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(2005) 08 CAL CK 0056

Calcutta High Court

Case No: None

Sri Sukumar Dey	APPELLANT
Vs	
The Municipal Commissioner and Others	RESPONDENT

Date of Decision: Aug. 26, 2005

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 400(1), 48, 48(3)
- Constitution of India, 1950 - Article 226, 227, 32

Citation: (2006) 1 CALLT 299 : 110 CWN 136

Hon'ble Judges: Asit Kumar Bisi, J

Bench: Single Bench

Advocate: Ashok Banerjee and Chaitali Chatterjee, L.C. Bihani and N.C. Bihani, for the Appellant;Arindam Banerjee, for the Opposite party No. 6, for the Respondent

Final Decision: Dismissed

Judgement

Asit Kumar Bisi, J.
The instant application under Article 227 of the Constitution of India preferred by the petitioner is directed against the Judgment and order passed by the learned Chairman, Municipal Building Tribunal on 15.2.05 in B.T. Appeal No. 14 of 2001.

2. The facts leading to filing of the instant application under Article 227 of the Constitution of India may briefly be stated thus.

3. Premises No. 12 and 13, Raja Rajendra Lal Mitra Road, Kolkata 700 010 which are adjacent premises belonged to the predecessor-in-interest of both the petitioner Sukumar Dey and opposite party No. 6 Jaya Addy and by way of inheritance the petitioner became owner of premises No. 12, Raja Rejendra Lal Mitra Road and opposite party No. 6 became owner of premises No. 13, Raja Rajendra Lal Mitra Road. Both the petitioner and

opposite party No. 6 have been residing at the said respective premises. The petitioner constructed one room and one kitchen on the roof of ground floor of premises No. 12, Raja Rajendra Lal Mitra Road at the time of repairing of the house without obtaining any sanctioned plan therefore and installed two windows in the said room. Opposite party No.6 also made unauthorised construction at her premises No. 13, Raja Rajendra Lal Mitra Road. On the basis of the complaint lodged by opposite party No.6 the corporation authority posted guard at the premises of the petitioner and issued stop work notice. Thereafter the petitioner closed the said windows. As per case of the petitioner, since he closed those windows and did not make any construction thereafter, the municipal authorities being opposite party Nos. 1 to 5 withdrew such posting of guard.

4. Opposite party No. 6 filed a writ petition being W.P. No. 19249(W) of 1999 alleging unauthorised construction by the petitioner in his premises No. 12, Raja Rajendra Lal Mitra Road. It has been further alleged by present opposite party No.6 that due to such unauthorised construction her structure at premises No. 13, Raja Rajendra Lal Mitra Road has been seriously damaged. P.K. Samanta, J. by His Lordship"s order dated 6.6.2000 disposed of the said writ petition by directing the Chief Municipal Engineer (Building), Kolkata Municipal Corporation or other competent person as may be entrusted by him to look into the allegations made by the writ petitioner (present opposite party No. 6) and to dispose of the same if necessary by making an inspection in the locale in presence of the writ petitioner and respondent No. 7 (the present petitioner) and also by giving an opportunity of hearing to them expeditiously and preferably within a period of two months from the date of communication of this order.

5. Pursuant to the said order dated 6.6.2000 passed by His Lordship in W.P. No. 19249 (W) of 1999 hearing took place before the Deputy Chief Engineer (North)/Building, authorised by Chief Municipal Engineer (Building), Kolkata Municipal Corporation, on 25.7.2000 where both the parties were present. The Executive Engineer, Bor.III (Bldg.) and the Assistant Engineer concerned attended the hearing.

6. It appears that on consideration of facts and circumstances of the said case the Deputy Chief Engineer (North), Building by his order dated 20.11.2000 passed an order for demolition of the unauthorised construction with direction to carry out the said work of demolition within one month from the date of communication of the order. The operative portion of the said order passed by the Deputy Chief Engineer (North), Building runs as follows :-

Considering the facts and circumstances of this case, it is ordered that the unauthorised construction should be demolished including closing of two windows within one month from the date of communication of this order as it has encroached upon the mandatory open spaces as well as the structural condition of the said building failing which CMC will be at liberty to demolish the same at the risk and cost of the person responsible i.e. private respondent. The matter is thus disposed of.

