IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Jyotirmay Bhattacharya

W.P. No.781 of 2012

Tapan Bhattacharya & Ors.
-Vs-
The Kolkata Municipal Corporation & Ors.

W.P. No. 842 of 2012

Carmel Jyoti Nilaya
-Vs-
State of West Bengal & Ors.

W.P. No.865 of 2012

Tapan Bhattacharya & Ors.
-Vs-
The Kolkata Municipal Corporation & Ors.

Appearance:
Mr. Jayanta Kumar Mitra, Senior Advocate
Mr. Partha Sarathi Sengupta, Senior Advocate
Ms. Vineeta Meharia, Advocate
Mr. Mainak Bose, Advocate
Mr. Pushan Kar, Advocate
Ms. Tapti Chatterjee, Advocate
Mr. Santanu Chatterjee, Advocate
Mr. Aniruddha Sinha, Advocate
.....For the petitioners

Mr. Pradip Dutta, Senior Advocate
Mr. Subrata Mukherjee, Advocate
Mr. Somnath Banerjee, Advocate

..... For the State

Mr. Barin Banerjee, Advocate
Md. Fazlul Haque, Advocate
Mr. Debanshu Mondal, Advocate
..... For the KMC

Mr. Kishore Datta, Advocate
Ms. Paramita Mukhopadhyay, Advocate
..... for the respondent no. 13 in WP 865 of 2012
..... for the respondent no.11 in WP 781 of 2012
..... for the petitioner in WP 842 of 2012

Heard on: 05.07.2013,12.07.2013,18.07.2013,19.07.2013, 16.08.2013,22.08.2013 & 29.08.2013.

Judgment On : 5th September, 2013

Three writ petitions are taken up for hearing analogously as the cause of action which is the foundation of all these three writ petitions, are inter-related to each other.

The parties are fighting with each other, on a common issue relating to the legality of the sanction granted to the building plan submitted by the School Authority namely, Carmel Jyoti Nilaya, a society registered under the West Bengal Societies Registration Act 1961, permitting it to construct a G+3 storied school building on the rear vacant part within the school compound. The school building being premises No.19, Deshopriya Park Road, Police Station Tollygunge, Kolkata 700076 is situated on 40' feet wide Deshopriya Park Road.

Here is the case where profit earning motivated promoter and/or builder has not come forward to construct a multi-storied building on a plot of land within the city of Kolkata with a motive to commercially exploit his customer viz., the intending purchasers of flats either for residential or commercial purpose. On the contrary here is a case where in order to accommodate the ever increasing number of students in the primary section of a reputed school namely, Carmel Primary School, the School Authority decided to construct a new building on the rear vacant part within the school compound. Existing school building was constructed in the front portion of the premises abutting Deshopriya Park Road vide sanctioned plan No.451 dated 27th March, 1973 leaving a open vacant space having an area of 7500 square feet equivalent to 10 khattas of land approximately on the rear side of the existing school building. The School Authority decided to extend the school building by constructing a G+3 storied building on the rear open space within the school compound to introduce 4 more class rooms and toilets on each of the three floors of the proposed building leaving ground floor open for children's play. To materialize the said decision, the School Authority took steps for obtaining necessary permissions from various authorities including the Municipal Authorities and the authorities of West Bengal Fire and Emergency Services. Provisional no objection certificate was initially issued by the West Bengal Fire & Emergency Services for construction of such a school building subject to compliance of several recommendations mentioned therein which not only included a condition for observance of the Municipal Building Rules but also included a condition for providing adequate

fire safety measures and also for providing open space surrounding the building in conformity with the relevant Building Rules for permitting the accessibility and maneuverability of fire appliance with turning facilities. This provisional no objection certificate was issued on 30th July, 2010 on the basis of the drawing of the proposed school building, which was yet to be submitted by the school authority before the Municipal authority for its sanction. The Municipal Authority while considering the building plan submitted by the School Authority took note of the said "no objection certificate" issued by the West Bengal Fire & Emergency Services including the recommendations made by it and ultimately accorded sanction to such building plan on 29th October, 2010 vide sanction reference No.2010080095.

