

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :
The Hon'ble Justice Sengupta
And
The Hon'ble Justice Asim Kumar Ray
22.03.2011

APO 95 of 2011
GA 580 of 2011
WP 34 of 2011
Tapan Bhattacharya & Ors.
Vs.

Kolkata Municipal Corporation & Ors.

The Court :- We have heard Mr. Pal, Mr. Dutta and Mr. Banerjee appearing for the respective parties. We have gone through the impugned judgment and order of the learned Trial Judge. The point has been taken by Mr. Dutta that the appeal itself is not maintainable since the writ petition was a defective as the person aggrieved did not approach the learned Trial Judge in a writ jurisdiction.

We are of the view this point could have been taken before the learned Trial Judge although it is submitted this point was taken but the learned Trial Judge has not dealt with this aspect of the matter. Prima facie we are unable to accept the contention since no where it is recorded by the learned Trial Judge that the maintainability of the writ petition on the question of locus had been taken. As such for the time being we overrule this objection.

It appears to us, prima facie of course, the learned Trial Judge perhaps was not called upon to decide the merit of the matter and for that matter the learned Trial Judge ought not to have undertaken the enquiry as to the misrepresentation as mentioned

in Section 397 of the Kolkata Municipal Corporation Act in obtaining sanction to the building plan. We are of the prima facie view that it is the function of the Municipal Commissioner after sanction is accorded to look into the complaint as to whether any material misrepresentation or any fraudulent statement has been made while obtaining sanction to the building plan in supplying information under Sections 393, 394 and 395 of the said Act.

We, therefore, quote Section 397 of the said Act appropriately

"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."

On plain reading of the said section it appears to us that it is the subjective satisfaction of the Commissioner and/or any other official delegated to him to come to a conclusion that there has been a material misrepresentation or any fraudulent statement.

At the first instance no Court of law can take up the task itself to decide this issue. It can be examined by the Writ Court or any other Court after decision is taken, not otherwise.

While going through the judgment we find that the learned Trial Judge has really relegated himself to the position of the Commissioner. The Writ Court at the first instance first allow the statutory body to function and the same cannot be usurped at the first instance.

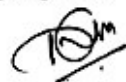
According to us prima facie this task should have been left with the Commissioner in terms of Section 397 of the said Act for decision on the issue at the first instance.

We are, therefore, of the view that judgment and order of the learned Trial Judge is required to be scrutinised. Accordingly, there will be stay of operation and further operation of the order of the learned Trial Judge.

Mr. Dutta wants to file affidavit in opposition. Affidavit in opposition is to be filed within a fortnight from date, reply fortnight thereafter and matter to appear six weeks hence.

In the meantime we direct the Director General (Building) to enquire into the complaint annexed to the writ petition and in the process shall invite the parties, give hearing and pass a speaking order upon considering all the aspects of the matter and the decision shall not be supplied nor divulged to any one else, it shall be placed before the Court in a sealed cover. This shall be done within a period of fortnight from the date of communication of this order.

This order is passed without prejudice to the rights and contentions of all the parties. It appears that the learned Trial Judge has recorded in the impugned judgment



that there has been deviation in construction. We are, therefore, of the view that so far as the sanction of the building plan is concerned it is for the interest of all the parties that no construction should be undertaken.

However, we make it clear in the event the appeal fails and the order so might be passed by the Commissioner in terms of this order supports the view of the learned Trial Judge naturally the loss which might be suffered due to delay of this matter shall be amply compensated by the appellant.

We direct the Director General (Building) that while deciding the issue must not be influenced and/or swayed by decision and/or observation of the learned Trial Judge since the operation of the same is stayed and he will come to his own and independent finding in accordance with law.

The Corporation is directed to produce the records relating to this matter as it is recorded that there has been deviation in construction of the building in past and whether the same has been regularised by the Kolkata Municipal Corporation upon payment of fine.

All parties shall act on a xerox signed copy of this order on usual undertakings.

30.3.11

Sd/- Kalyan Pyoti Sengupta
 Sd/- Asim Kumar Ray

ANC.

T. D. Sankar
 30/3/2011
 Assistant Registrar,
 High Court, O. S. Calcutta