

22.08.2023
Item No.05
Court No.6.
S. De

F.M.A. 349 of 2023
With
I.A. No. CAN/1/2023

Tapan Kumar Mondal.
Vs
The Sate of West Bengal & Ors.

Mr. Debasis Nandi,
Mr. Kumaresh Dalal,
...for the appellant.
Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
...for the respondent no.9.
Ms. Rupsha Chakraborty,
...for the State.
Mr. Sandipan Banerjee,
Mr. Ankit Sureka,
Mr. Sobhan Majumder,
...fir the HMC.

By consent of the parties the appeal and the connected application are taken up together for hearing.

A judgment and order dated February 1, 2023, whereby the appellant's writ petition being WPA No. 21748 of 2022, was dismissed by a learned Single Judge, is under challenge in this appeal at the instance of the writ petitioner.

The appellant had approached the learned Single Judge with the complaint that the private respondent has constructed a building at 64/4/Ichapur Road, Howrah without obtaining any

sanctioned plan from Howrah Municipal Corporation (in short 'HMC').

Before the learned Single Judge, a copy of a sanctioned plan was produced by the private respondent. Initially, the reverse of the plan was not disclosed. The writ petitioner disclosed the reverse of the plan and indicated that there is an endorsement to the effect "sanction refused". The writ petitioner further contended that the sanction of the building plan was in respect of premises no.64(P), Ichapur road and not 64/4 Ichapur road.

HMC filed a report before the learned Single Judge to the effect that there was a sanctioned plan. However, the private respondent has constructed a mezzanine floor having an area of approximately 70 sq. ft. which is in deviation from the sanctioned plan. Demolition proceedings have been initiated in respect of such unauthorized portion of the building.

Noting the aforesaid, the learned Judge came to the conclusion that the allegation of the writ petitioner that there was no sanctioned plan at all, was not substantiated. Further, to the extent the private respondent has made unauthorized construction, HMC has already taken steps to deal with the same. Accordingly, the learned Judge dismissed the writ petition. Hence, this appeal.

Learned advocate for the appellant tried to impress upon us that the sanctioned plan that was produced by the private respondent before the learned Single Judge and which is also before us, is not at all sanctioned plan. It is non est in the eye of law. HMC however, does not support such stand. In any event, we cannot go into that aspect of the matter in this proceeding since we notice that the appellant had filed a suit before the learned Civil Judge (Jr. Divn.), 7th Court at Howrah being Title Suit No. 19 of 2006, against the private respondent herein. In that suit a question arose as regards whether the same sanctioned plan is a valid document or not. The learned Civil Judge in no uncertain terms came to the finding that it was a genuine and valid document. The issue is thus res judicata. Learned advocate for the appellant says that the appellant has preferred an appeal against the judgment and decree of the learned Trial Court dismissing the appellant's suit. If that be so, the appellant will naturally be entitled to carry such appeal to its logical conclusion and it will be open to him to raise all issues that may be available to him in law.

In so far as the unauthorized mezzanine floor measuring about 70 sq. ft. in area, alleged to have been constructed by the private respondent is concerned, we are told that the private respondent has

filed a suit being Title Suit No.1747 of 2022, before the learned Civil Judge (Jr. Divn.), 2nd Court at Howrah impleading HMC and the present appellant as defendants, challenging the demolition order. On an application moved by the plaintiff in that suit, an interim order for stay of operation of the demolition order was refused by an order dated December 22, 2022. The plaintiff in that suit being the private respondent here went up in appeal by filing Misc. Appeal no.04 of 2023 before the learned District Judge, Howrah. In that appeal the learned Court has passed an order of status quo in respect of the suit property which is the same property involved here. Such order is still in operation.

Learned advocate for HMC referred to the decision of a co-ordinate Bench of this Court rendered on February 25, 2022 in **FMA 1062 of 2021 (Shail Kumari Singh Vs. Girija Shankar Shaw @ Jaiswal & Ors.)**, in support of his contention that no Civil Court can pass any order restraining HMC from discharging its statutory functions and duties. It is the statutory obligation of HMC to demolish unauthorized constructions made within its territorial limits. It cannot be prevented from doing so by any Civil Court.

The decision relied upon by learned advocate for HMC was rendered in the special facts of that case. In

that case, the demolition order that was issued by HMC, had been affirmed and upheld by the High Court. In that factual background, it was observed by the co-ordinate Bench that a demolition order issued by the Corporation and upheld by the High Court cannot be rendered infructuous or nugatory by a subordinate Civil Court by passing an order of injunction or status quo in respect of unauthorized construction. In the present case, the private respondent herein has approached a Civil Court contending that the demolition order is bad in law and should be set aside as there is no unauthorized construction. In other words, the demolition order is under challenge before a competent forum. The Civil Court had to be approached because the appellate forum contemplated under Section 181 of the Howrah Municipal Corporation Act, 1980, was not in existence as on the date the suit was filed. After institution of the suit, by a notification dated August 3, 2023, the Government of West Bengal has constituted the appellate forum. Whether or not after constitution of Tribunal, the private respondent's suit would be maintainable in the Civil Court is a point which the parties may urge in the said suit and we are not inclined to go into that point. If HMC is of the genuine opinion that the mezzanine floor in question constructed by the private respondent herein is

unauthorized, we would expect HMC to take appropriate steps for getting the status quo order vacated and to take steps for removal of such unauthorized construction in accordance with law.

FMA 349 of 2023 is disposed of 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.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)