Admittedly, the building plan which was submitted by the School Authority for its sanction was not drawn in strict conformity with the Building Rules. As a matter of fact, the School Authority prayed for relaxation of certain Building Rules for maximum utilization of Floor area (FAR). While examining the said building plan, infringement of several provisions of the Building Rules such as Rule 6(b), Rule 6(d), Rule 6(e), Rule 64, Rule 69, Rule 70, Rule 78, Rule 81(2) & (3) and Rule 124 (g) & (h) was noticed by the Building Department. However, after considering the school's proposals for construction of school building thereon, the Municipal Building Committee which is a High Power Committee of the Corporation, ultimately condoned such lapses by relaxing application of certain Building Rules pertaining to car parking space, side open space (partially on one side) F.A.R and ground coverage. Such relaxation was given after

considering the public interest involved in the proposed construction which is a school building. Ultimately the building plan submitted by the School Authority was sanctioned on 29th October, 2010 by the Building Department in light of the recommendation made by the Municipal Building Committee by giving relaxation of those Building Rules.

Thereafter, the School Authority started constructing the school building in the said premises in accordance with the building sanctioned plan after service of notice upon the Municipal Authority intimating it about the date of commencement of such construction. Immediately thereafter the first round of litigation started, at the instance of the owners of some adjoining premises on the northern side of the school premises (hereinafter referred to as the complainants) as their complaint against such unauthorized construction was not redressed by the Municipal Authority. Those complainants filed a writ petition being W.P No. 34 of 2010 challenging the legality of such sanctioned plan by complaining that such sanction was granted by the Municipal Authority in violation of several Building Rules. They further contended that the sanction which was granted by the Municipal Authority to the said building plan should be recalled inasmuch as such sanction was obtained by fraudulent misrepresentation of the School Authority's right of access through a 14' feet wide partition passage lying on the northern boundary of the school building and the school authority did so purposively, knowing fully well that the said partition passage exclusively belonged to those complainants who are owners of different sub-divided plots of the erstwhile premises No.21, Deshopriya Park Road over which the school had

no right of passage. It was further contended by them that had the said passage not been shown in green wash, in the building plan submitted by the School Authority, the Municipal Authority would not have sanctioned the building plan. Thus, they by highlighting the provision contained in Section 397 of the Kolkata Municipal Corporation Act, claimed that the sanction which was given by the Municipal Authority to the building plan should be recalled.

Though infraction of those Building Rules which was ignored by the Building Department on the recommendation of Municipal Building Committee in the process of grant of such sanction, was pleaded in the said writ petition and revocation of the sanctioned plan was sought for by challenging the jurisdiction of the Municipal Authority to relax the Building Rules in sanctioning the building plan, but ultimately the Court was not invited to resolve the said dispute. As such the Learned Single Judge of this court restricted her consideration to the misrepresentation alleged to have been made by the School Authority in the process of obtaining sanction to its building plan and while doing so the Learned Single Judge, after considering the relevant records produced in court, recorded her satisfaction about the fire safety arrangement made by the School Authority which according to His Lordship was made in conformity with the suggestion of the Fire Service Authority. The Learned Single Judge also held that since the Fire Service Authority, after examining the fire safety measure proposed to be taken by the School Authority in the said building, approved the proposed building plan with certain recommendations regarding fire safety measures to be taken by the School Authority while constructing the building and further when

to whether any fraudulent misrepresentation was made by the applicant, while obtaining sanction to the building plan and in the event it is found that sanction was obtained by fraudulent misrepresentation by supplying incorrect and/or wrong information under Sections 393, 394 & 395 of the said Act, then the sanction granted to such building plan, may be recalled by the Municipal Commissioner. The appeal Court held that since no such decision was taken by the Municipal authority on the said issue, the Writ Court was not justified in pre-empting such consideration on the said issue. According to the Hon'ble Appeal Court, such decision was required to be taken by the Municipal Commissioner and/or any other official to whom such power was delegated at the first instance which of course is subject to scrutiny by the Writ Court, if the decision of the Commissioner and/or any other delegated authority is challenged before the Writ Court. Operation of the order, impugned in the said appeal was stayed by the Hon'ble Appeal Court with these prima facie findings. Direction for filing affidavits by the parties, was given by the Hon'ble Appeal Court. The said appeal was made returnable after six week and in the mean time the Director General (Building) was directed to enquire into the complaint annexed to the writ petition and pass a speaking order, after giving opportunity of hearing to the parties and upon consideration of all the aspects of the matter, without divulging the decision, to be taken by the said authority to anyone else. The Director General (Building) was directed to submit his speaking order before the court in sealed cover. Pursuant to the aforesaid direction passed by the Hon'ble Appeal Court on 22nd March, 2011, the complaint submitted by the appellants therein was

