

(2022) 06 CAL CK 0079

In the Calcutta High Court

Case No : M.A.T. No. 1226, 1300 Of 2021, I.A. No. C.A.N. 2 Of 2021

Laxmi Residency Private Limited And Another

APPELLANT

Vs

Rajesh Jain And Others

RESPONDENT

Date of Decision : 24-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 142
Kolkata Municipal Corporation Act, 1980 — Section 400
Howrah Municipal Corporation Act, 1980 — Section 177, 220
Calcutta Municipal Act, 1951 — Section 414
Bombay Municipal Corporation Act, 1888 — Section 351

Citation : (2022) 06 CAL CK 0079

Hon'ble Judges : Arijit Banerjee, J;Kausik Chanda, J

Bench : Division Bench

Advocate : Ankit Agarwala, Saket Sharma, Ravi Ranjan Kumar, Sudipa Ray, Srinath Singha Roy, Animesh Paul, Sandipan Banerjee, Ankit Sureka

Final Decision : Disposed Of

Judgement

Kausik Chanda, J

1. The age-old controversy with regard to the power of a Municipal Corporation to regularise an unauthorised construction has again surfaced in these two appeals. This time the issue crops up from an order of demolition passed by the learned Single Judge in respect of a construction which was allowed to be retained by the Howrah Municipal Corporation upon payment of retention fees. Interestingly, the learned Single Judge has passed the said demolition order suo motu in absence of any prayer made by the parties to these litigations.

2. The appellants in the year 2006 obtained a sanctioned plan for construction of a ground plus four-storeyed building at the premises no. 7, Hardutt Rai Chamaria Road, Howrah-711101 from the Howrah Municipal Corporation.

3. It appears that the appellants, thereafter, constructed the fifth floor without any sanctioned plan from the Howrah Municipal Corporation, which was

regularised by the Howrah Municipal Corporation upon acceptance of retention fees of Rs.32,30,293/- on June 17, 2015.

4. The appellants, thereafter, in the year 2016 obtained another sanctioned plan from the Howrah Municipal Corporation for the construction of two additional floors (sixth floor and seventh floor) at the said premises upon payment of Rs.14,99,165/-.

5. The appellants, however, could not construct the said additional two floors due to objections raised by some residents of the said building, who purchased the flats from the appellants.

6. The respondent nos.1, 2, and 3, who are some of the flat owners of the said building, approached this Court by filing W.P.A. No. 651 of 2020 (Rajesh Jain and Others v. The Howrah Municipal Corporation and Others) seeking, inter alia, a direction upon the Howrah Municipal Corporation and the Howrah Police authorities to take immediate steps to stop any further constructions at the said premises and also to cancel the plan sanctioned in favour of the appellants in 2016 for construction of said two additional floors (sixth and seventh floor). It was also prayed that a direction should be passed upon the Howrah Municipal Corporation and Howrah Police authorities to demolish the unauthorised construction of the sixth floor by the appellants.

7. On the other hand, the appellants also filed another writ petition being W.P.A. No. 87 of 2020 (Laxmi Residency Private Limited and Another v. State of West Bengal and Others) seeking a direction upon the relevant police authorities and the Howrah Municipal Corporation to allow them to make construction on the basis of the sanctioned building plan granted by the Howrah Municipal Corporation and also for rendering necessary police protection to them for constructing the said additional two floors smoothly.

8. The said two writ petitions were analogously heard before the learned Single Judge. It was the observation of the learned Single Judge that the fifth floor ought not to have been constructed without obtaining any permission from the Corporation. Any construction made beyond the sanctioned plan remains unauthorised and the same could not be regularised even upon the payment of penalty as there was no provision in the Howrah Municipal Corporation Act, 1980 for regularisation of additional floors constructed without obtaining any sanctioned plan.

9. The learned Single Judge has, further, observed that if the fifth floor remains unauthorised, there is no scope for sanctioning the sixth and seventh floors as the same also remains unauthorised.

10. In view of the aforesaid findings, learned Single Judge by an order dated April 16, 2021, directed the Howrah Municipal Corporation to initiate appropriate proceedings for demolition of "any unauthorized construction made beyond the sanction plan." Learned Single Judge also set aside the sanctioned plan granted

in respect of the sixth and seventh floors. The Howrah Municipal Corporation was directed to initiate the proceedings at the earliest, positively within a period of twelve weeks from the date of communication of the order.

