

Form J(2)

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Bibek Chaudhuri

W.P.A. 100 OF 2021

Sri Vijay Kumar Agarwal

-Vs.-

State of West Bengal & Ors.

For the petitioner : **Mr. Sunil Kumar Sarkar, Adv.,
Ms. Smita Sinha Mitra, Adv.,**

For the State Respondents : **Mr. Subir Kumar Saha, Adv.,
Mr. Momenur Rahman, Adv.**

For the Respondent No. 4 : **Mr. Jagriti Mishra, Adv.**

Heard and Judgment on : **04.02.2020.**

Bibek Chaudhuri, J.

Vide order dated 20th January, 2021, the petitioner has served the copy of the writ petition to the respondents and filed affidavit-of-service. The affidavit-of-service be kept with the record.

The petitioner is the son of the private respondent no. 4. Grievance of the petitioner is that his father purchased 0.12 acres of land at Siliguri in the name of his wife, respondent no. 4 herein by virtue of a registered deed of sale in the year 1990 for the benefits of

all the members of the family. On the said land the father of the petitioner constructed a four-storied building. The said building was constructed by the money earned by the father of the petitioner. After construction of the said house the father of the petitioner, respondent no. 4 and their children including the petitioner started residing there. The petitioner started a furniture business under the name and style of Royal Traders in the year 1988. He also contributed his profit for running the joint family since 1991. After the death of the father of the petitioner on 23rd January, 2012 some family dispute cropped up between him and the respondent no. 4 and since then the petitioner started residing separately in a single room situated on the first floor of the said building. He is carrying his business in the ground floor of the said building. As the dispute between the petitioner and the respondents and his other brothers over the family property escalated, he filed a suit for declaration, injunction and consequential relief before the competent Civil Court which was registered as Title Suit No. 204 of 2020. As the respondent no. 4 and other brothers of the petitioners were obstructing him from carrying out necessary repairs and their dwelling house he initiated a proceeding under Section 144 of the Code of Criminal Procedure before the Learned Executive Magistrate at Jalpaiguri. The respondent no. 4 filed an application under Section

22 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 read with Rule (7) (a) of the Rules framed under the said Act claiming, *inter alia*, that the said dwelling house was purchased by respondent no. 4 from her streedhan properties and the building was also constructed from the income made by her as a partner of a business under the name and style of Royal Traders.

Over the said application under Section 22 of the said Act the Sub-Divisional Magistrate, Jalpaiguri passed the following order :-

"Today a petition for maintenance and welfare is filed in my Court by Shanti Devi Agarwala, wife of Late Srinivas Agarwal.

Perused the petition. Heard the submission of the petitioner. Considered.

After hearing the petitioner and on perusal of the documents submitted before me, I am of the opinion for personal appearance of the opposite parties before this Court on the next date.

Considering the vulnerable condition of the petitioner, I do hereby SUMMONED the opposite parties member to appear before the Court on 01.12.2020 at 3.30 p.m. and show cause as to why proceeding under Maintenance and Welfare of Senior Citizens Rules, 2008 will not applicable to them. Police will ensure that the opposite parties member should present before the Court for hearing on the next date with written submission, if any.

I.C., Bhaktinagar Police Station is directed to enquire the matter after giving the copy of order to the opposite parties and submit report by the next date”.

The petitioner being aggrieved by the said order has filed the instant writ petition.

At the outset, Learned Advocate for respondent no. 4 submits that function of the Learned Tribunal requires adjudication of rights and not merely ascertaining whether the conditions are provided in the Statute and thereafter applying them. According to the Learned Advocate for the respondent no. 4, the function of the Sub-Divisional Magistrate while dealing with an application under Section 22 of the said Act is in the nature, a judicial rather than a quasi judicial function. If the impugned order dated 6th October, 2020 is held to be a judicial order, the same cannot be challenged under Article 226 of the Constitution of India but must be challenged under Article 227 of the Constitution of India. It is held by the Hon’ble Supreme Court in ***Radheyshyam –Vs.- Chhabinath***, reported in ***2015 (5) SCC 423*** that an order of Civil Court can be challenged under Article 227 and not under Article 226 of the Constitution of India. Relying on the said decision it is submitted by the Learned Advocate for the respondent no. 4 that in a proceeding under Section 22 of the said Act, the Tribunal is empowered to pass order of maintenance and protection

against wrongful act of the respondents. Adjudication of a proceeding under Section 22 of the said Act being judicial in nature, the impugned order is revisable under Article 227 of the Constitution of India and the instant application under Article 226 of the Constitution is not maintainable. In support of his contention the Learned Advocate for the respondent no. 4 relies on an unreported decision of this Court in the case of ***Pabitra Kumar Naskar @ Shyamal Kumar Naskar –Vs.- The State of West Bengal & Ors.*** [W.P. 15348 (W) of 2018].

Learned Advocate for the petitioner, on the other hand, submits that the petitioner has already filed a civil suit for declaration, permanent injunction and consequential relief before the competent Civil Court against the respondent no. 4 and his other brothers seeking for declaration that the dwelling house in the name of respondent no. 4 is in reality, a family dwelling house constructed by his father for the benefit of all the family members and the Section 4 of the Benami Transaction Prohibition Act is not applicable in respect of the said dwelling house.

It is further submitted by him that the petitioner has no grievance against the order dated 6th October, 2020 passed by the Sub-Divisional Magistrate, Jalpaiguri. However, he has grievance against the respondents who are officers of the Police Department of

the concerned jurisdiction because of their overt act done in excess of what has been directed by the order dated 6th October, 2020.

It is pointed out by the Learned Advocate for the petitioner that I.C., Bhaktinagar Police Station was directed to serve summons upon the petitioner for his appearance and filing application showing cause as to why the proceeding under Section 22 of the said Act will not be applicable against him. But the police has restrained him from making any renovation work and also from entering into the house.

On careful perusal of the writ petition, I find that though the writ petition was improperly drafted, grievance of the petitioner is not against the proceeding under Section 22 of the said Act. His grievance is against the alleged act done by the police authority, especially, I.C. Bhaktinagar Police Station who restrained him from entering into his dwelling house and from carrying out the repairing and renovation work. In the absence of any restraining order in the nature of injunction, the police authority cannot restrain the petitioner from entering into his house and carrying out repairing and renovation work.

In view of such circumstances, I find that the decision in ***Prabitra Kumar Naskar (supra)*** is not applicable under the facts and circumstances of the case. The instant writ petition has been filed against the overt act done by the respondents-police officers.

In view of such circumstances, I find that the instant writ petition is maintainable.

Considering the nature of allegation, the instant writ petition is disposed of directing the respondents-police officers not to interfere with the petitioner's right of ingress and egress in his dwelling house and carrying out essential repairing works of the said dwelling house by him.

The petitioner is, however, directed to appear before the Sub-Divisional Magistrate to contest the proceeding under Section 22 of the said Act filed by respondent no. 4.

It is specifically recorded that this Court has not dealt with the merit of the case and all issues including the maintainability of the proceeding under Section 22 of the said Act is opened for adjudication by the Sub-Divisional Magistrate.

The instant writ petition is, thus, disposed of in accordance with the above order on contest, however, without cost.

(Bibek Chaudhuri, J.)

**Srimanta
A.R.(Court)**