

2nd August,
2023
(AK)
21

W.P.A 18077 of 2023

Swapan Kumar Shaw @ Swapan Sau
Vs.
The State of West Bengal and others

Mr. Tanmay Chowdhury
Mr. Tanmay Mukherjee
Ms. Ritoprita Ghosh
Mr. Soumava Santra

...for the petitioner.

Mr. Malay Singh
Mr. Nilay Baran Mandal

...for the State.

The petitioner, being aggrieved by an order dated June 15, 2023 passed by the Executive Engineer (I &W Dte.), West Midnapore Division, Midnapore, has preferred the instant writ petition.

By virtue of the said order, the Executive Engineer, apparently taking resort to Rule 22(b) of the West Bengal Panchayat (Gram Panchayat Administration) Rules, 2004, directed the petitioner to remove the structure which has allegedly been constructed by the petitioner directly on the bed and slope of a drainage channel, to provide sufficient waterways and maintenance of the drainage channel.

Learned counsel contends that upon obtaining a valid sanction from the local Panchayat, the petitioner started the construction in issue.

The local Gram Panchayat, it is contended, in the sanction plan, clearly put in a rider that the petitioner has to leave aside the drainage area which is adjacent to the plot where the construction is being made. That apart, the petitioner was to leave the eight feet wide drain prior to making the construction.

It is argued that the petitioner has been making the construction in strict compliance with the said sanction.

Thereafter, the Assistant Architect of the Irrigation Authorities, by a notice dated May 19, 2022, communicated to the petitioner that the petitioner has made an unauthorized construction in front of a sluice gate on the drainage system, for which the same was to be removed by the petitioner.

In default, it was indicated, legal action would be taken against the petitioner.

The petitioner, thus aggrieved, moved court and an order was passed on August 24, 2022 in connection with WPA 9666 of 2022, directing affidavits to be filed.

It was observed in the said order that, despite the query of court, learned counsel appearing for the Irrigation Department failed to cite any provision of law conferring authority on the Irrigation Department to issue a notice such as that dated May 19, 2022.

The operation of the said notice was also stayed for a limited period.

The writ petition ultimately came up for final hearing before a coordinate Bench on April 26, 2023, when it was disposed of by a direction on the Executive Engineer, West Midnapore Division, Department of Irrigation and Waterways, to call the petitioner for a hearing on the alleged encroachment as well as the statutory provisions including Rule 22 of the 2004 Rules or any other Act or Rules which may be relevant to the facts of the said case.

In compliance thereof, hearing was given to the petitioner at least on two occasions and the impugned order was passed.

Learned counsel argues that the petitioner has been constructing in strict compliance of the sanction plan issued by the Panchayat.

Since the Panchayat, that is, the sanction-issuing authority, itself has not raised any grievance regarding such construction, it is beyond the jurisdiction of the Irrigation Department to take such steps as impugned herein.

That apart, it is argued that the sanction plan required the petitioner to keep sufficient space beside the drain-in-question, eight feet in width, which has duly been kept by the petitioner. However, the Irrigation Department, in its impugned order, proceeded on the

premise that the petitioner has made constructions on the bed of the drainage channel itself.

Learned counsel also places reliance on the relevant extracts of the records of rights, where the concerned two plots have been shown to be 'Bastu' and 'Danga'.

Moreover, under Rule 22 of the 2004 Rules, it is argued, the Irrigation Department has no authority to take any action.

At best, it is argued, the Irrigation Department ought to have challenged the sanction plan issued to the petitioner like every other litigant.

Learned counsel appearing for the respondent authorities places reliance on Rule 22 of the 2004 Rules itself and submits that, in terms of the same, steps can be taken, as considered appropriate, regarding drainage facility in the locality.

It is submitted that the Irrigation Department, through its concerned Officer, produced photographs and sections of the sluice bed level and column foundation, which clearly clinched the issue against the petitioner.

It is submitted that the Executive Engineer, in his impugned order, clearly referred to all such materials and came to the specific observation that, from the drawing submitted by the petitioner and the report of respondent no.4, that is, the Irrigation Department, it is revealed that the petitioner has constructed RCC columns and

foundation on the bed of the said drainage system itself, which violates Rule 22(b) of 2004 Rules, obstructing the drainage facility in the locality.

It is, thus, submitted that the Executive Engineer acted well within his authority to pass the impugned order.

That part, it is argued that the coordinate Bench, by its order dated April 26, 2023, had specifically observed that the petitioner was willing to participate in a hearing before the Irrigation Department Authority and directed the Executive Engineer of the Irrigation Department to call the petitioner for a hearing on the alleged encroachment as well as the statutory provisions including Rule 22.

Hence, after having participated in such hearing, the petitioner cannot stand around and dispute the authority of the Executive Engineer himself.

