

IN THE HIGH COURT AT CALCUTTA

**Civil Appellate Jurisdiction
(Appellate Side)**

MAT 1131 OF 2022

Lakshmi Roy

Vs.

The State of West Bengal & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Appellant : Mr. Biswaroop Bhattacharya, Adv.
Mr. Pratik Majumdar, Adv.

For the Respondent No. 5 Mr. Shaunak Ghosh, Adv.
Mr. Rajib Mullick, Adv.
Ms. Shreyashi Maity, Adv.

For the State : Mr. Sudipto Panda, Adv.
Ms. Munmum Tewary, Adv.

For the Municipality Mr. Amalesh Roy, Adv.
Ms. Mousumi Bhowal, Adv.
Mr. Aman Gupta, Adv.
Mr. Ishan Bhattacharya, Adv.

CAV On : 27.09.2022

Judgment On : 20.12.2022

Apurba Sinha Ray, J. :-

Backdrop of the Appeal

1. The present appeal has a chequered history, way back to 1982-83, and without knowing the same, it would be difficult to decide the issues involved in the present appeal.

2. It is alleged by the writ petitioner/ appellant that her predecessor-in-interest was a Refugee from East Pakistan and, from 1969 onwards, he started residing in a portion of Colony no. 360, Jessore road (being re-numbered as 6, Shyama Prasad Colony) in the house of one Jagabandhu Saha who was also a Refugee from East Pakistan, and who occupied the premises no. 6 Shyama Prasad Colony. Jagabandhu Saha had three sons, viz., namely Gopal Chandra Saha, Anath Bandhu Saha and Shreenath Bandhu Saha. On the death of Jagabandhu Saha, his two sons, Anath Bandhu and Shrinath Bondhu Saha left the premises and Gopal Saha continued his stay therein along with members of his family. After the death of Gopal Saha, his legal heirs continued to live there. It is also alleged that

the predecessor of the writ petitioner/ appellant, during the lifetime of Jagabandhu Saha started residing in one room and surrounding spaces being the portion of Anath Bandhu Saha. Anath Bandhu Saha vacated his occupied portion in favour of the predecessor of the writ petitioner after receiving Rupees 11,000/-. Subsequently with the intervention of Refugee Rehabilitation Department, Government of West Bengal, the said premises no. 6 , Shyama Prasad Colony was bifurcated and 12 chittaks, 6 square feet were recorded in the name of the predecessor of the writ petitioner and the said predecessor mutated his name in the register of South Dumdum Municipality. The predecessor of the respondents initiated a suit for eviction of licensee against the said predecessor of the writ petitioner in the Learned Court of Civil Judge at Sealdah being Title Suit no. 249 of 1985 and the predecessor of the petitioner contested the said suit by filing written statement. When the predecessor of the writ petitioner became seriously ill and was taken elsewhere for treatment, the predecessor of the respondents forcibly occupied the said room and property of the predecessor of the writ

petitioner by breaking open the padlock. Several proceedings, both civil and criminal, were lodged, and a prayer for mandatory injunction for restoration of the possession of the predecessor of the writ petitioners was filed. Subsequently the said suit was dismissed for non prosecution at the instance of the predecessor of the respondents. It is also alleged that the suit was dismissed for default without disposing of the petition for restoration of possession filed by the predecessor-in-interest of the present writ petitioner/ the appellant. Subsequently, the matter was carried before this Court. According to the appellant, being advised, she filed Title Suit no. 310 of 2008 for declaration of title and restoration of possession, as the previous suit was dismissed for non prosecution at the instance of the predecessor in interest of the respondents without disposal of her prayer for mandatory injunction for restoration of possession on merit. However, during the pendency of Title Suit no. 310 of 2008, the present writ petitioner/the appellant noticed that the respondents started construction on the property of the present writ petitioner without any sanctioned plan,

and accordingly, the matter was brought to the notice of the South Dumdum Municipality which passed an order of demolition, after inspection of the relevant property, and with the intervention of the Hon'ble High Court in writ petition no.17348 of 2018, the demolition of the first floor of the relevant building was carried out by the concerned municipality. However, according to the present writ petitioner/ appellant, the municipality was unable to dismantle the entire construction which was raised by the respondents without a sanctioned plan. The matter was brought to the notice of the concerned municipality and other authorities at the instance of the present writ petitioner /appellant, but unfortunately the municipality did not pay any heed to such requests compelling the present writ petitioner/ appellant to file writ petition no. 4760 of 2019 praying for issuance of writ of mandamus directing the municipality to dismantle the entire unauthorised construction made by the respondents. After contested hearing, the Learned Single Judge dismissed the said writ petition, and hence this appeal.