ultimately considered by the Director General (Building) upon hearing the parties and a speaking order was passed by him on this May 2011, disclosing therein his independent views on each aspect of the complaint. Though he came to a definite conclusion that there was no material misrepresentation on the part of the School Authority at the time of obtaining sanction to the proposed building plan and he believed that the 14' feet wide partition passage was shown in green wash in the building plan by the School Authority by mistake, but still then certain suggestions were given by him as precautionary measures, to deal with emergency situation, in case any accident occurs in future due to fire. The Director General (Building) suggested that for better interest of all concern, a passage of sufficient width need to be provided by the School Authority by punching through the existing structure of the school building at the ground floor level to have sufficient access from the main 40' feet wide Deshopriya Park Road to the rear side of the plot where the proposed school building is coming up, so that there may not be any issue of free access and free ingress and egress of the students, teachers, guardians including movement of emergency vehicles like ambulance, small fire tenders, if and when required at time of emergency. Such suggestion of creation of passage having sufficient width by punching through the existing structure of the school building at the ground floor level was given by the Director General (Building) as he found that the entire width of the plot is covered by the existing building, leaving no side open space on either side of the said building through which one can approach to the new construction on the rear side of the school premises. Considering a large number of school

children will assemble at the existing as well as the proposed building, the Director General (Building), after taking into consideration the safety and security of the visitors including several hundreds of students who will visit the existing building as well as new upcoming building everyday, suggested that the School Authority must take adequate fire preventive measure by installing necessary fire fighting equipment, as prescribed by the West Bengal Fire & Emergency Services. He thus, suggested that the School authority should be directed to create a passage having sufficient width, by demolishing a portion of the existing structure at the ground floor level with adequate structural support under supervision of a qualified empanelled structural engineer of Kolkata Municipal corporation and on submission of a fresh plan to the Municipal authority incorporating all relevant details of existing conditions and the proposal of the works to be undertaken subject to its approval by the Municipal Authority. With this recommendation, the Director General (Building) concluded the said proceeding with a definite finding that no material misrepresentation was made by the School Authority for obtaining sanction to the building plan submitted by it, for the proposed construction. The Director General Building further held that the School Authority did not make any material misrepresentation in describing the boundary of the school building in the plan. The allegation of the complainants to the effect that the building plan was sanctioned only on the basis of that 14 feet wide partition passage, was held to be baseless and without any foundation. Though he found that the building plan was not drawn strictly in compliance of the building Rules, but he held that sanction cannot be recalled

as those infractions were condoned by the Municipal Building Committee. The said report was submitted by the Director General (Building) before the Hon'ble Appeal Court.

At the time when the said appeal was taken up for hearing, it was submitted by Learned Senior Counsel appearing for the appellants that having regard to the decision taken by the Director General (Building), the appellants were not inclined to proceed with the appeal without prejudice to their rights and contentions to assail the decision of the Director General (Building) or to take any further action as per law. In view of such submission made on behalf of the appellant, the appeal was dismissed by reserving the appellants' right to challenge the decision of the Director General (Building) and to take any further action as per law.

During the pendency of the said appeal, some subsequent development occurred resulting stoppage of the constructional work by following an order issued by the Deputy Director (H.Q), West Bengal Fire and Emergency Services whereby the School Authority was instructed to submit a revised plan showing proper ingress and egress provision and until such revised drawing is approved by the office of the Fire Service Authority, all constructional work was directed to be postponed. The said order was issued by the Deputy Director (H.Q), West Bengal Fires & Emergency Services on 16th August, 2012, after holding an ex parte inspection at the site on 14th August, 2012, as in course of such inspection it was detected that the egress route shown in the submitted architectural plan drawing is not sufficient for free movement of fire vehicles inside the school

premises. Upon receipt of the said letter from the Deputy Director (H.Q), West Bengal Fire & Services, the Executive engineer/Building/Br.-VIII also issued a letter on 23rd August, 2012 advising the School Authority to suspend the constructional work till the revised drawing is approved by the West Bengal Fire and Emergency Services Department.