11. The appellants, thereafter, sought review of the said order dated April 16, 2021, passed by the learned Single Judge by filing a review petition (R.V.W. 69 of 2021). Learned Single Judge by her order dated July 15, 2021, held that no ground for review was made out before her and accordingly, dismissed the said review application.

12. The appellants assail the order dated April 16, 2021, by preferring the appeal M.A.T. No.1300 of 2021 (Laxmi Residency Private Limited and Another v. Rajesh Jain and Others). The appellants have also challenged the said order dated July 15, 2021, in appeal M.A.T. No.1226 of 2021.

13. These two appeals preferred against the orders dated April 16, 2021, and July 15, 2021, thus pose the question as to whether or not the unauthorised construction on the fifth floor could have been regularised by the Howrah Municipal Corporation upon acceptance of retention fees.

14. It may be seen that the languages deployed in Section 400 of the Kolkata Municipal Corporation Act, 1980 and Section 177 of the Howrah Municipal Corporation Act, 1980 in so far as they relate to the power of the Municipal Commissioner to demolish an unauthorised construction are somewhat similar and there are divergent judicial views of this Court on this issue.

15. In the case reported at AIR 1972 (Cal) 459 (FB) (Purusottam Lalji v. Ratan Lal Agarwalla) a Full Bench of this Court held that Section 414 of the Calcutta Municipal Act, 1951, vests upon the Commissioner a discretion. The discretion is, for the purpose of facilitating the scheme and the object of the Calcutta Municipal Act, 1951. That discretion must be used bona fide and not on any extraneous ground. The section also enjoins that the Commissioner should exercise discretion quasi judicially. If in an appropriate case where it is found that there has been an infraction of the rule, which cannot be relaxed or which has not been relaxed the parties show sufficient cause to the Commissioner for example that the infraction is of minor nature or has not in any way affected the sanitation or ventilation and the amenities of the building in question and other adjoining premises, then the Commissioner has the discretion not to order demolition.

16. In the judgment reported at (2012) 5 CHN 146 (Sital Chandra Bodhak v. Howrah Municipal Corporation) a Division Bench of this Court after considering a number of judgments rejected the contention that Howrah Municipal Corporation has the discretion to regularise an unauthorised construction in terms of Section 177 of the Howrah Municipal Corporation Act, 1980.

17. In the case reported at (2014) 3 HCC (Cal) 596 (Ghanashyam Das v. Kolkata Municipal Corporation) a learned Single Judge of this Court held that in the absence of statutory provision, the orders allowing retention or regularisation,

even on payment of money, be it called a fee or penalty or charges, is a nullity. In the absence of legal sanction, even acceptance of municipal taxes cannot validate such a building or a part of it, and it continues to remain illegal. It was held that neither Kolkata Municipal Corporation Act nor Howrah Municipal Corporation Act and the Rules framed thereunder permit post-facto sanction of an unauthorised construction, if orders are passed for retention even on payment of fine or penalty or fees.

18. A different view, however, was taken by another learned Single Judge of this Court in a case reported at (2019) 2 CHN (Cal) 596 (Sandhya Pal v. The Kolkata Municipal Corporation) wherein the learned Single Judge held that the interpretation of Section 400 of the 1980 Act must be made similar to the interpretation given by the Full Bench of this Court in Purusottam Lalji case to Section 414 of the 1951 Act thereby meaning that the Municipal Commissioner under the KMC Act, 1980 and authorities thereunder have the discretion to, in lieu of demolition, order rectification and/or changes.

19. We may also notice another judgment reported at (2017) 4 CHN 754 (Tanmoy Moshat v. The State of West Bengal) wherein a learned Single Judge of this Court held that by no stretch of imagination one can hold that the conjoint reading of the provisions contained under Section 177 and Section 220 of the Howrah Municipal Corporation Act, 1980, gives the Commissioner an unfettered power to pass an order for regularisation or retention of the illegal and unauthorised construction nor does it confer any power on the corporation or its authority to impose any charges or fees for such retention and/or regularisation of the illegal construction.

20. In the case reported at (2006) 8 SCC 590 (Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad) under the Bombay Municipal Corporation Act, 1888, it was held that the power under Section 351 which deals with show-cause notice for demolition of unauthorised structures, the Municipal Commissioner has the discretion to order or not to order demolition of the alleged unauthorised structure.

