

CAN 161 OF 2020
(Application for stay)
in
MAT 23 OF 2020

Hasen Ali Sk.
-vs.-
State of West Bengal & Ors.

Mr. Pinaki Dhole
Md. Ziaur Rahaman
Ms. Srinoyanti Mukherjee.

....For the Appellant/
Applicant.

Ms. Sharda Parmar
Mr. Gour Baran Sau

....For the Respondents
Nos. 8 to 11 &
13 to 17.

1. A learned Judge of this Court by His Lordship's order dated 5th December, 2019 passed in W.P. 7460 (W) of 2018 declined to interfere with an order dated 16th March, 2018, which was passed by the Sub-Divisional Officer, Malda Sadar, Malda, (hereafter the SDO) pursuant to an earlier order dated 9th August, 2017 of of this Court while disposing of W.P. 18954 (W) of 2017. The reasons for declining interference are two fold – i) disputed questions of fact are involved, which cannot be adjudicated by the writ court; ii) a suit is pending before the competent civil court wherein a registered instrument of transfer of a piece of land by the private respondents in the writ petition to a particular masjid was under challenge.

2. The order dated 5th December, 2019 is questioned in the intra-court writ appeal.

3. CAN 161 of 2020 is an application for stay filed in the appeal. While hearing the application, we have heard the parties on the merits of the appeal. Treating it as on day's list and dispensing with all formalities, we proceed to decide the appeal here and now.

4. The appellant had addressed a representation dated 1st June, 2017 to various authorities which, *inter alia*, included the

Prodhan, Jaluabadhal Gram Panchayat. The complaint in such representation was that certain miscreants, named under Schedule-D, were raising construction on a vested property in such manner that ingress to and egress from the appellant's property was sought to be obstructed. According to the appellant, such construction was being raised without obtaining any plan from the concerned panchayat.

5. Alleging inaction on the part of the addressees to proceed on the basis of the representation dated 1st June, 2017, the appellant had the occasion to invoke the writ jurisdiction of this Court for the first time by presenting W.P. 18945 (W) of 2017. The order passed on 9th August, 2017 to the extent relevant, reads as follows :

"It is submitted by Mr. Mahato, learned advocate, appearing for the State Authorities, pursuant to the letter dated 21st July, 2017 issued by the Block Land & Land Reforms Officer, Kaliachak – I, Malda, to the Sub-Divisional Officer, Malda Sadar, already initiated proceedings against the private respondent nos. 7 to 10 as patta holders had transferred the land to the Jumma Masjid by a registered deed in contravention of the statutory provisions, such sale is not permissible as per section 49(1A) of the WBLR Act and the patta issued is liable to be annulled.

That being the scenario, I direct the Sub-Divisional Officer, Malda Sadar, the respondent no.17, to take a decision in respect of the petitioner's complaint dated 1st June, 2017 in accordance with law within four weeks from the date of communication of this order after giving an opportunity of hearing to the petitioner or his authorised representative and the private respondent nos. 7 to 10 or their authorised representatives and other interested parties, if any, and thereafter communicate the decision to the parties within one week.

With this direction this writ petition is disposed of. No order as to costs.

Needless to mention, if it is found in the hearing that the patta holders had transferred the land to the Jumma Masjid by a registered deed in contravention of the statutory provisions, then the respondent authority is at liberty to take appropriate step against such illegality committed by the patta holder and also against the Jumma Masjid as well as the respondent nos. 7 to 10.

Needless to mention, the Sub-Divisional Officer, Malda Sadar, the respondent no.17, is at liberty to take appropriate steps for demolition of such illegal construction of the shop room. Till the decision is taken the respondent nos. 7 to 10 are restrained from carry on any construction of shop room at the plot in question."

6. Acting in compliance with the said order dated 9th August, 2017, the SDO proceeded to pass an order dated 16th March, 2018. For the reasons recorded in his order, the SDO refused to interfere. The basic reason for declining interference was that the instrument by which the land was sought to be transferred was under challenge before the civil court and that in the absence of any declaration made by such court, it would not be prudent to make any direction.

7. The said order was challenged before the writ court in course of the second round of litigation by the appellant and the learned Judge made the order under challenge, noticed above.

8. Mr. Dhole, learned advocate appearing for the appellant contends that he is not concerned as to what transpires before the civil court and whether the instrument of transfer is held to be invalid or not. According to him, the appellant is concerned only with the fact of raising of construction by the private respondents without having a sanctioned building plan and despite specific direction given by the Court while disposing of W.P. 18954 (W) of 2017, the SDO failed and neglected to enquire into the allegation of the appellant that a construction had been raised without any sanctioned building plan.

