

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

MAT 1987 of 2022

with

IA No.CAN 1 of 2022

Sabita Nandy & anr.

-Versus-

State of West Bengal & ors.

With

MAT 1988 of 2022

with

IA No.CAN 1 of 2022

Sabita Nandy

-Versus-

Bidhannagar Municipal Corporation & ors.

For the Appellant(s)
(in both the matters) : *Mr. Arindam Banerjee,*
Mr. Rupayan Deb,
Ms. Priya Nandy.

For the Private
Respondent
(in both the matters) : *Mr. Rahul Karmakar,*
Mr. Sounak Mukherjee,
Mr. S.S. Bhutoria.

For the Bidhannagar
Municipal Corporation
(in both the matters) : *Mr. Sirsanya Bandopadhyay,*
Mr. Tirthankar Dey,
Mr. Arka Kumar Nag.

Hearing is concluded on : *23rd August, 2023.*

Judgment On : **3rd October, 2023.**

Tapabrata Chakraborty, J.

1. This case has a chequered history. The dispute between the parties is attributable to an alleged construction raised by the appellant, namely, Sabita Nandy (in short, Sabita) beyond the sanction plan dated 19th March, 2003. The issue was first agitated by Sabita's neighbour, namely, Ganesh Chandra Patra (in short, Ganesh) by filing a writ petition being WP 21391 (W) of 2013. By an order dated 18th September, 2013, the writ petition was rejected with an observation that if any comprehensive complaint is made, the municipal authority will take steps on such complaint. Ganesh thereafter filed a complaint on 3rd December, 2013 to the Rajarhat Gopalpur Municipality (in short, RGM). As the same was not considered, Ganesh filed WP 2128 (W) of 2014 which was disposed of by an order dated 6th August, 2014 directing the Board of Councillors (in short, BOC) of the RGM to initiate proceeding under Section 218 of the West Bengal Municipal Act, 1993 (in short, the 1993 Act) and to conclude the same by passing a reasoned order. As the said order dated 6th August, 2014 was not complied with, Ganesh preferred a contempt application being CPAN 2296 of 2014. In the said contempt application, an order was passed on 30th January, 2017 directing the Commissioner of Bidhannagar Municipal Corporation (in short, BMC) to file a report by 2nd March, 2017 since the affairs of RGM were taken over by BMC. Thereafter, upon notice to the parties, a physical inspection was conducted on 20th February, 2017 and a demolition order was passed by the Commissioner, BMC on 9th February, 2018. Challenging the demolition order Sabita preferred a writ petition being WP No. 7672 (W) of

2018. Sabita, however, withdrew the said writ petition on 12th June, 2018 and preferred a statutory appeal on 31st July, 2018. During pendency of the said statutory appeal, Ganesh preferred a fresh writ petition being WPA No. 17998 (W) of 2018 seeking directions towards implementation of the demolition order. The said writ petition was disposed of by an order dated 27th September, 2018 directing the appellate authority to consider and dispose of Sabita's appeal within twelve weeks. The pending contempt application thereafter came up for hearing on 8th February, 2019 and the same was disposed of recording part compliance with liberty to Ganesh to take out a fresh contempt application, if there is any failure on the part of BMC to comply with the Court's order dated 6th March, 2014 by 31st March, 2019. Thereafter, in a writ petition being WPA 6780 of 2022 preferred by Ganesh for implementation of order of demolition, an interim order was passed on 11th July, 2022 directing BMC *'to proceed with the demolition that is scheduled tomorrow (12th July, 2022) strictly in accordance with law'*. The writ petition was also made returnable on 18th July, 2022 to ensure compliance of the directions. Challenging the said order dated 11th July, 2022, Sabita preferred a mandamus appeal being MAT 1077 of 2022 which was dismissed by an order dated 15th July, 2022. Challenging the said order, Sabita preferred a Special Leave Petition (in short, SLP). The same was disposed of by an order dated 3rd August, 2022 directing the registry of the High Court to list the writ petition preferred by Sabita being WP 15950 (W) of 2022 challenging the order of demolition before the appropriate Bench within a week and for such period the demolition order was stayed without

prejudice to the rights and contentions of the respective parties. In the midst thereof, Ganesh preferred a fresh contempt petition being CPAN 1003 of 2019 as per liberty granted in the earlier contempt application. The same was disposed of by an order dated 4th November, 2022 observing *inter alia* that '*when the Supreme Court as evident from its said order placed before us was desirous of disposal of the writ application, in my opinion, it would not be proper to exercise this Court's power in its contempt jurisdiction*'. Pursuant to the order passed in the SLP, Sabita's writ petition was taken up for hearing and judgment was reserved on 8th August, 2022 and BMC was directed not to take any step towards demolition till delivery of the judgment. In the midst thereof, Ganesh preferred a fresh writ petition being WPA 6780 of 2022 seeking implementation of the order of demolition which was heard by the learned Single Judge and was tagged with Sabita's writ petition being WPA 15950 of 2022 by an order dated 2nd September, 2022. Thereafter on 30th November, 2022, Sabita's writ petition was dismissed. On the same date, in Ganesh's writ petition being WPA 6780 of 2022, BMC was directed to take steps to implement the order of demolition at the earliest, but positively within a period of four weeks from the date of communication of the order. The judgment dated 30th November, 2022 passed in the writ petition being WP 15950 (W) of 2022 is the subject matter of challenge in the appeal being MAT 1988 of 2022 and the order dated 30th November, 2022 passed in the writ petition being WPA 6780 of 2022 is the subject matter of challenge in the appeal being MAT 1987 of 2022 preferred by Sabita and her husband.

