

03. 14.03.2024
Court No.6
(Tanmoy)

MAT/451/2024
ABDUL SUBAN ALI KHAN
VS
THE STATE OF WEST BENGAL & ORS.
WITH
IA NO: CAN/1/2024

Mr. Mainak Bose, Adv.,
Mr. Lakshminath Bhattacharya, Adv.
...for the appellant.

Mr. Ansar Mondal, Ld. AGP,
Mr. Safik Dewan, Adv.
...for the State.

Mr. Tarun Kr. Das, Adv.
Mr. Dilip Kr. Shyamal, Adv.
...for the respondent no.12.

Leave is granted to learned Advocate-on-Record for the appellant to correct the cause title of the appeal papers by numbering Tapan Das as respondent no.12 instead of respondent no.11.

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

A judgment and order dated February 27, 2024, whereby the appellant's writ petition being WPA 4213 of 2024, was dismissed by a learned Judge of this Court, is the subject-matter of challenge in this appeal.

It appears that the respondent no.12 herein, namely, Tapan Das, filed a writ petition being WPA 7839 of 2022, alleging that one Gulsan Khan and Anarul Seikh had made illegal construction by encroaching on National Highway land, which is causing obstruction to the egress from and ingress to Tapan's property. The

learned Judge hearing that writ petition noted that a joint field verification report had been prepared by the appropriate Authority.

The learned Judge disposed of the writ petition by directing the concerned Sub-Divisional Officer as follows:-

“The writ petition is accordingly disposed of directing the 13th respondent to consider the joint field verification report of the Block Land & Land Reforms Officer and in the event encroachment upon the National Highway or any portion thereof is found upon verification, the said respondent is directed to initiate proceeding in accordance with law and take the proceeding to its logical conclusion within two months from the date of communication of this order upon affording reasonable opportunity of hearing to all the interested persons including the petitioner and the private respondents.”

Pursuant to the aforesaid order, the concerned Sub-Divisional Officer, after consideration of the joint field inspection report, found that Anarul Seikh, Abdul Suban Ali Khan (present appellant) and one Sushma Pal, were encroachers on National Highway land. The Sub-Divisional Officer directed the National Highway Authority to take immediate steps for removal of such encroachment.

Challenging such order of the Sub-Divisional Officer, the appellant approached the learned Single Judge in the present round of litigation. It was submitted before the learned Judge that the concerned Sub-Divisional Officer had no jurisdiction to deal with the matter of alleged encroachment on National Highway land. Any such encroachment has to be dealt with in

accordance with the provisions of the Control of National Highways (Land and Traffic) Act, 2002 (in short, 'the 2002 Act) and in particular Section 26 thereof.

On behalf of the State and the private respondent being Tapan, it was submitted before the learned Judge that the Sub-Divisional Officer had acted pursuant to the direction and the order of the learned Single Judge passed in WPA 7839 of 2022. If the present writ petitioner i.e. Abdul, is of the view that the Sub-Divisional Officer did not have jurisdiction to deal with the matter, Abdul should have assailed the earlier order of the learned Single Judge before a higher forum. It was further submitted that Abdul participated in the hearing before the Sub-Divisional Officer. The order of the Sub-Divisional Officer does not call for interference.

The learned Judge dismissed the writ petition with the following observations:-

"From the materials on record, it is evident that the Sub-Divisional Officer, Kakdwip, 24 Parganas (South) being the respondent no. 6 has passed the impugned order dated 27th December, 2023 in compliance with the order passed in WPA 7839 of 2022. Admittedly, the order passed in WPA 7839 of 2022 has not been assailed in appeal. The Sub-Divisional Officer, Kakdwip, 24 Parganas (South) being the respondent no.6 herein before passing such order notified all the interested parties including the petitioner. The impugned order has been passed holding Anarul Sk., Abdul Suban Ali Khan (petitioner herein) and Sushma Pal as encroachers upon considering the joint field verification report as directed by this Court, enquiry report of the Block Land & Land Reforms Officer, Namkhana and hearing all the interested parties. It is also pertinent to note that during hearing, the petitioner and one other have admitted of encroachment of the land of PWD (roads) by them before the Sub-Divisional Officer, Kakdwip, 24 Parganas (South). Mr. Roy,

learned advocate referring to Section 26(2) of the Control of National Highways (Land and Traffic) Act, 2002 urged that the Sub-Divisional Officer is not authorized under the Act to take steps for removal. At the first instance, it is noted that the Sub-Divisional Officer has acted in terms of order of this Court passed in WPA 7839 of 2022. That apart, it has also directed the National Highways Authority to take immediate steps for removal of the encroachment. Therefore, the aforesaid argument on behalf of the petitioner does not hold good.

Such being the position, this Court does not find any illegality in the order dated 27th December, 2023 passed by the Sub-Divisional Officer, Kakdwip, 24 Parganas (South) being the respondent no.6 herein in Misc Case No. SDO/Kakdwip/05/2023.”

Being aggrieved, the writ petitioner has come up by way of this appeal.

