

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(ORIGINAL SIDE)

Present:

The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Rai Chattopadhyay

APO 45 of 2017
With
WPO 880 of 2011

Dev All Pvt. Ltd.
Vs.
The Kolkata Municipal Corporation & Ors.

WITH

APO 46 of 2017
With
WPO 880 of 2011

Mangaldeep Nursing & Diagnosis Pvt. Ltd.
Vs.
The Kolkata Municipal Corporation & Ors.

With

APO 47 of 2017
With
WPO 880 of 2011

M/S. Sweet Hut Super Construction
Vs.
The Kolkata Municipal Corporation & Ors.

For the appellant

: Mr. Saptangshu Basu,
Ld Senior Advocate
: Mr. Dipankar Halder.

For the KMC

: Mr. Alak Kumar Ghosh,

: Mr. Gopal Chandra Das,
: Mr. Debangshu Mondal.

For Respondent nos. 6 &7 : Mr. Jaydip Kar,
Ld. Senior Advocate
: Mr. Nirmalya Biswas,
: Mr. Debdeep Sinha.

Hearing concluded on: 12/12/2023

Judgment on: 12/03/2024

Rai Chattopadhyay, J.

1. The three appeals have arisen assailing a judgment and order of a learned Single Bench, dated December 15, 2016. Those are numbered as ***APO 45 of 2017, APO 46 of 2017 and APO 47 of 2017***, respectively. All the three, as above have been heard analogously. Those are being disposed of by dint of this common judgment.
2. A writ petition being No. W.P.No.880 of 2011, was filed by two petitioners namely, (i) Larica Inn Private Limited (henceforth referred to as “Larica”) and (ii) Kanu Paul Chowdhury. The respondents, excepting the State respondent, were (i) Sweet Hut Super Construction (henceforth referred to as “Construction”), (ii) Mangaldeep Nursing and Diagnosis Private Limited (Henceforth referred to as “Mangaldeep”), (iii) Dev-ALL Private Limited (henceforth referred to as “Dev-All”).

The said writ petition was disposed of by the Hon'ble Single Bench, vide the impugned judgment dated December 15, 2016 - which is under challenge, in these appeals.

“Dev-ALL” is the appellant in APO No.45 of 2017, whereas “Mangaldeep” is the appellant in APO No.46 of 2017 and “Construction” is the appellant in APO NO.47 of 2017.

3. Before attempting to go into the details of the judgment impugned in this writ petition, the factual background of the case may be mentioned in a nutshell for better understanding of the dispute involved in this case.

“Dev-All” had purchased the property situated at the premises No. 41, B. B. Ganguly Street (henceforth referred to as the “said premises”). A joint venture agreement was entered into by “Dev-All” with the developer, that is, “Construction”, for construction of a multi-storeyed building comprising several flats therein. It was agreed that the respective portions of the constructed new buildings would devolve upon the owner “Dev-All” and the developer, in accordance with their respective shareholding, as agreed upon in the said agreement. A building plan was sanctioned by the Kolkata Municipal Corporation (respondent Corporation and hence forth referred to as such), on May 18, 2005. Hence, one five storeyed building, comprising the basement and four separate storeys there upon, came into being, the respective portions of which duly devolved upon the owner and the developer, in accordance with their respective shareholding. “Larica” had entered into the

scene thereafter, upon purchase of a portion of the said building from "Dev-All". Three conveyance deeds were executed on July 11, 2009. "Larica" had purchased the following portions of the said property, by dint of the said three registered deeds:

i.) 3954 sq.ft. of super built-up area;

ii.) seven car parking space at the basement comprising an area of 1200 sq.ft.;

iii.) the first floor containing a super built-up area of 2754 sq.ft. together with the proportionate share of land;

iv.) 2700 sq.ft. on the second floor of the premises, including an open space, together with the proportionate share of land;

v.) The third floor of the building comprising of an area of 2700 sq.ft. and 50% of the open roof, containing an area of 4773.5 sq.ft., together with the proportionate share of land.

The developer "Construction", has been a confirming party in all the said three deeds of conveyance.

4. "Larica" has mutated the said property in its name after duly remitting the property tax, rents and incidental charges, to the assessment collection department of the respondent Corporation. Thus it has been owning and possessing the said property exclusively, to the exclusion of any other person over the same.

5. "Mangaldeep" had purchased on August 1, 2008, a separate and demarcated portion of the said property, comprising a portion thereof which was distinct from the portion owned by "Larica".
6. On July 12, 2009, "Larica" and "Mangaldeep" entered into an agreement, that from a total area of 26,250 sq.ft. previously owned by "Mangaldeep", it would allow 16,390 sq.ft. area to be provided for placement of 71 tenants, and shall thereafter remain owner with respect to 9860 sq.ft. of area. In the said agreement, the parties had agreed further that in case of any shortfall while making allotment of area to the said 71 tenants, the same would be made up equally from individual roof rights, that is, roof space of both the parties. There the parties had also agreed that "Mangaldeep" could get an additional plan sanctioned by the respondent Corporation, without disturbing the possession of "Larica", with respect to its 50% roof right. However, all the 71 tenants were accommodated within 16,390 sq.ft. of area. Thus, the right of 50%, over the roof of the said property, of "Larica", had remained uninterrupted.
7. The following two years were unruffled, though not thereafter. Allegedly on September 5, 2011, "Construction" and "Mangaldeep" were found to have constructed unauthorizedly and illegally, by encroaching over the vacant portion of the roof of 3rd floor, owned and possessed by "Larica". The writ petitioner (Larica) says that in doing so,

