

**IN THE HIGH COURT AT CALCUTTA  
Circuit Bench at Jalpaiguri  
Constitutional Writ Jurisdiction  
Appellate Side**

**Present :- Hon'ble Justice Amrita Sinha**

**WPA 617 of 2023**

**Sri Manoj Kumar Gupta  
Vs.  
The State of West Bengal & Ors.**

**With**

**WPA 642 of 2023**

**Sri Rajat Kundu  
Vs.  
Siliguri Municipal Corporation & Ors.**

|                                  |    |                                                                                                                                                                                                                  |
|----------------------------------|----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the writ petitioner          | :- | Mr. Kishor Dutta, Sr. Adv.<br>Dr. Navin Barik, Adv.<br>Ms. Esha Acharya, Adv.<br>Mr. Koustav Shome, Adv.<br>...in WPA 617 of 2023.<br>Mr. Amales Ray, Adv.<br>Ms. Mousumi Bhowal, Adv.<br>...in WPA 642 of 2023. |
| For the State                    | :- | Mr. Lalit Mohan Mahata, Adv.<br>Mr. Prasanta Behari Mahata, Adv.                                                                                                                                                 |
| For the respondent no. 5         | :- | Mr. Saptansu Basu, Sr. Adv.<br>Ms. Mrinalini Majumdar, Adv.<br>Mr. Suresh Mitraka, Adv.<br>Mr. Aayush Mitraka, Adv.<br>...in WPA 617 of 2023                                                                     |
| For the respondent no. 4         | :- | ...in WPA 642 of 2023                                                                                                                                                                                            |
| For the SMC                      | :- | Mr. Bijay Bikram Das, Adv.                                                                                                                                                                                       |
| For the respondent nos. 5<br>& 6 | :- | Mr. Ayan Banerjee, Adv.<br>Mr. Dhiraj Lahhotia, Adv.<br>Ms. Radhika Agarwal, Adv.<br>...in WPA 642 of 2023.                                                                                                      |
| Hearing concluded on             | :- | 22.03.2023                                                                                                                                                                                                       |
| Judgment on                      | :- | 30.03.2023                                                                                                                                                                                                       |

**Amrita Sinha, J.:-**

The matter relates to the circuit bench at Jalpaiguri. As the bench is currently not in session the same has been filed before the principal bench citing urgency.

Facts and points of law being similar in both the writ petitions, the cases are taken up for consideration analogously and are being decided by this common judgment.

The petitioners, in both the writ petition, are aggrieved by the order passed by the Commissioner, Siliguri Municipal Corporation ('SMC' for short) whereby the authority held that there has been contravention to the sanctioned building plan and the deviations and/or unauthorised constructions have been directed to be demolished.

After holding that demolition entails civil consequences, the owners and occupiers have been given notice to meet the Commissioner within thirty days from the date of the order. The deviations and/or unauthorised constructions, as pointed out in the joint inspection report, have been directed to be demolished by the concerned department of SMC after a period of thirty days from 27<sup>th</sup> February, 2023.

The aforesaid order was allegedly passed in compliance of the direction passed by the Hon'ble division bench on 6<sup>th</sup> June, 2022 in MAT 30 of 2022 with CAN 1 of 2022 (Saumitra Kundu and Others versus Ram Chandra Agarwal and Others) directing SMC to invoke Section 287 of the West Bengal Municipal Corporation Act, 2006 ('the Act' for short). The Court directed the adjudicating authority to afford opportunity of hearing to the private parties before passing final order.

The petitioners claim to be the owners and occupiers of the subject premises which has been held to be constructed in deviation of the sanctioned

plan and direction for demolition of the unauthorised/deviated portions has been given.

It is the specific case of the petitioners that no opportunity of hearing was granted to them prior to passing the order of demolition. The petitioners have gained ownership of the property nearly a decade back and valuable right accrued in their favour in respect of the said property. Passing order of demolition, behind their back, is contrary to the principles of natural justice, equity and fair play.

It has been contended that the adjudicating authority noticed that, at present there are many other lawful owners and occupiers who are possessing portions of the building in question, but despite having noticed so, did not feel necessary to afford an opportunity of hearing to the said owners and occupiers prior to passing the impugned order of demolition. After passing the final order, the petitioners have been directed to appear for hearing.

It has further been contended that as the adjudicating authority has already made up its mind to demolish the alleged unauthorised portions, accordingly, granting any post decisional hearing will be an idle formality. The outcome of the hearing being predetermined, granting any opportunity of hearing is a mere eye wash and will not serve the purpose.

It has been argued that prior to passing the impugned order of demolition, the relevant rules and the sanctioned plan in question were not properly examined by the adjudicating authority. The authority merely acted as a post office and put a rubber seal by blindly accepting the findings of the inspection team. It was the duty of the adjudicating authority to independently apply its mind and thereafter take a decision as to whether demolition is the only remedy to deal with the alleged unauthorised construction.

