
(2009) 04 CAL CK 0075
In the Calcutta High Court
Case No : Writ Petition No. 70 (W) of 2004

Bijoy Krishna Bhandary

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 09-04-2009

Acts Referred:

West Bengal Municipal Act, 1993 — Section 218, 218(5), 220

Citation : 113 CWN 1000

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Anjan Kumar Banerjee and Prakash Ch. Mondal, for the Appellant; Shyama Prasad Purkait, for the Respondent

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—The petitioner in this writ petition dated January 5, 2004 is seeking a mandamus commanding the authorities of Diamond Harbour Municipality to reconstruct his rice-milling shop that they demolished and to return his engine, rice-milling machinery, and equipment he was using for carrying on rice-milling operation from the shop, and the other valuable properties and documents which all were taken away by the people who demolished the shop. The case of the petitioner is this. He is the owner of the properties that he was using for carrying on a lawful rice-milling trade from the shop constructed on the land in Plot No. 93, J.L. No. 88, Khatian No. 79, Mouza-Makalhat, P.S.-Diamond Harbour, District-South 24 Parganas. Initially he rented the construction. Under a registered conveyance dated September 29, 1995 he purchased the land and the construction from their owner, Maya Karmakar. On April 24, 2003 he submitted an application to the Chairman, Diamond Harbour Municipality, South 24 Parganas seeking mutation of the assessment records. The construction, a tiled top structure with brick walls, was, however, in a state of dilapidation. He made arrangements for replacing the broken tiles of the overhead covers with new ones, and reconstructing the broken walls. On

November 25, 2003 the vice-chairman of the municipality issued a notice, alleging that he was illegally erecting a building. On December 1, 2003 he submitted an application stating the need to repair and reconstruct his twenty feet by fourteen old construction and seeking permission for the purposes from the chairman. During pendency of the application and without giving any notice and making any order, and behind his back, on December 14, 2003, a Sunday, the people of the municipality, with the assistance of the local police, illegally broke open the padlock of the shop, demolished the construction and took away all the properties. On December 15, 2003 he submitted a representation stating what happened on December 14, 2003 and demanding compensation and reconstruction of the shop. He went to lodge an F.I.R. but the local police refused to register the F.I.R. Hence he lodged an F.I.R. with the superintendent of police on December 15, 2003, but he did not take any action as well. Under the circumstances, he was compelled to approach this court.

2. The fourth and fifth respondents are the chairman and the vice-chairman of the municipality respectively. The ninth respondent is one Krishna Bera (Baidya). She was the commissioner of ward No. 2 of the municipality at the relevant time. These respondents have jointly filed an opposition dated April 2, 2004 verified by the solemn affirmation made by the chairman. Their case is this. On November 4, 2003 Krishna found that after demolishing his old construction and without taking any permission from the municipality, the petitioner started erecting a new construction. Under the circumstances, the vice-chairman issued the stop-work notice dated November 5, 2005. The notice was received by the petitioner, who, accordingly, stopped work. On December 1, 2003 the municipality received the petitioner's application seeking permission to reconstruct his shop. He, however, did not submit any plan. On December 14, 2003 Krishna gave the chairman notice that in violation of the stop-work notice, from the night of December 13, 2003, the petitioner started erecting a Pucca wall. It was further learnt that the petitioner started erecting the new construction by enclosing a part of the public pathway situated in front of his shop. Under the circumstances, finding no other alternative the chairman sent the staff of the municipality with local police to demolish the illegal construction erected on the public pathway (not on the plot of the petitioner), so that local people might not face any obstruction to their smooth movement. After demolishing the new construction, the people engaged in the work asked the petitioner to take his rice-milling machinery inside the room, but he refused to take the machinery and put his signature on any register or document. Finding no other way, they brought the machinery and other things to office for safe custody. On December 15, 2003 the petitioner filed an application alleging that in his absence his shop was demolished, and demanding his machinery and other things back. On December 19, 2003 the chairman sent his peon to the petitioner with a notice asking him to attend the office of the municipality and collect the machinery and other things. He refused to accept the notice. After receiving the copy of the writ petition the chairman sent a notice dated February 6, 2004 asking him to collect the things.

Though he received the notice, he did not collect his machinery and other things from the office of the municipality.

3. The facts noted hereinbefore clearly establish that the construction in question was demolished by the people engaged by the chairman of the municipality, otherwise than in accordance with law. I say so, because neither anything has been stated by the chairman in his opposition, nor has anything been shown by his counsel to hold that the chairman and the people engaged by him were empowered to demolish the construction, assuming that was erected unauthorisedly and encroaching upon a part of the public pathway or road, without initiating any proceedings and making an order for the purpose in them, after or without giving an opportunity to the petitioner to justify his alleged illegal acts. If the chairman and the people engaged by him were empowered to demolish the construction without initiating any proceedings and just on the basis of information received from some source, the position will, however, be totally different.

4. It was not mentioned in the stop-work notice under which provision of the Bengal Municipality Act it was issued. As a matter of fact, at the date the notice was issued there was no existence of any Act called "Bengal Municipality Act." The notice could be issued, if at all, and that too only by the chairman, in terms of provisions of Section 220 of the West Bengal Municipal Act, 1993. By this Act the Bengal Municipal Act, 1932 was repealed. Section 220 of the West Bengal Municipal Act, 1993 is set out below:

"220. Power of Chairman to stop unauthorised construction.--

(1) In any case in which the erection of a building or any other work connected therewith has been commenced or is being carried on unlawfully, the Chairman may, by written notice, require the owner or the person carrying on such erection or unlawful work to discontinue the same forthwith, pending further proceedings as respects such unauthorised construction.

