

06.04.2022
Sl. No.6
srm

W.P.A. No. 4993 of 2022

Biswajit Pramanik

Versus

The State of West Bengal & Ors.

Mr. Soumen Kumar Dutta,
Ms. Arpita Kundu

...for the Petitioner.

Mr. Jahar Lal De,
Mr. Abdus Salam

...for the State-respondents.

Mr. Dilip Kumar Sinha

...for the Respondent Nos.6 & 7.

Mr. J.N. Manna

...for the Respondent No.3.

The petitioner is the person aggrieved by an order of demolition issued on March 2, 2022 by the Pradhan, Chaitanyapur 3 No. Gram Panchayat, District-Purba Medinipur. The challenge to the said order is two-fold: (a) that the boundary wall was constructed by the petitioner with permission from the erstwhile Pradhan and the contrary finding was incorrect. The petitioner had produced a permission granted by the erstwhile Pradhan which was not considered; (b) the Pradhan did not have any power under the law to order demolition and further could not act as a Civil Court directing the petitioner to submit a plan

showing a common passage, which is the subject matter of a civil suit.

Mr. Dutta, learned Advocate appearing on behalf of the petitioner, relied on a decision of a Division Bench of this Court in the matter of Biswajit Naskar vs. Pradhan, Shirakole Gram Panchayat reported in (2008)3 Cal LT 165(HC). The Division Bench held that the concerned authority empowered to give any direction of demolition on hearing the owner of the building as per the provisions of Section 23(6) of the West Bengal Panchayat Act, 1973 (hereinafter referred to as the said Act), would mean the Gram Panchayat. Mr. Dutta further submits that with the amendment of the said Act and incorporation of the provisions of Section 23(5) of the said Act, by such amendment in 2017, the mandate of the law is very clear. The Gram Panchayat upon coming to a finding of unauthorised construction shall refer the matter to the Sub-Divisional Officer of the concerned locality and the Sub-Divisional Officer upon hearing the owner of such construction may order demolition or demolish the structures and recover the expenses thereof, as a public demand.

Mr. Sinha, learned Advocate appearing on behalf of the complainants/the respondent Nos.6 and 7, submits that there is no ambiguity with regard to the factual finding that

there was no plan for construction of the boundary wall. He next submits that a Division Bench of this Court in the matter of Feluram Mondal & Ors. vs. Subodh Kumar Mondal & Ors. reported in 2008(1) CHN 383 had held that the Pradhan may order demolition in terms of Section 23(6) of the said Act. Mr. Sinha further submits that Section 23(5) and Section 23(6) of the said Act must be given a purposive interpretation. The interpretation should be such that the law could be made universally applicable for public good. Thus he submits that the demolition order was in consonance with the provisions of Section 23(6).

Reliance has been placed on a decision of Abhiram Singh vs. C.D. Commachen & Ors. reported in (2017)2 SCC 629. It is further submitted that the expression “shall”, which appears in Section 23(5) of the said Act, should be interpreted as “may”, as the object and purpose of the said sub-section was public good and interpretation of the expression “shall” to be mandatory would cause general inconvenience. He relies upon a decision of the Hon’ble Apex Court in the matter of PEC Limited vs. Austbulk Shipping SDN BHD reported in (2019)11 SCC 620

Mr. Manna, learned Advocate appearing on behalf of the Pradhan, submits that the order was passed pursuant to a direction of this Court dated November 9, 2021 by which this

Court had directed the Pradhan to dispose of a representation made by the complainants/the respondent Nos.6 and 7 herein. He further submits that the matter may be referred to the Sub-Divisional Officer in terms of Section 23(5) of the said Act. However, Mr. Manna categorically states that the records of the Gram Panchayat office did not show that any permission was granted to the petitioner.

The question to be answered by the Court is as follows:

- (a) Whether the Pradhan was empowered to order demolition?
- (b) Whether the Pradhan could have directed the petitioner to file an application for sanction showing the common passage?
- (c) Whether the decision that the construction was unauthorised should have been taken by the gram panchayat and then referred to the Sub-Divisional Officer as per Section 23(5) of the said Act.