Since the constructional work was stopped by those two notices dated 16th August, 2012 and 23rd August, 2012, issued by the Fires Service Authority and the Municipal Authority respectively, the School Authority moved a writ petition by challenging the legality and/or validity of those two notices. The said writ petition was registered as W.P No. 842 of 2012. The owners of the adjoining premises on the northern boundary of the building, at whose instance such notices of stop work were issued by the aforesaid authorities, were joined as private respondent No. 10-19 in the said writ petition. These respondents viz., the complainants also filed a writ petition being W.P No. 781 of 2012 for implementation of the order of stop work issued by the West Bengal Fire Services Authority as well as the Kolkata Municipal Corporation, as aforesaid.

Pending disposal of those two writ petitions, the Fire Service Authority after considering every pros and cons of the said sanctioned building plan, withdrew its stop work notice by its letter dated 27th September, 2012, as the said authority was of the view that the passage way which was shown in the sanctioned plan, could be treated as an emergency egress route for the rear building. Thus, the restraint order on construction was ultimately lifted by the said authority and the School Authority was permitted to proceed with the

constructional work at the above premises. The Executive Engineer (Building), Br.-VIII, by his letter dated 27th September, 2012, also permitted the School Authority to resume the constructional work at the building site as per the sanctioned plan. Since the restraint order on further construction was subsequently withdrawn by the Fire Service Authority and the Municipal Authority and further since the School Authority was permitted to proceed with further constructional work at the building site as per the sanctioned building plan, those private respondents No. 10-19, of the writ petition being W.P No.842 of 2012, viz., the complainants, filed another writ petition being W.P. No. 865 of 2012 for quashing of those two letters issued by the West Bengal fire Service Authority and the Municipal Corporation respectively. These are the three writ petitions which are now pending for consideration before this court.

Since the restriction on such construction which was imposed by the West Bengal Fire Service Authority and/or the Calcutta Municipal Corporation Authority as stated above was ultimately lifted by those two authorities by their aforesaid orders which are impugned in the writ petition being W.P. No.865 of 2012, the earlier two writ petitions being W.P. No.842 of 2012 filed by the School Authority and the writ petition being W.P No.781 of 2012 filed by complainants, have now become infractuous as neither the restraint orders on construction can now be enforced, nor these restraint orders are now required to be quashed in the changed scenario.

In this changed scenario this court is now required to consider the merit of the writ petition being W.P. No. 865 of 2012, Tapan Bhattacharya and Ors. –Vs- the Kolkata Municipal Corporation & Ors.

Parties have exchanged their affidavits in connection with the said writ petition. Several supplementary affidavits have also been filed by the parties which are also replied by their adversaries by filing their respective affidavits to those supplementary affidavits. Not only the legality and/or validity of those two orders of lifting the restriction on construction issued by the West Bengal Fire Service Authority and the Municipal Authority respectively vide their letters both dated 27th September 2012, were challenged and quashing thereof was prayed for, in the said writ petition, but also legality of the sanction granted by the Municipal Authority to the building plan submitted by the School Authority was also challenged as according to the petitioners, such sanction was granted by the Municipal Authority by illegally relaxing the application of certain mandatory provisions of the Building Rules without jurisdiction. Thus, in effect, the issue with regard to the legality of the sanction plan which was raised in the earlier disposed of writ petition, was sought to be re-agitated by the petitioner in the instant writ petition. In this context it is contended by Mr. Dutta, Learned Advocate appearing for the School Authority that the grounds which were formulated in the earlier writ petition for challenging the legality of the building sanctioned plan due to grant of relaxation of certain Building Rules by the Municipal Authority while according sanction to the said building plan, cannot be re-agitated in the present writ petition as the petitioners, despite making out

those grounds as foundation of their challenge in the earlier writ petition, did not agitate those grounds in course of hearing of the said writ petition, before the Learned Trial Judge. As such Mr. Dutta submits that those grounds should be presumed to have been abandoned by the petitioners while moving earlier writ petition and as such those abandoned grounds cannot be the foundation of challenge with regard to legality of the sanction plan in this writ petition. In support of his submission, he has relied upon a decision of the Hon'ble Supreme Court in the case of Sarguja Transport Service -Vs- State Transport Appellate Tribunal, Gwalior & Anr., reported in AIR 1987 (SC) 88 wherein it was held that re-agitation of the abandoned claim of the earlier proceeding, in the subsequent proceeding between the same parties, is not permissible as a Rule of Public Policy as contained in order 23 Rule 4 of Civil Procedure Code which also applies to writ proceedings, excepting Haveas Corpus petition.

