

D/L
Item No. 02
31.01.2024
KOLE

**MAT 212 of 2024
With
IA CAN 1 of 2024**

**Jyotirmoy Debnath
-Vs.-
The State of West Bengal & Ors.**

*Mr. Abhrajit Mitra, Sr. Adv.,
Ms. Pritha Basu,
Ms. S. Mitra,
Mr. D. Chakraborty,
Ms. J. Ghosh,*

...for the appellant.

*Mr. Tapan Kr. Mukherjee, Sr. Adv.
Ms. Tuli Sinha,*

...for the State.

*Mr. Ranajit Chatterjee,
Mr. Arijit Dey,*

...for the Municipality.

*Mr. Raghunath Chakraborty,
Mr. Uddipan Banerjee,*

...for the respondent no. 6.

*Mr. Soumya Roy Chowdhury,
Mr. D. Dan,*

...for the proforma respondent.

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

A judgment and order dated January 25, 2024, whereby the appellant's writ petition being WPA 1898 of 2024, was dismissed by a learned Single Judge of this Court with costs assessed at Rs. 25,000/- to be paid to the Baranagar Municipality (erroneously recorded as Baranagar Municipal Corporation), is the subject matter of challenge in this appeal at the instance of the writ petitioner.

The writ petitioner claims to be a tenant of a portion of the premises in question. The owner of the premises is

one Bengal Fodder Mills Private Limited (in short 'Bengal Fodder'). There were earlier rounds of litigation. Initially, Bengal Fodder approached a learned Single Judge in 2010 with the grievance that there is unauthorized construction at the concerned premises but the Baranagar Municipality (in short 'the Municipality') is not taking necessary steps. The court directed the Municipality to look into the matter and come to a decision.

Pursuant to such order, the Chairman of the Municipality passed an order for demolition of the illegal construction. Bengal Fodder filed a writ petition being WP No. 13048 (W) of 2011 for implementation of the aforesaid demolition order. By an order dated February 7, 2012, the writ petition was allowed and demolition was directed.

This order was carried in appeal by some of the occupants of the premises in question by filing MAT 700 of 2012. The order impugned in that appeal was set aside by a Coordinate Bench on the ground that the order of demolition was not passed by the Board of Councilors of the Municipality which is authorized to issue a demolition order. The Chairman has no authority to issue a demolition order. The Division Bench directed the Board of Councilors to take an appropriate decision in the matter.

Notice of hearing was issued by the Municipality and hearing was held wherein the occupants of the premises in question participated. An order dated June 28, 2013, was passed by the Board of Councilors of the Municipality, the operative portion whereof reads as follows:-

“In spite of issuance of “stop work” Notice, it has been reported that construction had been continuing. No reply has been submitted to the Show cause Notice. The Parties present were unable to produce copy of the sanctioned plan in respect of the construction work.

After lengthy discussion the Board of Councillors decided that Direction be issued to the owner/assessee. Bengal Fodder Mills Pvt. Ltd. to demolish the unauthorized construction. This order is passed under section 218(1) of the West Bengal Municipal Act, 1993.”

Bengal Fodder subsequently approached a learned Single Judge by filing WP No. 33433 (W) of 2013 contending that the cost of demolition should be borne by the occupants of the premises and should not be foisted on Bengal Fodder. The writ petition was disposed of by an order dated September 7, 2015, the operative portion whereof reads as follows:-

“Having heard the learned Counsel for the parties, one thing is clear to me. The Board of Councillors of the respondent Municipality have come to a conclusion after hearing all the concerned parties that there is unauthorized construction on the property in question. Hence, the Board issued notice under Section 218(1) of the West Bengal Municipal Act, 1993 to the owner/assessee of the said premises. The assessee, being the writ petitioner is unwilling to carry out the order of demolition since according to it, some other people are responsible for the unauthorized construction and they should bear the expenses of demolishing such construction. The Municipality says that it is under no legal obligation to demolish the unauthorized construction. This stand of the Municipality I am unable to appreciate. I agree with Mr. Chatterjee that Section 218(1) of the 1993 Act gives a discretion to the Board of Councillors as regards demolition of unauthorized construction, but I also strongly feel that such discretion

must be exercised in a reasonable manner and bona fide. If it be found that a particular unauthorized construction is posing danger to life and property in the vicinity thereof, and if in spite of notice being issued to the owner/assessee of the property, the construction is not demolished, the Municipality cannot be a silent spectator and sit tight on the ground that there is no legal obligation on it to demolish such unauthorized construction.

However, in the facts of this case nobody has contended that the unauthorized construction is posing danger to life and property in the vicinity of the property in question. The petitioner is apprehensive that it may have to face criminal prosecution if the unauthorized construction causes damage to life or property. Since the Municipality feels that there is no immediate urgency for demolishing the unauthorized construction, let notice be put up in front of the said property by the Corporation notifying the public of the factum of such unauthorized construction and that if the same in any way causes damage to others, the assessee, the Bengal Fodder Mills Private Limited shall not be liable for the same. This should protect the writ petitioner adequately.