“Construction” and “Mangaldeep”, have made gross violation of the stipulations made in the original plan sanctioned dated May 18, 2005. Connivance of the respondent Corporation, with “Construction” and “Mangaldeep”, in allowing such unauthorized and illegal construction, has also been pleaded. Two letters of the writ petitioner (Larica), that are dated September 5, 2011, addressed to “Mangaldeep” and “Construction”, expressing grievance and insisting on production of sanctioned plan if any and demolition of the unauthorised structure, went in vain. However, when the writ petitioner had ventured himself, the facts revealed that an additional sanctioned plan over and above the original one, has been issued by the respondent Corporation on May 3, 2011, in favour of “Dev-All”, on the strength of which the said unauthorised construction was made. It has further been stated that the additional and/or revised plan as above, is a result of suppression and manipulation of the actual state of affairs before the respondent Corporation, while making an application for the same. Gross inaction on part of the respondent Corporation has also been pleaded, that necessary inspection as per the existing records has not been made by the Corporation before grant of sanction to such additional plan for construction. A letter dated September 5, 2011, had also been sent to the Corporation, but to no avail. The writ petitioner had perceived serious prejudice and injury to its right of property as well as carrying on business. Hence the said writ petition was filed, seeking adequate relief.

8. "Dev-All" has put forward objections to the contentions and prayers of the writ petitioner (Larica), on various grounds. Its first point of objection has been that even if there is a dispute, the same is of civil nature, seeking declaration as to the title of the property. For this, a civil court and not the writ court would be eligible to adjudicate the issues in dispute, in accordance with law. "Dev-All" has supported the additional plan of sanction dated May 3, 2011, stating it to have been sanctioned duly and in accordance with law. Allegations of suppression of fact at the time of sanction or any inaction on part of the respondent Corporation is denied. The right over the roof, though owned by the writ petitioner (Larica) and "Dev-All", in equal shares, the same is said to have not been partitioned by metes and bounds. Hence, there is nothing illegal in constructing over its own share, on the basis of sanctioned plan, is the key note agreement of "Dev-All".

Instead, "Dev-All" alleges suppression of fact and coming to court with unclean hands, against the second writ petitioner, that is, Kanu Paul Chowdhury, a partner of the developer "Construction", who is said to possess adequate knowledge about the relevant facts. "Dev-All" says that its right over the 3rd floor roof, to the adequate proportion thereof, is unfettered and cannot be restricted in any way. Therefore, there would neither be any illegality for

it to apply for sanction of a plan for construction, over there, nor would the Corporation be powerless under the statute, to accord sanction to a lawful owner, which it has actually done. The writ petitioners approaching the writ court with unclean hands, has further been pleaded on the basis of the facts, that even being party to the agreement dated July 12, 2009, which stipulates 50% off the roof right of "Larica", only after completion of construction over the proposed area, pursuant to the said agreement, "Larica" has approached the writ court, ignoring and suppressing the same. It has been submitted that an appropriate reading of the indentures would suggest sufficiently, that the writ petitioner (Larica) has not been transferred the 50% right of roof of 3rd Floor of the said premises, but 50% right of roof of the completed construction over there, in terms of the additional building plan sanctioned. It had prayed, before the Hon'ble Single Judge, for dismissal of the writ petition.

9. "Mangaldeep" as well as "Construction" are attuned to the case, as made out by "Dev-All". All three have supported the respondent Corporation with respect to issuance of the additional sanctioned plan in favour of "Dev-All", for construction over the vacant roof of the concerned premises.
10. The Respondent Corporation says that a building plan (of B+G+4stories) was sanctioned on May 18, 2005. Thereafter, pursuant to the prayer of the owner

thereof (represented by the Constituted Attorney), another plan for addition and alteration of the said B+G+4stories plan was sanctioned on May 3, 2011. In sanctioning both the plans the Corporation had proceeded strictly in terms of the letters and spirit of the statute and there would not be any scope for the said action of the Corporation, to be termed as illegal.

According to the Corporation the addition, for which plan was subsequently sanctioned was at the fifth and sixth floors of the said building. On September 7, 2011, a complaint letter was received by it from "Larica", alleging unauthorised constructions being made over the said premises. An inspection of the site was held when some unauthorised construction, in the form of a framed structure, was found to have been built at the rear side of the building, on the sixth floor thereof, where originally, an open space was shown in the sanctioned plan. A 'stop work' as well as demolition notice was issued immediately to the 'person responsible'. Since, demolition of the unauthorised portion of the building was carried out, therefore, on December 15, 2011, the notice under section 401 of the Kolkata Municipal Act, was withdrawn. The Corporation says that the writ petitioner (Larica) has for the first time brought in the writ petition the allegations of fraud and misrepresentation having been meted out at the time of sanction of the additional plan. No such allegation was ever placed by the writ petitioner (Larica) before

the Corporation in its letter as above. The allegations made in the said letter of the writ petitioner dated September 7, 2011, was with regard to the unauthorised construction and for that the Corporation has taken adequate steps within a reasonable period of time, to redress that grievance of the writ petitioner (Larica). The corporation has specifically stated that there would not be any ground for revocation of the additional building plan, as above. The Corporation too has pleaded that dispute, if any, between the occupants of the said building, is in the nature of a civil dispute relating to their respective title, in which the said Corporation cannot be entangled.