Mr. Mitra, Learned Senior Counsel appearing for the writ petitioner contradicted such submission of Mr. Dutta, by drawing my attention to the order of the Appeal Court by which the appeal preferred against the order passed in the earlier disposed of writ petition, was disposed of by the Hon'ble Appeal Court. Mr. Mitra contended that while disposing of the said appeal not only the petitioners' right to assail the order of the Director General (Building) was reserved but also the appellants' right to take any further action as per law was saved by the Hon'ble Appeal Court. Mr. Mitra, thus, contended that in view of the said order of the Appeal Court, all points which are raised in this writ petition, are now left open to be decided by this court. According to him, the

principle of order 23 of the Code of Civil Procedure, has no application in the instant case, because the petitioners' right to challenge the decision of the Director General (Building) and for taking any further action as per law, was saved by the appeal Court while disposing of the earlier appeal. In this context this court has considered the order of the Appeal Court, to find out the real purports thereof and while doing so, this court, has also considered the observation of the other Appeal Court made in an appeal arising out of the interlocutory order passed in this writ petition, wherein the said Appeal Court observed that the previous appeal was not pressed and the same was dismissed as withdrawn with a rider that while passing the said order, the Division Bench of this court kept all points open for agitating before the appropriate forum.

On perusal of the said order of the Appeal court, this court; finds that the said appeal was, in fact, allowed to be withdrawn without prejudice to the rights and contentions of the petitioners to assail the decision of the Director General (Building) or to take any further action as per law. Thus, the Appeal Court in effect permitted the petitioners to challenge the legality and/or correctness of the decision of the director General (building) and to take any further action as per law. The said order of the Appeal Court is absolutely clear so far as reservation of the petitioners' right to challenge the decision of the Director General (Building) is concerned. However, some confusion is raised with regard to reservation of the other right of the petitioners whereby the petitioners were permitted to take any further action as per law. Let me now consider as to how far the petitioners can extend their right to reopen the abandoned challenge of

the earlier proceeding in this writ petition. By reserving the petitioners' right to take any further action as per law, the Appeal court, in my considered view, permitted the petitioner, not only to challenge the correctness of the decision of the Director General (Building) but also to enforce it as per law. The Appeal Court while disposing of the said appeal neither permitted the appellants therein to file a fresh writ petition on the cause of action which was the foundation of the earlier disposed of writ petition nor permitted the appellants to reopen the abandoned issue in the subsequent writ petition. As such this court cannot stretch the liberty which was granted by the Appeal Court to the petitioner to such an extent whereby the petitioner can be allowed to reopen the abandoned issue in the present writ petition.

That apart the Appeal Court, permitted the petitioners to take any action as per law. The use of the expression as per law is very significant here as the petitioners' right to challenge was restricted within the parameter which is permissible under law.

In this context, this court is required to consider the effect of abandonment of claim in the earlier proceeding and the scope of re-opening such abandoned claim in the subsequent proceeding between the same parties. In other words, whether law permits a party to re-agitate his abandoned claim in the earlier proceeding in a subsequent proceeding, between the same parties? To find out answer to this question, this court has carefully considered the earlier pleadings of the petitioner in the disposed of writ petition and found that not only the jurisdiction of the Municipal authority to grant relaxation of the Building Rules

was challenged but also the legality of such sanction was challenged as the plan drawing was not in conformity with the Building Rules. Though such challenge was raised in the said writ petition, but in course of hearing of the writ petition, those grounds of challenge were not canvassed; on the contrary, the petitioner only restricted their challenge to the legality of such sanction, within the short campus of Section 397 of the Kolkata Municipal Corporation Act. They restricted their challenge primarily and principally to the fraudulent misrepresentation of the School authority's right of passage over the said 14 feet wide partition passage which exclusively belonged to the complainants. Thus this court has no hesitation to hold that those points which were raised in the said writ petition relating to legality of the sanction due to grant of relaxation of certain Building Rules were consciously abandoned by the writ petitions therein. Once these points of challenge were abandoned by them, those points of challenge, in my view, cannot be permitted to be re-agitated in the subsequent writ petition as re-agitation of abandoned claim of the earlier proceeding, in the subsequent proceeding, is not permissible in law.