Appearing on behalf of the appellant, Mr. Mainak Bose, learned Advocate, essentially made the same argument as had been made before the learned Single Judge on behalf of the writ petitioner. The argument is one on the point of jurisdiction of the Sub-Divisional Officer to deal with matters pertaining to encroachment on National Highway land. Referring to Section 26 of the 2002 Act, Mr. Bose submitted that it is the Highway Administration as defined in Section 2(f), read with Section 3 of the 2002 Act, which is empowered and authorized to deal with matters of encroachment on National Highway land. The Sub-Divisional Officer had no such authority. His order dated December 27, 2023, is without jurisdiction and *non est* in the eye of law. If an officer does not have jurisdiction as per law, the Court cannot confer jurisdiction on him.

Learned Advocate appearing for Tapan, drew our attention to Section 20 of the 2002 Act, which reads as follows:

“20. Appointment of officers to act on behalf of Highway Administration. – (1) *The Highway Administration may, if it thinks fit after the approval of the Central Government, by notification in the Official Gazette, appoint such–*

- (a) *gazetted officer of the Central Government; or*
- (b) *gazetted officer of the State Government; or*
- (c) *officer of the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act, 1988 (68 of 1988) or any other authority constituted under any other enactment, equivalent to a gazetted officer of the Central Government or the State Government,*

to exercise such powers and discharge such functions of the Highway Administration as may be specified in the notification.

(2) The Highway Administration may specify in the notification under sub-section (1), the limits of the Highway within which or the length of the Highway on which an officer appointed under that sub-section shall exercise the powers and discharge the functions.”

Learned Advocate argued that it is possible that the concerned Sub-Divisional Officer has been authorized by the Highway Administration by notification in the Official Gazette, with the approval of the Central Government, to exercise the powers and discharge the functions of the Highway Administration. However, learned Advocate was unable to produce any such notification. He said that it is for the State to produce such notification.

We have given our anxious consideration to the rival contentions of the parties.

Sub-Sections (1) and (2) of Section 26 of the 2002 Act, which is captioned as “Removal of unauthorized occupation”, reads as follows:-

“26. Removal of unauthorised occupation. – (1)

Where the Highway Administration or the officer authorised by such Administration in this behalf is of the opinion that it is necessary in the interest of traffic safety or convenience to cancel any permit issued under sub-section (2) of section 24, it may, after recording the reasons in writing for doing so, cancel such permit and, thereupon, the person to whom the permission was granted shall, within the period specified by an order made by the Highway Administration or such officer restore the portion of the Highway specified in the permit in such condition as it was immediately before the issuing of such permit and deliver the possession of such portion to the Highway Administration and in case such person fails to deliver such possession within such period, he shall be deemed to be in unauthorised occupation of highway land for the purposes of this section and section 27.

(2) When, as a result of the periodical inspection of highway land or otherwise, the Highway Administration or the officer authorised by such Administration in this behalf is satisfied that any unauthorised occupation has taken place on highway land, the Highway Administration or the officer so authorised shall serve a notice in a prescribed form on the person causing or responsible for such unauthorised occupation requiring him to remove such unauthorised occupation and to restore such highway land in its original condition as before the unauthorised occupation within the period specified in the notice.”

It appears that the 2002 Act has specified an Authority which is described as the Highway Administration, for dealing with unlawful encroachment on or occupation of National Highway land. In that view of the matter, we are inclined to agree with Mr. Mainak Bose that the Highway Administration is the sole Authority which can deal with such matters of encroachment. The Sub-Divisional Officer did not and

does not have any such power. Even the order of the learned Single Judge passed in the earlier writ petition could not have clothed the concerned Sub-Divisional Officer with such power or jurisdiction. It is established law that when a statute provides a procedure or manner for doing a thing, that thing must be done following such procedure and in such manner only or should not be done at all. Reference may be made to the decision of the Privy Council in the case of ***Nazir Ahmad v. Emperor*** Reported at ***AIR 1936 Privy Council 253***.

In view of the aforesaid, we set aside the order of the Sub-Divisional Officer passed on December 27, 2023, and allow the appeal to that extent.

However, if unauthorized encroachment has been made by the appellant on National Highway land, the same must be removed following due process of law, after observing the principles of national justice.

Tapan has made a representation dated March 2, 2022, addressed to various Officers in the Administration including the Executive Engineer, National Highway, who, we are told, is the Highway Administration. We direct the Highway Administration to consider the representation made by Tapan and dispose of the same following due process of law within a period of six weeks from the date of communication of this order along with a copy of the representation by Tapan to the Highway Administration. A reasoned order will be passed by the Highway Administration after affording

opportunity of hearing to all concerned parties including Tapan and the appellant herein. Needless to say, if the Highway Administration finds encroachment on National Highway land, it shall forthwith take necessary steps for removal of such encroachment, in accordance with law.

The order under appeal is set aside.

We have not gone into the merits of the allegation made by Tapan as regards encroachment made by the appellant herein and other persons. The Highway Administration shall take an independent informed decision in that regard.

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

The appeal being MAT 451 of 2024 along with the connected application being IA No: CAN/1/2024 are disposed of.

Urgent photostat certified copy of this order, if applied for, be made available to the parties upon compliance with all requisite formalities.

(Arijit Banerjee, J.)

(Supratim Bhattacharya, J.)