11. It is necessary here to mention that the writ court, vide order dated June 8, 2012, had directed for exchange of affidavits between the parties, keeping the point of maintainability of the writ petition, open for adjudication. It had directed further that construction over the premises may continue, though a 'completion certificate' should not be issued by the Corporation, without the leave of the court. Installation of water supply connection and grant of any extra sewerage connection by the Corporation was also directed to be restrained without leave of the court. This order of the Hon'ble single Judge was carried in an appeal by "Larica". The same has however dismissed by the appeal Court, vide order dated May 16, 2012. The appeal court made observations inter alia that, *"having regard to the prayer is made in the*

writ application, we are of the view that question of maintainability is basic question which goes root of the matter to exercise the jurisdiction by the Writ Court and until and unless that question is decided by the Learned Trial Judge, there is no scope to pass any further order in the appeal. Accordingly, we are dismissing the appeal along with the stay application.”

12. The said writ petition was heard and finally disposed of thereafter, by dint of the order of the Hon’ble single Judge, dated December 15, 2016, which is impugned in these appeals.

The Hon’ble Single Judge has held in the said impugned order, inter alia that, the writ petitioner(Larica) has questioned grant of additional sanctioned plan dated May 3, 2011, by the Corporation, as being the owner of 50% share, the writ petitioner (Larica) did not consent for grant of such sanction. The Hon’ble single Judge has noted the writ petitioner’s prayers, which are for declaration of 50% ownership of it, with respect to the roof of the premises and also for cancellation of the additional building plan.

The Hon’ble single Judge has formed points for determination, that “it is not in dispute that, the private respondent had constructed in terms of additional sanctioned plan and has raised several floors over the roof of the 3rd floor of the building.

The question is, given the documentations entered into between the parties, and made available on record, is private respondents entitled to do so”.

It has been held that the writ petitioner's (Larica) right as regards 50% of the roof is sacrosanct. The same has never been waived by the writ petitioner. 50% roof right of the writ petitioner (Larica) is mutated and recorded. Having bestowing such a right over the roof to the writ petitioner (Larica) vide conveyance dated July 11, 2009, the present appellants/private respondents, would not have applied for additional sanction over such space, without the consent or authorisation of the writ petitioner (Larica). That, the roof right has not been demarcated by metes and bounds. Hence, the Court concludes that the present appellants were not authorised to make construction over there, even pursuant to the agreement dated July 11, 2009, which, according to the court, authorises the present appellant, maximum to obtain a plan sanctioned therefore and not beyond that. Construction by the present appellants has been considered to be in excess of their authority under the said agreement and otherwise also. The court has held that the title deeds are not disputed in this case. Thus, while allowing the said writ petition, the Hon'ble single Judge has directed that construction made on the rooftop of the third floor of the premises is illegal and should be demolished.

13. The first and foremost point of argument of the appellants has been on maintainability of the writ petition. Mr Basu, learned Senior Advocate, has represented the appellants. He says that pursuant to the observation and direction of the Hon'ble Division Bench, in its order dated May 16, 2012, the Hon'ble single Judge was required to decide first as to the preliminary point of maintainability, which it has not decided. It is submitted that for the reason as above, the appellants have lost a forum as regards the preliminary objection raised by them and have suffered prejudice.

He says that the dispute between the parties relates to interpretation of the title deed. The writ petitioner has purchased one unit on the third floor of the building and 50% of the open roof, though the title deed has not specified and mentioned explicitly regarding roof right of which floor was bestowed upon the writ petitioner (Larica), by dint of the said deed of conveyance. According to the appellants, the purchase deed of the writ petitioner has bestowed it 50% right of roof, over the completed construction only and not over the third floor of the building as claimed by the writ petitioner (Larica). Also that the writ petitioner would require the roof of the completed building to be partitioned by metes and bounds to ultimately claim its right over the proportionate share of the roof. All these, according to Mr Basu learned Senior Advocate, would be the questions for adjudication by a competent civil Court

on the basis of oral and documentary evidence. A writ court, in a summary proceeding, is not competent to go into such questions of title to the property, he says. Since the writ petitioner (Larica) has sought for Court's interference in such issues, its prayer would not be maintainable that way and would be liable to be rejected at the threshold. Mr. Basu has relied on a judgment reported in **(2010) 8 SCC 329 (Shalini Shyam Shetty & Anr. vs. Rajendra Shankar Patil)**, on this. The Hon'ble Court was pleased to hold that a proceeding under Article 226 is not an appropriate forum for adjudication of property disputes or disputes relating to title or disputes between the landlord and the tenant. A regular suit is the appropriate remedy for deciding property disputes between private persons. Jurisdiction under Article 226 is extraordinary in nature and is not meant for such issues unless there is violation of some statutory duty on the part of the some statutory authority or any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

Secondly, he says, that the writ petition is a pre-matured one, the writ petitioner (Larica) having never raised a grievance against the legality of sanction of additional building plan, before the authorities, at any point of time before. That, the writ petitioner has never approached the Corporation for cancellation of building sanction plan on the ground of fraud and misrepresentation. The writ petitioner (Larica) has

