

AD. 7.
August 4, 2021.
MNS.

C. O. No. 3431 of 2019
with
CAN 1 of 2019 (CAN 11016 of 2019)
(Via video conference)

Sri Ashoke Santra and others
Vs.
Sri Gobinda Hazra and another

Mr. Srijib Chakraborty,
Mr. Tanmoy Mukherjee,
Mr. Souvik Das

... for the petitioners.

Mr. Sandeep Prasad Shaw,
Ms. Priyanka Gupta,
Ms. Ilika Patra

...for the opposite party no. 1.

Mr. Animesh Paul,
Ms. Fatima Hassan

...for the opposite party no. 2.

Affidavit-in-reply in connection with the
vacating application, filed by the opposite party
no. 2, be kept on record.

The petitioners have challenged an order
of refusal of *ad interim* injunction by the appellate
court, while taking up an appeal against a similar
order of refusal of the trial court.

Learned counsel for the petitioners
submits that the appellate court did not advert to
the materials on record and/or the relevant law.

First, a poverty alleviation Scheme is an exception within the contemplation of Rule 19(1), proviso of the West Bengal Panchayat (Gram Panchayat Administration) Rules, 2004 (in short '2004 Rule'). The said proviso says that no permission of the Gram Panchayat shall be required for construction of houses under poverty alleviation programmes. Although nothing was produced by the parties, as evident from the impugned order, to establish that the scheme under which the construction was sought to be made by the petitioners was a poverty alleviation scheme, such question was not even adverted to by the appellate court, despite being *germane* for adjudication of the prayer for *ad interim* injunction.

A printout taken out by the petitioners from the relevant website indicates the provisions of the Pradhan Mantri Awas Yojana (hereinafter referred to 'PMAY'). Let such printout be kept on record. It is indicated in the same that the PMAY seeks to address the housing requirement of the urban poor, including slum dwellers, through certain programme verticals.

Be that as it may, without going into that question, the appellate court could not have decided either way.

The next question raised by the petitioners is that the West Bengal Panchayat Act, 1973 (in short 'Act of 1973'), as amended, includes Section 23(5), which specifically stipulates that where any new structure or building or addition to any structure or building is being erected or made in contravention of the provisions of sub-section (1) thereof, the permission granting authority, that is, the Gram Panchayat, shall refer the matter to the Sub-Divisional Officer concerned, who may, after giving the owner of such building an opportunity of being heard, make an order directing demolition of the building or a portion thereof.

By placing reliance on such provision, learned counsel contends that the Panchayat and/or the Panchayat Pradhan in his own capacity was incompetent under the law to issue a demolition notice.

Learned counsel appearing for the opposite parties argues that the conduct of the petitioners has been extremely poor and reeks of *mala fides*. It is submitted that a previous

challenge to the same demolition notice, which is challenged in the suit, was turned down by a co-ordinate Bench of this Court in its writ jurisdiction on the ground of suppression of material facts. Hence, it is argued, the appellate court was justified in refusing to grant any *ad interim* injunction order.

That apart, by placing reliance on sub-section (6) of Section 23 of the Act of 1973, which was retained in the statute even after the amendment, stipulates that when such an erection or structure is made in contravention of the provisions of sub-section (1) of Section 23, the 'authority' may, after giving the owner of such building an opportunity of being heard, make a demolition order.

It is, thus, contended that the power of the Sub-Divisional Officer and the Gram Panchayat is co-extensive inasmuch as the jurisdiction to direct demolition is concerned.

Learned counsel for the petitioners, while addressing this Court, places reliance on a judgement reported at ***AIR 1966 Supreme Court 1332 (Sheodan Singh Vs. Daryao Kunwar)*** in support of the proposition that in order that the matter may be said to have been heard and

finally decided, the decision in the former suit must have been on the merits. It is pointed out that the Supreme Court, while laying down such proposition, cited certain examples of dismissals which are on technical grounds not attracting the principle of *res judicata*.

One of such grounds is multifariousness or that the suit was badly framed or on a technical mistake and/or failure on the part of the plaintiff to produce certain documents etc. By placing reliance on the said judgment, learned counsel reiterates that mere dismissal of the writ petition by this Court against the same demolition notice on the ground of suppression of fact does not operate as *res judicata* for the purpose of the suit and/or interlocutory applications made therein.

Next placing reliance on ***Hoshnak Singh Vs. Union of India and others reported at (1979) 3 Supreme Court Cases 135***, learned counsel argues that the principle of *res judicata* is not applicable when the first petition was dismissed *in limine* without passing a speaking order.

Upon hearing learned counsel appearing for both sides, it is evident from the impugned order of the appellate court that the same is

vitiated by utter non-consideration of any of the materials on record and/or the governing principles for deciding prayers for injunction.

