

APO No. 123 OF 2011  
WITH  
WP 403 of 2010  
IN THE HIGH COURT AT CALCUTTA  
Civil Appellate Jurisdiction  
ORIGINAL SIDE

BIDYUT ADDYA & ORS.

Versus

SRI SUKUMAR DEY & ORS.

BEFORE:

The Hon'ble JUSTICE KALYAN JYOTI SENGUPTA

The Hon'ble JUSTICE ASIM KUMAR RAY

Judgment on: 19.5.2011.

**K. J. Sengupta, J.:-**

The appeal is directed against an order dated 7.4.2010 passed in the above writ petition. By the said order the Learned Trial Judge was pleased to admit hearing of the above writ petition and gave direction for filing affidavits. While asking to file affidavit the learned Trial Judge passed an interim order to the effect that during pendency of the matter before the Supreme Court, the private respondent should not start nor continue any construction, if any already started. Above interim order was passed in the context of the factual aspect that the disputes between the writ petitioner and the present appellant was pending before the Hon'ble Supreme Court. By above writ petition the respondent Sukumar Dey and Ors. challenged legality and validity of the Building plan being

BP 2009070104 dated 11.9.09 granted in relation to the plot no. 46 comprising dag nos. 690 and 691 pertaining to mouza Kasba RS Khatian No. 1127 within Tollygunge Police Station (hereinafter referred to as the said property) and consequential relief for cancellation of the said plan was prayed for. The above writ petition was filed on 23.3.2010.

In view of the aforesaid restraint order the appellant did not undertake any construction until the time hereinafter mentioned. It appears that the writ petitioner/respondent filed an SLP in the year 2004 wherein legality and validity of conditional order setting aside of sale of the property held by Court passed on 8<sup>th</sup> June, 2004 was challenged. On 10<sup>th</sup> December, 2004 the Hon'ble Supreme Court passed interim order of stay and it continued until the time hereinafter mentioned. Thereafter, it appears that appellant before us applied to the Kolkata Municipal Corporation to obtain sanction to the building plan as referred to above. The respondent herein had filed an application before the Commissioner, Kolkata Municipal Corporation under Section 397 for cancellation of the same. The Special Officer (Building) concerned duly gave hearing to the said application made by the respondent herein and after hearing came to the conclusion that there was no reason to withdraw the sanction to the building plan. It was also held by him that there is no suppression nor misrepresentation of fact in obtaining the building plan in question. However, the Special Officer, (Building) vide his order dated 22.3.2010 made it clear that construction of the building could not be allowed to commence unless the leave of the Hon'ble Supreme Court is obtained.

It is appropriate to mention that the said writ petition was filed by the respondent herein on 23.3.2010 without referring to or mentioning the hearing of the Special Officer, or passing order in question. Subsequently the same was brought to the records. Fact remains that the said order of the Special Officer, (Building) has not been challenged either in the above writ petition or by filing a subsequent one. In view of the observation made by the Special Officer, (Building) the appellant before us thereafter approached the Hon'ble Supreme Court to intervene in the matter by making application in IA 5-6/2010. The Hon'ble Supreme Court after hearing passed an order clarifying that interim order of stay that has been granted by the Hon'ble Apex Court in regard to the judgment of the High Court will not come in the way of the of the Municipal Corporation considering request by the applicants in regard to property no. 44(Dag no.690-691), if they are of the view that the property has nothing to do with the property which is claimed by the petitioner, they may pass appropriate orders. It was further clarified that pendency of this matter will not come in the way of such orders being made in regard to the property claimed by the applicants. By the said order the Hon'ble Apex Court gave liberty to the respondents herein to file their objection if any, before Municipal Authority.

It appears that subsequently Director General of Building pursuant to the said order passed an order of course without receiving any objection on merit from the writ petitioner/respondent that in view of the Supreme Court order there is no bar to make further construction.

In the meantime, after the Supreme Court order was passed the writ petitioner/respondent had filed an application for contempt alleging violation of the aforesaid order and Rule was issued to draw up contempt proceedings and with the issuance of Rule appropriate restraint order was passed. The said order in contempt jurisdiction was challenged by filing a separate appeal, which has been heard along with this matter and the same has been disposed of by delivering judgment as on 1.4.2011.

Mr. Pal, Learned Senior Advocate appearing with Mr. Debal Banerjee, Senior Advocate submitted that impugned order passed by the Hon'ble Trial Judge in view of subsequent development, has now become infructuous as Hon'ble Supreme Court by the aforesaid order has already held that the property held by his client has nothing to do with the property being the subject matter of the Special Leave Petition. Moreover, this aspect has been examined by the Special Officer (Building) in his order which still remained unchallenged. Pursuant to the order of the Hon'ble Supreme Court the Director General (Building) has already allowed to make construction.