With regard to the first question, this Court is of the view that Section 23 of the said Act makes it mandatory for any person who wishes to erect any structure or building to obtain a previous permission in writing from the gram panchayat. It is clear that the gram panchayat is the

permission granting authority to allow erection of any structure or building or any addition or alteration of a structure or a building.

Section 23(5) of the said Act provides that when any new structure or new building or any addition to any structure or building is being or had been erected or made, as the case may be, in contravention of the provisions of sub-Section (1) meaning thereby that such construction has been made without any permission, the permission granting authority 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 of the building within a specified time. The Sub-Divisional Officer has also been empowered to effect the demolition and impose a fine, as may be specified by the State Government, and thereafter recover the cost thereof from the owner as a public demand. In this case, the expression “shall” is a mandate on the permission granting authority to refer the matter to the Sub-Divisional Officer. As such, the decision cited by Mr. Sinha in *PEC Limited (supra)* that “shall” should be construed as “may” for public convenience, is not accepted by the Court. Section 23(5) was incorporated by an amendment in 2017, despite there being a provision under sub-section (6) of

Section 23 of the said Act, empowering the authority to order demolition and take steps for such demolition. The legislature in its wisdom incorporated a mandatory provision to refer such matters to the Sub-Divisional Officer before an order of demolition is passed. Such order affects the right to property of a citizen and results in demolition of his property. The incorporation of sub-section (5) to the provisions of law in spite of the existing provision under Section 23(6) is a clear indication of the intention of the legislature to provide a double safeguard before such demolition takes place. Thus, the decision in PEC Limited (supra) shall not be applicable in this case.

Section 23(5) and 23(6) have to be harmoniously construed and they cannot be mutually exclusive or mutually destructive. When the legislature brought in the amendment by incorporating Section 23(5) despite there being a provision for demolition, upon harmonious construction of these two provisions of law which operate in the same field, this court is of the opinion that the amended provisions under Section 23(5) shall prevail and must be followed. In any event, the direction by the Pradhan was contrary to the provisions of Section 23(5) of the said Act.

The law is clear that the permission granting authority has to refer the matter to the Sub-Divisional Officer. The

permission granting authority, as per the provision of Section 23 of the said Act, is the gram panchayat and not the Pradhan. The Pradhan can at best intimate the order taken by the gram panchayat, but a resolution to the effect that the said construction was unauthorised will have to be taken by the gram panchayat and then referred to the Sub-Divisional Officer.

This Court is not inclined to go into the factual findings as the same are within the domain of the authority. This Court is of the view that although the Pradhan was directed to dispose of a representation, yet the proper course of action would be that the gram panchayat should have taken a decision with regard to the unauthorised construction and then referred the matter to the Sub-Divisional Officer under Section 23(5) of the said Act and the Sub-Divisional Officer should have proceeded in accordance with law in view of the mandatory provisions of Section 23(5).

Under such circumstances, the matter is remanded for a hearing before the gram panchayat with regard to the allegations of unauthorised construction made by the respondent Nos.6 and 7. Such decision shall be arrived at within three weeks from communication of this order and if it is found that the construction was not with permission

from the permission granting authority, the matter shall be referred to the Sub-Divisional Officer concerned in terms of Section 23(5) of the said Act, within a week thereafter.

The impugned order dated March 2, 2022 is quashed and set aside.

When the panchayat authorities are revisiting the matter afresh, they shall permit the parties to appear and make their submissions and produce necessary documents.

If the matter is referred to the Sub-Divisional Officer by the permission granting authority on detection of unauthorized construction the matter shall be disposed of. The parties shall be heard. The only question to be determined would be the allegation of unauthorized construction. The Sub-Divisional Officer will proceed in accordance with law and pass necessary orders within four weeks from the reference.

This writ petition is, thus, disposed of.

There will be no order as to costs.

All parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)