

11.03.2022
Sl. No.90
srm

CAN 1 of 2021
In
W.P.A. No. 11117 of 2021

In Re: Smt Krishna Mukherjee

Mr. Bhaskar Ghose,
Mr. Siddhartha Paul

...for the Applicant.

Mr. Sudipto Maitra,
Mr. Vijay Verma,
Mr. Dwipayuan Biswas

..for the Respondent Nos.10 & 11/Petitioners.

Mr. Sandipan Banerjee,
Mr. Ankit Sureka

...for the HMC.

CAN 1 of 2021 is an application for recalling of the order dated July 13, 2021 passed by this Court in WPA No.11117 of 2021. It is submitted by the applicant, who was the original complainant before the Howrah Municipal Corporation, that the order of this Court has been passed in ignorance of the order passed by a learned co-ordinate Bench of this Court dated March 19, 2021 in WPA No.9390 of 2020 with regard to some unauthorised construction, which was the subject matter of decision in WPA No.11117 of 2021. It is submitted that this Court ought not to have heard the writ petition in view of the order already passed by a learned co-

ordinate Bench of this Court and also because a contempt application was pending before the learned co-ordinate Judge.

The order passed on March 19, 2021 in WPA No.9390 2020, at the instance of the petitioner, is quoted below:

“As it appears from records that steps have already been taken by the Howrah Municipal Corporation in response to the complaint filed by the petitioner accordingly, the instant writ petition is disposed of by directing the Howrah Municipal Corporation being the respondent No.3 herein to act strictly in accordance with law and to take necessary consequential steps for completion of the proceeding initiated under Section 177 of the Howrah Municipal Corporation Act, at the earliest, but positively within a period of twelve weeks from the date of communication of a copy of this order.”

On a perusal of the order, it appears that the learned Judge had directed the Corporation to complete the proceedings initiated under Section 177 of the Howrah Municipal Corporation Act, 1980 at the earliest and in accordance with law.

Pursuant to the direction of the learned co-ordinate Bench, an order dated April 29, 2021 was passed by the Executive Engineer, Building, Howrah Municipal Corporation directing the respondent Nos.10 and 11 in this application to remove/demolish the unauthorised constructions.

The said order of the Howrah Municipal Corporation was challenged in WPA No.11117 of 2021 before this court by the said respondents and it was contended that the order of

the Howrah Municipal Corporation directing demolition, was not sustainable in law in view of the fact that the “as made plan” had not been taken into consideration at the time of hearing and, thereby, the provision of regularization read with Explanation 1 of Section 177(1) of the Howrah Municipal Corporation Act had not been complied with by the Commissioner.

This court by an order dated July 13, 2021 directed the Corporation to re-hear the matter.

The order passed by this Court is set out below:

“I accept the contention of Mr. Banerjee to the extent that the petitioners have not filed a proper application annexing the plan. A copy of the plan may have been deposited in the office of the Howrah Municipal Corporation but the plan and the request for regularization should be made before the Commissioner. Explanation 1 to Section 177(1) states that minor unauthorized erection/minor deviation shall be such erection or construction as may be determined by regulations. It is an admitted position that there are no regulations in place.

The Commissioner of the Howrah Municipal Corporation has exercised discretion in the past and has considered issues with regard to such regularization, in accordance with law and the building rules as far as practicable. Although the petitioners have been asked to demolish their unauthorized structures, when the law provides that the Commissioner of the Howrah Municipal Corporation may consider prayers for regularization of minor deviation/minor unauthorized constructions, in my opinion, one last chance should be given to the petitioners to approach the Commissioner of the Howrah Municipal Commission, who shall take a decision upon hearing the petitioners after taking into consideration the “as made plan”, the building rules

and also cases of similarly situated persons, whose construction have been regularized in the past. The petitioner shall file the application within 7 days.

This Court is not expressing any opinion on the merits of the claims of the petitioners and the Commissioner of the Howrah Municipal Corporation shall decide the issue in accordance with law.

Till the decision is taken by the Commissioner, the Howrah Municipal Commission shall not take any coercive measure against the building. The Commissioner shall be at liberty to call for further documents from the petitioners, if necessary.

The Commissioner shall take a decision within a period of four weeks from the date of receipt of the documents and a reasoned order shall be passed and communicated to the petitioners thereafter.”

This order is sought to be recalled. As directed on July 13, 2021, the Corporation passed an order Court on December 30, 2021. The “as made plan” submitted by the petitioner was not allowed. The unauthorised constructions were not treated to be a minor deviation and the respondent Nos.10 and 11 in this application were directed to remove the unauthorised structures.

Pursuant to the order of the Howrah Municipal Corporation, the respondent Nos.10 and 11 in this application, filed another writ petition being WPA No.342 of 2022. This Court by its order dated January 19, 2022 set aside the order passed by the Corporation on the ground of violation of principles of natural justice. The respondent Nos.10 and 11, that is, the affected parties were not heard. The Court itself

fixed the date for hearing. The factum of pendency of the contempt application was recorded in the order and the submission of the learned Advocate of the Howrah Municipal Corporation was also recorded. Taking note of the pendency of the contempt application, the Court recorded that the Court did not express any opinion with regard to the earlier order passed by the learned co-ordinate Bench and the contempt application shall follow its own course.

