

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
(ORIGINAL SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

WPO 738 of 2017

Gopal Gobinda Ghosh

vs.

The Kolkata Municipal Corporation & Ors.

For the Petitioner : Mr. Jayanta Narayan Chatterjee,
: Mr. Gourav Banerji.

For the KMC : Mr. Alok Kr. Ghosh.

Heard on : 07/03/2024

Judgment on : 07/03/2024

Rai Chattopadhyay, J.

1. The moot question determinable in this writ petition is as to whether the OSD (Building)/South, of the respondent, was justified in not directing for demolition of the existing structure of kitchen (asbestos shaded structure) at the western side ground floor of the building, in lieu of deposit of the 'demand fees', in spite of coming to a finding that the said structure was unauthorised and illegal, being beyond the purview of the sanctioned building plan. The writ petitioner is the son of the donor of 'Debottor property', that is the land and structure over there. According to the writ petitioner at present, the respondent no. 5 and 6 are in possession of the concerned property, unauthorisedly, by exercise of undue coercion and force.
2. The writ petitioner alleges of construction being made unauthorisedly and illegally by the said private respondent over the concerned property

and that in collusion with and support of the respondent Kolkata Municipal Corporation.

3. This Court had earlier directed the Corporation vide order dated 11.02.2016, in C.O No. 4382 of 2015, to conclude the proceeding of demolition at the concerned premises. With respect to the said demolition procedure the authority as mentioned above held a hearing of the parties on 21.02.2017. The order of the said hearing procedure dated 22.02.2017, is challenged in the present writ petition.
4. Let the finding of the concerned authority in the impugned order dated 22.02.2017 be scrutinised at first.
5. The details of the unauthorised construction has been mentioned therein, in the following manner :-

“Detail of Unauthorised Construction of : - (1) Asbestos roofed structure with Brick Walls in the 3rd storey on South-East corner along with a polythene shed with C.I. Posts. (2) Single storied Asbestos roofed structure on South-West corner & North. All works are without sanction.”

6. The authority has noted that according to the report of the concerned Borough, infringement of the Building Rules, 2009, would be evident, i.e, of Rules 62, 70, 133 and 134. Borough has also mentioned in the report a previous order dated 11.12.2013, by dint of which the Person Responsible has been directed to demolish the impugned unauthorised construction as per the précis and the demolition sketch plan. That, in default the Corporation would be at liberty to demolish the same.
7. The Corporation serves notice, under Section 544 and 546 of the Act regarding unauthorised building and informing the date of demolition of the asbestos roof structures at ground floor and second floor of the said

premise, on 17.12.2013. The process, however, has been abandoned, in the midst of it.

8. The authority recorded its observations as follows, in the said impugned order :-

“As per documents collected from Assessment Department name of Owner is EST Hemchandra Ghosh. No sanction plan has been produced for the building. As per record of Assessment Department there is one existing Asbestos Shaded Room at third floor. This is long pending case. The violation of Building Rules 2009 are so grave and serious and infractions of Building Rules for the same in terms of the provision for regulation framed for hearing & regularisation of the case U/s. 400(1) of KMC Act, 1980, as amended on June 20, 2015 could not be considered except old existing small structures at ground floor and roof shown in D. Sketch.

Going though the statement of P.R. I am inclined to pass demolition order for the structure marked in D. Sketch in respect of the impugned unauthorised construction. The structure shaded by Poly Sheet at roof and Asbestos Structures at mandatory open spaces may lead fire hazard. The structure should be removed immediately to avoid any accident/hazard.”

9. The operative part of the impugned order dated 22.02.2017 is as follows:-

“Part ‘A’

The P.R are directed to demolish the unauthorised structure of Asbestos shaded structure at (Northern Side) rear open space, Southern Side Asbestos Shaded structure at open space and Eastern Side Pollythene Sheet at roof as shown in revised D. Sketch Plan marked on D. Case No. 88-D/VIII/12-13, within 30 (thirty) days from the date of communication of this order in default the KMC Authority will be at liberty to demolish the same cost will be recovered from P.R.

Part ‘B’

Considering all the available information & document placed with the file, statement of P.R. Complainant and keep due regards to the spirit of Law, that no order for demolition is hereby passed for the existing structure for Kitchen (Asbestos Shaded structure at ground floor at Western side), subject to submission of affidavit declaring on oath that no

construction what-so-ever in the impugned premises without prior sanction from the authority will be done.

