
(2009) 07 CAL CK 0026

In the Calcutta High Court

Case No : M.A.T. 557 of 2009 With C.A.N. 5438 of 2009

Bholanath Nandy and Others

APPELLANT

Vs

Smt. Indira Ghosh and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Citation : 113 CWN 1191

Hon'ble Judges : Tapan Mukherjee, J;Pranab Kumar Chattopadhyay, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Rabi Sankar Dutta, Sibasis Ghosh, for the Appellant; P.N. Chatterjee, Dipak Bhattacharya and D.P. Mukherjee, Smritikana Mukherjee, for the Respondent

Judgement

Pranab Kumar Chattopadhyay, J.—Challenging the interim order dated 19th June, 2009 passed by a learned Single Judge of this Court in the writ petition being W.P. 10302 (W) of 2009, appellants herein have preferred the appeal and also filed this Stay Application in connection with the said appeal. By the said interim order learned Single Judge restrained the appellants herein from making any further construction in relation to the building in question.

2. Coming to the factual matrix of the writ petition we find from the said writ petition and other annexed documents that the writ petitioners are the flat owners of "Ganges Shree Apartment" at 40, Dharma Das Kundu Lane, P.S. Shibpur, Dist: Howrah. The said complex consists of two 4-storied buildings in two blocks. The impugned order of injunction was passed by the learned Single Judge restraining the appellants/petitioners herein from making any construction although the competent authority of the Howrah Municipal Corporation sanctioned building plan for construction of additional floors.

3. It has been argued on behalf of the appellants/petitioners that the flat owners cannot raise any objection against the sanction of additional floor unless it affects structural stability of the building in question. The impugned interim order of injunction passed by the learned Single Judge is set out hereunder:-

"The deed of conveyance executed in favour of the writ petitioner contained a clear stipulation that the building shall be a four storied building that is to say, G+3 and that no further construction shall be raised. This stipulation is to be found in Clause 13 of the deed of conveyance a copy whereof is annexure P-1 to the writ petition.

The learned Advocate appearing for the respondent Nos. 9 to 16, had no answer to offer as to why his clients committed breach of that covenant by seeking sanction for an additional storey or further seeking to make construction of the fourth floor.

In that view of the matter, the respondent nos. 9 to 16, are restrained from making any further construction.

Let affidavit-in-opposition be filed within four weeks, reply, if any, be filed within two weeks thereafter, and the matter be listed after eight weeks."

4. Referring to the aforesaid interim order passed by the learned Single Judge, Mr. Saktinath Mukherjee, learned Senior Counsel representing the appellants/petitioners submitted that the learned Single Judge should not have entertained the present writ petition for deciding any allegation arising out of the breach of contract between two private parties. Mr. Mukherjee further submitted that the learned Single Judge was of the view that the appellants herein had committed breach of covenant by seeking sanction for an additional storey or further seeking to make construction of the fourth floor in the premises in question without appreciating that any allegation relating to breach of covenant cannot be adjudicated by this Court in its Constitutional Writ Jurisdiction.

5. Without prejudice to the aforesaid submissions Mr. Mukherjee further submitted that every writ petitioner except Mr. Ashok Kumar Samanta gave consent in the sale deed for further construction or put additional construction at the premises in question. Referring to the sale agreement Mr. Mukherjee also submitted that every writ petitioner including Mr. Ashok Kumar Samanta specifically assigned absolute right in favour of the Developer to raise further construction or put additional construction at the premises in question. The relevant Clauses from the sale agreement are set out hereunder:

"9. THAT the Developer shall have absolute right to raise further construction or put additional construction at the said premises without any time limit up to any height permissible by the Corporation and the decision in this regard of the Developer will be final and the same will be final and the same will be binding on the Purchaser, such additional structural will be sole property of the Developer who shall have right to dispose of the same accordingly and the Purchaser will not be able to raise any objection whatsoever;

10. THAT for the purpose of raising further construction the Developer shall have right to remove, shift and substitute water tank, reservoir, antenna and other ancillaries and to that effect the Purchaser will not interfere in the matter but at

all material time the Developer undertake to substitute the said facilities and re-built the same at own cost;"