not ventilated its alleged grievance of any fraud and misrepresentation committed on the part of the present appellants for sanction of the additional building plan, in its representation dated September 9, 2011, before the respondent Corporation. It is stated that the so-called representation of the writ petitioner (Larica) does not comply with the requirements of ingredients of any fraud and misrepresentation. Therefore, according to the appellants, such a plea of the writ petitioner (Larica) is only an afterthought. That, no proceeding in terms of the specific provisions of the Kolkata Municipal Corporation Act, for cancellation of the additional building plan has ever been sought to be espoused by the writ petitioner. Also that no such proceeding under provisions of section 397 of the said Act has ever been undertaken by the respondent Corporation, by complying with the formalities thereunder of affording opportunity of hearing to all the concerned parties, before issuing an order for cancellation of the building sanctioned plan. A judgment of the Hon'ble Supreme Court has been relied on this, that is reported in *(2008) 13 Supreme Court Cases 506 [Municipal Corporation, Ludhiana vs. Inderjit Singh & Anr.]*. The appellants have relied on the findings of the Court therein, that compliance with the principles of natural justice is a sine-qua-non, for the statutory authority, by affording reasonable opportunity of hearing to the affected parties, before issuing an order of demolition of the alleged unauthorised construction. In the present case, no such steps have

been taken by the respondent Corporation, Mr. Basu, Learned Senior Advocate, says.

It has further been submitted that as per section 393 of the Kolkata Municipal Corporation Act, the Municipal Commissioner is the only authority under the law, for granting, modifying and cancelling a building plan. That, unless there is gross illegality or perversity in the process adopted by the said authority in discharge of its statutory duty as above, a court of equity would refuse to interfere with the decision of the statutory authority. On this, Mr Basu has relied on a judgment of the Supreme Court reported in *(2006) 8 Supreme Court Cases 590 [Muni Suvrat-Swami Jain S.M.P. Sangh vs. Arun Nathuram Gaikwad]*. That the Hon'ble Court has held that the Municipal Commissioner has the discretion to issue a demolition order of an alleged unauthorised construction. Also that the High Court cannot, in exercise of its writ jurisdiction, impede by a mandatory order, the exercise of such discretion by the said authority.

Therefore, it is said that the Municipal Commissioner is the appropriate authority to whom representation should be made on the alleged ground of fraud and misrepresentation in obtaining the building plan sanctioned. The writ court may assume jurisdiction only if the said authority does not take any action or takes action by following a way which is not in accordance with law and is perverse. It is stated that in this case there would not be any

occasion like that as the writ petitioner (Larica) has never approached the statutory authority with any allegation of fraud and misrepresentation having been committed to obtain the additional building plan sanctioned by that authority. Thus, it is submitted that the writ petition is a premature one.

It has further been submitted that the respondent Corporation has faulted in discharging its statutory duties and obligations, by not performing adequate verification before grant of mutation with respect to the roof right, to the writ petitioner (Larica) in an unfinished building, for which no completion certificate has been issued.

Further it has been submitted that with respect to the selfsame dispute, two suits are pending before the competent civil Court for adjudication and also that an order of demolition would jeopardise the rights of the bona fide purchasers of the units, on the fifth and sixth floors of the said building.

Mr. Basu, learned Senior Advocate, on behalf of his clients, has sought for an order, to set aside the impugned order of the Hon'ble Single Bench, dated December 15, 2016.

14. The other two appellants in APO 46 of 2017 and APO 47 of 2017, that is, "Mangaldeep" and "Construction" respectively, have more or less supported the

contentions and submissions of “Deb-All”, as narrated herein before.

15. Respondents no. 6 and 7 in these appeals, that is “Larica” and another, were the writ petitioners before the Hon’ble Single Judge. Mr. Kar, learned Senior Advocate, representing them, submitted regarding the preliminary point of maintainability of the writ petition, that the Hon’ble Single Judge has found, title dispute between the parties, not to be there. According to the Court, the vendor and the developer both are parties to the deed of conveyance and the documents are undisputed. The Court held further that as the deed of conveyance executed in favour of the said respondents (Larica) was not disputed, no title dispute can be said to have been alleged. It is submitted further that the respondent Corporation has not only mutated the name of the writ petitioner (Larica) but also has accepted municipal taxes and charges over the proportionate share of the building under the writ petitioner’s ownership. According to Mr. Kar, learned Senior Advocate, the report filed by the respondent Corporation would indicate in no uncertain terms that before obtaining the grant of sanction with respect to the constructions over the undivided roof, the appellants have not disclosed and has wilfully suppressed the fact that the undivided half share of the same has already been transferred in favour of other person, i.e, his client, the writ petitioner. According to Mr. Kar this is an appropriate case to be made out under Section 397 of

the K.M.C Act, 1980, for cancellation of the additional sanction plan. Mr. Kar, learned Senior Advocate, has objected to the contention of the appellants that the dispute involved in this writ petition/appeal is a private dispute between the parties and submits that there would not be any element of private dispute over title of the property, brought before this Court of equity.

On behalf of the writ petitioner (Larica), Mr. Kar, learned Senior Advocate, has made reference to the objection letter dated September 09, 2011, sent by his client to the respondent Corporation and says that the factum of fraud and mis-representation, as has been exercised while seeking sanction of the additional building plan, has sufficiently been brought on record by his client vide the said letter. According to Mr. Kar, learned Senior Advocate, the contentions in the said letter, would have been sufficient for the respondent Corporation, to initiate a proceeding under Section 397 of the said Act of 1980, in order to make an inquiry as to the mis-representation and fraudulent conduct by the present appellants, in obtaining the sanction of a plan. That, the Municipal Corporation has failed, as a public authority, to exercise power as vested in it by law. That, the respondent Corporation having failed miserably in following up the due procedure of law, in redress of grievance of the writ petitioner (Larica), is evident and gross. Under such circumstances, the said writ petitioners/ respondents shall have redress

of their grievance only before the writ court and relegating it before the Corporation would be a futile exercise as it has earlier neglected to perform its statutory duties. Mr. Kar, learned Senior Advocate relies on the decisions of a three Judges Bench of the Hon'ble Apex Court reported in **(1997) 6 SCC 370 (Manju Bhatia (Mrs.) & Anr. vs. New Dehli Municipal Council & Anr.)**, to submit that in view of the specific factual background of this case as mentioned above, this court would have ample authority to intervene. The following portion of the judgment, he has relied on:-

