

15.12.2022
Court No.19
Items 1 & 2
srm

W.P.A. No. 35543 of 2013
Smt. Sonali Kumar
versus
The State of West Bengal & Ors.

With

W.P.A. No. 4431 of 2019
Smt. Sipra Mondal
versus
The Howrah Zilla Parishad & Anr.

Mr. Sandip Ghosh,
Mr. Subrata Das,
Mr. Debayan Ghosh,

... for the Petitioner in
WPA No. 35543 of 2013.

Mr. Malay Singh,
Mr. Bibekananda Tripathi

...for the State in
WPA No. 35543 of 2013.

Ms. Monjuli Chowdhury,
Ms. Mekhla Sinha,

...for the Howrah Zilla Parishad.

Mr. Nilanjan Bhattacharjee,
Mr. Saikat Dey

...for the Petition in WPA 4431/2019 &
Respondent No. 6 in WPA 35543/2013.

Re: W.P.A. No. 35543 of 2013

Affidavits-in-opposition to the writ petition filed on
behalf of the respondent No.4 as also the respondent No.6
are taken on record.

The learned Advocate for the petitioner submits that the petitioner does not want to use any reply to such affidavits. The learned Advocate for the respondent No.6 also does not want to use an Affidavit-in-reply.

This writ petition has been filed by a person who assails a notice of demolition dated November 20, 2013 passed by the Assistant Engineer, Howrah Zilla Parishad. A portion of the building which was constructed by the petitioner was found to be beyond the sanction plan. 71.012 m² area was found to be unauthorised. The details of the unauthorised portion is as follows:

"East Side:-	3.03m x 0.60m
	3.90m x 0.23m
West Side:-	8.998m x 2m
South Side:-	6.739m x 0.70m
	7.59m x 1.0m
North Side:-	6.782m x 0.50m "

The authority indicated the extent and nature of unauthorized construction in the impugned notice as quoted above.

The said notice is a composite one which includes direction for demolition also upon the respondent No.6, who is the writ petitioner in WPA No.4431 of 2019 and also

the husband of the petitioner, Sri Sukdeb Kumar. From the enquiry report dated November 7, 2013, it appeared that behind the building of the petitioner, another G+1 storeyed structure had been raised by the husband of the petitioner and both the buildings were joined together and interconnected. The said building also had a covered area of more than 90% which was not permissible in law. Sukdeb Kumar has not challenged the order of demolition. The respondent No.6 has challenged the said order by filing WPA 4431 of 2019.

The petitioner contends that after the construction was completed sometime in 2005, a revised plan seeking regularization of the deviation from the approved plan had been submitted before the Thanamakua Gram Panchayat, District-Howrah. Reliance has been placed on a receipt dated May 22, 2006.

The petitioner justifies the construction and retention thereof, by invoking Rule 30 of the West Bengal Panchayat (Gram Panchayat Administration) Rules, 2004 (hereinafter referred to as the said Rules). The learned Counsel submits that the revised plan was submitted before the gram panchayat on May 22, 2006. It is submitted that as the petitioner did not hear anything from the said

authority for more than 30 days, by operation of the deeming provision, the petitioner had acquired the right to retain the portion which was constructed beyond the sanction. Learned counsel submits that regularization was automatic in this case as the authorities kept silent over the issue. The silence amounted to post facto sanction. Reliance has been placed on a decision of this Court in the matter of *Sri Muktipada Bhandar vs. The State of West Bengal & Ors.* reported in (2002)3 Cal LT 324(HC), in support of such contention.

The petitioner further submits that different Benches in several rounds of litigation, had directed the Howrah Zilla Parishad to demolish the structure raised by the respondent No.6, but there was no mandate upon the Howrah Zilla Parishad to direct demolition of the alleged unauthorised structure of the petitioner. Reliance has been placed on an interim order dated January 21, 2014 passed by a co-ordinate Bench of this Court in this writ petition.

At the interim stage, there was an observation that the provisions of Rule 30 of the said Rules were squarely applicable in respect of the petitioner's construction. Reliance has been further placed on an order dated June 13, 2018 passed by another co-ordinate Bench. It is

submitted that His Lordship in the order dated June 13, 2018 did not make any observations with regard to the implementation of the order in respect of the petitioner's construction. Hence, it is urged that the allegation against the petitioner was not substantiated and there was no direction upon the Howrah Zilla Parishad to take steps in respect of the petitioner's construction.