9. It is true, as has been contended by Mr. Dhole, that the SDO did not consider the allegation of unauthorised construction. We were minded to make an appropriate direction in that behalf but the Record of Rights, at page 71 of the stay application, persuaded us to think otherwise. In the complaint dated 1st June, 2017, it is the admitted case of the appellant that plot nos. 291, 291/611 and 291/612 are vested property and using the same he sought access to reach his property. It is also the admitted case of the appellant that his name has been recorded in the Record of Rights as "possession without permission". However, it appears from page 71 that one Jafur Sk. has been in illegal

occupation of plot no. 291/612 (বেআইনি দখলদার). We have noted from the cause title of the memorandum of appeal that 'Hasen Ali Sk.', i.e., the appellant is also known as Jafur Sk.

10. Once it is found that the appellant has been illegally occupying vested property, we do not consider it proper to exercise discretion in his favour. Writ remedy is not intended to facilitate grant of relief to a party who himself occupies a land illegally and then complains of illegality, allegedly committed by others.

11. It is also clear that the appellant is claiming easement right and if there is any obstruction to enjoyment of such right by him at the instance of private parties, the right to relief lies in instituting a suit before the competent civil court having jurisdiction.

12. In that view of the matter, we find no reason to interfere. The appeal stands dismissed, without any order for costs. Consequently, the application for stay also stands dismissed.

13. Needless to observe, this order shall not preclude the appellant from approaching an appropriate forum for relief and if such forum is approached, the proceedings shall be taken to its logical conclusion uninfluenced by any observation made in this order.

Photostat certified copy of this order, if applied for, be furnished expeditiously.

(Madhumati Mitra, J.)

(Dipankar Datta, J.)

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)

10. 24.08.2022
Ct. No.6
Tanmoy

F.M.A. 633 of 2022
(M.A.T. 23 of 2020)

Hasen Ali Sk.
-Versus-
State of West Bengal & Ors.
With
IA No: C.A.N. 1 of 2020 (Old No: C.A.N. 161 of 2020)
With
IA No: C.A.N. 2 of 2022

Mr. Pinaki Dhole, Adv.,
Md. Ziaur Rahaman, Adv.,
Mr. Debjit Bhattacharyya, Adv.

...for the appellant.

Mr. Soumitra Bandyopadhyay, Adv.,
Mr. Aniruddha Sen, Adv.

...for the State respondents.

Mr. Gour Baran Sau, Adv.,
Ms. Mousumi Kundu, Adv.

...for the respondent
nos. 8 to 11 & 13 to 17.

This appeal was heard on March 2, 2020, by two learned Judges of this Court and the appeal was dismissed along with the connected stay application by a judgment and order of the same date. However, it has now transpired that although the judgment and order was pronounced in open Court, the same was not signed by the learned Judges. One of the learned Judges is now the Hon'ble Chief Justice of Bombay High Court. The other learned Judge has demitted Office. Since the judgment and order has not been signed by the learned

Judges who heard and dismissed the appeal, the appeal is shown as 'pending' in the records. The question arises as to whether the appeal should be re-heard or we, having determination regarding the matter, can sign the said judgment and order as the successors of the learned Judges who heard and dismissed the appeal.

Order XX, Rule 8 of the Code of Civil Procedure, 1908, which deals with a situation where a Judge has vacated Office before signing decree, reads as follows:-

“O. XX, R. 8. Procedure where Judge has vacated office before signing decree. – Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.”

However, Order XLIX Rule 3(5) of the Code of Civil Procedure excludes the operation of Rules 1 to 8 of Order XX of the Code to Chartered High Courts, Calcutta High Court being one of them, in the exercise of its ordinary or extraordinary original civil jurisdiction.

Although the provisions of the Code of Civil Procedure, 1908 do not apply in terms to applications under Article 226 of the Constitution, Rule 53 of the *“Rules of the High Court at Calcutta Relating to Applications under Article 226 of the Constitution”* may be noted, which reads as follows:-

“53. Save and except as provided by these Rules and subject thereto, the provisions of the Code of Civil Procedure (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The exclusion of application of Order XX Rule 8 of the Code to Chartered High Courts is limited to exercise of ordinary or extraordinary original civil jurisdiction by such High Courts. Hence, the exclusion would not apply to a Chartered High Court when it exercises Constitutional Writ Jurisdiction.

Keeping the aforesaid in mind, we are of the opinion that once a Bench has pronounced an order in open Court and has disposed of a matter, the question of re-hearing does not arise as no lis survives for being heard. We, as successors of the learned Judges, who heard the matter and dismissed the same, should sign the said judgment and order.

Let this order form part of the judgment and order dated March 2, 2020.

The appeal being F.M.A. 633 of 2022 along with all connected applications being IA No: C.A.N. 1 of 2020 (Old No: C.A.N. 161 of 2020) and IA No: C.A.N. 2 of 2022 stands disposed of.

Let urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with all necessary formalities.

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)