

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

MAT 1148 of 2024

with

CAN 1 of 2024

Dipak Modi

-Vs-

The State of West Bengal & Ors.

For the Appellant

: Mr. Saptangshu Basu, Sr. Adv.
Mr. Kuldip Mallick
Mr. Anil Choudhury
Md. Mohiuddin

For the State

: Mr. Monoj Malhotra
Mr. Ejaz Hossain

For KMC

: Mr. Alok Ghosh
Mr. Fazlul Haque

For the respondent No 8

: Mr. Rudra Prasad Motilal
Mr. Shubham Banerjee

For the Board of Auqaf

: Md. Salahuddin
Md. Ahsanuzzaman
Md. Raziuddin

Heard on

: 23.09.2024 & 24.09.2024

Judgment on

: 24.09.2024

Joymalya Bagchi, J.:-

1. Learned senior Counsel for the appellant submits in the inspection report Executive Engineer admitted that Corporation does not have mechanism and infrastructure to ascertain exact age of the building. Report records lease deed executed in 1974 and the entries in the inspection book from second quarter in 1980-81 shows a two-storied building at 70, Braun Fled Row and a one storied asbestos structure at 68, Braun Fled Row. In 2006, demolition proceeding was initiated but the records of the proceeding are not available. In such view of the matter, initiation of a subsequent demolition proceeding in 2019 and demolition order passed therein was wholly unwarranted. In 2021 appeal was preferred against the said order which had been dismissed for default. Application for restoration is pending but could not be taken up due to absence of quorum in the Tribunal.

2. Learned Counsel for the Corporation submits on visual estimation the engineer came to a finding that the three storied dwelling house at 70, Braun Fled Row was not an old construction. Complaints had been made with regard to illegal construction in 1996 and demolition proceeding in 2006 was initiated. This shows the three storied structure had been constructed on or after 1996. No sanction plan with regard thereto is placed on record. He also submits the appeal which had been filed in 2021

was hopelessly time barred. Accordingly, the demolition order is deemed to have become final and binding.

3. Learned Counsel for the Auqaf Board submits the appellant has no right, title or interest on the land. Lease deeds were unauthorisedly executed in their favour by the concerned *Mutawali* who had not taken permission from the Board.

4. We have considered the materials on record in the light of the aforesaid submissions. Principal thrust of Mr. Basu's argument is that the construction at 68 & 70, Braun Fled Row is an old one. It was in existence prior to 1974 as would appear from the lease deed executed in 1974. Even inspection book of 1980-81 records a two storied structure at 70, Braun Fled Row and one storied asbestos structure at 68, Braun Fled Row. According to him demolition proceeding undertaken in 2006 was dropped. Demolition order passed in the subsequent proceeding suffers from inherent defect as it does not distinguish between the earlier structure vis-a-vis additions thereon.

5. Lease deeds dated 1964 and 1974 were placed before the inspecting officer. Recitals in the 1964 deed record a dilapidated one storied brick built structure at 68, Braun Fled Row. 1974 deed records a two storied pucca remodelled building and an asbestos godown at 68 and 70, Braun Fled Row. Lease deeds were executed by the *Mutawali* who according to the Auqaf Board did not have permission to do so. Civil proceedings were instituted which, however, were dismissed due to lack of jurisdiction. Be

that as it may, execution of the lease deeds by the *Mutuwali* is not in dispute. Recitals as well as the schedule in the 1974 deed show a two storied pucca building and an asbestos structure at 68 and 70 Braun Fled Row. Inspection book of second quarter of 1980-81 maintained by the Corporation records a two-storied dwelling house at 70, Braun Fled Row and a asbestos structure at 68, Braun Fled Row. In 1996, Aquaf Board complained illegal constructions were being undertaken by the appellants and in 2006 demolition proceeding in respect of a three storied structure (G+2) was initiated. Records of the said proceeding are not available.

6. In this backdrop, writ petitioner/private respondent approached this Court seeking demolition of the three storied structure. An Hon'ble Single Judge directed initiation of fresh demolition in 2018. In terms of the said order, demolition proceeding were initiated and a demolition order came to be passed in 2019. In such view of the matter, appellant to fall back on the earlier 2006 demolition proceeding and argue initiation of the subsequent demolition proceeding was impermissible.

7. The other issue which has been strongly canvassed is that a two storied structure was in existence prior to the promulgation of 1980 Act. Mr. Basu, has relied on Section 414 (4) of the Calcutta Municipal Act, 1951 to submit that the structure is protected by operation of law. Section 414(4) of the Calcutta Municipal Act, 1951, inter alia, provides that a structure existing for 12 years prior to issuance of the notice of demolition of the said structure stands protected. However, demolition proceeding is in

respect of a three storied (G+2) structure at 68 and 70, Braun Fled Rows. Lease deeds produced by the appellants and the entries in the inspection book for the 2nd quarter of 1980-81 show a two-stories building was standing at 70, Braun Fled Row and an asbestos shed was standing at 68, Braun Fled Row. Bare comparison of the nature of the present structure i.e. a three storied building with the previous structures standing on the premises as per recitals in lease deeds and/or entries in the inspection book leave no doubt that the demolition order pertains to a new structure which cannot be protected by operation of law.

8. Moreover, the aforesaid documentary evidence corroborates opinion of the Executive Engineer that the three storied building is not an old one and is liable to be demolished in absence of a sanction plan. In light of the aforesaid uncontroverted materials on record we are unwilling to accede to Mr. Basu's prayer for further inspection by a qualified civil engineer with regard to exact age of the building.

9. Finally it is argued the matter be adjourned as an application for recalling order dismissing appeal is pending before the Tribunal. Period of limitation to prefer appeal against the demolition order is 30 days, whereas appeal was instituted after two years of the demolition order. It was barred by limitation and no steps were taken. Tribunal issued show cause notice upon the appellant which remained unanswered. Under such circumstances appeal was dismissed for default.

10. We are of the opinion that dismissal of appeal for default is a mere formality as the appeal was *non est* in law in the first place having been filed after two years i.e. beyond the period of limitation. That apart, we have given ample opportunity to the appellants to establish the building was lawfully constructed. His defence that the unauthorised building is an old one runs hollow for reasons that we have recorded hereinbefore.

11. Accordingly, we are of the opinion the Hon'ble Single Judge's order directing implementation of the demolition order does not call for interference.

12. Appeal is dismissed.

13. In view of dismissal of the appeal connected application being CAN 1 of 2024 is also dismissed.

14. There will be no order as to costs.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)