7. Being aggrieved by the said order the present petitioner preferred W.P. No. 22229 (W) of 2000 and Pinaki Chandra Ghose, J. by His Lordship''s order dated 25.4.2001 in W.P. No. 22229 (W) of 2000 directed the petitioner to file an appeal before the Tribunal in accordance with the Kolkata Municipal Corporation Act within a fortnight from date whereupon in terms of the said direction the present petitioner as appellant preferred B.T. Appeal No. 14 of 2001 before the Chairman, Municipal Building Tribunal, Kolkata Municipal Corporation.

8. By the impugned Judgment and order dated 15.2.2005 the learned Chairman, Municipal Building Tribunal dismissed the said appeal.

9. Being aggrieved by the Judgment and order of dismissal of the appeal passed by the Chairman, Municipal Building Tribunal in B.T. Appeal No. 14 of 2001 the present petitioner has preferred the instant application under Article 227 of the Constitution of India alleging inter alia that the Chairman, Municipal Building Tribunal acted illegally and without jurisdiction in passing the impugned order, that the Chairman of the Tribunal should have allowed the said appeal directing the petitioner to retain the unauthorised construction, if any, on the roof of the first floor in premises No. 12, Raja Rajendra Lal Mitra Road on imposition of penalty upon the petitioner, that the learned Tribunal failed to consider that the impugned construction is minor in nature and nobody was going to be affected and that the learned Tribunal erred in not holding that the impugned construction has been made by the petitioner for the purpose of giving accommodation to the members of the petitioner''s family.

10. Mr. Ashok Banerjee, the learned Counsel appearing for the petitioner, has contended that only the Municipal Commissioner is empowered by Section 400(1) of the Kolkata Municipal Corporation Act (in short the Act) to pass an order of demolition of any unauthorised construction and as per Section 48 of the Act the Municipal Commissioner can delegate his power to any other officer or employee of the Corporation. It has been urged by Mr. Banerjee that since no such delegation of power is reflected in any order of the Municipal Commissioner, it can be presumed that no such delegation was there and therefore the Deputy Chief Engineer (North), Building, Kolkata Municipal Corporation cannot pass the order of demolition. It has been further contended by him that such jurisdiction can only be vested by the statute and it cannot be created by any Court of law either by consent or by dissent. As argued by him, the order dated 6.6.2000 in W.P. No. 19249 (W) of 1999 directing the Chief Municipal Engineer or any other competent person as may be entrusted by him to look into the allegations made by the petitioner has got no binding effect since such order itself is nullity. He has cited State of Madhya Pradesh v. Babu Lal and Ors. AIR 1977 S C 1718 in support of his contention.

11. Mr. Banerjee has pointed out in the course of his argument that Pinaki Chandra Ghose, J. by His Lordship''s order dated 25.4.2001 passed in W.P. No.22229 (W) of 2000 directed the petitioner to file an appeal before the Tribunal in accordance with the Act. He has contended that by the said order dated 25.4.2001 His Lordship only granted leave to

the petitioner to file the appeal before the Tribunal without going into the merits of the case and though the point of jurisdiction has been raised His Lordship is of the view that the Deputy Chief Engineer is a competent person being a technical person to decide the matter after causing inspection. As urged by Mr. Banerjee, the petitioner raised the point of jurisdiction before the learned Tribunal but the learned Tribunal did not adjudicate upon the question of jurisdiction in view of the aforementioned order dated 25.4.2001 passed in W.P. No.22229 (W) of 2000. It has been further argued by Mr. Banerjee on behalf of the petitioner that at no point of time there was any proper adjudication on the question whether the Municipal Commissioner has since delegated his power following the procedure as envisaged in the statute. The grievance raised by Mr. Banerjee on behalf of the petitioner is that petitioner repeatedly agitated the question of jurisdiction but at no point of time his case has been properly considered and so the question of res judicata cannot at all stand in the way of the petitioner. He has cited Hoshnak, Singh v. Union of India and Ors. (979) 3 SCR 399, it has been held that if a petition under Article 226 is dismissed not on merits but because an alternative remedy was available to the petitioner or that the petition was dismissed in limine without a speaking order, such dismissal is not a bar to the subsequent petition under Article 32 and it must follow as a necessary corollary that a subsequent petition under Article 226 would not be barred by the principles analogous to res judicata. Relying on the aforesaid ruling Mr. Banerjee has submitted that since by the said order dated 25.4.2001 the petitioner was directed to file the statutory appeal before the Tribunal in accordance with the Act, the finding relating to jurisdiction cannot have any binding effect on the Tribunal.

