

10.01.2023
Court No.19
Item No.5
srm

W.P.A. No. 28524 of 20122

Sk. Ahid Ali

Versus

The State of West Bengal & Ors.

Mr. Nilanjan Bhattacharjee,
Mr. Arpan Guha,
Mr. Abhilash Chatterjee,
Mr. Saikat Dey

... for the Petitioner.

Mr. Manas Kundu,
Mr. Debabrata Mondal

...for the State-respondents.

Ms. Monjuli Chowdhury,
Ms. Mekhla Sinha,

...for the Howrah Zilla Parishad.

Mr. Animesh Paul

...for the Respondent No.7.

Affidavit-of-service is taken on record.

The petitioner has challenged the order of demolition passed by the District Engineer, Howrah Zilla Parishad. The said order was communicated to the petitioner by a letter dated September 17, 2022 issued by the Assistant Engineer, Howrah Zilla Parishad. The order was passed by the District Engineer upon physical inspection of Plot No.525 pertaining to Khatian Non.529 of mouza Satghoria, District-Howrah.

The respondent No.7 had moved this Court on an earlier occasion by filing WPA 20832 of 2021. It was alleged that the petitioner had raised an illegal and unauthorised construction on the said plot which fell within the jurisdiction of the Howrah Zilla Parishad. The writ petition was disposed of by an order dated July 6, 2022 passed by a learned co-ordinate Bench of this Court with the direction upon the District Engineer, Howrah Zilla Parishad to consider and dispose of the representation, which was filed on behalf of the respondent No.7 on November 30, 2021 after giving an opportunity of hearing to all necessary parties. Her Lordship further directed that if the respondent authority was of the considered opinion that the construction had been made either in violation of the plan or devoid of sanction plan, necessary steps shall be taken in accordance with law with regard to such unauthorised construction.

The District Engineer, in compliance of the order of Her Lordship held an inspection and thereafter passed a reasoned order, which is impugned before the Court. The inspection conducted by the Assistant Engineer reveals that there was an unfinished structure of around 900 sq.ft. with nine columns and a roof. The petitioner admitted that

there was no sanction. Hence the petitioner was asked to demolish the structure.

Aggrieved by the aforementioned order, the writ petition has been filed on the following grounds:

- (a) The land was not required to be converted from '*danga*' to '*bastu*' as the same was purchased prior to incorporation of Section 4C of the West Bengal Land Reforms Act, 1955 and the user of the land had already been changed.
- (b) As the existing '*hut*' was damaged during Amphan a construction was raised, which was in the nature of repair.
- (c) Third clause to Rule 15 of the bye-laws under Chapter IV of the Howrah Zilla Parishad permitted regularization of an unauthorised construction without any sanction.
- (d) The Howrah Zilla Parishad did not have the jurisdiction to effect such construction in view of the notification/SOP3 issued by the Department of Panchayat and Rural Development.

It is further submitted that a building of any kind can be regularized by the zilla parishad in terms of the bye-laws.

Rule 28 of the West Bengal Panchayat (Gram Panchayat Administration) Rules, 2004 provides as follows:

“28. Construction within the Kolkata metropolitan area.—(1) Notwithstanding anything contained in these rules, any application made under sub-rule(1) of rule 17 pertaining to the Kolkata metropolitan area as defined in the West Bengal Town and Country (Planning and Development) Act, 1979 (West Ben. Act XIII of 1979) shall be subject to the provisions of any rule made, or any order or direction of a competent authority issued, under the West Bengal Town and Country (Planning and Development) Act, 1979.

(2) An application under sub-rule (1) shall, within a period of thirty days from the date of receipt of the application, be forwarded by the *Gram Panchayat* with its comments to the *Zilla Parishad* having jurisdiction and the *Zilla Parishad*, on receipt of such application and comments of the *Gram Panchayat*, shall, on a reference of the matter to the Kolkata Metropolitan Development Authority, if necessary, return the application and other documents within a period of thirty days from the date of such receipt, with its approval or comments as the case may be, to the *Gram Panchayat* for action under sub-rule (4) of rule 27.”

Thus the power of the zilla parishad to take action within the four corners of the bye-laws is undisputed. Chapter IV of the bye-law deals with the general procedure for sanction of a building plan. Rule 2 of the said chapter clearly provides that no person shall erect any building or re-erect or make addition or alteration in any building without sanction from the District Engineer. The

petitioner admittedly did not take such sanction from the District Engineer. It is not a case that the petitioner had mistakenly prayed for sanction before the panchayat authorities, either. The District Engineer also reserved the right to demolish such structure. The order impugned was passed on a direction of this Court.

The authority was directed to dispose of the representation, in respect of the unauthorised construction. If the authority found that the construction was either without any sanction or in violation of the sanctioned plan, steps were directed to be taken in accordance with law. Although it is the petitioner's submission that it would be incumbent on the authority to consider the third paragraph of Rule 15 of the said chapter of the bye-laws, neither the pleadings in the writ petition nor the representation filed before the authority by the petitioner, did the petitioner take recourse to such provision.

Moreover, when the authority had directed demolition it is assumed that such construction could not be regularized. The land has not been converted to '*bastu*' and permission to construct cannot be granted on any land other than land classified as '*bastu*'. A co-ordinate Bench directed that steps must be taken in respect of such

construction in case the same was found to be without a plan or contrary to the plan. Learned Advocate for the Howrah Zilla Parishad submits that the construction which has just started, was without any sanction and could not be regularized by the authority and Rule 15 would not be applicable.

Mr. Paul, learned Advocate appearing on behalf of the respondent No.7 submits that the regularization cannot be a matter of right. Rule 15 provides that when a residential building was completed without any sanction, the authorities may impose a penalty and also claim a development fee, but the same cannot be taken as a mandate on the authority to grant regularization. He further submits that the construction was new and had been initiated long after the bye-laws had come into force. As such, the petitioner was bound by law to take such permission from the zilla parishad upon obtaining conversion.

Admittedly, the petitioner has started raising a construction which is at its very early stages and the authority directed demolition upon consideration of the fact that the construction was made without any sanction,

It is also very clear that the conversion of the land had not been taken and the land continues to be a 'danga'.

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 deprecated the practice of regularization and 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 deviation of the plan.

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

"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."

Even in cases of deviation, the Hon'ble Apex Court ruled against regularization. There is blatant illegality in the construction in hand. There is no conversion and no sanction.

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.”

In *Priyanka Estates International (P) Ltd. v. State of Assam* reported in (2010) 2 SCC 27, 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 view of the order passed by a learned co-ordinate Bench directing the Howrah Zilla Parishad to take steps in accordance with law and in view of the findings of the Howrah Zilla Parishad of the illegalities in the construction of the petitioner, no further indulgence can be shown to the petitioner.

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 order, in accordance with law, within a period of six weeks from the date of communication of this order, with notice to all parties.

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.)