From the impugned order it does not appear that there has been any application of mind prior to accepting the findings of the inspection report. The

said inspection was conducted behind the back of the petitioners and, accordingly, the petitioners did not have any opportunity to defend the allegation of unauthorised construction levelled against them.

The joint inspection report has also been challenged. It has been argued that the site inspection was conducted without notice to the owners and occupiers. It may be that proper and necessary details may not have been pointed out before the engineers who inspected the property. The said inspection report has been prepared without proper consultation of the plan in question which was sanctioned long back.

The petitioners assert that the construction has been made in accordance with the plan sanctioned and there are hardly any deviations which can be treated as unauthorised. Assuming that there are any unauthorised constructions, the same ought not to be demolished but are liable to be regularised.

In support of the submission that post decisional hearing is a mere eye wash, Mr. Ray, learned counsel appearing for one of the petitioners relies upon the decision passed by the Hon'ble Supreme Court in the matter of ***Shekhar Ghosh versus Union of India and Another*** reported in ***(2007) 1 SCC 331*** paragraph 14.

To buttress the submission that the Commissioner, SMC ought to have applied its mind and recorded satisfaction prior to passing the order of demolition, reliance has been placed on the judgment delivered by this Court in the matter of ***Mascharak Commercial (P) Ltd. and Others versus the Bengal Fodder Mills Private Limited*** reported in ***MANU/WB/0688/2013***.

Reliance has also been placed on the judgment passed by this Court in the matter of ***Bank of Baroda Employees' Association & Anr. versus Union of India & Ors.*** reported in ***(2005) 2 CHN 439*** paragraph 4.4.

Mr. Ray, learned counsel also relies upon the judgment delivered by the Hon'ble Supreme Court of India in ***Municipal Corporation of Greater Mumbai (MCGM) versus Abhilash Lal and Others*** reported in ***(2020) 13 SCC 234*** paragraph 46.

The petitioners pray for setting aside the inspection report and the order passed by the Commissioner, SMC. Prayer has been made for affording the petitioners an opportunity of hearing before a decision is taken by the adjudicating authority in this regard.

Learned advocate representing the erstwhile owners of the subject premises submits, upon instruction that, an opportunity of hearing was granted to the erstwhile owners. At the time of hearing the owners disclosed about the sale of major portions of the property in favour of third parties who by now obtained the right, title and interest over the same. The owners have brought to the attention of the engineers that the construction in question commenced in the year 2004. The complainant never raised any objection till fifteen years after commencement of the work of construction.

It was pointed out that the site inspection reports were contradictory and ambiguous. It was further pointed out that there is a title suit pending in between the erstwhile owners and the complainant and the issues raised in the complaint related to the said building are presently under consideration before the Court of the learned Civil Judge, Jr. Division at Siliguri and in the Court of the learned Additional District Judge, at Siliguri.

It has been pointed out that the inspection report was prepared ignoring the fact that the property in question lies in a slope and there was sanction for construction of basement in the initial plan itself. The owners categorically deny that there has been any unauthorised construction as alleged, or at all.

The parties contend that the manner in which the demolition has been directed to be conducted will destroy the entire structure and, accordingly, it is practically impossible to implement the said order of demolition.

Learned Senior Counsel representing the complainant asserts that there has indeed been unauthorised construction liable to be demolished in terms of the order passed by the Commissioner, SMC. It has been submitted that as the erstwhile owners were given opportunity of hearing and as the construction work commenced in the hands of the erstwhile owners, accordingly, there is no requirement of affording any further opportunity of hearing to the present owners. The petitioners, i.e, the present owners and occupiers, do not have a separate say as they have merely stepped into the shoes of the erstwhile owners. All the points raised by the present petitioners have already been highlighted by the erstwhile owners, and accordingly, the order of demolition passed by the Commissioner, SMC is liable to be implemented.

Learned advocate representing SMC submits, upon instruction that, fair opportunity of hearing was given to all the parties and upon consideration of the submissions made on behalf of the parties and on perusal of the inspection report, the Commissioner passed the order of demolition. It has been denied that there has been any violation of the principles of natural justice as alleged, or at all.

It has been contended that the adjudicating authority acted strictly in accordance with the direction passed by the court and on the basis of the documents available on record, the order of demolition was passed. Reasonable opportunity of hearing was afforded to the petitioners but the petitioners intentionally and deliberately did not appear in the hearing and on the contrary sought for adjournment of the hearing. The petitioners could have raised all the points raised in the present writ petition before the adjudicating authority, so

that the same could have been taken into consideration by the Commissioner. SMC, seeks leave to proceed with the order of demolition.

I have heard and considered the rival submissions made on behalf of all the parties.

It appears that the Commissioner, SMC proceeded to act in accordance with the direction passed by the Court. The Court directed SMC to invoke Section 287 of the Act and to afford private parties an opportunity of hearing before passing a final order. The Court further directed that the parties will be at liberty to rely upon such evidence as they may be entitled to and the adjudicating authority will be at liberty to take into consideration all materials that the adjudicating authority deems appropriate including the report submitted in Court.