3. The respondents' case is that the predecessor of the writ petitioner used to attend one Rakhal Goswami, being the original lessee of a room in the property of their predecessor in interest, as his disciple and after the death of Rakhal Goswami, the predecessor of the writ petitioner used to stay in the said room and took various pretexts for staying there. As the said predecessor of the writ petitioner failed to vacate the said room, the predecessor in interest of the respondents, filed Title Suit no. 249 of 1985 in the learned Court of Civil Judge (Junior Division) at Sealdah and subsequently, due to ill health of the predecessor of the petitioner, he handed over the possession of the room to the respondents in the presence of witnesses and since then the said suit room was in the possession of the respondents. The Refugee Rehabilitation Department, Government of West Bengal could not have bifurcated premises no. 360 (old), now 6 (new) Shyamaprasad Colony and if any such order was passed by the said department, that was bad in law. The respondents further state that the writ petitioner/ appellant is now trying to make out a new case, in an

attempt to grab the property. However, the respondents claim that the entire alleged unauthorised construction was dismantled and there remains nothing to be demolished.

Submission from the Bar

4. Learned Counsel, Mr. Bhattacharya, appearing for the appellant, has submitted that the learned Single Judge has made a third case at the time of disposal of the writ petition being no. 4760 of 2019. According to him, the cause of action arose when the writ petitioner found that in spite of the order of demolition in respect of entire unauthorised construction, the concerned municipality demolished only part of the structures unauthorisedly raised by the respondents and did not take any step for dismantling the remaining portion of the unauthorised construction. Learned Counsel has referred to several complaints lodged before the police authority and other authorities on 18.12.2018, 29.12.2018 and 14.1. 2019, 2.2.2019 and 11.2.2019. Learned counsel has also pointed out that it is not proper to make a distinction between old and new structures since it is

found that all structures therein have been made without sanctioned plan.

The municipality and its power have been recognised in the provisions of the Constitution and the learned counsel has drawn the attention of this Court to schedule IX A, Schedule XII, and Article 330 of the Constitution. He also referred to the Laxmi Residency case law. The attention of this Court was also drawn to the provisions of section 370 of Bengal Municipal Act 1932, Section 441(e) and also section 218 of West Bengal Municipal Act 1993.

5. Learned Counsel, appearing for the municipality on the other hand, has submitted that one Court of law has held that demolition work has been completed and, therefore, the decision of the Learned Single Judge in writ petition no. 4760 of 2019 should not be interfered with. In the initial complaint, there was no allegation about old construction. The spot was inspected by the experts of the South Dumdum municipality and thereafter they have submitted a report where it is found that unauthorised construction of the first floor has been dismantled. As the spot is within the squatters' colony , where a huge number of structures have

been made without sanctioned plans , there is a practical difficulty if the structures, which were raised 50 years ago, are required to be dismantled on the ground of not having sanctioned plans. Accordingly, the report of the municipality, supported by affidavit , had been submitted before the Learned Single Judge of this Court, who after taking into consideration all the minute details, has been pleased to record that there is no need for further demolition of the structure in the ground floor . According to him, the reasoned order passed by the Board of Councillors still holds good as the municipal appeal against it was withdrawn.

The other respondents have more or less supported the stand taken by the Municipality.