Mr. Bhattacharjee, learned Advocate appearing on behalf of the respondent No.6 admits that the said respondent did not have any sanction from the authority. He further submits that from 1985 the Howrah Zilla Parishad was the authority competent to grant sanction as per the Panchayat Act and bye-laws of the Howrah Zilla Parishad. The respondent No.6 did not apply for sanction as the plot over which the construction has been made was very small and did not meet the criteria as per the building rules and the bye-laws of the zilla parishad. However, learned counsel prays for regularization. Mr. Bhattacharjee relies on a decision of the Hon'ble Division Bench in the matter of Sri Ajay Nath Yadav @ Ahiri vs. The State of West Bengal & Ors. (In Re: FMA 3553 of 2015). The Hon'ble Division Bench directed the building committee of the Howrah Zilla Parishad to consider the prayer for

regularization made by the appellant in the said appeal, in terms of Rule 15 of the bye-laws of the Howrah Zilla Parishad.

The learned Advocate for the Howrah Zilla Parishad submits that by an order dated September 4, 2013, another co-ordinate Bench of this Court had disposed of a writ petition being WP No.5452(W) of 2012 filed by the present petitioner with a direction upon the Sabhadhipati, Howrah Zilla Parishad to demolish the unauthorised construction raised by the respondent No.6 within a period of eight weeks from the presentation of a certified copy of the order and upon granting a notice to the respondent No.6. With regard to the allegation of unauthorised construction undertaken by the petitioner, His Lordship found that the same was evident from the report filed by the authority in the said proceeding. His Lordship directed the authority to enquire into the matter and take steps for demolition in accordance with law, if such construction was found to be unauthorised. Such step was also directed to be taken within eight weeks from the date of receiving a copy of the order. It is submitted that on the basis of such direction, the impugned notice was issued.

It is next submitted that the order dated June 13, 2018 directing the Howrah Zilla Parishad to implement its own order wrongly mentioned as July 26, 2011, instead of July 18, 2011 by His Lordship, both the petitioner and the respondent No.6 were asked by the Zilla Parishad to demolish the illegal and unauthorized construction raised by the said parties in violation of the sanction plan and the bye-laws of Howrah Zilla Parishad.

The Howrah Zilla Parishad was authorized to finally demolish the structures as all the Courts had directed demolition of the structure constructed by the petitioner which was found to be beyond the approved plan and not only the construction of the respondent No.6 which was admittedly without any sanction.

It has been averred in the affidavit-in-opposition filed by the Howrah Zilla Parishad that both the constructions were unauthorised. A further report has been filed along with the affidavit-in-opposition which indicates the extent and nature of the unauthorised constructions of the parties as also the husband of the petitioner. The same is a recent report. It is also clear from the reports and the orders passed by the Howrah Zilla Parishad that the amalgamation of plots, which was

prayed for by the petitioner and her husband, had not been allowed. The co-ordinate courts had also noticed that both the parties had raised unauthorized constructions and had thus directed implementation of the orders of demolition. The petitioner refused to file affidavit-in-reply to the said opposition and the same goes untraversed.

The Howrah Zilla Parishad has specifically stated in paragraph 7 of the opposition that regularization, as prayed for by the respondent No.6, could not be allowed due to insufficient clearance. In order to ensure safety norms and for protection of life and the environment, the structure of the respondent No.6, could not be regularized.

Heard the learned Counsels appearing for the respective parties. There is no dispute with regard to the fact that inspection by the competent authority, that is, the Howrah Zilla Parishad revealed that the constructions are irregular. The extent and nature of irregularity in the construction of the petitioner has been mentioned in the impugned notice and also in the current report. The construction of the respondent No.6 is without any sanction and wholly illegal. While the petitioner claims *post facto* regularization on the basis of the deeming provisions, the respondent No.6 claims that the matter may

be sent to the building committee of the Howrah Zilla Parishad for consideration of the prayer for regularization.

The Howrah Zilla Parishad has been consistent in its findings with regard to the unauthorised structures of both the parties. Since 2011, the Howrah Zilla Parishad has been trying to implement its order of demolition upon detection of unauthorised constructions. It was at the petitioner's instance that the Howrah Zilla Parishad was activated to inspect both the premises in order to detect irregularities in the construction. When the portion of the petitioner's construction was found beyond the plan, the petitioner was issued several notices. The petitioner claims protection of the deviated portion, by application of Rule 30 of the said Rules.