Mr. Mitra, Learned Senior Counsel further submitted that when the other Appeal Court while dealing with an appeal arising out of an interlocutory order passed in this writ petition also interpreted the order of the earlier Division Bench of this court and held that the said Division Bench while disposing of the said appeal, kept all points open for agitation before the appropriate forum, this court should consider all the points which are raised by the petitioners in this writ petition by following the principle of law as laid down by the Division Bench

of Bombay High court in the case of Panjumal Hassomal Advani -Vs- Harpal Singh & Abanshi Singh Sawhney & Ors. reported in AIR 1975 Bombay P120 wherein it was held that it is well settled that an interpretation (and equally misinterpretation) of a binding decision of the Supreme Court will itself be binding subsequently on co-ordinate courts and must be got corrected by a higher court, and no co-ordinate court on the ground of misinterpretation of law, can refuse to follow an earlier decision, opining that in its view, the said earlier decision has wrongly understood or improperly applied a decision of a higher court.

I cannot accept such submission of Mr. Mitra, as in my view, the said observation of the Appeal Court is merely a casual observation. The Appeal Court was never invited to give its views on the scope of challenge in the writ petition. Neither party made any submission before the Appeal Court in this regard. As such, such casual observation made by the Appeal Court in an interlocutory proceeding, in my view, has no binding effect upon the court at the final hearing of the writ petition. It is well settled that any observation made by any court even by the Appeal Court in an interlocutory proceeding does not operate as res judicata even on identical issue at the final hearing of the writ petition. As such the said observation made by the Appeal Court does not create any binding precedent which is required to be followed by this court at the final hearing of the writ petition. All findings of the court at the interlocutory stage are either prima facie finding or tentative finding which do not operate as res judicata at the final hearing of the writ petition. That apart casual observation of the

Appeal Court cannot be regarded as precedent binding upon the Sub-ordinate court or even upon the Co-ordinate court. In order to create precedent, some ratio is to be decided.

Let me now consider as to whether any ratio was decided by the said order of the Appeal Court. Scope of hearing of the appeal was never at an issue before the Appeal Court while deciding the said appeal. Appeal Court was not addressed by any of the parties on the scope of hearing of the writ petition and/or the ambit of its trial. As such, in my view, by the said casual observation made by the Appeal Court no precedent having its binding effect was created by the Appeal Court which may operate even as res judicate at the trial of the writ petition.

Thus, this court has no hesitation to hold that the petitioners' right of challenge was not enlarged by such casual observation of the Appeal Court, to such an extent by which the petitioners can reopen their abandoned claim of the earlier proceeding, in the present writ petition. As such they cannot be permitted to re-agitate their abandoned plea regarding legality of the sanctioned building plan due to grant of relaxation of certain Building Rules by the Municipal Authority, in this writ petition by taking aid of reservation of their right to take further action as per law, as provided by the Hon'ble Division Bench of this court in its order as mentioned above.

Thus, this court holds that the petitioner must restrict their right either to implement the decision of the Director General (Building) which still remains unassailed by any of the parties or to challenge the correctness of such decision

of the Director General (Building), within the parameter as permissible under law.

Even after answering this question in favour of the School Authority, this court feels that the petitioners' contention regarding legality of the sanction due to grant of relaxation of the certain Building Rules can not be ignored altogether, as public interest of high magnitude is involved in the present case.

Let me now consider as to how far the Municipal Authority was justified in relaxing the mandatory Building Rules in the process of according sanction to the building plan in the present case. Mr. Mitra Learned Senior Counsel submitted that the rules which were relaxed by the Municipal Authority were not relaxable and as such Municipal Authority transgressed its jurisdiction in relaxing such mandatory provisions of the rules while granting sanction to the building plan. In support of his submission he has relied upon the following decisions:-

(i) In the case of V.M Kurian –Vs- State of Kerala reported in AIR (2001) SC 1409.

(ii) In the case of Smt. Sushama Banerjee & Anr. –Vs- Kolkata Municipal Corporation and Ors. reported in 2000 (2) CHN 447

(iii) In the case of Dipak Kumar Mukherjee -Vs- Kolkata Municipal Corporation reported in 2013 (1) CHN 21

On perusal of those judgments, this court finds that in the case of V.M Kurian -Vs- State of Kerala, the Hon'ble Supreme Court held that since

observance and compliance of rules is necessary for public safety and convenience, there cannot be any relaxation of rules, which are mandatory in nature and cannot be dispensed with specially in the case of high rise building. Such observation was made by the Hon'ble Supreme Court in a case where the State Government relaxed the Building Rules by permitting construction of a eight-storied building. While making such observation, the Hon'ble Supreme Court, also held that grant of relaxation of the Building Rule may be differently applied in the case of construction of one or two multi-storied building, where there are minor deviation from the rules which do not affect the public safety and convenience.