Upon hearing learned counsel for the parties, the co-ordinate Bench order dated April 26, 2023 is required to be considered first, since the same was the genesis of the consideration by the Executive Engineer, which ultimately led to the impugned decision.

Upon considering the submissions of parties, the learned Single Judge had disposed of the writ petition with an observation that the petitioner was willing to participate in a hearing before the concerned authority,

which had then been fixed by the notice impugned in the said writ petition.

The Executive Engineer of the West Midnapore Division was directed to give a hearing to the petitioner on the alleged encroachment as well as the statutory provisions, including Rule 22 of the 2004 Rules, or any other Act or Rules which may be relevant to the facts of the case.

It is further seen from the said order that nothing was finally decided by the court with regard to the authority of the Executive Engineer or the merits of the case.

It is well-settled that a court direction on a particular authority to hear a matter, *per se*, does not confer jurisdiction on the said authority, unless such power is bestowed on the authority by the statute.

The order of the coordinate Bench merely directed a hearing to be given to the petitioner and the Executive Engineer was directed to advert to “any other Act or Rules which may be relevant to the facts of the instant case”, even apart from Rule 22 of the 2004 Rules.

A mere reference to such Rule or other Acts and statutes does not, in any manner, tantamount to an observation or conclusive finding as to the authority of the Executive Engineer to empower the Executive

Engineer to assume jurisdiction which it does not have in law.

Upon a consideration of Rule 22 and the other Acts or Rules, the only possible option before the Executive Engineer was to come to a finding either way as to the legality of the construction made by the petitioner and, at best, to refer the same, if held illegal in the perception of the Executive Engineer, to the appropriate authority having jurisdiction to pass an appropriate order.

However, it cannot be said that anything in the said order of the coordinate Bench dated April 26, 2023, clothed the Executive Engineer with jurisdiction.

Rule 22, in no uncertain terms, provides that a *Gram Panchayat* is the authority which shall take such steps, as may be considered appropriate, for drainage facility in the locality.

In sub-rule (2) of Rule 22, it is stipulated that in case of illegal filling of any tank, pond or other water body etc. or any other water area, the Gram Panchayat shall immediately report the matter to the Executive Officer of the Panchayat Samiti and the Police Station for taking appropriate action.

Read in conjunction, the two sub-Rules of 22 clearly confer a limited power on the Gram Panchayat, even if satisfied that there has been an illegality regarding drainage facility in the locality, to refer the matter to the

Executive Officer of the Panchayat Samiti as well as the local Police Station for taking appropriate action.

Rule 22 (1)(b), which has been quoted by the Executive Engineer, does not authorize the Executive Engineer himself to pass an order of removal of the unauthorized construction, if any.

Hence, the impugned order is palpably without jurisdiction.

Even on facts, there is some doubt, since there is a contradiction between the initial notice dated May 19, 2022, which was never revoked, and the stand now taken by the Executive Engineer.

In the said notice, it was clearly indicated that the petitioner had allegedly made illegal construction on the drainage channel/sluiice, and that the *entire construction* was unauthorized and illegal. The petitioner was directed to remove the entire construction.

The construction, as per the petitioner, is going on strictly in terms of the sanction which was issued by the Panchayat authorities (which authority has not taken any adverse view against the petitioner in the present case), clearly directing the petitioner to leave eight feet space beside the sluice channel.

Hence, there is nothing on record to indicate that any construction is being made on the bed of the

drainage channel itself, apart from the observations in the order impugned herein.

In any event, if the petitioner is making any unauthorized construction on the drainage channel, the authorities are definitely entitled to take steps in that regard.

However, in view of the above observations, the impugned order of removal of the construction passed by the Executive Engineer is *de hors* the law and bad for lack of jurisdiction.

Accordingly, the said order ought to be set aside.

Hence, WPA 18077 of 2023 is allowed, thereby setting aside the “Reasoned Decision” dated June 15, 2023 taken by the Executive Engineer (I & W Dte.), West Midnapore Division, Midnapore, Paschim Medinipur of the Irrigation Department, as well as the notice dated May 19, 2022 (annexed at page-88 of the writ petition) issued by the Assistant Architect of the Irrigation Department, Ajuria Branch.

It is, however, made clear that nothing in this order shall preclude the Irrigation Department of the State to refer the matter to the local Gram Panchayat for the Gram Panchayat to ascertain its own view on the same.

In the event the Gram Panchayat is satisfied that there is substance in the contention of the Irrigation Department regarding the alleged unauthorized

construction by the petitioner on the drainage channel itself, the Gram Panchayat shall immediately report the matter to the Executive Officer of the Panchayat Samiti and the Police Station, in terms of Rule 22(1)(b) of the 2004 Rules for taking appropriate action.

In the event any action is taken consequentially against the petitioner, the petitioner shall be given adequate opportunity of representation and hearing and to produce the petitioner's relevant documents, prior to taking any coercive steps against the petitioner on such score.

There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)