21. It has been held in the judgment reported at (2001) 4 SCC 215 (V.M. Kurian v. State of Kerala) that minor deviations from the Rules which are mandatory in nature, may be permissible in the case of one or two-storeyed buildings, but no deviation can be permitted in case of high-rise buildings as public safety and convenience would be jeopardized.

22. The maze of conflicting judicial decisions as noted above has been sought to be enlightened by the legislature by way of introduction of amendments in the Kolkata Municipal Corporation Act, 1980 as well as in the Howrah Municipal Corporation Act, 1980.

23. Section 400 of the Kolkata Municipal Corporation Act, 1980 has been amended by the Kolkata Municipal Corporation (Amendment) Act, 2014 with effect from January 15, 2015 by insertion of the third and the fourth provisos.

24. Said provisos to Section 400 of the Kolkata Municipal Corporation Act, 1980 read:

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

...

1[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.

Explanation.—For the purpose of this section, "minor deviation" shall be such as may be determined by regulations.]

1[Provided also that the Municipal Commissioner may, by order, delegate his powers and functions under the first proviso and the third proviso of this sub-section to the Special Officers, appointed by the Municipal Commissioner with the approval of the State Government on such terms and conditions as may be determined by the Corporation, and expenses for payment of such officers shall be borne on the Municipal Fund.]"

25. In terms of the said amendment the Kolkata Municipal Corporation introduced a regulation dated June 20, 2015 namely Kolkata Municipal Corporation (Regularization of building) Regulations, 2015, which defines 'Minor Deviation' and 'Minor Unauthorized erection or work' as follows:

"3. Definition:

...

(b) 'Minor Deviation' means deviation as will be determined by the Municipal Commissioner or any of its officer delegated by him, in consideration of the terms and conditions mentioned in clause 4 of these regulations.

(c) 'Minor Unauthorized erection or work' means

—

1) Execution of any minor work without sanction;

2) Minor erection or work in contravention of any sanctioned plan in consideration of the terms and conditions mentioned in regulation 4 of these regulations.

(2) The words and expression used in these regulations but not define shall have the same meaning respectively assigned to them in the Act, Rules & Regulations

made thereunder,”

26. The other relevant provisions of the said notification are as follows:

“4. Terms and condition for regularization:

Any unauthorized erection or work may be regularized by the Municipal Commissioner or any of its officer delegated by him, provided that the erection or work is determined by the Municipal Commissioner or any of its officer delegated by him as ‘minor’ as per regulation 3(1)(b) and 3(1)(c) of this regulation keeping regard to the following things:

- a) Objections raised by any local inhabitants of the construction in question.
- b) Road width and communication facilities.
- c) Drainage system of the surrounding locality.
- d) Other civic infrastructures.
- e) Clearance from Fire and Emergency Services Department and Pollution Control Board, if required.
- f) Reasons beyond the control of the person responsible,
- g) Social interest,
- h) Facilities of ingress and egress,
- i) Infrastructural supports at site,
- j) Structural safety,
- k) Fire safety, if required,
- l) Environmental aspects,
- m) Local complaints,
- n) National loss in case of demolition,
- o) Availability of other statutory clearances as will be required etc. with due regards to the spirit of law, any court order, as well as provisions of Kolkata Municipal Corporation Act, 1980 as amended up to date.

Explanation:

‘local inhabitants’ means the next door neighbor, or inhabitant of same locality, mohalla or otherwise connected to site of the construction,

“Person Responsible” – means any person responsible for the unauthorized construction in question or any of his power of attorney holders or representatives.

5. Payment of fees for regularization: Before calculation of fees, order issued by

the officer delegated by the Municipal Commissioner, shall be placed before Mayor/Mayor-in-Council for necessary concurrence/approval. Thereafter, the Municipal Commissioner may by order charge fees as will be calculated on the basis of rates/fees provided and prescribed under the relevant heads in the Budget Schedule under Section 131 (3) of the Kolkata Municipal Corporation Act 1980,

6. Review of the order: If the Municipal Commissioner so thinks that the process of hearing was not followed properly, he may pass further orders after review/recall the earlier order.”

27. Undoubtedly, the 2015 Regulation does not define ‘Minor Deviation’ or ‘Minor Unauthorized erection or work’ in a clear and unambiguous manner. The Regulation does not provide for any objective criteria to determine whether there has been a ‘Minor Deviation’ from the sanctioned plan or whether the construction in question can be termed as ‘Minor Unauthorized erection or work’. In fact, some of the factors to be considered in terms of Clause 4 of the said 2015 Regulation are too vague to relate to a ‘minor deviation’ or ‘Minor Unauthorized erection or work’. The said Regulation leaves enough space for arbitrary and uncanalised exercise of power by the Kolkata Municipal Commissioner or his delegate in dealing with the regularisation of a ‘Minor Deviation’ or ‘Minor Unauthorized erection or work’. Since in the present case we are dealing with Howrah Municipal Corporation Act, 1980, we refrain from making any further comments or observations on the said regulation of 2015.