Thus while delivering the said judgment, the Hon'ble Supreme Court made a distinction between construction of a high rise multi-storied building and a single or two storage building so far as the grant of relaxation of building Rules is concerned. The Hon'ble supreme court held in clear terms that in case of high rise multi-storied building relaxation of the mandatory provision of the Building Rules cannot be given, as grant of such relaxation may endanger public safety and security. However the Hon'ble Supreme Court held in the said decision that relaxation of Building Rules to regularize the minor deviation in a single or two-storied building can be given, if such relaxation does not endanger public safety and security.

On perusal of the other decision cited by Mr. Mitra, in the case of Smt. Sushama Banerjee -Vs- Kolkata Municipal Corporation (supra) this court finds that the Division Bench of this court held that since the Act is regulatory in

nature, a building plan can be sanctioned only in terms of the Building Rules. It was further held that relaxation can only be granted by a proper authority on reasonable ground.

Thus, in none of the said decisions, it was held that even in the absence of any explicit power for grant of relaxation of Building Rules, the authority concerned cannot relax the Building Rules under any circumstances. On the contrary it was held that even in the absence of any specific provision for grant of such relaxation, the authority concerned may relax certain provision of the building rules in suitable circumstances where relaxation of such building rules does not cause any inconvenience to the public and/or endanger public life and safety.

Let me now consider the other decision of the Hon'ble Supreme Court cited by Mr. Mitra. Having regard to the fact that an additional floor was constructed beyond the sanction plan, the Hon'ble Supreme Court in the case of Dipak Kumar Mukherjee –Vs- Kolkata Municipal Corporation reported in 2013 (1) CHN 21 directed the concerned authority not only to demolish such unauthorized construction as deviation in construction was made contrary to Rule 25 of the Building Rules but also imposed adequate penalty on the wrong doer. The facts of the present case is completely different from the set of facts before the Hon'ble Supreme Court in the said decision. I have already indicated above that this is not a case where the School Authority raised any additional construction in deviation of the sanction plan and/or beyond the sanction plan. This is a case where relaxation of such Building Rule was prayed for by the School Authority at

the time of submission of the building plan and the said building plan was sanctioned by the Municipal authority by relaxing application of certain Building Rules as per the recommendation of the High Power Committee namely the Municipal Building Committee. As such the principles laid down by the Hon'ble Supreme Court in the said decision cannot be applied in the instant case.

In the present case this court finds that the sanction was sought for by the School Authority for constructing a G+3 storied building to be used exclusively for accommodating some additional class rooms therein.

Be it noted here that it is not a case where the School authority constructed any building either without a sanction plan or in deviation of a sanction plan and regularization of such illegal construction was prayed for subsequently. Rather here is a case where the school authority claimed several relaxation at the time of submission of building plan, and the plan was sanctioned by relaxing the Building Rules, as per the recommendation of the Municipal Building committee and construction of G+3 building was made subsequently in accordance with the sanction plan.

When the expert body formed such an opinion before grant of such sanction to the building plan submitted by the School Authority and when the other expert authority namely Director General (Building) has also opined that relaxation of such Building Rules in the present case was not unjustified, this court does not find any reason to disturb the sanction plan, simply because of the fact that such sanction was granted by relaxing certain Building Rules, particularly when the decision of the Director General (Building) approving such

relaxation, has not been assailed by the petitioners in this writ petition, despite their right to assail the decision of the Director General (Building) was reserved by the Appeal Court.

As a matter of fact, the petitioners have not challenged the legality and/or correctness of the decision of the Director General (Building); rather they have relied upon the said decision of the Director General (Building). Extensive argument was advanced by Mr. Mitra, the Learned Senior Counsel appearing for the petitioner, for enforcement of the decision of the Director General (Building) wherein he, after considering the safety and security of the students, teachers, guardians and/or regular visitors of the school premises, recommended for creation of a passage by punching the existing building at the Ground Floor level for giving free ingress and egress of the inmates in general, and also for taking adequate fire preventive measure by installing necessary fire fighting equipment, as prescribed by the West Bengal Fire and Emergency Services in case any emergency situation arises. The Director General (Building) also recommended that creation of such passage by demolishing a portion of the existing structure on the Ground Floor level should be made by providing adequate structural support under the supervision of a qualified empanelled structural engineer of Kolkata Municipal Corporation and after submission of fresh plan to the Municipal Authority subject to its approval by the Municipal Authority.

