

Form No. J (2)

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**FMA 522 of 2024
IA NO: CAN/1/2024**

**Dilip Ray
vs.
The Howrah Municipal Corporation & Ors.**

For the Appellant : Mr. Pawan Kumar Gupta, Advocate
Syed Julfikar Ali, Advocate
Ms. Sofia Nesar, Advocate
Mr. Santanu Sett, Advocate

For the State : Mr. Anirban Ray, Ld. G. P.
Mr. Nilotpal Chatterjee, Advocate
Mr. Saptak Sanyal, Advocate

For the Howrah
Municipal Corporation : Mr. Sandipan Banerjee, Advocate
Mr. Ankit Sureka, Advocate

For the Respondent
No. 6 : Mr. M. P. Gupta, Advocate
Mr. Ayan Mitra, Advocate
Mr. Aditya Sinha, Advocate
Mr. Sartak Singh, Advocate
Ms. Shinjita Ray, Advocate

Heard on : 05.02.2025

Judgment on : 05.02.2025

DEBANGSU BASAK, J.:-

1. Appeal is at the behest of the writ petitioner and directed against an order dated January 25, 2024 passed in W.P.A. 14410 of 2018.
2. By the impugned the order, the learned Single Judge dismissed the writ petition.
3. Learned advocate appearing for the appellant submits that, the appellant complained to the Howrah Municipal Corporation of unauthorized construction. He submits that, initially a sanction for G+3 was granted by the Howrah Municipal Corporation. The private respondent constructed beyond the sanction granted. In fact, it was in deviation of the sanction granted. Thereafter, the private respondent applied for sanction of 'as made' building plan. He submits that, the Howrah Municipal Corporation granted sanction thereof illegally and wrongfully. The building presently is G+5 storied.
4. Learned advocate appearing for the appellant draws the attention of the Court to the two sanctions granted. Initially, sanction for G+3 according to

him, shows a particular width of the road in front of the building. G+5 sanction which was allowed after retention fees being taken shows a width of the road which is at variance with the width shown in the G+3 sanction. Increased width of road was shown for the G+5 sanction. He submits that, there cannot be two width of the same road.

5. Learned advocate appearing for the appellant submits that, in view of the construction being unauthorized, it is imperative that Howrah Municipal Corporation invokes provisions of Section 177 of the Howrah Municipal Corporation Act, 1980 and take appropriate steps with regard thereto.
6. State, Howrah Municipal Corporation and the private respondent are represented.
7. In course of hearing of the appeal, we called for certain reports from the Howrah Municipal Corporation which were submitted from time to time. Lastly, we enquired from Howrah Municipal Corporation as to whether the width of the road presently available at the location as also whether, the G+5 sanction can be granted considering the width of the road presently available and the building rules governing the buildings located within the Municipal Corporation area of the Howrah Municipal Corporation.
8. Learned advocate appearing for the Howrah Municipal Corporation submits a report dated February 1, 2025 which be taken on record. He submits that, height of the building is to be calculated after taking into

consideration various factors. He points out that, the Kolkata Municipal Corporation Building Rules apply so far as the Howrah Municipal Corporation is concerned. Referring to such report, particularly, the last paragraph thereof he submits that, it is based on available records. In the surrounding area building plan of height more than 22.5 meters were not sanctioned by Howrah Municipal Corporation. He points out that the sanctioned height of building is finalized not only on the basis of the width of the road but also, various other factors as enshrined in the Kolkata Municipal Corporation Building Rules, 2009 as amended.

9. Learned advocate appearing for the private respondent submits that, an Assistant Engineer of a Municipal Corporation cannot sit in appeal over an order passed by the Mayor in Council. He refers to a report dated December 7, 2024 of Howrah Municipal Corporation. He submits that, initially, a notice of stop work was issued on December 15, 2017. Show cause notice was issued on January 5, 2018. Hearing took place on January 10, 2018. He contends that, the higher authority passed an order for retention fees on January 5, 2018. Retention fees notice was issued on May 31, 2018 and retention fees were deposited on June 7, 2018. He contends that, with the demand of retention fees and the deposit thereof, the construction no longer remains unauthorized. The same issue cannot

be reopened by Howrah Municipal Corporation and that too, at the instance of an Assistant Engineer.