6. Mr. Mukherjee submitted that except in the case of Sri Ashok Kumar Samanta, there is a clause in the sale deed permitting the owner and the Developer to make further construction on the basis of the sanctioned plan and it was further agreed that the intending purchaser or purchasers have no claim in respect of such further construction. Referring to the affidavit-in-reply filed on behalf of the appellants/petitioners herein Mr. Mukherjee further submitted that atleast in the sale deeds of eight flat owners namely, Mr. Rajendra Kumar Agarwal, Mrs. Annapurna Sharma, Mr. Manoj Kumar Agarwal, Mr. Shyam Sunder Khandelwal, Mrs. Nilam Devi, Mr. Dharendra Nath Majumdar, Mr. Sailen Majumder and Mrs. Supriya Majumder, specific clause has been mentioned permitting the Developers to make additional storey in the premises in question. The said clause mentioned in the aforesaid sale deeds has been quoted in the affidavit-in-reply and is also set out hereunder:-

"It is hereby further agreed that the purchaser hereto of the said flat, have no claim and/or right of any nature or kind over and in respect of the terrace and roof of the said building and the vendors and the developers hereto shall have the power to make additional storey/s and that such an additional property of the vendor and the developer hereto, who will be entitled to determine the use thereof and also be entitled to dispose of it in any manner they like and that the purchaser shall have not entitled to raise any objection or put up any claim of any nature or obstruction hereto, towards the purchaser hereto, but the ultimate roof shall be common to all the flat owners."

7. It has been submitted by Mr. Mukherjee that the writ petition is liable to be dismissed on the sole ground of non-disclosure or suppression of material facts regarding consent of most of the writ petitioners permitting the developers to raise additional storey in the premises in question. Mr. Mukherjee further submitted that half of the construction in the premises in question has already been completed as per sanctioned building plan and, therefore, balance of convenience is tilted in favour of vacating the interim order passed by the learned Single Judge.

8. Relying upon a decision in the case of Mandali Ranganna and Others etc. Vs. T. Ramachandra and Others, Mr. Mukherjee contended that the court cannot confine itself only to the basic questions of existence of prima facie case, balance of inconvenience and irreparable injury while considering the prayer for injunction and the court should also take into consideration the conduct of the parties. Mr. Mukherjee referred to Paragraph 26 of the aforesaid decision, which is reproduced herein below-

"26. Rightly or wrongly constructions have come up. They cannot be directed to be demolished at least at this stage. Respondent 7 is said to have spent three crores of rupees. If that be so, in our opinion, it would not be proper to stop

further constructions."

9. Mr. Mukherjee further contended that in this case also all the co-owners including Sri Ashok Kumar Samanta (respondent No. 2) entered into agreement giving the Developer absolute right to raise further construction or additional construction at the suit premises upto any height permissible by the Corporation and decision of the Developer in this regard will be final. The Developer raised construction. According to Mr. Mukherjee, writ petitioners herein are now seeking to take advantage of Clause 13 of the sale deed executed in favour of Sri Ashok Kumar Samanta (respondent No. 2) in order to stall the half done construction at the premises in question.

10. Mr. Mukherjee submitted that the writ petition was affirmed by Sri Debabrata Ghosh, husband of the writ petitioner No. 1, who suppressed deliberately the sale deed executed in favour of his wife and other writ petitioners wherein specific right was assigned in favour of the Developer for raising further construction or additional construction in the suit premises. Referring to the aforesaid conduct of the writ petitioners specially the person who affirmed the affidavit in the writ petition Mr. Mukherjee further submitted that the aforesaid conduct of the writ petitioners cannot be overlooked by this Court since the same disentitled them to equitable relief of injunction. Mr. Mukherjee also submitted that when constructions have already come up at the premises in question upon serving specific notice to the respondents/writ petitioners, the same cannot be directed to be demolished at this stage and it would also not be proper to issue any direction to stop the said construction. Mr. Mukherjee urged before this Court that the appellants should be allowed to carry on further construction of the building in question as per sanctioned building plan.