Today, it is submitted by Mr. Banerjee, learned Advocate appearing on behalf of the Howrah Municipal Corporation, that the order dated January 19, 2022 has been complied with and the final order of demolition has been passed.

The validity or legality of the said order is not to be decided in this proceeding. At this juncture, the complainant has come up with an application for recalling of the order passed on July 13, 2021. The Court does not find any reason to recall the order dated July 13, 2021 in view of the following facts:-

(a) A co-ordinate Bench of this Court on a complaint raised by the applicant had passed an order in WPA No.9390 of 2020 on March 19, 2021 directing the Corporation to take steps with regard to the allegations

of unauthorised constructions on Holding No.14/2, Khagendra Nath Ganguly Lane, Howrah, Ward No.12.

(b) The Corporation proceeded in accordance with law and passed an order.

(c) The order was challenged before this Court which, by then, had the determination to take up such matters, vide WPA No.11117 of 2021.

(d) The law provides that the order of demolition may be challenged by way of an appeal under Section 177(7) of the Howrah Municipal Corporation Act, 1980 before a tribunal to be constituted. As no tribunal has been constituted till date to hear out such appeals, the writ petition was entertained by the High Court. The aggrieved party, would otherwise, be without any remedy. The Court upon being satisfied of the irregularities in the said order passed by the Corporation, set aside the order and directed re-hearing of the entire issue in accordance with law by an order dated July 13, 2021.

(e) Pursuant to the order of this Court dated July 13, 2021, the Corporation heard the matter and found the structures to be unauthorised and did not regularise

any minor deviation. Again, a demolition order was passed.

(f) Neither the learned co-ordinate Bench nor this Court had made any observations on the merits of the claims and counterclaims of the parties and the entire issue with regard to the unauthorised construction had been left open to be decided by the Corporation.

(g) The said order was once again challenged before this Court in WPA No.342 of 2022 and by an order dated January 19, 2022, the order of demolition was once again set aside by this Court with the following observations:-

“In the earlier round of litigation when the demolition order was challenged before this Court, this Court had directed that in view of the provisions of the Howrah Municipal Corporation Act, the petitioners should be given a chance to approach the authority and pray for regularization of the alleged minor deviations.

This Court does not express any opinion with regard to the earlier order passed by this Court and with regard to the contempt application, which shall follow in its course. However, as an opportunity of hearing had been directed to be given to the petitioners, this Court is of the opinion that the order impugned has been passed in violation of the principles of natural justice and it is liable to be set aside.

The contention of Mr. Banerjee that two additional floors without any plan cannot be treated as a minor deviation is not gone into at this stage. All these issues shall be decided at the appropriate stage. The merit of the order is not being considered only because the order was passed without granting a hearing to the petitioners. The order is being set aside.

Let the matter be relegated to the appropriate authority of the Howrah Municipal Corporation in terms of the earlier order passed on July 13, 2021 and the authority shall give a hearing to the petitioners. In view of this situation which has been cropped up and the pendency of the contempt application, this Court is of the opinion that the decision should be arrived at by the authority within January 25, 2022. Let the hearing be held on January 21, 2022 at 12 noon. The petitioners and/or their legal representatives will be heard by the concerned authority on that date. No further notice shall be given to the petitioner. This order shall be treated as the notice."

h) It is now informed that the order dated January 19, 2022 has been implemented and an order of demolition has been passed.

i) Thus the application for recalling the order dated July 13, 2021 has become infructuous in view of the subsequent orders passed by this court and proceedings initiated by the Howrah Municipal Corporation. The unauthorized structures have been asked to be demolished.

The Court does not find that the applicant has suffered any prejudice as the demolition proceeding instituted at the instance of the writ petitioner was reached to its logical conclusion.

The question of contempt shall be decided by the learned Judge, whose order has been claimed to have been violated.

This Court considered the orders passed by the Corporation which were challenged by subsequent writ petitions on their own merits, having the determination to do so. The writ petition was entertained by invoking the power of judicial review, in order to review not only the decision taken by the authority but also the procedure adopted by the authority to arrive at the decision. The Court does not find any reason to recall the order dated July 13, 2021 in view of the subsequent development and series of orders and decisions taken by the Court and also by the Corporation.

I do not find that any prejudice has been suffered by the applicant, even if, they were not heard by the Corporation during the subsequent rounds of hearing of the demolition case. The orders were passed in favour of the applicant, who had made the complaint, and against the respondent nos.10 and 11. Finally, in respect of such construction another order of demolition has been passed, pursuant to the direction of this court.

Accordingly, the application is disposed of.

There will be no order as to costs.

(Shampa Sarkar, J.)