"11. In this backdrop, it would be seen that in the tort liability arising out of contract, equity steps in and tort takes over and imposes liability upon the defendant for unquantified damages for the breach of the duty owed by the defendant to the plaintiff. Equity steps in and relieves the hardships of the plaintiff in a common law action for damages and enjoins upon the defendant to make the damages suffered by the plaintiff on account of the negligence in the case of the duties or breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances. In this case, it is found that four floors were unauthorisedly constructed and came to be demolished by the New Delhi Municipal Council. It does not appear that the owners of the flats were informed of the defective or illegal construction and they were not given notice of caveat emptor. Resultantly, they are put to loss of lakhs of rupees they have invested and given as value of the flats to the builder-responent.

12. The question arising for consideration is whether the appellants should be recompensated for the loss suffered by them. The High Court in the impugned judgment has directed the return of the amount plus the escalation charges. We are informed that the escalated price as on the date is around 1.5 crores per flat. In this situation, taking into consideration the totality of the facts and circumstances, we think that the builder-responent

should pay Rs 60 lakhs including the amount paid by the allottees, within a period of six months from today. In case there is any difficulty in making the said payment within the said period to each of the flat-owners, the builder-respondent is given another six months peremptorily for which, however, the builder-respondent will have to pay interest @ 21 per cent per annum on the said amount from the expiry of first six months till the date of payment.

13. The builder impleaded, suo motu, as one of the respondents, is also directed to obtain the certified copy of the title deeds and secure the loan, if he so desires. After the payment is so made, the appellants are directed to deliver the original title deeds taken custody of on 1-3-1994. It appears that with regard to the payment of Rs 1 crore as the price of the flats, property and money are kept under attachment. The attachment will continue till the said amount is paid over.”

The following three decisions of the Hon’ble Supreme Court have been mentioned on behalf of the said respondent/writ petitioner (Larica) to fortify the grounds made out by it in favour of the directions of the Hon’ble Single Judge for demolition of the unauthorised portion of the building. Those are:-

- (i) *Supertech Ltd. vs. Emerald Court Owner Resident Welfare Association & Ors.*, reported in (2021) 10 SCC 1.
- (ii) *Kerala State Coastal Zone Management Authority vs. State of Kerala*, reported in (2019) 7 SCC 248,
- (iii) *Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors.* reported in (2013) 5 SCC 336,

On all the three occasions, the Supreme Court, in view of the infraction of the statutory provision as well as neglect in discharge of statutory duty by the public authority, has been pleased to direct for demolition of the unauthorised portion of the

construction. Furthermore, in the case of **Supertech Ltd. (supra)**, the Supreme Court has also been pleased to hold as follows:-

“160. Hence, when these regulations are brazenly violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Hence, illegal construction has to be dealt with strictly to ensure compliance with the rule of law.

162.This Court held that an unregulated construction materially affects the right of enjoyment of property by persons residing in a residential area, and hence, it is the duty of the municipal authority to ensure that the area is not adversely affected by unauthorised construction.”

It is further submitted that the agreement entered into by the writ petitioner (Larica) with one of the appellant “Mangaldeep” dated July 11, 2009, would not have the effect of relinquishment of the rights of the said writ petitioner(Larica)/respondent, in respect of the immovable property, as regards its proportionate share. Mr. Kar, learned Senior Advocate, further relies on the decision of the Supreme Court reported in **(2009) 11 SCC 18 (Commissioner of Customs (preventive) vs. Aafloat Textiles India Private Limited & Ors.)**, in which the Hon’ble Court has dealt on the maxim of ‘caveat emptor’ and has been pleased to hold in the following manner:-

“13. It was for the buyer to establish that he had no knowledge about the genuineness or otherwise of the SIL in question. The maxim caveat emptor is clearly applicable to a case of this nature.

14. As per *Advanced Law Lexicon* by P. Ramanatha Aiyar, 3rd Edn., 2005 at p. 721 : Caveat emptor means "let the purchaser beware". It is one of the settled maxims, applying to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased, which is obvious, or which might have been known by proper diligence. "Caveat emptor does not mean either in law or in Latin that the buyer must take chances. It means that the buyer must take care." (See *Wallis v. Russell* [(1902) 2 IR 585 (CA)], IR p. 615.)

15. "Caveat emptor is the ordinary rule in contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist." (See William R. Anson, *Principles of the Law of Contract* 245, Arthur L. Corbin, ed., 3d Am. Edn. 1919.) Applying the maxim, it was held that it is the bounden duty of the purchaser to make all such necessary enquiries and to ascertain all the facts relating to the property to be purchased prior to committing in any manner.

16. *Caveat emptor qui ignorare non debuit quod jus alienum emit.* A maxim meaning "let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another". (Hob. 99; Broom; Co., Litl : 102 a : 3 Taunt. 439.) As the maxim applies, with certain specific restrictions, not only to the quality of, but also to the title to, land which is sold, the purchaser is generally bound to view the land and to enquire after and inspect the title deeds; at his peril if he does not."