11. Mr. Mukherjee also submitted that the learned Single Judge without following the settled principle of law entertained the writ petition and passed an interim order inspite of taking note of the specific allegation made by the writ petitioner with regard to alleged breach of contract between two private parties. According to the learned Senior Counsel of the appellants, writ petition is not at all maintainable since most of the writ petitioners permitted the developers to construct additional storey in the premises in question which were intentionally suppressed from the learned Single Judge by the said writ petitioners.

12. Referring to various decisions of this Court Mr. Mukherjee submitted that the present writ petition is not at all maintainable since the claim of most of the writ petitioners would fail in view of granting specific consent to the developers as recorded both in the sale agreement and in the sale deed. Mr. Mukherjee urged before this Court that the claim of the writ petitioners being joint, if one fails because of his conduct, no relief can be granted to the rest.

13. Mr. Mukherjee referred to and relied on a judgment delivered by Sinha, J. in the case of Ganesh Nayak and Others Vs. Land Acquisition Collector and Others, wherein it has been specifically held that even where a joint application is

permissible, if one of the applicants is disentitled to relief, the whole application must fail. Mr. Mukherjee also referred to another subsequent decision of this Court in the case of Kanailal Mondal and Others Vs. State of West Bengal and Others, wherein eminent Jurist D. Basu, J. referring to the aforesaid earlier decision of this Court held as under:-

"3.....Apart from that, it has been held by this Court in a decision reported in (2) 65 CWN 909 (Ganesh Nayak vs. L. A. Collector) that in a case where a joint petition is made by several petitioners if the claim of one is attended by some defects on his part, no relief can be granted to the rest.

This principle rests on the reasoning that the claim of the petitioners being joint, the Court cannot make any appointment if one fails because of his conduct....."

14. In view of the aforesaid decisions of this Court, Mr. Mukherjee submitted that most of the writ petitioners when specifically permitted the developer to construct additional storey in the premises in question by incorporating a specific clause in the sale deed as well as in the sale agreement then following the principles decided by this Court in the aforesaid judgments, present writ petition is bound to fail because of the conduct of most of the writ petitioners since the claims of the said writ petitioners being joint, the court cannot make any apportionment and if the claim of even one of the petitioners fails because of his conduct then also no relief can be granted to the rest.

15. Mr. P. N. Chatterjee, learned Senior Counsel representing the respondents/ writ petitioners submitted that owners herein have sold out the entire land to the flat owners as the entire land in respect of the premises in question after sale of the flats have been proportionately owned by the respective flat owners. Sanction of further plan at the instance of the erstwhile owners is not permissible as the said owners, according to the learned Senior Counsel of the writ petitioners, lost title over the land. Mr. Chatterjee referred to Rule 4(3) of the Howrah Municipal Corporation Building Rules and submitted that the concerned authority of the Howrah Municipal Corporation sanctioned building plan for construction of additional storey in the premises in question at the instance of the erstwhile owners who had no title in respect of the land in question. Mr. Chatterjee specifically urged before this Court that the erstwhile owners had no right or authority to apply for sanction of building plan for construction of any additional storey in the premises in question as the said erstwhile owners had sold out the entire land to the flat owners together with the flats.

16. Mr. Chatterjee further submitted that there is no scope to engage any new developer for construction of any additional storey in the premises in question. Mr. Chatterjee also referred to Rule 15(a) of the Howrah Municipal Corporation Rules and submitted that the building plan already sanctioned by the Howrah Municipal Corporation is liable to be cancelled since the same was sanctioned

without appreciating the correct factual position relating to the ownership of the land in question. Mr. Chatterjee referred to and relied on the following decisions in support of his aforesaid arguments:-

- 1) 1977 CHN 889 [The Saha Institute of Nuclear Physics Co-operative Housing Society Ltd. vs. The Corporation of Calcutta and Ors.] (Paragraph 12)
- 2) 1987 (1) CHN 232 [Sukumar Ganguly vs. Howrah Municipal Corporation & Ors.]
- 3) 2000 (2) CHN 466 [Lakshmi Jaiswal vs. Sanjay Jaiswal & Ors.] (Paragraph 43)
- 4) Common Cause A Registered Society Vs. Union of India and others, (Paragraph 26)

17. Undisputedly, the Howrah Municipal Corporation authorities have already sanctioned the building plan for construction of additional storey and the same has not yet been cancelled by the competent authority or by a competent court of law.

