

The Court of the Civil Judge (Jr. Divn.), Bidhannagar, North 24 Parganas.

Present: Dhrubajyoti Bhattacharyya,
Civil Judge (Junior Division),
Bidhannagar, North 24 Parganas
Title Suit No. 74 of 2020.
CIS No.74 of 2020.

Order, Bidhannagar, dated the 28th July, 2023.

This date is fixed for further hearing on the application filed under order XXVI Rule 9 and order XXXIX Rule 4 of CPC. Plaintiff and defendants contesting the case have filed their respective memorandum of attendance. The crux of the application U/o-XXXIX Rule 4 r.w. Sec. 151 CPC is that the plaintiff in his application filed U/o-XXXIX Rule 1 and 2 CPC on the basis whereof they have got an ad interim order of *status quo* granted *ex parte* on 15.06.20 has concealed the fact that while the defendant no.1 & 2 were constructing the building in accordance with the plan sanctioned by the municipality they have got a no objection certificate from the plaintiffs. The property was being developed on the basis of loan of Rs.23,50,000/- and as the defendants are precluded from using the said property now in the light of the order of the status quo and consequently, they are suffering from substantial loss. The plaintiffs have filed a W.O to the said application. In the said objection in writing it has been asseverated by the plaintiffs that no objection was granted with respect to a sanctioned plan of the defendants which had been subsequently altered by the defendants. The construction actually made by the defendants are violative of Rule 50 of the West Bengal Municipal (Building) Rules and the said no objection certificate purportedly granted by the plaintiffs would not circumvent the compulsory legal provision. The construction actually being effected by the defendants no. 1 and 2 are totally in deviation of the plan sanctioned in favour of one Ranjit Das who was originally the owner of the property.

This Court has heard the submissions made by Ld. Counsel for the plaintiffs who have relied on the decision of Hon'ble Kerala High Court in the case of P.Saina and others vs Kondari and others reported in 1984(2) MCC 136 and that of Hon'ble High Court at Calcutta in case of Tanmoy Moshat vs State of West Bengal reported in 2017(4) Cal HCN 754 and has observed that it is a settled principle of law that if a building has been constructed in violation of the Building Rules and materially deviating from the sanctioned plan it would be deemed to be an unauthorized construction and shall have to be demolished by the intervention of Civil Court. Ld. Counsel for the defendants has submitted that as the suit has been purportedly instituted for declaration of right in personam of the plaintiffs against the defendants the grant of no objection certificate by the plaintiffs in favour of the defendants in 2019 is a material point of the determination. By concealing the said fact the plaintiffs have mislead the court in obtaining an order of status quo. The defendants while instituting the said case has not been served with any notice U/s.407 of West Bengal Municipal Act and therefore the suit is barred by Law. In this connection Ld. Counsel for the defendants has relied on the decisions of Hon'ble Supreme Court of India in the case of State of Madras v. C.P.Agencies and another reported in AIR 1960 SC 1309 and Raghunath Das v. Union of India and another reported in (1969)1 SCR 450, and submitted that the provision regarding the notice U/s.80 having an analogical application in this case, has been held to be mandatory. In reply to the submission made on behalf the defendants Ld. Counsel for the plaintiffs submitted that in view of the compulsory legal provision under Rule 50 of the West Bengal Municipal (Building) Rules, such no objection allegedly granted by the plaintiffs has no legal force and maintainability. Even if such no objection constitute an agreement of non interference the said agreement is void U/s.23 of the Indian Contract Act. He has concluded that the plaintiffs have not claimed any relief against defendant no.3 who is a proforma defendant. Therefore, the said defendant South Dum Dum Municipality is merely a necessary party. No objection has been raised on behalf of

the said defendant as to non receipt of any notice issued U/s.407 of West Bengal Municipal Act.

For effective determination of the dispute this court find it expedient to have a cursory look on the case of the plaintiffs as per the plaint. Plaintiffs are the owners of the property adjacent to the property purchased by the defendants and described in the schedule-C of the plaint. The defendants while making further construction in the said property have deviated from the actually sanctioned plan and encroached upon the compulsory side space prescribed under the West Bengal Municipal (Building) Rules and thereby has jeopardized the plaintiffs easementary right upon ancient light and air.

Easementary right upon a property owned by the plaintiffs is fundamental to their peaceful possession of their respective properties. Such right should be enforceable by the plaintiffs and justice-able in the Civil Court by institution of suit. Moreover, the provision regarding side space in Sec. 50 of West Bengal Municipal (Building) Rules is compulsory in nature and cannot acquiesced by way of no objection certificate. In these circumstances granting of no objection certificate allegedly by the plaintiffs is an act which apparently is non est in terms of Law and would have no significance in granting any right or license to the defendants to commit and continue any act violative of legal sanctions and provisions.

As is apparent from the plaint no relief has been specifically claimed against South Dum Dum Municipality. On this premises, this Court does not find any ground to interfere with the order issued on 15.06.20 on the ground of non compliance of Section 407 of West Bengal Municipal Act. On the similar ground this Court find that the decision of Hon'ble Apex Court in C.P.Agencies Case (Supra) and Raghunath Das case (Supra) has no application in this context. This Court does not find any necessity for any discharge, variation or setting aside of the order originally delivered in favour of the plaintiffs in terms of order dt. 15.06.20 at this stage.

The application under order XXVI Rule 9 of CPC filed on behalf of the plaintiffs is taken up for consideration. The crux of the said application is that the defendants are making unauthorized construction by total deviation from the plan sanctioned as per West Bengal Municipal (Building) Rules and has encroached upon compulsory side space in the property mentioned in the schedule-C. At the time of purchase by the defendants the said property is a single storied building and while the defendant no. 1 and 2 developing the said building into a three storied one encroached upon the side space compulsorily prescribed under Section 50 of West Bengal Municipal (Building) Rules. The plaintiffs have prayed for appointment of an Engineer Commissioner to inspect the property fully described in schedule-C of the plaint, to measure the said land, to ascertain whether any encroachment has occurred in the side space in all four sides of the property and if the constructions violate the West Bengal Municipal Act.

This Court has heard the erudite submissions of the Ld. Counsels for the plaintiffs and the defendants. In the said application none of the prayers made by the plaintiffs pertains to the determination/ascertainment/elucidation of facts as to the violation of the easementary rights of the plaintiffs. Rather the questions raised in the application are regarding the deviations from sanctioned plan or unauthorized nature of the construction allegedly effected by the defendant nos. 1 and 2. The determination in that regard falls within the scope of the power and jurisdiction of the Board of Councilors under Rules 31 and 32 of the West Bengal Municipal (Building) Rules, 2007 and Section 218 of the West Bengal Municipal Act. This Court cannot usurp the powers of the municipal authority granted by statute and delegated legislation.

Therefore, this Court is not inclined to grant the said application for appointment of Engineer Commissioner in its present form.

Hence, it is

ORDERED

that the application under order XXXIX Rule 4 of CPC read with Section 151 CPC filed by the defendants be and same is dismissed without order as to cost.

The application U/o-XXVI Rule 9 of CPC read with Section 151 of CPC for appointment of Engineer Commissioner, by the plaintiffs be and the same is dismissed without any order as to cost.

Fix 10-10-2023 hearing on the prayer for temporary injunction U/o-XXXIX Rule 1 and 2 of CPC. Update CIS accordingly.

Civil Judge (Jr. Divn.)
Bidhannagar