

17.10.2023
Item No.2.
Court No.6.
AB

M.A.T. 2089 of 2023
With
I A CAN 1 of 2023

M/s. S. Construction
Vs
Howrah Municipal Corporation & Others

Mr. Arindam Banerjee,
Mr. Srijib Chakraborty,
Mr. Sumitava Chakraborty...for the Appellant.

Mr. Sandipan Banerjee,
Mr. Ankit Sureka,
Mr. Sobhan Majumdar ...for the HMC.

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

A judgment and order dated October 12, 2023, whereby the writ petition of the appellant, being WPA No.20480 of 2023, was disposed of by a learned Single Judge of this Court, is under challenge in this appeal.

It appears that in an earlier round of litigation, one Jayanta Saha Chowdhury approached a learned Single Judge of this Court, by filing WPA 22771 of 2022, with the grievance that the private respondent in that writ petition, being the appellant herein, has made illegal and unauthorized construction at the concerned premises within the territorial limits of Howrah Municipal Corporation (in short "HMC"). The learned Judge noted that the representation that had

been made by the writ petitioner did not contain adequate details of the alleged unauthorized construction. The learned Judge disposed of that writ petition with the following observations and directions:

“Accordingly, leave is granted to the petitioner to file appropriate application highlighting illegalities committed at the time of making the construction.

In the event such a representation is filed before the Corporation, the same shall be taken up for consideration and decided in accordance with law after giving reasonable opportunity of hearing to all the necessary parties. A spot inspection shall be conducted upon prior notice to all the parties to ascertain the allegation made in the representation to be filed by the petitioner.

In the event it transpires that there has been any unauthorized construction, the same shall be dealt with in accordance with law within a period of twelve weeks from the date of filing the representation.

A reasoned order shall be passed and communicated to the parties immediately thereafter.

If the notice of hearing cannot be served upon all the necessary parties or if the persons responsible for making construction avoid service of notice, it will be open for the Howrah Municipal Corporation to affix the notice of hearing at conspicuous places of the disputed structure. The same shall be sufficient notice to all the necessary parties.”

It appears that subsequently, a self-demolition order was served on the present appellant by HMC. However, no spot inspection was conducted by HMC whether upon notice to the concerned parties or otherwise, prior to passing of the self-demolition order, as had been directed by the learned Single Judge in the earlier round of litigation.

Accordingly, the appellant approached the learned Single Judge in the present round of litigation challenging the self-demolition order.

Primarily, on the ground of breach of the principles of natural justice, the learned Judge set aside the self-demolition order as no prior spot inspection had been held by HMC. The learned Judge then passed the following direction:

“The Corporation is directed to inspect the property in question to ascertain the exact nature and extent of unauthorized construction and forward a copy of the inspection report to the person responsible, the owners/occupiers and the complainant.

Opportunity of hearing shall be given to all the necessary parties and thereafter a decision shall be taken to deal with the unauthorized construction.

The spot inspection shall be conducted upon prior notice to all the parties at the earliest but positively October 19, 2023. The hearing and final order shall be passed positively within a period of 45 days from the date of forwarding the inspection report.

As massive unauthorized constructions have been detected, the person responsible is restrained from making any construction at the subject premises until further order.

The Officer in Charge, Malipanchghora Police Station is directed to keep strict vigil over the property to ensure that construction in any manner whatsoever is not carried out at the subject premises until further order.

The person responsible, the owners/developers are restrained from transferring/alienating/handing over possession or creating any third party right over the subject premises until further order.

It will be open for the Corporation to affix the notice of spot inspection at several conspicuous places in and around the subject premises so that everybody gets aware about the date of inspection.”

The writ petitioner has come up in appeal being aggrieved by only the portion of the order, which restrains it from transferring/alienating/handing over possession or creating any third party right over the subject premises until further order.

Mr. Banerjee, learned Advocate for the appellant/writ petitioner says that such an order cannot be passed by the HMC itself. The Writ Court was necessarily enforcing the provisions of the HMC Act. The order of injunction was beyond the scope of the writ petition and the same is also not contemplated by the provisions of the HMC Act. The injunction has been directed to continue “until further order”.

Further, there is no reason to injunct the appellant from dealing with the authorized portion of the construction. Learned Counsel also submitted that the Writ Court could not have passed a final order against a private person.

We have heard learned Counsel for the HMC. He says that the 4th and 5th floors of the building in question are not supported by a sanctioned plan. Those floors are unauthorized. If third party right is created in respect of such unauthorized portion, unnecessary future complications will arise.

We agree with the submission of Mr. Sandipan Banerjee, learned Advocate for HMC. We also partly agree with the submission made by Mr. Arindam

Banerjee, learned Advocate for the appellant. Accordingly, we clarify and/or modify the order under appeal as follows:

The order of injunction passed by the learned Single Judge will operate only in respect of the unauthorized portion of the building in question till a decision is taken by HMC in terms of the order of the learned Single Judge. Neither the learned Single Judge nor we have gone into the merits of the case as to whether or not the impugned construction is unauthorized. This issue will be decided in the proceedings to be held before the HMC in terms of the learned Single Judge's order. The appellant will be at liberty to rely on all the provisions of law and on such material as it may be advised. The appellant will be at liberty to make all such prayers before the Corporation as it may be entitled to in law.

Since we have not called for affidavits, the allegations in the stay application are deemed not to be admitted by the respondents.

MAT 2089 of 2023 is disposed of along with CAN 1 of 2023.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after compliance with all the necessary formalities.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)