P.R. have to deposit the demand fees after due concurrence of authority within 30 days from the date of issue of order, failing which action for demolition will be taken on approval of authority, cost of demolition may be recovered from P.R. on approval of authority. D. Sketch may be issued only after compliance of Part 'A' & Part 'B' & submission of Structural Stability Certificate from L.B.S./E.S.E.”

- 10.** Thus, by dint of the said impugned order the second floor structure with asbestos roof was directed to be demolished. However, the ground floor structure used as the kitchen, was allowed to be retained against the payment of 'demand fees' and filing of an affidavit.
- 11.** The writ petitioner is aggrieved that the decision of the respondent Corporation for retention of the portion of property, which is admittedly unauthorised, would be illegal and not maintainable.
- 12.** Mr. Chatterjee, who is appearing for the writ petitioner has categorically submitted that the impugned order passed by the respondent authority as mentioned above is an arbitrary and unreasoned one and an effect of colourable exercise of the jurisdiction and power vested upon the Corporation. He says that an unauthorised minor deviation from the sanctioned plan, if to be retained would be subjected to the decision of the respondent Corporation in exercise of its discretionary power as regards the same and on consideration of the relevant facts and circumstances. According to him, this would entail mention of the specific reasons for which the respondent Corporation have allowed such retention, if any. He has further pointed out to the Court that reasons assigned would be the heart and soul of an order of a public authority. Hence, according to him, the unreasoned order of the authority, as impugned in the present case, is arbitrary and liable to be set aside. He has not failed to point out that the decision of the authority in part 'B' of

the said order is bereft of any finding by the authority as regards whether the unauthorised construction would be a minor deviation from the sanctioned building plan or major additional constructions. Therefore, while allowing the said unauthorised construction to be retained, the respondent authority which is an instrumentality of the State, has acted absolutely beyond the scope of the statute, though it had a duty not to act in a manner otherwise than provided in a statute.

13. Mr. Chatterjee has prayed for adequate relief for the writ petitioner in terms of the prayers in the writ petition.

14. The primary objection of the respondent Corporation is with regard to the maintainability of the writ petition. Mr. Ghosh appearing for the Corporation has put forth with reference to the statutory provision that the impugned order is an appealable one. He says that, as against the same, the statutory appeal would be maintainable.

15. The other limb of submission of Mr. Ghosh, is with regard to the power available with the respondent to act in a manner, as it has done. He says that retention of a portion which is beyond the sanctioned plan, cannot be straight away called as illegal, since the respondent is authorised to do so by the provisions of the statute itself. For this, he relies on the third proviso of Section 400 of the KMC, 1980, which is as follows:-

“400. Order of demolition and stoppage of buildings and works in certain cases and appeal. –

Provided also that the Municipal Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulation, 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 hereunder, as the case may be.”

- 16.** To fortify his argument regarding non-maintainability of the writ petition, Mr. Ghosh refers to Section 400 (3) of the said Act, which is as follows:-

“400 (3) Any person aggrieved by an order of the Municipal Commissioner made under sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under section 415.”

- 17.** According to Mr. Ghosh since there is an efficacious alternative remedy available for the writ petitioner, he may be relegated to the statutory Tribunal and the writ petition be dismissed.
- 18.** As regards the merits of the case, according to Mr. Ghosh, the statutory provision as above has empowered the Corporation to recognise and authorise minor deviations from the sanctioned building plan, in constructing a building. He says that the same however should not be a threat to the structural stability of the building and, also mentions that the writ petitioner has not made out any such case. Accordingly he says that on merits also, the writ petition may not successfully lie, the order of the respondent authority as impugned, being a reasonable and justified one.
- 19.** Availability of alternative remedy would not always restrain grant of equitable relief to a petitioner. The constitutional Courts have time and again held to that effect and some of the decisions may be mentioned here.
- 20.** It would be beneficial to see the Hon'ble Supreme Court's decision on this in *M/s. Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer-cum-Assessing Authority & ors.* reported in **2023 SCC OnLine SC 95**. The Court has held that :-

“.....we feel the urge to say a few words on the exercise of writ powers conferred by article 226 of the Constitution having come across certain orders passed by the High Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". In a long line of decisions, this court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law.”