Mr. Dutta, Learned Advocate appearing for the School Authority, does not dispute such contention of Mr. Mitra. He in his usual fairness submits that this part of the submission of Mr. Mitra is very reasonable and as such he cannot

contradict this part of the submission of Mr. Mitra, as even according to him creation of such an emergency exit passage in the said school as a precautionary measure is necessary as large number of visitors including students of tender age will assemble in the school building everyday. He further contended that the school authority has, in fact, created such a passage by demolishing a part of the existing school building at the Ground Floor level as per the suggestion of the Director General (Building).

Since the parties have accepted the said decision of the Director General (Building), this court has no hesitation to hold that the decision of the Director General (Building) should be implemented strictly as this court cannot be oblivious about the safety and security of large number of regular visitors of the said school building particularly when large number of student of tender age, will assemble in the school building everyday.

The Municipal authority in its supplementary affidavit has confirmed that the school has already created such an emergency exit passage by demolishing a part of the existing school building at the Ground Floor level.

Mr. Banerjee, Learned Advocate appearing for the Municipal authority drew my attention to the sketch map annexed to their supplementary affidavit for showing that such an emergency exit passage has already been created by the School authority. Photograph of the said emergency exit passage has also been produced before this court.

It is however an admitted fact that neither any revised plan has been submitted by the School Authority nor such revised plan has been approved by

the Municipal authority nor the structural stability of the emergency passage which was created by the School Authority by demolishing a part of the existing construction at the Ground Floor level has been certified as stable and safe by any qualified empanelled structural engineer of the Kolkata Municipal Corporation till date. As such this court has no hesitation to hold that the existing building cannot be allowed to be used by the School Authority for any purpose until the observations made by the Director General (Building) in its concluding part of his order dated 4th May 2011 are strictly complied with.

This conclusion is arrived at by this court as all throughout the Fire Service Authority was very much candid in enforcing its recommendations for ensuring safety and security of the inmates of the upcoming new building. When the Fire Service Authority, after holding an inspection at the building site, issued stop work notice, it ought not be have recorded its satisfaction about the sufficiency of the safety measures taken therein with reference to unrevised building sanctioned plan nor it should have withdrawn the said stop work order by its impugned notice, without holding a further inspection at the building site. Similarly, this court holds that the Municipal Authority ought not to have withdrawn the stop work order by its impugned notice mechanically, without holding any spot inspection upon notice to the parties.

Be that as it may, now the construction is almost complete. The school authority claims that an emergency exit has already been created by demolishing a part of the existing construction at the Ground Floor level in the light of the observation made by the Director General (Building). The School Authority also

claims that it has already taken all precautionary measures as per the recommendation of the Fire Service Authority for ensuring safety and security of the inmates of the upcoming building. Neither the Municipal Authority nor the Fire Service Authority has yet certified that the emergency exit passage which is so created in the said premises, is safe and sufficient to tackle the emergent situation or not.

This court, thus feels that the upcoming building cannot be allowed to be used until those authorities concerned, give green signal for its use.

Thus this court directs the School Authority to submit a revised plan before the Municipal Authority in the light of the observation made by the Director General (Building) in his aforesaid order with this rider that the new construction of the school building will be allowed to be used only if the Municipal Authority as well as the Fire Service authority, after holding a joint inspection at the Building site certify that the emergency exit passage created by the school authority is safe and sufficient for fighting fire and/or for evacuating the inmates from the new construction through the said passage, in case any emergency arises due to fire or otherwise. It is thus, clarified that in case it is held that the emergency exit passage which is so created in the said premises is not safe and/or insufficient to meet the emergent situation and/or the School Authority is unable to create such a passage, to the satisfaction of those authorities, then the Municipal authority will not permit the said construction to be used for any purpose whatsoever and in such circumstances, the demolition of the new construction is inevitable.

Thus all the three writ petitions are disposed of. The first two writ petitions have been rendered infractuous by the subsequent events and the third writ petition wherein the subsequent events were challenged, is disposed of on merit, with the above directions.

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

(Jyotirmay Bhattacharya, J.)