18. All the purchasers including the respondent No. 2 herein have entered into agreement giving the Developer absolute right to raise further construction or put additional construction at the premises in question without any time limit and up to any height permissible by the Corporation. It has further been embodied in the said agreement that the decision of the Developer in this regard would be final and binding upon the purchaser and such additional structure will be sole property of the Developer who shall have the right to dispose of the same accordingly and the purchaser will not be able to raise any objection whatsoever. The agreement was executed in the year 2003. Only in the sale deed executed in favour of the respondent No. 2 in pursuance of the said agreement contained the recital in Clause 13 that the Developer or the Vendor shall have no right to raise any additional storey or storeys or put up additional structure over the top-most roof of the said building or in excess of G/3 pattern duly sanctioned by the Howrah Municipal Corporation.

19. It appears from the recital in the said deed of sale executed in favour of the respondent No. 2 that all the parties in the said deed entered into agreement for sale on 15.12.2003 with various terms and conditions. In the said deed, it has not been stated that any condition incorporated in the deed of agreement is repugnant to the interest of the purchaser. There is room for the contention that on the basis of such clause in the sale deed of the respondent No. 2, joint writ petition cannot be filed by all the respondents as the sale deed of other respondents except respondent No. 2 did not contain any recital contrary to the agreement. Moreover, if the case of the other respondents fails then the entire writ petition is bound to fail. There is also room for the contention that remedy, if any, on behalf of the respondent No. 2 against the appellants does not lie in any Writ court as the matter arises out of breach of contract which invites a civil remedy and cognizable by the Civil court. At this stage, half of the construction

at the premises in question has already been completed as per the sanctioned plan of the Corporation. Respondents allowed atleast half of the construction to be completed and conduct of the respondents does not inspire us to restrain the appellants from completing the construction. So, placing reliance on the decision in the case of Mandali Ranganna & Ors. (Supra), it can be said that rightly or wrongly construction have already come up and the same cannot be directed to be demolished atleast at this stage. Respondents have already spent huge amount and it will not be proper to stop further construction.

20. However, we also cannot altogether ignore the issues raised by the writ petitioners in the writ petition at this stage although the appellants have made out a strong arguable case on the point of maintainability of the writ petition.

21. In any event, we are not inclined to express any final opinion with regard to any issue argued before us at the present stage in view of the pendency of the writ petition before the learned Single Judge for final adjudication.

22. For the aforementioned reasons, we request the learned Single Judge to decide the writ petition as expeditiously as possible after filing of affidavits by the parties. The appellants herein will be permitted to file affidavit-in-opposition within two weeks from date if the same has not yet been filed pursuant to the earlier direction of the learned Single Judge. The writ petitioners will also be at liberty to file affidavit-in-reply in answer to the said affidavit-in-opposition within two weeks thereafter.

23. However, we are of the view that at this stage, it will be proper to permit the appellants to complete the construction as per sanctioned plan subject to ultimate decision of the writ petition.

24. We, therefore, modify the impugned interim order passed by the learned Single Judge by granting liberty to the appellants/petitioners herein to carry on construction work at the premises in question strictly according to the sanctioned building plan subject to condition that the fate of such construction will abide by the result of the writ petition.

25. The appellants are further restrained from creating any third party interest in the newly constructed additional area of the premises in question.

26. The Stay Application thus stands disposed of.

27. The aforesaid order virtually disposes of the appeal. Therefore, the appeal is also treated as on day's list and disposed of accordingly.

28. In the facts of the present case, there will be no order as to costs.

29. Let urgent Xerox certified copy of this judgment, if applied for, be given to the learned Advocates of the parties on completion of usual undertaking.

Tapan Mukherjee, J.

30. I agree.

Latter:

After pronouncement of the judgment, Mr. P. N. Chatterjee, learned Senior Counsel of the respondents/writ petitioners prays for stay of the operation of the said judgment and order. We find no reason to grant such stay.