Mr. Pal then contends that in view of the subsequent development the impugned order of the Learned Trial Judge has now become infructuous and, in fact, the same runs counter to the judgement of the Hon'ble Supreme Court as well as the order passed by the Director General (Building) pursuant to the direction of the Supreme Court.

Moreover, he submits that the relief claimed in the writ petition cannot be granted, in any circumstances, at the first instance, by the Writ Court for power to rescind or cancel or withdraw any building plan has been primarily vested with the Commission under the statute, who has power to delegate it to some other officials. Besides, this issue has already been decided by the Director General (Building) just one or two days before filing of the writ petition. The Director General (Building) held that there was no reason to cancel or withdraw the building plan already sanctioned. The said order of the Director General (Building) is not challenged in the present writ petition. Even no steps have been taken to bring the subsequent event before the Learned Trial Judge by way of amendment of the writ petition.

He, therefore, contends that even if the direction of the Hon'ble Supreme Court and the order subsequently passed by the Director General (Building) permitting the construction of the building are not take into consideration, still examining the prima facie case the Learned Trial Judge ought not to have passed any interim order.

Mr. Surojit Nath Mitra, learned Senior Advocate appearing for the respondent, Mr. Sukumar Dey, submits that the appellant has not acquired any ownership of the property to construct any building or for that matter to apply for sanction of the building plan. Accordingly, this dispute is pending for adjudication of the Supreme Court of India in the SLP (Civil) No. 25797 of 2004. The Hon'ble Supreme Court has granted stay of operation of the impugned order of Division Bench dated 8<sup>th</sup> June, 2004 allowing to deposit requisite amount for

setting aside auction sale under Order 21 Rule 29 of the Code of Civil Procedure. Since the order of the Supreme Court was not obeyed by the appellant the writ petitioner had to file subsequent writ petition asking for the aforesaid relief. He argued that the writ petition is pending for hearing and this appeal is against the interim order dated 7.4.2010. When the Learned Trial Judge, in exercise of his discretion, has passed an order the Appeal Court should not disturb the same substituting its own discretion.

He would then agree that the order of the Hon'ble Supreme Court has to be read in the proper perspective as the matter has not been decided finally.

The learned Counsel, for the Corporation, has brought the records to show us that in terms of the direction of the Supreme Court obtained by the appellants herein, on their applications for addition of party, Director General (Building) has considered the matter and allowed construction of the building. It is also shown to us that Director General (Building) had earlier taken a decision on the basis of complaint being made by the respondents that there was no ground or reason to withdraw the sanction.

We have heard the learned Counsels for the parties and considered the records. It appears to us that the Learned Trial Judge passed the order dated 7.4.2010, in our view, without addressing to relevant fact mentioned in the writ petition but concerning that the dispute with regard to the title of the properties is pending before the Hon'ble Supreme Court.

It also appears to us, prima facie, that the Learned Trial Judge did not take into consideration the fact that the Director General(Building), immediately

before filing of the writ petition, has already decided the issue which has been canvassed in the writ petition. The Learned Trial Judge did not, prima facie, take note of the fact that the decision of the Special Officer (Building) under the statute with regard to cancelling and/or rescinding the sanction of the building plan still remain unchallenged.

We are of the, prima facie, view given on the aforesaid fact that the Learned Trial Judge ought not to have passed the impugned order as we think overruling contention of Mr. Mitra, learned Judge did not consider prima facie case made out in the writ petition, hence exercise of discretion is so to stay capricious, and based on unconnected fact and issue. Moreover, if we look at the impugned order on its face value the Court cannot pass any order keeping in view pendency of any proceeding before the Hon'ble Supreme Court in the subsequent writ petition. It would have been open for the litigants concerned to approach the same Court where the matter is pending.

We are of the, prima facie, view that the relief claimed in the writ petition, as appropriately argued by Mr. Pal, cannot be granted, at the first instance, by the Writ Court, for if it is entertained and granted that amounts to usurpation of the power of the statutory authority. Under the statute, at the first instance, statutory authority has to exercise such power and if any decision is taken upon exercise of such power under the statute, the same could be challenged thereafter in this Court within the jurisdiction of Article 226 of the Constitution of India, that is to say, within the parameter of power of judicial review. In the instant case, it appears that the Writ Court is sought to be called upon to

discharge the function of the Commissioner under the Calcutta Municipal Corporation Act. On that ground also, we think that the writ petition is premature and should not have been entertained. In order to appreciate our above conclusion we set out the principal prayer made in the writ petition :

“a) A writ of and/or in the nature of Mandamus do issue commanding the respondent authorities concerned, each one of them, their men, agents, servants, sub-ordinates and/or assigns to forthwith rescind/cancel and/or withdraw the purported building plan, being B.P. No. 2009070104 dated 11<sup>th</sup> day of September, 2009 granted in respect of Dag Nos. 690 and 691 pertaining to Mouza - Kasba, R.S. Khatian No. 1127, J. L. No. 16 (now 13), Police Station - Tollygunj (now Kasba), Calcutta - 700 042 without any delay whatsoever.

b) A writ of and/or in the nature of Mandamus do issue commanding the respondent authorities concerned, each one of them, their men, agents, servants, sub-ordinates and/or assigns to forthwith rescind/cancel and/or withdraw the purported mutation granted in favour of the private respondents Nos. 8 to 22 in respect of Dag Nos. 690 and 691 pertaining to Mouza - Kasba, R.S. Khatian No. 1127, J. L. No. 16 (now 13), Police Station - Tollygunj (now Kasba), Calcutta - 700 042 without any delay whatsoever.”