12. Mr. Banerjee has further urged that if the Corporation proceeded on the basis of the statute regarding demolition of the unauthorised structure, that procedure must be followed strictly as per the provisions of law and when the petitioner specifically denies that he has made any such construction on the common wall, the matter should be properly investigated and the report ought to have been submitted by the Corporation to prove their bona fide. He has also contended that at no point of time any inspection has been made at the premises of the petitioner to ascertain the real state of affairs and the petitioner''s case has never been adjudicated upon in proper manner on the basis of the relevant materials.

13. In the above circumstances as stated by him Mr. Banerjee on behalf of the petitioner has prayed for setting aside the order of demolition of the structure and prays for appointment of any Chartered Engineer to inspect the premises in question in presence of a both parties and for remanding the matter to the appropriate authority. He has further prayed for retention of the portion of the construction made by the petitioner on payment of penalty.

14. Mr. L.C. Bihani, learned Counsel appearing for the opposite party Kolkata Municipal Corporation, has opposed the above noted contentions raised by Mr. Banerjee in support of the petitioner. He has drawn my attention to Section 48(3)(b) of the Act and contended that in view of the provision contained therein the Municipal Commissioner can by order

delegate, subject to such conditions as may be specified in the order, any of his powers or functions including the powers or functions to pass an order of demolition under Sub-section (1) of Section 400 to any other officer or employee of the Corporation. He has pointed out that the question of jurisdiction has already been set at rest by the aforementioned orders passed in W.P. No. 19249 (W) of 1999 and W.P. No.22229 (W) of 2000 respectively and in view of the said orders and also in view of Section 48(3)(b) of the Act as pointed out above the petitioner is precluded from raising the question of jurisdiction.

15. Mr. Bihani, on behalf of the Corporation, has emphasised the factum of unauthorised construction made by the petitioner and contended that since such unauthorised construction is admitted by the petitioner himself, the order of demolition of the unauthorised structure passed by the Deputy Chief Engineer (North), Bldg which has been affirmed on appeal by the Tribunal cannot be interfered with by this Court in revision.

16. Mr. Arindam Banerjee appearing for opposite party No. 6 has vehemently opposed the contentions raised by Mr. Banerjee on behalf of the petitioner and fully supported the contentions raised by Mr. Bihani on behalf of the opposite party Corporation. He has further urged that when both the trial forum and the appellate forum have come to the specific finding of fact with regard to the unauthorised construction, such concurrent findings of fact cannot be interfered with by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India. He has further argued that an error of fact, even if there be any, can be corrected only by a Superior Court in exercise of its statutory power as a Court of appeal and this Court cannot in exercise of its jurisdiction under Article 227 convert itself into a Court of appeal when the legislature has not conferred such right of appeal. He has cited AIR 1975 1297 (SC) and Mrs Labhkuwar Bhagwani Shaha and Others Vs. Janardhan Mahadeo Kalan and Another, in support of his contention. As contended by him, when admittedly the construction is an unauthorised one, the Municipal authority has no power to regularise the same and the only course left open is to demolish the unauthorised construction. He has cited Mahendra Baburao Mahadik and Others Vs. Subhash Krishna Kanitkar and Others, in support of such contention.

17. I have given my anxious consideration to the rival contentions raised by Mr. Banerjee on behalf of the petitioner, Mr. Bihani on behalf of the opposite party Kolkata Municipal Corporation and Mr. Arindam Banerjee on behalf of private opposite party No. 6 respectively. Indisputably the construction in question is an unauthorised one and the same has been made by the petitioner without obtaining any permission from the municipal authority. From the order dated 20.11.2000 passed by the Deputy Chief Engineer (North)/Bldg. in respect of premises No. 12, Raja Rajendra Lal Mitra Road it transpires that the unauthorised construction comprising two rooms along with the stair-case has since been made in the front portion on first floor of premises No. 12. Raja Rajendra Lal Mitra Road and the roof slab of the said construction rests on the 125 mm thick brick wall supported on the common wall of premises No. 12 and 13, Raja Rajendra

Lal Mitra Road and two windows have also been fixed on the said common wall. The Deputy Chief Engineer (North)/Bldg. has come to the finding that the said unauthorised construction infringes several Building Rules including encroachment on mandatory open spaces and the structural ability of unauthorised construction is very much doubtful. Considering all these aspects, the Deputy Chief Engineer concerned passed an order of demolition of the said unauthorised construction.