(2) If any notice issued under sub-section (1) is not duly complied with, the Chairman may, with the assistance of the police or any employee of the Municipality, if necessary, take such steps as he may deem fit to stop the continuance of the unlawful work.

(3) If it appears to the Chairman that it is necessary, in order to prevent the continuation of the unlawful work, to depute any police or employee of the Municipality to watch the premises, the cost of providing the same shall be borne by the person to whom the said notice was addressed."

5. Here in his opposition the chairman has admitted that the stop-work notice was issued by the Vice-Chairman of the municipality. This is also apparent from the notice. The subject of the notice was "Unauthorized Structure of Building". By it the petitioner was directed to stop erecting unauthorized construction at the plot of land in question. Therefore, there can be no doubt that the stop-work

notice was incurably vitiated by lack of jurisdiction.

6. Assuming that the stop-work notice was binding, and that the petitioner started erecting unauthorized construction in violation thereof, the situation could not have empowered the Chairman to demolish the unauthorized construction without initiating appropriate proceedings, giving the petitioner opportunity of hearing, and making order declaring the construction to be unauthorized and directing its demolition. The situation could have been a warrant only for enforcing, as an interim measure, the stop-work notice by deputing police or employee of the municipality to watch the premises at the petitioner's expense. In addition, the municipality could proceed against the petitioner in accordance with law for acting in breach of the notice. An order of demolition could have been made only by the Board of Councilors of the municipality, according to the provisions of Section 218 of the West Bengal Municipal Act, 1993. For the purpose the Board of Councilors was required to initiate appropriate proceedings, give opportunity of hearing to the petitioner, and make order recording its satisfaction that the construction in question was unauthorisedly erected by the petitioner. If aggrieved, the petitioner could have appealed to the court having jurisdiction. Sub-section (5) of Section 218, however, provides as follows:

"(5) Notwithstanding anything contained in the foregoing provisions of this section or elsewhere in this Chapter, if the Chairman-in-Council is of opinion that immediate action is necessary in respect of any building being constructed, or any work being carried on, in contravention of the provisions of this Act, it may, for reasons to be recorded in writing, cause such building or work to be demolished forthwith."

7. It is not the case of the respondents who have filed the opposition that since in the opinion of the Chairman in Council an immediate action was necessary, for reasons recorded by it in writing the construction was demolished forthwith.

8. It is therefore evident that the Chairman did not demolish the construction in terms of a decision taken by the Chairman in Council u/s 218(5). Hence there is no scope to make an attempt to justify the illegal act of the chairman and the people engaged by him by invoking the provisions of Section 218(5). An attempt for the purpose by the court, of its own accord, because no such case has been stated in the opposition or has been argued by a counsel for the respondents, in my view, will amount to giving a premium to a blatant illegality flowing from an arrogant demonstration, display and application of power by an authority. If the petitioner actually erected any unauthorized construction, and even assuming that he did it in breach of the stop-work notice, he was liable to be proceeded against and the construction could have been demolished only according to law. But the Chairman and his people were not empowered to resort to a superior category of illegality with a view to countering the illegality. For dealing with a criminal the State, or a local or statutory authority cannot become a criminal. On the facts, there can be no doubt that the Chairman and the people engaged by him indulged in grave illegal activities.

9. The question is whether a mandamus can be issued directing the Chairman of the municipality to reconstruct the petitioner's rice-milling shop and return his properties. It is very difficult to make such an order. What was the construction cannot be said with certitude, unless detailed oral evidence is recorded. The exact nature and present condition of the articles of movable property are not known. It is not known whether they are still usable. It appears from his licence dated January 1, 1987 that he was authorised to use (a) an engine, and (b) rice-milling machinery, consisting of (i) a machine for dehusking paddy, and (ii) a machine for polishing. It is not known whether the boiling equipment was there. The engine and machinery were presumably embedded in the ground. Unless damage to the properties is assessed, the exact compensation cannot either be determined. All these can be done only by a competent civil court. But I do not think the petitioner should simply be relegated to the civil court. There is no doubt that he is entitled to compensation. His rice-milling shop was illegally demolished, his properties were taken away. The illegal acts ousted him from business, and he was deprived of the means of livelihood. Therefore, in my opinion, the writ court should allow him a tentative compensation.

10. For these reasons, I allow the writ petition and order as follows. The petitioner will be at liberty to approach the civil court seeking adequate compensation for illegal demolition of his rice-milling shop, and removal of and damage to his engine, rice-milling machinery, equipment and other properties by the Chairman of the municipality and the people engaged by him. If the suit is instituted, then the civil court concerned shall decide the question of compensation and other reliefs after recording evidence that may be adduced by the parties. Compensation tentatively determined at the sum of Rs. 1 lakh shall be paid by the Chairman of the municipality within three weeks from the date of communication of this order to him, and failure to do so shall make him liable to pay interest on the amount at the rate of 12% per annum. There shall be no order for costs. Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.