2. Mr. Banerjee, learned advocate appearing for the appellant submits that the impugned order of demolition was passed in derogation to the provisions of the West Bengal Municipal Corporation Act, 2006 (in short, 2006 Act). The appellant was not granted any reasonable opportunity of hearing prior to issuance of the demolition order and such violation of natural justice knocks down the said order with nullity. Such plea can be set up by a person against whom the order is sought to be used or executed, at any stage and in any proceedings including collateral proceedings. In support of such contention reliance has been placed upon a judgment delivered in the case of *Nawab Khan Abbas Khan Vs. the State of Gujarat*, reported in (1974) 2 SCC 121 and an unreported judgment delivered in the case of *Bina Saha versus The Kolkata Municipal Corporation & Others*.

3. He argues that learned Judge failed to appreciate that on 20th February, 2017, a mere inspection was conducted for the purpose of recording alleged deviation. The presence of the appellant during such inspection does not absolve the Commissioner from granting pre-decisional opportunity of hearing to the appellant.

4. Mr. Banerjee submits that the Government of West Bengal by a notification dated 11th March, 2015 published in the Kolkata Gazette Extraordinary constituted the municipal area of Rajarhat Gopalpur, a Municipal Corporation area with headquarter at Bidhannagar under Section 3 of the 2006 Act. In view thereof, the 2006 Act had no application in respect of construction initiated and completed prior to the date of

notification and as such, the impugned order of demolition stated to have been passed by the Commissioner under the 2006 Act is a nullity.

5. He hastens to add that the order dated 30th January, 2017 passed by the Hon'ble Court cannot be construed to have conferred any jurisdiction upon RGM to initiate or complete the proceeding under Section 287 of the 2006 Act. In the absence of any appropriate mandate, the said proceeding could not have been continued and completed under the new Act being 2006 and that as such, the ultimate order of demolition suffers from the vice of jurisdictional error and is a nullity in the eye of law. It is well-settled that if a decision of any authority is without jurisdiction, such a decision or finding cannot operate as *res judicata* in any subsequent proceeding. In support of such contention reliance has been placed upon the judgment delivered in the case of *Sayyed Ali and Others -vs- A.P. Wakf Board, Hyderabad and Others*, reported in (1998) 2 SCC 642.

6. *Per contra*, Mr. Karmakar, learned advocate appearing for Ganesh submits that on one pretext or the other and taking the advantage of the inaction of the municipal authorities, Sabita had been successful in retaining an unauthorised construction for more than a decade. Sabita all along had noticed that objections were raised by Ganesh as regards her illegal construction. By order dated 6th March, 2014 passed in a writ petition filed by Ganesh, the proceeding under Section 218 of the 1993 Act was initiated. Notice was issued to Sabita. She duly participated in the joint inspection on 20th February, 2017 and thereafter, the order of demolition was passed. The principle of natural justice needs to be

examined on the rudiments of the basic principle of '*prejudice caused*'. Sabita had not been able to establish that any prejudice had been caused to her. Admittedly, there are major deviations in the construction raised by her. The building, with all such deviations, is existing till date. Such deviations have been ascertained upon conducting a physical inspection in which Sabita was present. The said deviations cannot by furthest of the imagination be construed to be minor deviations and there is also no provision in the statute to seek regularisation of such deviations. In support of such arguments reliance has been placed upon the judgment delivered in the case of *Dharampal Satyapal Limited –vs- Deputy Commissioner of Central Excise, Gauhati and Others*, reported in (2015) 8 SCC 519.

7. He further argues that having withdrawn an earlier petition without permission to file afresh debars the petitioner from filing a fresh petition involving the same subject matter. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In support of such contention reliance has been placed upon the judgment delivered in the case of *Sarguja Transport Service –vs- State Transport Appellate Tribunal, M.P., Gwalior and Others*, reported in (1987) 1 SCC 5.

8. According to Mr. Karmakar, the learned Single Judge upon dealing with all the factual issues arrived at specific findings supported with appropriate reasons and that as such no interference is called for in the present appeals since the order impugned does not suffer from any gross infirmity and is neither palpably perverse nor patently without jurisdiction.