18. It is quite evident from the impugned order passed by the learned Chairman, Municipal Building Tribunal, Kolkata Municipal Corporation on 15.2.2005 in B.T. Appeal No. 14 of 2001 that the petitioner failed to produce any scrap of paper showing his authority to make such construction and furthermore, due to such unauthorised construction the structure of the present opposite party No. 6 has been seriously damaged since a portion of the said construction is found to have rested on the common wall of the petitioner and opposite party No. 6. As rightly pointed out by Mr. Bihani on behalf of the Kolkata Municipal Corporation in course of his argument, there is no certificate showing structural stability of the construction. While dismissing the appeal, the learned Chairman, Municipal Building Tribunal has made the following observation: -

"Apart from the admitted part of unauthorised construction, no certificate from any competent Authority/Engineer filed by the conplainant towards the structural of the impugned construction. Besides, C.M.C. guards were withdrawn upon a specific undertaking by the P.R. to stop further construction. Summing up everything, we are to say that the Tribunal can always exercise his jurisdiction by way of retaining the same when no one suffers by the said construction or there was no obstruction towards the enjoyment of air and light of the neighbouring dwellers, and there should be the structural stability to show that it may not collapse at any point of time. In this regard, we find that roof slab of the said construction rests on the 125 mm. thick brick wall supported on the common wall which has no structural stability and is obviously not safe either on the part of the appellant or to the neighbouring dwellers. Besides, it caused damages to the property of others. Resulting which we are constrained to say that the prayer for retention thus cannot be dealt with liberally at the cost of suffering of the others."

19. So far as the question of jurisdiction of the Deputy Chief Engineer (North)/Bldg. to pass an order of demolition is concerned I share the view of Mr. Bihani on behalf of the Kolkata Municipal Corporation that in view of the aforementioned orders passed in W.P. No. 19249 (W) of 1999 and W.P. No.22229 (W) of 2000 respectively and also in view of Section 48(3)(b) of the Act empowering the Municipal Commissioner to delegate his power under Sub-section (1) of Section 400 of the Act to any other officer or any employee of the Corporation the question of jurisdiction is no longer res Integra and it has been conclusively set at rest and this Court being a Court of co-ordinate jurisdiction cannot adjudicate upon this aspect of Jurisdiction once again.

20. It is settled law that when the construction is found to be an unauthorised one, the proper course available is to demolish the unauthorised construction. Reference can be

made in this context to Mahendra Baburoa Mahadik (supra) as pertinently cited by Mr. Arindam Banerjee the learned Advocate for opposite party No.6. There is no provision in the Act empowering the municipal authority to regularise such unauthorised construction which has been made in gross violation of the statutory provisions.

21. From all that has been stated above I find that the findings of fact arrived at by the Deputy Chief Engineer (North), Building in his order dated 20.11.2000 and affirmed on appeal by the learned Chairman, Municipal Building Tribunal on 15.2.2005 in B.T. Appeal No. 14 of 2001 cannot be interfered with by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. It is well settled by a catena of decisions that the power of superintendence conferred by Article 227 is to be exercised most sparingly and the said power can be exercised only in appropriate cases with a view to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. Under Article 227 of the Constitution the power of interference is limited to seeing that the Tribunal functions within the limits of its authority. Reference can be made in this context to Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, , Waryam Singh and Another Vs. Amarnath and Another, and Bathutmal Raichand Oswal (supra). It is significant to point out in this context that jurisdiction conferred by Article 227 of the Constitution cannot be exercised as the cloak of an appeal in disguise.

22. For the foregoing reasons I find no merit in the instant application under Article 227 of the Constitution of India filed by the petitioner which is accordingly dismissed.

Interim order passed by this Court stands vacated. There will be no order as to costs.

Let a copy of this order be sent down to the learned Chairman, Municipal Building Tribunal, Kolkata Municipal Corporation forthwith.

Urgent xerox certified copy of this order, if applied for, be given to the learned Advocates for the parties as expeditiously as possible.