as normal flow of sewage through the said drain and the second complaint centers around construction of G+2 storied building by the respondent no. 7 at the aforesaid holding number on obtaining sanctioned plan for constructing G+1 storied building. There are other deviations, according to the petitioners while making construction including converting chhaja (sunshade) at the east side of the 1st floor of the building into verandah. According to the petitioners, deviations made by the respondent no. 7 being person responsible, are required to be demolished since the order of regularization made by the concerned authority of Bally Municipality vide order dated 31st January, 2014 is without jurisdiction since Bally Municipality has got no statutory authority to regularize deviations on receipt of fees. In support of such contentions made on behalf of the petitioners reliance has been placed on the judgment of a coordinate Bench reported in **(2014) 4 Cal LT 1 (HC), (Ghanashyam Das Vs. The Kolkata Municipal Corporation & Ors.)** in order to demonstrate before this Court that the concerned authority of the municipality in the context of Section 218 of the West Bengal Municipal Act, 1993 (hereinafter referred to as the 'said Act of 1993') is not authorized to regularize unauthorized construction.

Per contra, Mr. Ayan Banerjee, learned advocate representing Bally Municipality has strenuously argued to defend the decision as contained in the impugned regularization order dated 31st January, 2014 and it has been submitted that though initially attempt was made by the respondent no. 7 to construct 2nd floor upon constructing RCC columns, but subsequently on the intervention on the municipality the said columns were demolished and at present the building in question is G+1 storied for which sanctioned plan was accorded by the municipality. However, it has been submitted on behalf of the municipality that there are certain minor deviations at different parts of the premises in question out of which the striking one is conversion of chhaja (sunshade) into verandah at the 1st floor of the said premises at the eastern side which is not permissible in terms of the sanctioned plan.

In addition thereto on behalf of the municipality reliance has been placed on the three-Judge Bench judgment reported in **AIR 1972 CAL 459 (FB), (Purusottam Lalji & Ors. Vs. Ratan Lal Agarwalla & Ors.)** in order to contend that in the context of Section 414 of the Calcutta Municipal Act, 1951 the Court interpreted the power conferred upon the Municipal Commissioner whether to regularize deviations or not in consideration of the Building Rules which are relaxable or not relaxable. According to the municipality, since in the context of Section 414 of Calcutta Municipal Act, 1951 power of Municipal Commissioner was interpreted by the three judge

bench wherein it has been decided that in particular circumstances the Municipal Commissioner is authorized to exercise discretion not to pass order of demolition; the said ratio laid down by the larger bench may be applied in the present case in the context of Section 218 of the said Act of 1993 for regularizing the minor deviations as delineated in the impugned order dated 31st January, 2014.

It is already recorded in the previous order dated 22nd January, 2024 that private respondent no. 7 was attempted to be served with the notice, but the envelope returned with endorsement “addressee left”. Therefore, Court decided to hear the matter finally. Today also, respondent no. 7 is not represented. Therefore, the matter is being considered in absence of the private respondent no. 7.

However, this Court has considered the submissions made on behalf of the petitioners and the Bally Municipality and perused the impugned order dated 31st January, 2014. On perusal of the said impugned order it appears that apart from other deviations made by the respondent no. 7, while making construction after obtaining sanctioned plan to erect G+1 storied building a chhaja (sunshade) at 1st floor at the eastern side of the said premises has been converted into verandah which is not permissible in consideration of the plan sanctioned by the municipality.

Question arises for consideration before this Court whether the concerned authority of municipality is authorized to regularize deviations made by the respondent no. 7 on acceptance of fees as it has been decided in order dated 31st January, 2014. It has been submitted by the learned advocate representing the municipality that West Bengal Municipal Act, 1993 does not contain any provisions which empowers the concerned authority of municipality to regularize deviations in making constructions *dehors* the sanctioned plan on acceptance of fees. In spite of absence of any provisions empowering the municipality to regularize deviations in the present case regularization of deviations has been done upon imposing Rs. 1,000/- as fee on respondent no. 7. Though attempt has been made on behalf of the municipality to persuade this Court to decide the issue otherwise and not in sync with the decision of the coordinate Bench in **Ghanashyam Das** (supra) in consideration of the law laid down in **Purusottam Lalji** (supra) since on similar statutory provisions contained in Section 414 of the Calcutta Municipal Act, 1951 three-judge bench decided that the Municipal Commissioner is authorized to exercise discretion. While taking note of such submission made on behalf of the municipality it needs to be kept in mind that the validity of the regularization order dated 31st January, 2014 is being considered in the context of a different statutory provisions which is Section 218 of the said Act of 1993. Question further arises when provisions are *pari*