Decision with reasons

6. From the above, the admitted facts of the case may be narrated as follows:

- a. *The predecessor in interest of the writ petitioner was occupying one room of Jagabandhu Saha in Shyama Prasad Colony being premises no (old) 360 and (new) 6;*
- b. *An eviction suit against licensee was initiated against the predecessor in interest of the writ petitioner ;*
- c. *The premises no. 360 (old) Shyama Prasad Colony, (New) 6 Shyama Prasad Colony was bifurcated ;*
- d. *The room occupied by the predecessor in interest of the writ petitioner came under the possession of the respondents in 1988;*
- e. *Proceedings were initiated for restoration of possession by the predecessor of the writ petitioner on 24.06.1989;*
- f. *The predecessor in interest of the respondents moved Hon'ble High Court by filing Writ petition no.4078 of1988, and by order dated 11th April 1997, Hon'ble Justice Prabir Kumar Samanta disposed of the said writ petition by*

leaving it open to the respondent/Government authorities to proceed on the basis of the decree ,if any, passed in Title Suit no. 249/1985 ;

g. Suit for eviction of licensee , that is, Title Suit no. 249/1985, was dismissed for non prosecution at the instance of the respondents, without disposal of the petition dated 24.6.1989 for mandatory injunction for restoration of possession filed by the predecessor of the writ petitioner on merits;

h. The order of dismissal of Title Suit no. 249/1985 was finally recorded by Learned Civil Judge (Junior Division) at Sealdah on 5.09.2008 treating all the applications of writ petitioners/defendant(s) therein as disposed of.

i. Title suit number 310 of 2008 has been initiated by the writ petitioner for declaration of title, injunction and restoration of possession wherein an order of status quo against creation of third party interest and /or possession was passed and the same is subsisting ;

j. The construction was made by the respondents without any sanctioned plan in the south east corner of the relevant plot of land in the month of June 2018;

k. With the intervention of this Court, South Dumdum Municipality dismantled the first floor of the construction on the prayers of the writ petitioner.

l. The writ petitioner again moved the Hon'ble High Court on the ground that the entire unauthorised construction was not dismantled or demolished by the concerned municipality in spite of the orders of Board of Councillors and of this Court;

m. The said writ petition being number 4760/2019 was dismissed by the Learned Single Judge on 15.7.2022

7. At the very outset, I would like to state that the appellant has admitted that her predecessor in interest started staying in the room of Anath Bandhu Saha since 1969, and, therefore, it can be safely said that the said room was not constructed by the father of the appellant. From the relevant papers and other documents as contained in the paper book, it

transpires that nowhere the writ petitioner claims that the said room was constructed by her predecessor. But unfortunately the learned Single Judge has observed in the order under appeal, at page no. 2, that ‘.....The said Shyamapada Roy paid the municipal tax in respect of the aforesaid property and resided there on by constructing a single storied structure with brick walls and Tin roof.....’ and as such the said observation of Learned Single Judge is beyond record.

8. Therefore, from the record and materials, it transpires that the case of the appellant is that the predecessor of the writ petitioner started living in one room of Jagabandhu Saha which was allegedly under the occupation of one Anath Bandhu Saha, son of Jagabandhu Saha, who vacated the said room and other properties on receiving a sum of Rs. 11,000/- from the appellant’s predecessor. If that be so, then, it is astonishingly found that after 40 years or more, the appellant is claiming that the said room ,that is, the old structure in this fiasco, wherein the father of the appellants started living 40 years ago, and for which restoration application, suit and other

proceedings were filed from the side of the appellant, suddenly became the subject of unauthorised construction.

9. Law does not permit approbation and reprobation. The principle of approbate and reprobate is based on the maxim 'quod approbo non reprobo' which means 'that which I approve, I cannot disapprove'. According to Halsbury's Laws of England [4th edition, volume 16, para 1508], "after taking an advantage under an order,... a party may be precluded from saying that it is invalid and asking to set it aside." The Doctrine of Election also states that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turn around and say it is void for the purpose of securing some other advantages. Therefore, an individual is not authorised to accept and reject the same transaction at a time as per his/her convenience.