The law is well settled in this field. Retention/regularization cannot be claimed as a matter of right. Unauthorized structures or parts of constructions which were beyond the sanctioned plan must be demolished.

In the matter of *Dipak Kumar Mukherjee v. Kolkata Municipal Corpn.* reported in (2013) 5 SCC 336, the Hon'ble Apex Court held as follows:-

"24. In view of the pleadings filed before the High Court and the affidavits filed before this Court, there is no escape

from the conclusion that Respondent 7 had raised construction in violation of the plan sanctioned under Section 396 of the 1980 Act and continued with that activity despite the order of the Mayor-in-Council. In the prevailing scenario, the representative of Respondent 7 might have thought that he will be able to pull strings in the power corridors and get an order for regularisation of the illegal construction but he did not know that there are many mortals in the system who are prepared to take the bull by horn and crush it with iron hand.

The revised plan, if at all, should have been submitted before the construction in devising the plan. In

Dipak Kumar Mukherjee (supra) it was held as follows:-

25. Rule 25 of the Rules, on which reliance was placed by Respondent 7 for seeking regularisation of the illegal construction, reads as under:

‘25. Deviation during execution of works.—(1) No deviation from the sanctioned plan shall be made during erection or execution of any work.

(2) Notwithstanding anything contained in sub-rule (1), if during erection or execution of work any internal alterations or external additions which do not violate the provisions of the Act or these Rules is made, the Municipal Commissioner may without prejudice to any action that may be taken against the person at whose instance such alteration or additions have been made, allow the person referred to in sub-rule (1) of Rule 4 to submit, in accordance with the provisions of these Rules, a revised plan showing the deviation and may sanction such plan.

(3) Any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the provisions of the Act and these Rules and shall be dealt with accordingly.’

26. A reading of the plain language of Rule 25(1) makes it clear that a person, who erects any structure or executes any work is not entitled to deviate from the sanctioned plan. Rule 25(2) which contains a non obstante clause and provides for sanction of revised plan to be submitted by the person engaged in erection of building or execution of work

lays down that if during erection or execution of work, any internal alterations or external additions which do not violate the provisions of the Act or the Rules is made, the Municipal Commissioner can, at an application made in that behalf sanction the revised plan showing the deviation. Rule 25(3) is declaratory in nature. It lays down that any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the Act and the Rules shall be dealt with accordingly.

27. In our view, Respondent 7 cannot take benefit of Rule 25 because the disputed construction was in clear violation of the sanctioned plan and the notices issued by the competent authority of the Corporation and also because the application was made after completion of the construction."

There is no denial of the fact that a part of the construction of the petitioner was beyond the sanction plan. It appears that the petitioner applied before the Howrah Zilla Parishad for sanction and amalgamation. The receipt showing submission of application fee in 1995 has been placed before the Court. The plan was sanctioned originally was 1999, as it appears from the endorsement on the plan, and thereafter the said plan was renewed upto 2007. The plan was sanctioned for a partly commercial and partly residential building. Thus, the contention of the petitioner that after the completion of the structure with some deviation, a revised plan was prepared and was submitted before the Tanamakua Gram Panchayat seems

to be contrary to the action taken by the petitioner while praying for the original sanction.

The petitioner was well aware that the authority to grant sanction was the Howrah Zilla Parishad. Such application was filed before the Howrah Zilla Parishad in 1995. The plan was sanctioned in 1999 for a period of five years and thereafter further renewal was granted upto October 25, 2007. The renewal was granted by the District Engineer on March 22, 2005. Thus, there was no occasion for the petitioner to file a revised plan before the Tanamakua Gram Panchayat, which was neither the permission granting authority nor the approving authority for constructions within the area under the jurisdiction of the Kolkata Metropolitan Development Authority which had vested in the Howrah Zilla Parishad.

Moreover, the co-ordinate Benches had directed the Howrah Zilla Parishad to implement the orders of demolition. The orders of demolition were composite orders directing demolition of structures of the petitioner, her husband and the respondent No.6

Even in the year 2018, the agony of the petitioner in view of the inaction of the Howrah Zilla Parishad in respect of the structure of the respondent No.6, had been

recorded, but nowhere in the order, the construction of the petitioner had been protected. The order of this Court is silent in this regard.