The judgment of this Court reported in (2005) 3 CAL LT 67 (HC) (*Basana Dutta &Ors. vs. State of West Bengal &Ors.*), has also been relied on to say that as the owner of the concerned part of the premises, the writ petitioner/respondent (Larica) was the only competent person, to seek permission for any construction/reconstruction/addition/alteration over the said portion of the property.

Lastly, Mr. Kar, learned Senior Advocate, has submitted that the Corporation ought to have exercised more diligence in discharge of its statutory duties. Its inaction, as impugned in this case, would be damaging so far as protection of the statutory as well as constitutional rights and safeguards of his clients, i.e, writ petitioner (Larica), is concerned. He has supported the impugned judgment and seeks that no interference to the same may be made by this appeal Court.

16. The writ petitioner/respondent (Larica)'s right had accrued as to the proportionate 50% of the roof of the building, as on the date of execution of the deed, that is, May 18, 2005. At that point of time, 3rd floor roof was in existence. In absence of any contemplation in the said deed of conveyance, as regards the further construction of the building or the roof right to be bestowed upon the respondent/writ petitioner (Larica), at any future point of time, and not immediately thereafter, the submissions made by on behalf of the present appellant, do not inspire Courts confidence. The respondent/writ petitioner (Larica), was given right of roof, over the completed building, appears to be baseless, as neither the building was completed on the date of purchase of property by Larica, i.e, May 18, 2005, nor there was any contemplation of further construction over there, on the said date. Instead, it appears that the said respondent/writ petitioner (Larica) had purchased the

same, along with other portions of the building, by dint of the said deed and had subsequently recorded its name as against the said property, by way of mutation. It has also remitted taxes. Thus evidently its right over the same has become absolute.

17. A further deed came to be executed on July 11, 2009. The same is the basis for grant of sanction to the additional plan of construction, by the respondent Corporation. There is no record to show that the name of the applicants, who had sought for sanction of additional building plan, was mutated before such sanction, with respect to the portion of the building, where the additional construction was proposed to be made. Instead, recording of the name of the writ petitioner (Larica), with respect to the property purchased vide conveyance deed dated May 18, 2005, is an admitted fact in this case. On such premises, the submissions made on behalf of the appellants, that "Larica" was not vested with the roof right of 3rd floor of the building by dint of the purchase deed dated May 18, 2005, but that only after completion of construction of all floors of the building and only over the top floor thereof - is not acceptable to this court. Mutation of the purchased portion in the building by "Larica", was much prior than the date of execution of the subsequent deed, that is, dated July 11, 2009. There has not been any challenge, during all these period either to the ownership, mutation, enjoyment or tax payment by "Larica", as regards the

said portion of the property, purchased by it vide the deed of conveyance dated May 18, 2005.

18. Mutation, in the context of property ownership, refers to the process of updating the land revenue records with the local revenue authority to reflect a change in ownership or other property details. Despite not being the proof of property ownership and serving fiscal purposes only, a mutation certificate is a document indicating and fortifying the rights of the property owner. The primary purpose of mutation is to update records to reflect the current owner's name, when the property changes hands. It is a legal acknowledgement of the change in ownership and provides a clear record of the current property owner. Property mutation acts as a safe guard against double dealing or selling the same property to multiple buyers. Once a property is mutated in favour of a buyer, it becomes part of official land record. Mutation ensures transparency in property ownership records, reducing the chance of fraudulent claim or multiple ownership disputes.

19. Therefore, it is apparent that sanction of the additional building plan dated May 3, 2011, was done by the respondent Corporation, without considering all these aspects, relating to the matter. As a matter of fact, the appellant, who has been a party to the said agreement, has suppressed the connected material facts, while applying for sanction of the additional building plan. In such view of the things, submissions

made on behalf of the respondent/ "Larica" appears to be appropriate that, the Corporation has erred in not initiating a procedure under section 397 of the Kolkata Municipal Corporation Act, 1980, even after receipt of letter of complaint by the said respondent, dated September 7, 2011. It would be beneficial to see what the said statutory provision has laid down.

***"397. Sanction or provisional sanction accorded under misrepresentation. - If, at any time after the communication of sanction or provisional sanction to the erection of any building or the execution of any work, the Municipal Commissioner is satisfied that such sanction or provisional sanction was accorded in consequence of any material misrepresentation or any fraudulent statement in the notice given or information furnished under section 393 or section 394 or section 395, he may, by order in writing, cancel, for reasons to be recorded, such sanction or provisional sanction, and any building or any work commenced, erected or executed shall be deemed to have been commenced, erected or executed without such sanction and shall be dealt with under the provisions of this Chapter :
Provided that before making any such order, the Municipal Commissioner shall give a reasonable opportunity to the person affected as to why such order should not be made."***

In the judgment of ***Shalini Shyam Shetty (supra)*** the Supreme Court has categorically held that violation of statutory duty or infraction of statute or collusion may be agitated before a writ Court within jurisdiction under Article 226 of the Constitution of India. With regard to the point of maintainability of the present writ petition, this Court derive support to uphold the writ petition as maintainable, from the decision of the Hon'ble Apex Court in the said ***Shalini Shyam Shetty (supra)*** case, as mentioned above.