I am in agreement with Mr. Chatterjee's submission that in the facts of the case no mandamus can be issued on the Municipality. Hence, with the direction as given in the preceding paragraph, this writ petition is disposed of."

Against the aforesaid order, the Bengal Fodder went up in appeal by filing FMA 4716 of 2015. The appeal was disposed of by a judgment and order dated December 19, 2023, the operative portion whereof reads as follows:-

"15. Factum of existence an illegal and unauthorized construction being established, the issues remaining to be decided are who will to remove the same and at whose expense. Various provisions of the Act of 1993 were placed in support of the rival contentions. We find from Section 223(4) and (5) that an unauthorized construction is to be removed at the cost

and expense either by the owner or the person responsible thereof. The owner in this case did not demolish the unauthorized construction. The occupiers are not doing so.

16. In such circumstances, the municipality will proceed to demolish the unauthorized construction at the locale preferably within 6(six) weeks from date. The municipality is at liberty to recover the cost and expenses of such demolition in accordance with the provisions of Sections 223(4) and (5) of the Act of 1993.

17. There is the aspect of ownership of the appellant and the tenancy of the private respondents. As a Writ Court we need not enter into the arena as to who is the owner of the property concerned. It is the statutory obligation of the municipality to ensure that there is no illegal construction within its jurisdiction.

18. Demolition of the unauthorized construction, we hasten to add, will not erase the tenancy of the private respondents. Their tenancies will be governed by the appropriate law governing the same. We make no comments with regard thereto.

19. We clarify that our order directing demolition of unauthorized construction is not to be construed to be speaking on the rival contentions with regard to the ownership and/or of the tenancy or extinguishing any existing tenancy or creating any tenancy at the locale concerned.

20. Impugned judgment and order dated September 7, 2015 is set aside.”

Pursuant to the aforesaid order of the Division Bench, the Municipality issued a notice dated January 16, 2024 addressed to the occupants of the premises in question intimating that the Municipality will proceed to execute the demolition order on January 30, 2024, from 12 noon onwards. Challenging this notice, the present appellant

approached the learned Single Judge in this round of litigation.

The learned Judge referring to the judgment and order of the Division Bench passed on December 19, 2023, in FMA 4716 of 2015 dismissed the writ petition with costs, as indicated above. Hence, this appeal at the instance of the writ petitioner.

Mr. Mitra, learned Senior Advocate, appearing for the appellant/writ petitioner says that the appellant says in all fairness that the appellant obviously cannot resist demolition of any illegal construction. However, which portion of the concerned premises is unauthorized should be first ascertained and indicated by the Municipality by preparing a D-Sketch (Demolition Sketch). Otherwise, even the sanctioned portion of the premises may be demolished. Mr. Mitra relies on a building plan which the appellant claims was sanctioned by the Municipality.

Mr. Dey, learned Advocate for the Municipality, says that the demolition order dated June 28, 2013, passed by the Municipality, was not challenged by the occupants of the concerned premises in question including the present appellant, before any competent forum. That order has attained finality. At the hearing, pursuant to which that order was passed, the occupants could not produce any sanctioned plan as is recorded in the order. Today, the entire thing should not be reopened. The Municipality should be permitted to execute the demolition order as directed by the Division Bench on December 19, 2023.

Mr. Chakraborty, learned Advocate for Bengal Fodder makes submission similar to that made by learned Advocate for the Municipality. He says that it should be left to the Municipality to decide which portion of the concerned premises is unauthorized and should be demolished. He further says that there is no sanctioned plan at all in respect of the concerned premises and the entire structure is unauthorized. This is of course disputed by Mr. Mitra, Learned Senior Advocate appearing for the appellant.

We have considered the facts and circumstances of the case. A Coordinate Bench on December 19, 2023, has directed demolition of the unauthorized structures. Hence, the learned Single Judge in the present round of litigation really did not have any choice to pass any other order excepting an order for execution of the demolition order. We do not find any apparent infirmity in the order under appeal.

However, we clarify that the Municipality shall only demolish the unauthorized portion of the concerned premises and if there is any sanctioned portion, the same shall not be touched.

Since the appellant/writ petitioner has annexed copy of a building plan, which he claims was sanctioned by the Municipality, the appellant shall make available to the Municipality an authentic copy of such plan by 02.02.2024 and shall also supply a copy to Bengal Fodder. Thereafter, the Municipality shall take such steps as it may deem necessary in accordance with law. The entire exercise shall be completed within a period of two weeks from date.

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

In view of the above, this appeal and the connected application stand disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Arijit Banerjee, J.)

(M. V. Muralidaran, J.)