The question of deemed sanction would not arise in this case as the petitioner admittedly completed the construction and then allegedly applied for regularization before the Tanamakua Gram Panchayat, which was not the competent authority. Moreover there is nothing on record which would show that such application had ever been made. The Panchayat Act also does not provide for regularization. The petitioner all along moved the Howrah Zilla Parishad for grant of sanction and for the renewal. The renewal was applied for in 2005 and was granted upto 2007. Thus, the plan, which was renewed upto 2007, was the final plan. Rule 30 of the said Rules does not apply. The petitioner's case is that a revised plan was submitted in 2006 before the Tanamakua Gram Panchayat. This is contrary to the fact that the plan of the petitioner had been renewed upto 2007 by the Zilla Parishad. The records before the court and the petitioner's contention are mutually destructive. The deviation cannot be justified on the ground of deemed sanction. The pre-condition to invoke the Rule of deemed sanction would be that the

application for sanction would have to be filed in a proper form and before the appropriate authority. Regularization and deemed sanction are very different concepts in law.

In the matter of *Supertech Ltd. v. Emerald Court Owner Resident Welfare Assn.*, reported in (2021) 10 SCC 1, the Hon'ble Apex Court held as follows:-

"159. The rampant increase in unauthorised constructions across urban areas, particularly in metropolitan cities where soaring values of land place a premium on dubious dealings has been noticed in several decisions of this Court. This state of affairs has often come to pass in no small a measure because of the collusion between developers and planning authorities.

160. From commencement to completion, the process of construction by developers is regulated within the framework of law. The regulatory framework encompasses all stages of construction, including allocation of land, sanctioning of the plan for construction, regulation of the structural integrity of the structures under construction, obtaining clearances from different departments (fire, garden, sewage, etc.), and the issuance of occupation and completion certificates. While the availability of housing stock, especially in metropolitan cities, is necessary to accommodate the constant influx of people, it has to be balanced with two crucial considerations — the protection of the environment and the well-being and safety of those who occupy these constructions. The regulation of the entire process is intended to ensure that constructions which will have a severe negative environmental impact are not sanctioned. Hence, when these regulations are brazenly violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Hence, illegal construction has to be dealt with strictly to ensure compliance with the rule of law."

In *Friends Colony Development Committee v. State of Orissa* reported in (2004) 8 SCC 733, the Hon'ble Apex Court dealt with a case where the builder had exceeded the permissible construction under the sanctioned plan and had constructed an additional floor on the building, which was unauthorised. The Apex Court held as follow:-

"24. Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building."

Noting that the private interest of landowners stood subordinate to the public good while enforcing building and municipal regulations, the Apex Court issued a caution against the tendency to compound violations of building regulations :

"25. ... The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on

such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

Unauthorised floors had been held to be a burden on general welfare and to be dealt with strictly.

In *Priyanka Estates International (P) Ltd. v. State of Assam* reported in (2010) 2 SCC 27 the Hon'ble Apex Court, observed as follows:-

"55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder."

The Apex Court observed that if unauthorised constructions were allowed to stand or were "given a seal of approval by Court", it was bound to affect the public at large.

In *Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai* reported in (2013) 5 SCC 357, the Hon'ble Apex Court observed as follows:-

“8. At the outset, we would like to observe that by rejecting the prayer for regularisation of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the appellate authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed by them have given a hope to the law-abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it.”

In the matter of *Supertech (Supra)*, the Hon’ble Apex Court discussed the duties of the civic bodies and lamented the sorry state of affairs as under:-

“167. The Court further observed that an unauthorised construction destroys the concept of planned development, and places an unbearable burden on basic amenities provided by public authorities. The Court held that it was imperative for the public authority to not only demolish such constructions but also to impose a penalty on the wrongdoers involved. This lament of this Court, over the brazen violation of building regulations by developers acting in collusion with planning bodies, was brought to the forefront when the Court prefaced its judgment with the following observations : (Esha Ekta Apartments case [Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai, (2013) 5 SCC 357 : (2013) 3 SCC (Civ) 89], SCC p. 363, para 1)

“1. In the last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc. have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the

rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise.”

168. Finally, the Court also observed that no case has been made out for directing the municipal corporation to regularise a construction which has been made in violation of the sanctioned plan and cautioned against doing so. In that context, it held : (Esha Ekta Apartments case [Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai, (2013) 5 SCC 357 : (2013) 3 SCC (Civ) 89] , SCC pp. 394-95, para 56)

“56. ... We would like to reiterate that no authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The courts are also expected to refrain from exercising equitable jurisdiction for regularisation of illegal and unauthorised constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas.”