Moreover, admittedly the said issue has already been resolved by the Special Officer (Building), on the basis of complaint being lodged and upon hearing both the parties, relevant portion of which is reproduced hereunder :

“The complainant could not produce any evidence to prove that the plan holder had the knowledge of the stay order passed by the Hon’ble Supreme Court. Moreover, I find neither the present owner of the Premises No. 44, R. K. Chatterjee Road nor the K.M.C. are parties in the suit pending before the Hon’ble Supreme Court.



Considering the above, I do not find any reason that the Building Permit No. 2000070104 dated 11.9.09 for 41, R. K. Chatterjee Road was sanctioned on the basis of the misrepresentation and false submission made by Sri Moley Bose, Constituted Attorney and owner of the Premises No. 44, R. K. Chatterjee Road. Hence, there is no suppression of fact and misrepresentation in obtaining the Building Permit in question.

However, I find that the Constituted Attorney of this plan declared Premises No. 44, R. K. Chatterjee Road and Plot Nos. 690 and 691 are identical and as there is stay order over the same plot Nos., the plan holder should seek leave of the Hon'ble Supreme Court before commencing work of construction."

The above order was passed as it appears at page 218 of the Paper Book, on 22.3. 2010, whereas the above writ petition was affirmed on 23.3.2010. Therefore, the said order was brought to the notice of the Hon'ble Trial Judge when the aforesaid impugned order was passed on 7.4.2010.

Taking queue of the observation of the said Special Officer (Building) the appellant herein approached the Hon'ble Supreme Court and made an application thereat for addition of party as well as for clarification of the impugned order passed earlier. The Supreme Court, in the said pending Special Leave Petition (S.L.P.), on 12.11.2010, passed an order which is set out hereunder :

"According to the petitioner in the SLP, the subject matter of the SLP is property No. 46 ad 48 (Dag No. 690, 691). According to petitioner, the property with which he is concerned is Dag No. 690 and 691. The Special Officer, Buildings, Calcutta Municipal Corporation, by order dated 22.3.2010, has stated that the applicants who are claiming premises No.

44 (plot No. 690 and 691), should seek the leave of this Court before commencing the work of construction.

The question of this Court entertaining the application and examining whether the property No. 44 (Dag No. 690 and 691) claimed by the applicant overlaps or is a part of the property which is the subject matter of the SLP does not arise. All that we can say is that the interim order of stay that has been granted by this Court in regard to the judgment of the High Court will not come in the way of the Municipal Corporation considering any request by the applicants in regard to property No. 44 (Dag No. 690 and 691), if they are of the view that the said property has nothing to do with the property which is claimed by the petitioner, they may pass appropriate orders. Pendency of this matter will not come in the way of such orders being made in regard to the property claimed by the applicants.

I.A. Nos. 5-6 are disposed of accordingly. It is open to the petitioner to file his objections, if any, before the Municipal authorities."

We have checked up the original records produced before us in which the subsequent decision of Director General(Building) has been recorded. Initially, we had some confusion to understand the words of the observation of the Director General (Building). Thereafter he appeared before us personally and explained what he has written and then he has also filed an affidavit pursuant to the direction of this Court. It appears from his oral explanation and affidavit that he had found no bar to allow construction of building.

Incidentally, we note that the said decision was taken, of course, without hearing anyone else, but then in terms of the direction of the Supreme Court it was not incumbent upon him to take such decision upon hearing.

The records show that the respondents herein, in anticipation, asked the Director General (Building) to inform them before taking any decision. When we

notice that the decision has been taken and further when the respondent/writ petitioner is allowed to file his objection we think giving meaningful interpretation of the said order of the Hon'ble Supreme Court, that the respondents herein, in terms of the direction of the Supreme Court, may now file objection to the decision already taken. Of course, it will be post decisional objection. It is not impermissible in this case when the Hon'ble Supreme Court allowed the respondent to file objection without indicating time factor.

In view of the discussions above and the direction given by us herein-above, the impugned order passed by the Learned Trial Judge, going by the facts and material originally filed in record and placed at the time of hearing on subsequent development, is not sustainable and accordingly the same is set aside and quashed.

Let the operative portion of the judgment and order be made available to the learned Advocate-on-record immediately.

**( K. J. Sengupta, J.)**

I agree.

**(ASIM KUMAR RAY, J.)**