The Court being aware of the fact that there are several owners and occupiers of the subject structure, directed the adjudicating authority to afford opportunity of hearing to the private parties. The Court did not restrict hearing only to the parties impleaded in the said legal proceeding. By the expression 'private parties', the Court intended that all the necessary private parties be afforded an opportunity of hearing prior to passing the final order.

The adjudicating authority misread and misinterpreted the order passed by the Hon'ble Court and afforded hearing only to the parties impleaded in the writ petition and the appeal thereto. By way of the same, valuable rights of the other private parties being the owners and occupiers of the subject structure, have been infringed. The adjudicating authority noted that portions of the structure were sold and possession thereof handed over to the owners and occupiers long ago. The authority ought to have permitted the owners and occupiers, being necessary private parties, to put forth their views at the time of hearing.

After the decision is taken to demolish the alleged unauthorised/deviated portions, granting opportunity to the persons whose structures will be demolished does not have any meaning. The authority has already passed order for demolition. The tenor of the impugned order does not imply that the said decision to demolish may be modified or altered after hearing the necessary parties. If the decision is predetermined then the opportunity of hearing becomes perfunctory. There will hardly be any change in the foregone conclusion of demolition after the owners and occupiers of the premises are heard.

The sanctioned plan according to which the construction commenced to be raised in the year 2004 has been annexed to the writ petition. The petitioners contend that the said plan was not taken into consideration in its true perspective at the time of deciding the issue. The relevant building rules were also not considered at the time of passing the final order.

The petitioners are in possession of the respective portions in the subject structure which has been held to be unauthorised and suffering an order of demolition. Not granting an opportunity of hearing to the parties whose valuable rights has been snatched away in view of the order of demolition is certainly violation of the principles of natural justice, equity and fair play.

The adjudicating authority also does not appear to have taken into consideration the issues raised by the erstwhile owners in the written submission filed on their behalf. The authority in a mechanical manner and upon total nonapplication of mind has put a seal blindfold on the report prepared by the inspection team.

The petitioners assert that they are in possession of all documents and evidences and they are in a position to point out before the authority that there has hardly been any unauthorised construction. All evidences, as directed to be considered by the court, are presently in the custody of the present owners and

occupiers. The authority ought to examine such evidence before making up its mind whether the subject structure is authorised or not and whether to demolish the structure or not.

In *Shekhar Ghosh (supra)* the Court held that a post decisional hearing is not contemplated in law. The result of such hearing is a foregone conclusion.

In *Abhilash Lal (supra)* the Court reiterated the principle laid down in the celebrated case of *Taylor Vs Taylor; (1875) LR 1 Ch D 426* that if a statute has conferred a power to do an act and has laid down the method in which the power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.

Here, the court directed a prior hearing to be afforded before passing the final order. The said direction has not been carried out in its true perspective.

In *Mascharak Commercial (supra)* the Court was of the opinion that in view of the specific provision of Section 218 of the West Bengal Municipal Act, 1993, no order for demolition can be passed in the absence of the satisfaction of the Board of Councillors.

In the law applicable to the present case, satisfaction of the Commissioner is essential for passing the order of demolition. The Commissioner, instead of application of mind, has merely approved the report prepared by the inspection team. The act of the Commissioner is contrary to Section 287 of the Act.

In *Bank of Baroda (supra)* the Court opined that the authority, while forming an opinion, does not act either as a rubber stamp or a mere post office. It has to apply its mind in order to form an opinion as to the existence of the dispute. No opinion can be formed without applying its mind to the materials placed before it.

In the present case, the Commissioner acted without proper application of mind and without arriving at an independent decision.

In view of the above, both the writ petitions are disposed of by setting aside the order passed by the Commissioner, SMC dated 27<sup>th</sup> February, 2023. The inspection team is directed to conduct fresh inspection upon giving prior notice to all the necessary parties including all the owners and occupiers of the subject structure and thereafter verify the structure with the sanctioned plan and the corresponding building rules. The inspection report shall be circulated amongst all the parties. On receipt of the fresh inspection report, the Commissioner, SMC is directed to afford fresh opportunity of hearing to all the necessary parties and then take a decision in response to the complaint lodged by the complainant. A reasoned order shall be passed by the Commissioner, SMC and communicated to all the parties.

Efforts shall be taken to conduct the joint spot inspection upon prior notice to all the parties by 30<sup>th</sup> April, 2023. Final order shall be passed by the Commissioner within a period of eight weeks from the date of service of a copy of the joint inspection report upon all the parties.

The costs and charges for joint inspection by the court appointed engineer shall be borne equally by the complainant and the owners and occupiers of the subject structure. The previous joint inspection report prepared by the inspection team is liable to be ignored.

The writ petitions stand disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

**(Amrita Sinha, J.)**