169. These concerns have been reiterated in the more recent decisions of this Court in Kerala State Coastal Zone Management Authority v. State of Kerala [Kerala State Coastal Zone Management Authority v. State of Kerala, (2019) 7 SCC 248] , Kerala State Coastal Zone Management Authority v. Maradu Municipality [Kerala State Coastal Zone Management Authority v. Maradu Municipality, (2021) 16 SCC 822 : 2018 SCC OnLine SC 3352] and Bikram Chatterji v. Union of India [Bikram Chatterji v. Union of India, (2019) 19 SCC 161] .”

In the same decision *Supertech (Supra)*, the Hon’ble

Apex Court concluded as follows:-

“172. For the reasons which we have indicated above, we have come to the conclusion that:

172.1. The order passed by the High Court for the demolition of Apex and Ceyane (T-16 and T-17) does not warrant interference and the direction for demolition issued by the High Court is affirmed.

172.2. The work of demolition shall be carried out within a period of three months from the date of this judgment.

172.3. The work of demolition shall be carried out by the appellant at its own cost under the supervision of the officials of Noida. In order to ensure that the work of demolition is carried out in a safe manner without affecting the existing buildings, Noida shall consult its own experts and experts from Central Building Research Institute Roorkee ("CBRI").

172.4. The work of demolition shall be carried out under the overall supervision of CBRI. In the event that CBRI expresses its inability to do so, another expert agency shall be nominated by Noida.

172.5. The cost of demolition and all incidental expenses including the fees payable to the experts shall be borne by the appellant.

172.6. The appellant shall within a period of two months refund to all existing flat purchasers in Apex and Ceyane (T-16 and T-17), other than those to whom refunds have already been made, all the amounts invested for the allotted flats together with interest at the rate of twelve per cent per annum payable with effect from the date of the respective deposits until the date of refund in terms of Part H of this judgment.

172.7. The appellant shall pay to the RWA costs quantified at Rs 2 crores, to be paid in one month from the receipt of this judgment."

The order dated January 21, 2014 passed by a co-ordinate Bench of this Court in this writ petition which has been relied upon by the petitioner is an observation at the ad interim stage and the writ petition is now taken up for final hearing, upon exchange of affidavits.

In view of the orders passed by the co-ordinate Benches directing the Howrah Zilla Parishad to implement its order of demolition and in view of the factual finding by the Howrah Zilla Parishad about the illegalities in the constructions of the parties, no further indulgence or time can be allowed.

The decision of the Hon'ble Division Bench in the matter of Ajay Nath Yadav @ Ahiri (supra) is not applicable in this case, as the Howrah Zilla Parishad has categorically stated why the regularization would not be possible in case of the construction by the respondent No.6. It is the specific contention of the Parishad that an order of regularization of the structure would be beyond the safety rules and would be hazardous to the public and the environment. Moreover, an entire structure built without sanction cannot be regularized.

The decision of Muktipada Bhandari (supra) relied upon by the petitioner shall not apply in the instant case for the reasons aforementioned. The provisions of deemed sanction shall not be applicable. The petitioner did not apply before the appropriate authority in accordance with law for sanction of a revised plan. Any application filed before the gram panchayat would not have any legal

recognition as the petitioner was all along aware that the authority for grant of sanction was the zilla parishad and the petitioner had approached the zilla parishad time and again for sanction of a plan, amalgamation of plots and for renewal of the sanction.

Under such circumstances, the writ petition is disposed of without any orders in favour of the petitioner. The Howrah Zilla Parishad shall be free to implement its own orders, as already directed by the co-ordinate Benches in accordance with law within a period of 12 weeks from the date of communication of this order, with notice to all parties.

Re: WPA No.4431 of 2019

In view of the order passed in WPA No.35543 of 2013 hereinabove, this writ petition is disposed of accordingly. The order passed in WPA No.35543 of 2013 shall be applicable in this case.

There shall be no order as to costs.

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

(Shampa Sarkar, J.)

Later:

The learned Advocates for the petitioner and the respondent No.6 pray for stay of the operation of the order.

The same is considered and refused.

(Shampa Sarkar, J.)