In a cursory manner, the appellate court merely said that it had looked into the pleadings and the materials, without any reflection whatsoever in the order as to such consideration.

In the present case, both the questions raised by the petitioners are at least arguable, which raised triable issues for which trial is required. In view of such *prima facie* case having been made out by the petitioners, the appellate court, in any event, ought to have considered the injunction prayer on merits.

As regards the first question raised by the petitioner, it was *de hors* the jurisdiction of the appellate court to refuse *ad interim* injunction without looking into the specific provisions of the PMAY and/or granting an opportunity to either side to produce the particulars of the said scheme, to ascertain whether the same was a poverty alleviation scheme. Even without relying on the printout handed over in Court today, the question as raised above remained unanswered and not even addressed by the appellate court. Although the printout handed over to this Court

was not placed before any of the courts below, it indicates that the scheme-in-question addresses the housing requirement of the urban poor, including slum dwellers. However, no finding can be rendered at this stage on that score, since the courts below might be prejudiced by any such observation at this stage. However, in view of Rule 19(1), proviso of the 2004 Rules, sufficient doubt arises as to whether the permission of the Gram Panchayat was at all necessary in the present case or not.

As far as the second question raised is concerned, it can be argued both ways – that sub-sections (5) and (6) of Section 23 give coextensive powers to the Panchayat, as well as the SDO to direct demolition and, alternatively, that it is only the SDO, in view of introduction of the new sub-section (5), which has such authority.

Upon plain reading of the said provisions, the second argument appears to be more plausible, since it has not been indicated anywhere in either of the sub-sections-in-question that the power is co-extensive. Read harmoniously, the 'authority' mentioned in sub-section (6) can very well be read as an SDO,

since sub-section (5) categorically enumerates that the “permission granting authority”, that is, the Panchayat shall refer the matter to the SDO for the purpose of hearing both sides and directing demolition, if necessary.

The introduction of such procedure would be superfluous in the event it is construed that sub-section (6) gives the permission granting authority itself, that is, the Gram Panchayat, powers of demolition on an equal footing as that of the SDO. Thus, a harmonious construction of the two sub-sections, at least *prima facie*, indicates that the authority referred to in sub-section (6) is the SDO in the light of sub-section (5), which has been introduced to Section 23 subsequently, the Legislature being fully aware of the pre-existence of sub-section(6).

That apart, the petitioners are justified in contending that the principle of *res judicata* is not applicable to the present case at all, since the learned single Judge, in the previous writ petition, merely rejected the writ petition on the technical ground of suppression of facts. However bad such suppression might have been in the eyes of the writ court, the same suppression has not re-occurred before the civil courts. As such, the said

ground cannot hold true even for the purpose of considering the suit or the injunction application by the trial court or the appellate court, which have ample power to decide the issue finally under Section 9 of the Code of Civil Procedure.

Thus, sufficient *prima facie* case has been made out by the petitioners to go for trial, entitling the petitioners to an *ad interim* order of injunction.

That apart, the urgency involved is clear from the successive demolition notices being issued by the Panchayat Pradhan, either in his own capacity or at the behest of the Panchayat, subject to proof in the suit.

Regarding irreparable injury and balance of convenience and inconvenience, that cannot be any issue as both the said yardsticks unerringly indicate in favour of grant of injunction, since the Pradhan or any one else cannot be affected by non-demolition of the property-in-question to the extent that the petitioners will suffer from such demolition, and as the appellate court failed to advert to any of the relevant issues while passing the impugned order, it cannot be said that the appellate court exercised its discretion judicially, so as to preclude this Court

from interfering under Article 227 of the Constitution of India.

In view of the above discussions, the petitioners are entitled to an *ad interim* order of injunction restraining the opposite parties from demolishing the suit property till disposal of the injunction application pending in connection with Miscellaneous Appeal No. 154 of 2019.

Accordingly, C. O. 3431 of 2019 and CAN 11016 of 2019 are disposed of by setting aside the impugned order of the appellate court, being order no. 2 dated September 4, 2019 passed by the District Judge at Howrah in Miscellaneous Appeal No. 154 of 2019 and restraining the opposite parties by an order of injunction from demolishing the suit property during pendency of the temporary injunction application filed in the appellate court.

It is expected, however, that the appellate court shall decide the injunction application and appeal, pending before it, as expeditiously as possible, preferably within one month from the date of communication of this order to the appellate court below.

The parties as well as the courts below shall act on the written communication of the

learned advocates for the parties, accompanied by a server copy of this order, without insisting upon prior production of the certified copy thereof.

It is made clear that the above observations have been made only in the limited context of deciding this revisional application and shall not influence the courts below in any manner while adjudicating any of the applications and/or appeal/suit pending before the said courts.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

