

28.02.2023
Item No. 10.
Court No.6.
S. De

**M.A.T. 227 of 2023
with
I.A. No. CAN/1/2023**

**Ashalata Mondal.
Vs
The State of West Bengal & Ors.**

Mr. Pradip Kumar Chakraborty.
Mr. Sandip Kumar De,
Mr. Sabyasachi Mondal,
...for the appellant.
Mr. Shyama Prasad Purkait,
Ms. Moumita Mondal,
...for the Municipality.
Mr. Amal Kumar Sen, Ld. A.G.P.,
Mr. Jaladhi Das,
...for the State.

A judgment and order dated January 18, 2023 whereby the appellant's writ petition was dismissed by the learned Single Judge is under challenge in this appeal.

The appellant/writ petitioner is the owner of a one storied building standing on Dag No. 324, Khatian No. 61, J.L. No. 144, Mouza – Ramchandrapur, P.S. Diamond Harbour, District – South 24-Parganas.

It appears that the appellant made an application to the Diamond Harbour Municipality some time in September 2021 for sanction of a building plan for constructing an additional floor. With the grievance that the Municipality was not considering such application, the appellant had

approached the learned Single Judge in an earlier round of litigation by filing WPA 7158 of 2022. The learned Judge, after hearing the parties, had disposed of such writ petition by a judgment and order dated July 13, 2022 with the following directions :-

“After hearing the submissions made on behalf of the parties, the instant writ petition is disposed of by directing the Chairman, Diamond Harbour Municipality to take into consideration the application filed by the petitioner for grant of sanction of the first floor of the premises in question strictly in accordance with law, after giving reasonable opportunity of hearing to all the necessary parties, at the earliest but positively within a period of sixty days from the date of communication of a copy of this order.

The Chairman shall intimate the petitioner all the formalities or the documents that the petitioner is to submit for the purpose of obtaining sanction of the said plan.

The Chairman of the Municipality shall communicate the petitioner the fate of her application immediately thereafter.”

Pursuant to such direction, the Chairman has passed a reasoned order on September 6, 2022. The operative portion of the said order reads as follows :-

“At the time of hearing, I ask for the petitioner Ashalata Mondal, represent by her learned Advocate, to submit the copy of ground floor plan over which she seeks permission for 1st floor, but applicant/her representative failed to place that ground floor sanction plan, with a plea that they had lost the same. I ask our department to submit whether any ground floor plan is lying in the Office, which was approved in favour of Smt. Ashalata Mondal. Up on scrutiny of register it was reported to me that no such approval in the name of Ashalata Mondal/petitioner was found in respect of ground floor plan.

Apart from this it is surprising enough to see that petitioner/Ashalata Mondal applied for sanction of site plan only on 24.07.2020 which is still pending for consideration. If the ground floor sanction plan was already obtained by the petitioner earlier than why such site plan was submitted by her again on 24.07.2020. Therefore, it is presumed that petitioner/Ashalata Mondal did not obtain ground floor approved plan, over which she approach for approval of 1st floor plan, which is not permissible in the eye of law and as such petitioner prayer for sanctioning of 1st floor plan can not be entertain at this stage and rejected.”

Being aggrieved, the appellant approached the learned Single Judge assailing the aforesaid order of

the Chairman of the Municipality in the present round of litigation.

The learned Judge noticed that sufficient opportunity was granted to the appellant/writ petitioner herein by the Municipality to produce the sanctioned building plan for the ground floor but the same was not produced. There is nothing on record to show that permission for construction was granted by the Panchayat in favour of the writ petitioner as it was the case of the writ petitioner that at the time of construction, the area was within the territorial limits of a Panchayat. The writ petitioner relied on tax receipts. The learned Judge opined and in our view rightly, that payment of tax would not demonstrate that the writ petitioner obtained prior sanction of the Panchayat for constructing the ground floor. Since there was nothing on record to show that the construction was made in accordance with the permission granted by the Competent Authority, the learned Judge dismissed the writ petition. Hence this appeal.

We have heard learned counsel for the parties.

Learned advocate for the appellant says that the building plan for construction of the first floor was submitted in July 2021. It was incumbent upon the Board of Councillors of the Municipality to decide the application one way or the other within sixty days in

terms of Section 207 of the West Bengal Municipal Act, 1993. The same was not done. The appellant thereupon, appealed to the Municipality in terms of Section 208 of the 1993 Act in April 2022. The appeal was not disposed of within thirty days as mandated by Section 208 of the 1993 Act. Accordingly, the plan must be deemed to have been sanctioned in terms of Section 208.

We are of the view that the appellant in the present round of litigation, cannot be permitted to argue the point of deemed sanction since the same would be hit by the principle of constructive res judicata. At the time when the earlier writ petition was disposed of by the order dated July 13, 2022, this point was not urged, at least as would appear from the text of the order. We have to go by what is recorded in the order and we cannot consider any submission that a point was urged but not recorded by the learned Judge. The argument of deemed sanction was available to the appellant as on July 13, 2022 when the order was passed in the earlier writ petition. The same having not been argued, we are of the opinion that the principle of constructive res judicata precludes the appellant from raising such point in the present round of litigation.

In any event, we are of the view that if a ground floor has been constructed unauthorizedly without

obtaining prior permission of the competent authority, it would be contrary to common sense if Section 208 of the West Bengal Municipal Act, 1993 is interpreted to come to the rescue of the person by holding that there is deemed sanction of an additional floor. Where the base is without the sanction of law, nothing, in our opinion, can be built on it.

Learned advocate for the appellant says that the appellant is an elderly lady. We may have full sympathy for her but we have to go by the letters of law. Sympathy cannot be the basis for passing orders in Court.

We do not find any infirmity in the order under appeal which would warrant our interference.

The appeal being MAT 227 of 2023 is dismissed along with the application being I.A. No. CAN/1/2023.

Urgent certified photostat copy of this order, if applied for, shall be given to the parties as expeditiously as possible on compliance with all the necessary formalities.

(Apurba Sinha Ray, J.)

(Arijit Banerjee, J.)