28. As noted earlier, Section 177 of the Howrah Municipal Corporation Act, 1980 has also been amended by Howrah Municipal Corporation (Amendment) Act, 2017, with effect from September 15, 2017, in the following manner:

“5. In sub-section (1) of section 177 of the principal Act,—

(1) after the second proviso, the following proviso shall be added:—

“Provided also that the Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulations, regularize the minor unauthorized erection, or execution of any minor work without sanction under this Act, or minor deviation from the sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan under this Act or the rules or the regulations made thereunder, as the case may be:

Provided also that the Commissioner may, by order, delegate his powers and functions under the first and the second proviso of this sub-section to the Special Officers, appointed by the Commissioner with the approval of the State Government on such terms and conditions as may be determined by the Corporation, and the expenses for payment of such officers shall be borne on from the Municipal Fund.”;

(2) the ‘Explanation’ shall be renumbered as ‘Explanation-II’ and before the

'Explanation' so renumbered, the following 'Explanation' shall be inserted:—

"Explanation I—For the purpose of this section 'minor unauthorised erection, minor work, or minor deviation' shall be such as may be determined by regulations."

29. The aforesaid amendments have carved out an exception that the authorities of Howrah Municipal Corporation are vested with the discretion to regularise minor deviation or minor unauthorised construction upon acceptance of fees and on imposing terms and conditions; a fortiori, the Corporation has no discretion to regularise an unauthorised major construction.

30. Learned advocate appearing for the Howrah Municipal Corporation submitted before us that like Kolkata Municipal Corporation (Regularization of building) Regulations, 2015, no regulation has been framed yet to define 'Minor unauthorized erection, minor work, or minor deviation' in terms of the said amended provision of Section 177 of the Howrah Municipal Corporation Act, 1980.

31. The ordinary rule of interpretation is that the words used by the legislature shall be given the meaning as contained in the interpretation clause and in the absence thereof they should be understood in the same way in which they are understood in ordinary parlance maybe by having recourse to dictionaries.

32. As per Concise Oxford English Dictionary (Eleventh Edition), the word 'minor' means "having little importance, seriousness, or significance." In absence of any legal definition, the said meaning can be ascribed to understand the words "the minor unauthorized erection, or execution of any minor work without sanction, or minor deviation from the sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan".

33. In the present case the appellants have constructed the entire fifth floor measuring about 8300 sq. ft. without any sanctioned plan. The relevant Municipal Commissioner could not have regularised or granted post-facto approval to such construction upon acceptance of penalty or fees on June 17, 2015, since the amendment became operative on and from September 15, 2017. Even if, for argument's sake it is presumed that the said amendment is clarificatory in nature and therefore, it has a retrospective operation, by no stretch of imagination, such a huge construction can be termed as a "minor deviation or minor unauthorized construction," which could be regularised by the Corporation taking recourse to the amended provision. Therefore, the learned Single Judge was right in holding that the construction made on the fifth floor could not be regularised.

34. The Supreme Court in the judgment reported at (2009) 15 SCC 705 (Shanti Sports Club v. Union of India) sounded a word of caution in the following sentences:

"Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who

have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions.”

35. In the case reported at (2010) 2 SCC 27 (Priyanka Estates International Private Limited v. State of Assam) it was held that if the construction is in absolute violation of a sanctioned plan or approved plan, the necessary consequence is demolition and the Courts should not approve such illegality. It has, further, been held as follows:

“57. The jurisdiction and power of courts to indemnify a citizen for injuries suffered due to such unauthorised or illegal construction having been erected by builder/coloniser is required to be compensated by them. An ordinary citizen or a common man is hardly equipped to match the might and power of the builders.

58. In the case in hand, it is noted that a number of occupiers were put in possession of the respective flats by the builder/developer constructed unauthorisedly in violation of the laws. Thus, looking to the matter from all angles it cannot be disputed that ultimately the flat owners are going to be the greater sufferers rather than the builder who has already pocketed the price of the flat.

59. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the reliefs of granting compensation to the victims in exercise of the powers conferred on it. In doing so, the courts are required to take into account not only the interest of the petitioners and the respondents but also the interest of public as a whole with a view that public bodies or officials or builders do not act unlawfully and do perform their duties properly.

60. In the case in hand, admittedly, at no point of time was Appellant 1, Priyanka Estates International (P) Ltd. able to show to its prospective purchasers the occupancy certificate or completion certificate issued by the authorities concerned. The same could not even be shown to us and without it, Appellant 1 could not have embarked into sale of flats as it was mandatorily required.

61. The instant case is not a case of breach of contract. It is a clear case of breach of the obligation undertaken to erect the building in accordance with building regulations and failure to truthfully inform the warranty of title and other allied circumstances.

62. Even though at the first instance, we thought of invoking this Court's jurisdiction conferred under Article 142 of the Constitution of India so as to do complete justice between the parties and to direct awarding of reasonable/ suitable compensation/ interest to the flat owners, whose flats are ultimately going to be demolished, but, with a heavy heart, we have restrained ourselves from doing so, for variety of reasons and on account of various disputed questions that may be posed in the matter. However, we grant liberty to those, whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law.

63. We also feel it necessary and expedient to direct the respondent authorities that if ultimately, the flat owners, whose flats are going to be demolished shall be given at least three months' time to vacate the same. This would enable them to mitigate the losses that may be incurred by them. We accordingly direct so."

36. In the judgment reported at (2013) 5 SCC 336 (Dipak Kumar Mukherjee v. Kolkata Municipal Corporation) the Supreme Court directed the illegal construction which was raised in violation of the stop-work order by the Kolkata Municipality to be pulled down and directed the concerned promoter to pay the price of the flats to the purchasers with interest @ 18 % per annum.

37. In the facts of the present case, we do not feel that an order of demolition would sub-serve the ends of justice. Unlike the facts involved in the Priyanka Estates International Private Limited and Dipak Kumar Mukherjee cases, the whole dispute, in this case, before the learned Single Judge did not relate to the construction on the fifth floor. It was no one's case before the learned Single Judge that the construction on the fifth floor should be demolished. The demolition order was passed by the learned Single Judge suo motu. The dispute was related to the sanctioned plan and the construction work sought to be carried out by the appellants on the sixth and seventh floors.

38. All the flat owners of the fifth-floor flats are not parties to the proceedings before us. If the demolition order passed by the learned Single Judge is implemented, they will be seriously prejudiced without any notice. If we pass an order of demolition with regard to the fifth-floor construction and direct the appellants to compensate the said flat owners, practically speaking, it would be extremely difficult for them to realise the compensation amount after experiencing the demolition proceeding of their residential house. They may be reluctant to again take recourse to the protracted litigations to realise the compensation from the appellants who have already pocketed the sale proceeds. At the same time, we need to ensure that the appellants, who acted with impunity in violating the relevant building Rules are not allowed to go scot-free.

39. In the facts and circumstances, we disposed of the appeal being M.A.T. No.1300 of 2021 along with I.A. No. C.A.N. 2 of 2021, and M.A.T. No.1226 of 2021 with the following directions.

a. The order under appeal is set aside.

b. The sanctioned plan with regard to the sixth and seventh floors of the premises in question is quashed. The construction raised, if any, on the sixth floor should be demolished within a period of one month from date.

c. The appellants shall pay punitive cost of Rs.25,00,000/- (twenty-five lakh) within a period of one month from date which is to be deposited before the State Legal Services Authority, West Bengal who will utilise the said amount for Mediation purposes.

d. The West Bengal Real Estate Regulatory Authority (RERA) shall not register any real estate project of the appellants for a period of two years from the date of this order. The appellants will also within two weeks from the date of this order furnish an undertaking before the West Bengal Real Estate Regulatory Authority (RERA) that they will not undertake any project either in their own names or in any other name within two years from the date of this order. The West Bengal Real Estate Regulatory Authority (RERA) will be at liberty to take appropriate steps against the appellants in accordance with law in the event of any breach of such undertaking.

e. This order shall be communicated to the State Legal Services Authority, West Bengal and the West Bengal Real Estate Regulatory Authority by the Registrar General of this Court or the Registrar who is presently discharging the functions of the Registrar General. If the cost is not paid within the time period mentioned in this order, the State Legal Services Authority, West Bengal, will be at liberty to bring it to the notice of this Court.

40. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.