10. Learned advocate appearing for the private respondent submits that, the appellant is a co-owner of a property. There was a development agreement on the basis of which, the property was developed. The appellant received his fair share of the property under the development agreement. Appellant now cannot be allowed to contend to the contrary.
11. Learned advocate appearing for the private respondent draws the attention of the Court to the prayers made in the writ petition. He submits that, only the consideration of the representation made by the appellant was sought for. Scope and ambit of neither the writ petition nor the appeal should be enlarged as to allow the construction which was regularized on obtaining of retention fees to be reopened.
12. Learned advocate for the private respondent submits that the Building Rules permit a G+5 story building to be constructed on the basis of the width of road as shown in the G+3 sanction plan.
13. Appellant applied to the Writ Court in 2018 itself contemporaneous to the time when the so-called retention of the construction occurring at the locale was allowed.
14. Materials on record establish certain undisputed facts which are as follows:-

- i) Initial sanction of a G+3 building was granted by Howrah Municipal Corporation in respect of the premises concerned;
 - ii) Width of the road continues to be remain same as that shown in the original sanction for G+3 building;
 - iii) In view of the deviation made in the construction on the G+3 sanction, an application for grant of “as made” sanction was filed by the private respondent with Howah Municipal Corporation,
 - iv) Howrah Municipal Corporation issued a stop work notice on December 15, 2017;
 - v) A show cause notice was issued on January 5, 2018,
 - vi) Hearing took place on January 10, 2018, by which time, a G+5 storied construction was existing at the locale,
 - vii) Howrah Municipal Corporation issued an order for retention with levy of retention fees dated January 5, 2018.
 - viii) Retention fees notice was issued on May 31, 2018.
 - ix) Retention fees were deposited by the private respondent on June 7, 2018.
15. As noted above, the writ petition was filed in 2018 itself. In the writ petition, appellant sought consideration of representation dated July 2, 2018 made by the appellant to the Howrah Municipal Corporation and a

direction upon Howrah Municipal Corporation to demolish the unauthorized construction beyond the sanction plan of G+3.

16. Writ Petition of the appellant contains representation dated July 2, 2018 issued to Howrah Municipal Corporation. In the representation, the appellant questioned how a G+5 structure came into existence after a G+3 sanction being granted.
17. Representation dated July 2, 2018 is yet to be disposed of by the Howrah Municipal Corporation in its finality. Howrah Municipal Corporation is obliged to dispose of this representation particularly in view of the fact that, appellant before us is the co-owner of the property concerned and is entitled to know how a sanction for G+5 building was granted in respect of such property.
18. It is trite law that, under the garb of retention, levy of retention fees and the payment thereof, a Municipal Body cannot grant sanction of a construction which such construction, in the first place such Municipality was not permitted to grant in terms of the existing building rules and the Municipal Laws.
19. There is a complaint of unauthorized construction. Such issue needs to be decided by Howrah Municipal Corporation finally.
20. We are not impressed with the contention of the private respondent that demand of retention fees by Howrah Municipal Corporation and payment

thereof, allows the unauthorized construction to be regularized. Legality, validity and sufficiency of such retention order is justiciable. It is nobody's case that the retention order was passed in presence of the appellant. It is to be seen as to whether any construction which could not be permitted in the first place, be allowed under the garb of retention.

21. In such circumstances, we set aside the impugned order of the learned Single Judge. We direct Howrah Municipal Corporation to dispose of the representation dated July 2, 2018, after affording an opportunity of hearing to private parties and such other persons who are interested therein. Howrah Municipal Corporation will commence such hearing, on and from February 6, 2025 at 11 a.m. without any further notice as the parties are represented, and more so in view of the fact that, the private respondent appearing before us does not object to such date of hearing being fixed by Howrah Municipal Corporation. Howrah Municipal Corporation is requested to continue with such hearing on a day to day basis and complete the same within seven days from date. Howrah Municipal Corporation will pass a reasoned order with regard to its finding on the issue of unauthorized construction and communicate the same to the parties it heard forthwith thereafter.

22. It is clarified that, we did not enter into the merits of the construction per se. We keep the issue of unauthorized construction open to be decided by the Howrah Municipal Corporation.
23. **FMA 522 of 2024** along with connected application are **disposed of** without any order as to costs.

(Debangsu Basak, J.)

24. I agree.

(Md. Shabbar Rashidi, J.)

CHC