10. In the present case, the writ petitioners' father did not have any objection to the effect that the said room was constructed without a sanction plan and, on the contrary, he resided therein physically for more than 16 / 17 years as per case of the writ petitioner. Therefore, the predecessor of the writ petitioner who used the said room inspite of the fact that the said construction was made without a sanction plan, or the writ petitioner who stepped into the shoes of her father, cannot raise the issue of unauthorised construction without a sanction plan after 40 years of such construction. As the father of the writ petitioner chose to stay in the room which was constructed without a sanction plan, his heir /legal representative should not be allowed to take a somersault and to raise the issue of construction without a sanction plan in respect of old and existing structure at this stage. Moreover, there was a series of legal proceedings between the parties, but nowhere it was claimed from the side of the appellant that the old structure was raised without a sanctioned plan. As the predecessor in the interest of the writ petitioner had no objection, or we

can say, it other way round, that as he had tacit consent about the existence of the structure without a sanctioned plan, he or his legal representative is not allowed under law to raise the issue at this stage.

11. Our Civil Procedure Code and Statutes under Civil Law have been enacted in such a manner and to such an extent that these types of issues can be adjudicated in the Civil Courts without burdening the Writ Courts. In other words, the civil courts are equipped with provisions under Civil Procedure Code and the Statutes under the Civil law to adjudicate issues of encroachment, unauthorised construction and so on. If we scrutinise the provisions of Civil Procedure Code, we shall find that Civil Courts are empowered to issue commissions including local inspection commissions, engineering Commissions, survey commissions and so on. The Civil courts can examine experts to ascertain the existence of unauthorised construction or the age of construction and so on. In our case, it is found that one civil suit bearing number title suit 310 of 2008 is pending between the writ petitioner and the private respondents. It is also alleged by the petitioner

that an order of temporary injunction in the form of status quo restraining the private respondents from creating third party interest over the suit property and possession, was passed by the Court at Sealdah. The writ petitioner could have moved appropriate applications before the said Court complaining of raising unauthorised Construction by the private respondents without a sanctioned plan during pendency of the title suit, and also an application praying for the demolition of the same by way of temporary mandatory injunction, but without doing so the writ petitioner moved a series of writ petitions before this Court impleading the private respondents, the Municipality and others. Now, an important question is when a property is the subject matter of a civil suit, should the writ court pass an order for demolishing /dismantling the said property by issuing writ and other orders. If the writ court does so, it would, in fact, be an interference with the property which is the subject matter of a pending suit before a competent Civil Court. Had the writ Courts been persuaded that a civil suit encompassing substantial issues concerning the said property is

pending, surely the writ Court would not have entertained the prayer for demolition or dismantling of the structure. If we peruse the case records of the present appeal, we shall find there was a situation when the predecessor-in-interest of the respondents filed a Writ application before this Court, and Hon'ble Justice P.K. Samanta refused to entertain the same by holding that the parties will be guided by the order passed in the pending civil suit and the government authorities were to follow such order. Therefore, there is always a chance of passing conflicting decisions by the courts of law dealing with cases involving the same self suit properties and causing prejudice to the concerned parties in the long run. Therefore, in my view the jurisdiction of the writ courts should not be unnecessarily drawn into the controversy, particularly, when civil courts are sufficiently equipped to deal with such issues in a pending suit for declaration of title, injunction and restoration of possession.

12. Therefore, considering all aspects involved in this case, I would like to conclude by saying that as per records, the first floor construction in the

case property has already been demolished pursuant to the order of this Court, and further, from at least two reports of the concerned authorized persons of Municipality, it is revealed that two or three beams of new structures still exist. However, without directing further demolition work, this court disposes of the present appeal by giving liberty to the writ petitioner to move appropriate application in the pending civil suit, and they are also given liberty to submit certified copies of the affidavits, reports of the authorised persons of the municipality which have been filed in the present proceedings, before the civil court in the district, and the respondents are also at liberty to take appropriate steps therein in accordance with law. The South Dum Dum Municipality and other Government Authorities are to implement the order/orders passed by the Learned Civil Court as referred to above.

13. We are of the considered opinion that the order under appeal is a well balanced and perfectly reasoned order which serves the ends of justice. The

order warrants no interference. Accordingly this appeal fails and is dismissed without, however, any order as to costs.

14. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)