20. So far as if the writ Court can direct for demolition of the unauthorised portion of a premises - is concerned, the said direction of the Hon'ble Single Judge has not been seriously contested by the appellant. Be that as it may in view of the judgments mentioned above, i.e, *Suprertech Ltd. (supra)*, *Dipak Kumar Mukherjee (supra)* and *Kerala State coastal Zone Management Authority (supra)*, this issue has been set at rest.
21. As regards the point of maintainability raised by the appellants, it appears that the Hon'ble Single Bench, vide order dated June 8, 2012, had kept the same open, without determining the same. Subsequently the Hon'ble Division Bench, in its order dated May 16, 2012, observed that the point of maintainability of the writ petition, as raised, may be heard and disposed of by the Single Bench. And also that in case the writ is found not to be maintainable by the Court, necessary further directions may also be issued. Appellants are aggrieved that the preliminary point on maintainability has not been heard and decided by the Hon'ble Single Bench, while deciding the writ petition, vide impugned order dated December 15, 2016. That, the writ Court would not have any jurisdiction to entertain a title dispute between two private parties, as it is in the present case, in exercise of jurisdiction under section 226 of the Constitution of India. Appellant's plea that the point of maintainability has not been considered by

Court is, however, not sustainable. This is for the reason, that the Court has specifically held that title deeds are not being disputed, in the writ petition. It has noted that grant of sanction of an additional building plan and its alleged illegality is under challenge in the writ petition and the ownership rights of the respective parties are not the subject matter of challenge therein. Hence, the Court has proceeded to determine the issues involved in the writ petition, by dint of the said judgment dated December 15, 2016. The preliminary point touching the maintainability of the writ petition, has thus been decided by the Hon'ble Single Bench. In considered opinion of this Court, the same would be sufficient as regards determination of the preliminary point and compliance of the directions of the Division Bench vide order dated May 16, 2012.

22. The preliminary point regarding maintainability as raised in this case is with regard to involvement of the title dispute, which arguably ought to have been decided by a civil Court, instead of the writ court. In its judgment dated December 15, 2016, the Hon'ble Single Bench has elaborately dealt with as to how and for what reason the writ Court would assume jurisdiction in the matter and has thus sufficiently dealt with issues relating to maintainability of the case. Its decision is imbibed in the judgment itself and shall leave no scope for any grievance, that the same point has not been gone into or dealt with by the Court. Upon final determination of the writ petition,

on all the points involved, there would not be any prejudice caused, as regards the same.

It shall not be out of context to mention that in an intra court appeal, the appeal Court would not at every drop of a hat, embark upon setting aside the Hon'ble Single Bench's order, unless and until gross and apparent error is manifested and/or palpable illegality or glaring perversity has clogged the exercise of discretion and the decision making process of the Court, to come to a just and legal finding. Any conclusion arrived at by the Hon'ble Single Judge, if is a plausible one, based on due consideration of the particular facts of the case and settled laws, the appeal Court would not tarnish the same, simply because it may have perceived the materials in some way differently, than the Hon'ble Single Judge.

23. A decision of the Hon'ble Supreme Court may be referred to in this regard, that is, reported in (2023) 10 SCC 531 [*Sheo Raj Singh (deceased) through Legal Representatives & Ors. vs. UOI & Anr.*], wherein, while deciding if the exercise of discretion by the writ Court has been proper or not while condoning delay, the Court reiterates the settled law that '*a Court of appeal should not ordinarily interfere with the discretion exercised by the Courts below.*'
24. This Court shall rely on another decision of the Supreme Court, reported in (2023) 1 SCC 634 [*Shyam Sel & Power Ltd. vs. Shyam Steel Industries Ltd.*], on this. The

Court was pleased to mention an earlier judgment of *Wander Ltd. vs. Antox India Private Limited* [1990 Supp SCC 727]. The Court was testing the appellate Courts power, to consider the correctness of the discretion and jurisdiction exercised by the writ Court, while exercising their appellate jurisdiction. The Court has relied on the following :-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle.”

25. Two other judgments may also be referred to, i.e., reported in (1980) 2 SCC 593 (*Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha*) and *Manjunath Anandappa vs. Tammahasa* reported in (2003) 10 SCC 390, to say that in this regard Courts have consistently found that, “an appellate power interferes not when the order appealed is not right, but only when it is clearly wrong.”
26. Having discussed as above, this Court is of the opinion that there would be no sufficient reason, to interfere in to the order of the Hon’ble Single Judge, which is eloquently reasoned and founded on proper appreciation of facts and applicable laws and passed in due exercise of judicial discretion by the Court. Thus, the appeals would not succeed.
27. Hence, appeal being APO 45 of 2017 with WPO 880 of 2011 with APO 46 of 2017 with WPO 880 of 2011 with APO 47 of 2017 with WPO 880 of 2011 are dismissed. The judgment of the Hon’ble Single Judge dated December 15, 2016, passed in writ petition no. W.P 880 of 2011 is affirmed.
28. Interim order, if any, stands vacated.

Arijit Banerjee, J.

1. I have had the advantage of reading the judgment authored by my learned Sister. I completely agree with

the conclusion reached by Her Ladyship. However, I take this opportunity, to add a few words of mine.

2. The primary issue involved in the matter is whether or not the additional building plan sanctioned by Kolkata Municipal Corporation in favour of Dev-All should be sustained? Larica made a representation dated September 5, 2011, to the Director General, building, Kolkata Municipal Corporation which was to the following effect:-

"Re: Construction on the 5th floor level and above at Premises No. 41, B. B. Ganguly Street, Central Plaza, Kolkata - 700 012, under Ward No. 42.

Dear Sirs,

We are owner of the portion of 41, B.B. Ganguly Street, Central Plaza, Kolkata - 700 012, namely the 3rd floor consisting of an area of 2700 sq. ft. and 50% of the open roof containing an area of 4773.5 sq.ft. totalling 7473.5 sq. ft. A Copy of the Deed of Conveyance is enclosed.