- 21.** In another case reported in **(1998) 8 SCC 1 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.)**, the Hon'ble Supreme Court has held that availability of alternative statutory remedies would not be a constitutional bar to High Court's writ jurisdiction but would only be a self-imposed restriction. According to the Hon'ble Supreme Court in that case where the order or the proceedings are wholly without jurisdiction, the writ Court can interfere by exercising its plenary power under Article 226 of the Constitution.

- 22.** Following the ratio decided, as mentioned above and the law well settled in this regard, this Court is of the opinion that due to availability of any other statutory remedy, the writ petitioner cannot be restrained to espouse his cause before a writ Court, for equitable relief. Therefore, this Court finds the writ petition to be maintainable, in its present form.
- 23.** The peculiar part of this case is that the respondent Corporation has not denied but mentions in the order the fact that the part of construction as mentioned under part 'B' of the ordering portion of the impugned order, has been an unauthorised and illegal construction. The respondents while arguing the case, have justified its order directing retention of that part on the ground that the law empowers it for such retention, beyond the purview of the original sanction plan.
- 24.** The provision as mentioned above under Section 400 (1) third proviso has laid down that the Corporation would be empowered to regularise the minor unauthorised erection or execution of any minor work without sanction. Minor deviation from the sanction plan may also be regularised in terms of the prescribed regulations. Two things are noticeable in the impugned order. Firstly, that the concerned authority has failed to discharge its duty to determine in the said impugned order whether the retained construction would fall within the said category of a minor construction. As a matter of fact, such finding only, would have been the basis of the decision of the respondent in the impugned order. Also that, as per the statutory provision as discussed above, the same would be a mandatory pre-requisite, before the authority can take a decision for retention of any part of unauthorised construction. Secondly, that the authority while retaining portion of admitted unauthorised construction in part 'B' of the ordering portion of the impugned order, has failed to assign any reason for such retention. Obviously it has not been the desire or mandate of the legislature that

the unauthorised construction in a building would be retained at the sweet will of the building sanctioning authority, without being supported by any reason. The Court is not hesitant to mark the same as an unreasoned order, creating a commotion with the rule of law or prudence, to justify the concerned authority's decision as to why the unauthorised portion of the construction not sanctioned by it, is required to be sustained. Being bereft of such a reason being assigned, the order of the authority should be termed, as a result of sheer arbitrariness and lawlessness. The same therefore, would be found to be an arbitrary and unreasoned one, over and above being in contravention with the statutorily framed process. The third proviso to Section 400 of the 1980 Act, would justify exercise of the discretionary power by the respondent authority to retain additionally constructed area beyond the sanctioned plan for a conceivable reason, which is unavailable in this case. Thus, in considered opinion of this Court, such decision of the respondent authority is not maintainable. The Court finds the impugned order to be liable to be set aside as well as the writ petition to be legible to be allowed, being the impugned order unreasoned and arbitrary.

- 25.** The Court cannot but notice in the impugned order, of imposition of condition by the authority that the private respondent shall submit an affidavit declaring that no construction would be made in the premises without prior sanction of the authority. This appears to be beyond the scheme of the statute, as imposition of a condition, would not justify retention of any construction, beyond a sanctioned plan – as per the statutory framework. Illegality is manifest, as regards the said order.
- 26.** Court notices that the property is a 'debottor' property, which bears a specific purpose for the endowment. An action in hostility of such purpose must be deprecated. Respondent's action, unfortunately, would only fortify divergence from the purpose of such religious endowment of

the property. Thus, the order impugned is found not to be maintainable otherwise also, apart from being an unreasoned one and in contravention with the statutory provisions. Arbitrariness is evident and so imposing is the same being not maintainable.

27. Hence, this writ petition is allowed and disposed of with the following directions :-

- (i) Impugned order of OSD (Building)/South dated 22.02.2017 is set aside, to the extent of 'part B', in the ordering portion thereof.
- (ii) The writ petition being WPO 738 of 2017 is allowed.
- (iii) The respondent Corporation is directed to immediately execute the demolition proceeding with respect to the portion of unauthorised construction in the said premises as enumerated under part 'B' of the ordering portion of the impugned order dated 22.02.2017.
- (iv) The exercise as above shall be concluded within a period of four weeks from the date of service of copy of this order to the office of the respondent Corporation. For this purpose serve copy of the order would suffice.

28. Connected applications, if any, stands vacated.

29. The writ petition being WPO 738 of 2017 is disposed of.

30. Urgent photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

(Rai Chattopadhyay, J.)