materia whether the interpretation attributed by the Court in **Purusottam Lalji** (supra) is applicable in the present case or not. In this regard this Court finds it apt to rely upon **Ghanashyam Das** (supra). The coordinate Bench in **Ghanashyam Das** (supra) also took note of the decision of **Purusottam Lalji** (supra) and found the same is not applicable in view of the fact that the Municipal Commissioner was divested of the power which the Commissioner had previously under the old Act in consideration of Section 635 of the Kolkata Municipal Corporation Act, 1980.

In addition thereto, the interpretation attributed by the Court in **Purusottam Lalji** (supra) was in consideration of the special facts and circumstances as described in paragraph 7 of the said judgment. It was recorded in paragraph 7 of **Purusottam Lalji** (supra) that according to the Superintendent (Building) there was no serious infringement or violation of any Building Rule, nor was there any obstruction of light and air into the adjoining premises. It was found by the Apex Court that there was slight infraction of the relevant Rules. Situation is completely different so far the case which is at my hand today where a chhaja (sunshade) has been converted into verandah which cannot be termed as minor deviation specially when the residents of the adjoining house are raising objections.

At the same time this Court finds it appropriate to quote below paragraph 27 of **Ghanashyam Das** (supra):-

“27. Since Statutes and Rules totally rule out exercise of discretion for regularization of an illegal structure, it is appropriate to refer to the principles of law laid down in paragraph 73 of the judgment in M.I Builders Pvt. Ltd. v. Radhey Shyam Sahu: (1996) 6 SCC 464 wherein it was held that “Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles.”

It appears that in present fact situation the principle embodied in **Ghanashyam Das** (supra) is squarely applicable in view of the fact that there is no power conferred upon the concerned authority of Bally Municipality to regularize deviations which have been made *dehors* the sanctioned plan.

In addition thereto, the present scenario needs to be taken into consideration while determining power of municipal authority as per the statutory provisions as contained in Section 218 of the said Act of 1993 in view of mushrooming of unauthorized constructions by the residents/developers in the municipalities and corporations as it has been noticed by this Court regularly while dealing with corporation/municipality matters. This Court is a Court of equity. If, an interpretation is attributed while defining the authority of municipal authorities in the context of Section 218 of the said Act of 1993 thereby granting power to the municipal authority

to regularize unauthorized constructions/ deviations that may lead to exercise of unbridled power by the authorities in the guise of exercise of discretion which would impair the planned developments of cities and towns and would pose a serious threat. In this regard reliance is placed on the judgment of the Apex Court reported in **(2013) 5 SCC 336 (Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation & Ors.)**. Paragraph 2 of the said judgment is quoted below:-

“2. In the last four decades, the menace of illegal and unauthorized constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions as in K. Ramadas Shenoy v. Town Municipal Council, Udipi, Virender Gaur v. State of Haryana, Pleasant Stay hotel v. Palani Hills Conservation Council, Cantonment Board, Jabalpur v. S.N. Awasthi, Pratibha Coop. Housing Society Ltd. v. State of Maharashtra, G.N. Khajuria v. DDA, Manju Bhatia v. NDMC, M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, Friends Colony Development Committee v. State of Orissa, Shanti Sports Club v. Union of India and Priyanka Estates International (P) Ltd. v. State of Assam.”

In above conspectus the order dated 31st January, 2014 passed by the concerned authority of Bally Municipality stands set aside.

The concerned authority of Bally Municipality is directed to demolish unauthorized construction *dehors* the sanctioned plan accorded in favour of the person responsible so far the building in question is concerned within a period of 6 (six) weeks from the date of communication of this order and cost of such demolition is to be recovered from the person responsible. If necessary, the municipal authority shall take assistance of the concerned police authorities in carrying out demolition work. In the event the premises in question is under lock and key same shall be opened if required, for carrying out demolition work.

With the aforesaid directions and observations the writ petition stands disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Saugata Bhattacharyya, J.)