In support of such contention reliance has been placed upon the judgment delivered in the case of *Dr. Utpal Sharma –vs- Akshay Pant and Others*, reported in (2019) 1 CHN 328.

9. Mr. Bandopadhyay, learned advocate appearing for BMC denies and disputes the contention of Sabita and submits that she, in her affidavit in a previous proceeding, clearly admitted the deviations as would be explicit from the following paragraph :

‘11. It is most respectfully submitted that the alleged deviation/departure from the authorized sanction plan may be tolerable and regularizable and not justifying for harsh punishment like demolition. As the alleged unauthorized portion is not causing disturbance to public place, she seeks leave from the Hon’ble Court to file application for regularization.’

10. A perusal of the said affidavit as a whole would reveal that Sabita admitted about construction in deviation to the sanction plan and stated *inter alia* that prior to issuance of the order of demolition she ought to be granted an opportunity to explain the essentiality of deviation and that the demolition order was passed without appreciating that there is scope for regularization of the deviated portion. Having made such averments, Sabita is estopped from taking a plea afresh that the construction as existing had been raised in consonance with the sanction plan.

11. Drawing our attention to the provisions of Section 403(2)(d), Mr. Bandopadhyay argues that *‘every budget passed, loan taken, assessment made, building plan sanctioned, licence or permission or sanction granted or*

issued, or any other similar action taken under the West Bengal Municipal Act, 1993 shall, at the date of commencement of this Act, be deemed to have been passed, taken, made, sanctioned, granted or issued under this Act...’. In view thereof, the argument of Mr. Banerjee that an incomplete proceeding under Section 218 of the 1993 Act cannot be concluded under the new Act is fallacious.

12. In reply, Mr. Banerjee submits the power of the High Court vested in it under Article 226 of the Constitution of India cannot be abrogated or limited by the provisions of Order XXIII of the Code.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record.

14. The argument of Sabita that the respondents have acted in blatant violation of the principles of natural justice was rightly negated by the learned Single Judge since prior to issuance of the order demolition the BMC authorities intimated the parties that a physical inspection would be conducted and pursuant to such notice, the parties were present at the time of physical inspection. In their presence measurements were taken and the deviations were earmarked. Such deviations were also categorically incorporated in the order of demolition. It is not a case that immediately upon construction demolition proceedings were undertaken in hot haste. In the present case records would reveal that Ganesh first preferred a writ petition in the year 2013 [WP 21391 (W) of 2013] alleging that Sabita had raised illegal construction in deviation to the sanction plan. The said writ petition was rejected, however, it was observed that if any comprehensive

complaint is made the Municipality would take steps. As no such steps were taken Ganesh was constrained to prefer a second writ petition being WP 2128 (W) of 2014. As the order dated 6th March, 2014, passed in the same was not being complied with, a contempt application was preferred in which an order was passed on 20th January, 2017 and pursuant thereto notice for inspection was issued on 16th February, 2017. In the said conspectus the petitioner cannot feign ignorance and argue that she had no knowledge about the proceedings. Sabita in her affidavit in previous proceedings also admitted such illegal construction and made statements that prior to issuance of the order of demolition the competent authority ought to have considered regularisation of such deviations. We are, thus, unable to accept the argument of Mr. Banerjee that there had been any violation of the principles of natural justice. If fairness is shown by the decision-makers to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of its situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating.

15. It appears from the order impugned that irrespective of its finding as regards the bar under Order XXIII of the Code, the Court had gone into the merits of Sabita's claim and moreso when it is the constitutional court's inherent power which has been invoked through a writ petition, it would be fair to test the arguments as advanced on the merits of the matter.

Furthermore, the Hon'ble Supreme Court by the order dated 3rd August, 2022 directed the writ Court to decide on merit.

16. The argument of Mr. Banerjee that a building plan sanctioned and the construction completed on the basis of such sanction plan prior to constitution of BMC in respect of the municipal area of Rajarhat Gopalpur could not have been interfered with in terms of the provisions of 2006 Act is not acceptable to this Court. The provisions of the Act need to be read as a whole. A particular clause cannot be picked up and highlighted. A composite reading of the provisions of 2006 Act particularly the provisions of Section 383 and Section 403(2)(d) do not lend any support to Mr. Banerjee's contention. It would be an absurdity to suggest an incomplete proceeding under an old Act would stand wiped off after promulgation of a new Act. In view thereof, we are unable to accept the argument of Mr. Banerjee that the order of demolition issued by the Commissioner of BMC suffers from any jurisdictional error.

17. Even in slight distinction on fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. There is no dispute as regards the proposition of law laid down in the judgments upon which reliance has been placed on behalf of the appellant, however, they are distinguishable on facts.

18. We are of the considered opinion that there is nothing wrong with the approach and decision of the learned Single Judge. No arbitrariness, *mala fide*, irrationality or perversity could be established by the appellant.

19. Accordingly, the appeals and the connected applications are dismissed.

20. There shall, however, be no order as to costs.

21. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)