We are surprised when one M/s. Sweet Hut Super Construction of 119/1, Rajarhat Road, P.S. Rajarhat, Kolkata - 700 059, Dist. 24 parganas and M/s. Mangaldeep Nursing & Diagnosis Private Limited of 3A, Mangoe Lane, Surana House 1st Floor, Kolkata- 700 001 started construction in our portion of the roof. We are not aware of any sanctioned plan having been obtained by them nor have they obtained our consent in respect of the same. When we purchased the 3rd floor of the premises and the open roof, we did so, out of the area mentioned in the Sanctioned Plan no. 2005060021 dated 18.05.2005. The said sanctioned plan thus could not be modified nor any fresh sanction could be obtained without our consent.

In the facts and circumstances, you are requested to forthwith look into the matter and issue instruction, so that no further constructional activities takes place, before the issue is sorted out and our portion of the roof encroached upon for construction is demolished.

Your intervention and early action in the matter will be highly appreciated.”

3. It appears that pursuant to the said representation, the KMC people conducted spot inspection and issued stop work notice under Section 401 of the KMC Act, 1980. It is the stand of KMC that subsequently the person responsible demolished the unauthorised construction. Therefore, KMC withdrew the stop work notice.
4. It appears that subsequently Larica came to know that an additional building plan dated May 3, 2011, had been sanctioned by KMC for making construction on the roof of the 3rd floor of the building in question. Claiming to be 50% undivided owner of the said roof, Larica approached the learned Single Judge with the case that without Larica's consent, no plan could have been sanctioned by KMC for construction on the said roof since Larica was the 50% owner of the roof.
5. The learned Single Judge found that by reason of a registered deed of conveyance dated July 11, 2009, executed by Dev-All in favour of Larica, the latter became owner of, inter alia, 50% of the roof on which KMC permitted construction by sanctioning the additional building plan in favour of Dev-All. The learned Judge held that the plan could not have been sanctioned without the consent of Larica and the construction made on the roof of which Larica is 50% owner, without its consent, is illegal.

6. Dev-All relied on an agreement dated July 12, 2009, entered into by and between Larica and Mangaldeep which is obviously an associate concern of Dev-All and sailing on the same boat. In support of the contention that Larica had, by entering into such agreement, authorised Mangaldeep to raise construction on the concerned roof. The learned Judge negated such argument and held that the said agreement did not amount to relinquishment of Larica's 50% ownership of the concerned roof in favour of Dev-All/Mangaldeep Construction or consent to construction being made by them on the concerned roof.
7. Having come to the conclusion that the construction made on the basis of the additional plan is illegal, the learned Judge directed demolition thereof. Hence, these three appeals at the instance of Dev-All, Mangaldeep and Construction, who are all sailing on the same boat.
8. The appellants argued that disputed questions of title being involved, the learned Single Judge ought to have refused to exercise writ jurisdiction. I do not find such argument to be acceptable and the same has been rightly rejected by the learned Judge. Firstly, there is no absolute rule of law that disputed questions of fact cannot be gone into by the writ Court. However, normally, the High Court declines to entertain a writ petition when seriously disputed facts are involved. Writ proceedings are summary in nature, decided on affidavits. Resolution of factual disputes normally requires witness action. Hence, as a rule of self-

restraint, disputed questions of fact are not normally entertained by the writ Court.

In the present case no disputed question of fact is involved. The registered conveyance dated July 11, 2009, executed in favour of Larica, has not been called in question by any of the appellants. The learned Single Judge rightly held that Larica's case is based solely on such registered deed of conveyance which made it 50% owner of the concerned roof. The learned Judge was not required to decide any factual dispute.

9. The other point urged by the appellants was that the learned Judge, upon the matter being remanded by a Division Bench with the direction that the question of maintainability of the writ petition should be decided as a preliminary issue, failed to address that question, is also without merit. The learned judge has addressed that issue sufficiently in the following words:-

"The prayers as framed in the writ petition and the nature of allegations levelled by the parties against each other prompts one to be of the view that, the disputes raised ought to be relegated to a more elaborate adjudicatory process than a summary trial as obtaining in a writ petition. Such course is not embarked upon, in the facts of the present case, as the relief sought in the writ petition is depended upon interpretation of title deeds. The title deeds are not in dispute."

10. On an overall consideration of the facts and circumstances of the case, I am of the considered view that the appellants, surreptitiously and in a clandestine manner, behind the back of Larica,

obtained sanctioned plan from KMC for raising construction on the concerned roof of the building in question. This may or may not have been in connivance with the concerned KMC officers. I need not enter into that question. What is absolutely clear is that the KMC could not have sanctioned the additional building plan on the concerned roof without the consent of Larica.

11. I, therefore, find no infirmity in the order under appeal. It is an eminently plausible order. Even if we were of a different opinion, that would not be ground enough to interfere with the order. It is well settled that in an intra-Court appeal, the Division bench intervenes only when the order of the learned single Judge is 'clearly wrong' and not where it is merely erroneous. The view of the learned Single Judge being a plausible one in the facts and circumstances of the case, the same will not be upset by the Division Bench even if the Division Bench had another possible view. I hasten to clarify that in the factual matrix obtained in the present case, I fully agree with the conclusion reached by the learned Single Judge.
12. I therefore agree with my learned Sister that the three appeals deserve to be dismissed.
13. Urgent photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)