

W.P.A. 9675 of 2016

**Om Prakash Tiwari
Vs.
The State of West Bengal & Ors.**

Mr. Tanmoy Mukherjee
Mr. Amal Kumar Saha
Mr. Iresh Paul
....for the petitioner

Mr. Sandipan Banerjee
Mr. Ankit Surekha
...for the HMC

Mr. Wasim Ahmed
Sk. Md. Masud
...for the State

Mr. Ankit Agarwal
Mr. Nilay Sengupta
Mr. Sujit Banerjee
...for the respondent nos. 6 to 8

Affidavit-of-service filed on behalf of the petitioner
is taken on record.

In the writ petition allegation has been made
against the private respondents for making unauthorized
construction at the premises in question.

The petitioner has prayed for demolition of the
unauthorized construction. It has also been submitted by
the learned advocate representing the petitioner that no
proceeding under Section 177 of the Howrah Municipal
Corporation Act, 1980 (for short “the said Act of 1980”)
has been initiated to find out the nature of construction
made by the private respondents.

The learned advocate representing Howrah
Municipal Corporation (for short “HMC”) submits that

decision was taken by the then Executive Engineer to regularize the deviations made by the private respondents and such decision was forwarded to the Board of Councillors for giving approval and on being approved regularization was granted in favour of the private respondents upon payment of fees.

However, it has fairly been submitted by Mr. Sandipan Banerjee, learned advocate representing HMC that the construction made by the private respondents at the time when the 3rd proviso to Section 177 of the Howrah Municipal Corporation Act, 1980 was not brought in by the Howrah Municipal Corporation (Amendment) Act, 2017 which was given effect to on 20th September, 2017. According to the corporation, constructions were made by the private respondents prior to giving effect to the 3rd proviso to Section 177 which was with effect from 20th September, 2017.

Therefore, it is contended on behalf of the corporation, if this Court decides that the decision to regularize unauthorized construction made by the private respondents is not tenable, the corporation is ready to initiate appropriate proceeding in terms of Section 177 of the said Act of 1980.

The learned advocate representing private respondents has relied upon an order of the Hon'ble Supreme Court dated 5th December, 2023 passed on a **Special Leave Petition (C), No. 19405 of 2017 (Arijit**

Das & Anr. Vs. Shanti Dey & Ors.). It has been submitted that the benefit which has been granted by the Hon'ble Supreme Court vide order dated 5th December, 2023 should be extended to the private respondents who are similarly circumstanced. It is also contended since it has been submitted by the learned advocate representing the corporation that an order regularizing the deviation was passed on accepting fees at this stage, such order of the corporation ought not to be interfered with.

Having considered the submissions made on behalf of the parties this Court finds that submission has been made on behalf of the private respondents to get the benefit of 3rd proviso to Section 177 of the said Act of 1980, according to which minor deviations can be regularized on payment of fees to be prescribed by the regulations. However, what is minor deviations and charging of fees as contemplated under 3rd proviso to Section 177 should be in terms of the regulation and it appears that such regulation has not been promulgated as on date defining "minor unauthorized erection" and prescribing the requisite fees for regularization.

In addition thereto, it emanates from the submissions made by the learned advocates representing the petitioner and the private respondents that the complaint was made by the petitioner dated 21st September, 2015 stating that unauthorized constructions were alleged to have been made at the

instance of the private respondents which goes to show prior to 20th September, 2017 being the date when by amending Section 177, 3rd proviso was incorporated, construction was made.

It is nobody's case that 3rd proviso which was brought in by amendment has retroactive operation.

In the order passed in **Arijit Das** (supra) by the Apex Court the submission made on behalf of HMC was taken into consideration and it has been submitted before the Apex Court by the learned advocate that the regularization is made in terms of statutory power and the procedure prescribed therein. It was also submitted on behalf of the corporation that the deviation is minor in nature. Therefore, regularization is permissible.

But in the case at my hand the stand taken on behalf of the corporation is not in sync with the stand taken by the corporation before the Apex Court. On the contrary, submission is made that on refunding the fees deposited by the private respondents, the concerned authority of corporation is willing to initiate appropriate proceeding under Section 177 since the construction was made prior to the amendment which was brought in on 20th September, 2017. Therefore, the ratio of **Arijit Das** (supra) may not come in aid of the private respondents.

On the other hand, reliance is placed on the judgment of the coordinate Bench reported in **2014 (4) Cal LT 1 (HC) (Ghanashyam Das Vs. The Kolkata**

Municipal Corporation & Ors.) wherein it has been succinctly decided by the coordinate Bench that the concerned authority of the corporation cannot exercise discretion while deciding the fate of an unauthorized construction and to regularize such construction on receiving fees. The authorities of the civic bodies are required to follow the statutory provisions strictly without exercise of discretion in the matter of deciding the fate of unauthorized construction.

In addition thereto, reliance is also placed on the judgment of the Apex Court reported in **(2013) 5 SCC 336 (Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors.)**; paragraph 2 of the said judgment is quoted below:

“2. In the last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasised the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions as in K. Ramadas Shenoy v. Town Municipal Council, Udipi, Virender Gaur v. State of Haryana, Pleasant Stay Hotel v. Palani Hills Conservation Council, Cantonment Board, Jabalpur v. S.N. Awasthi, Pratibha Coop. Housing Society Ltd. v. State of Maharashtra, G.N. Khajuria v. DDA, Manju Bhatia v. NDMC, M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, Friends Colony

Development Committee v. State of Orissa, Shanti Sports Club v. Union of India and Priyanka Estates International (P) Ltd. v. State of Assam.”

In view of aforesaid discussions, the concerned authority of the corporation is directed to initiate a proceeding under Section 177 of the said Act of 1980 and bring the same into logical conclusion by 16 (sixteen) weeks from this date after granting opportunity of hearing to the petitioner and the private respondents or their representatives. The order to be passed by the concerned authority of the corporation shall be communicated to the parties within 1 (one) week thereafter.

HMC is directed to refund the fee paid by the private respondents within 4 weeks from date on cancellation of retention order, if any passed.

Leave is granted to the learned advocate representing the petitioner to amend the cause title of the writ petition and add Commissioner of Howrah Municipal Corporation as additional respondent in course of this day. However, service of notice upon the added respondent stands dispensed with since HMC is represented by Mr. Sandipan Banerjee, learned advocate.

With the aforesaid directions and observations the writ petition stands disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Saugata Bhattacharyya, J.)