

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

Before:

The Hon'ble Justice Subrata Talukdar

and

The Hon'ble Justice Hiranmay Bhattacharyya

MAT 799 OF 2020

With

IA No. CAN 1 of 2020

With

CAN 2 of 2021

Tapan Kumar Mukherjee

Vs.

The Kolkata Municipal Corporation and Others

For the Appellants : Mr. Ayan Mitra
Ms. Antara Panja..... advocates

For the State Respondents : Mr. Benazir Ahmed..... advocates

For the KMC : Mr. Alak Kumar Ghosh
Mr. Gopal Chandra Das.....advocates

For the Respondent Nos. 19(a)
& (b) : Mr. Biswanath Chatterjee
Mr. Sumitava Chakraborty..... advocates

Heard on : 05.03.2021

Judgment on : 19.03.2021

Hiranmay Bhattacharyya, J.:-

The instant appeal is at the instance of the complainant/respondent no. 7 in the writ petition and is directed

against an order dated November 5, 2020 passed by an Hon'ble Single Judge in WPA 9212 of 2020.

By the order impugned, the demolition order dated June 11, 2019 passed by the Special Officer (Building), Kolkata Municipal Corporation in Demolition Case no. 7-D/B-IX/19-20 was set aside and a direction was passed to decide the complaint regarding the demolition of the building in question afresh upon hearing the writ petitioner and the complainant/ appellant herein.

This case has a chequered history. The writ petitioner, who is the predecessor-in-interest of the respondent nos. 19(a) and 19(b) to the instant appeal, claims to be a co-owner in respect of the property being premises no. 4/2H/14/1, Bhukailash Road, Khiddirpur, Kolkata- 700 023 (for short "the said premises"). The writ petitioner alleged that in terms of the development agreement, the respondent no. 8 and 9 in the writ petition/ respondent nos. 7 and 8 herein agreed to construct a G+4 storied building on the said land. The writ petitioner claimed to have acquired knowledge through the officer-in-charge of the concerned police station that the municipal authority has initiated a proceeding under Section 400 of Kolkata Municipal Corporation Act, 1980 (for short "the KMC Act,1980") and an order of demolition of the said premises was passed and the demolition work is to be carried out by the corporation authority. The writ petitioner further claimed to have acquired knowledge about the initiation of a writ petition being WP No. 1700 (W) of 2019 at the instance of the complainant/ appellant herein

whereby an order was passed directing the Kolkata Municipal Corporation to initiate a proceeding under Section 400 of KMC Act, 1980 and to conclude the same in accordance with law after granting an opportunity of hearing to all parties. The writ petitioner filed a writ petition being WP No. 16865 (W) of 2019 challenging the order dated August 14, 2019 alleging that the same is a notice of demolition of a building, which is under construction. The said writ petition being WP No. 16865 (W) of 2019 was disposed of by an order dated September 30, 2019 as the writ petitioner had already preferred a statutory appeal against the order of the Special Officer (Building). The writ petitioner alleged that a notice of demolition was served upon him which indicated that demolition activities will be done on November 5, 2020 which prompted the writ petitioner to file the instant writ petition being WPA 9212 of 2020.

The writ petition was disposed of by an order dated November 5, 2020. Being aggrieved against such order, the complainant/ respondent no. 7 to the writ petition preferred the instant appeal.

The writ petitioner expired after disposal of the writ petition and the instant appeal was preferred impleading the heirs of the said writ petitioner as respondent nos. 19(a) and 19(b) to this appeal.

Mr. Ayan Mitra, the learned advocate for the appellant contended that the impugned construction is an unauthorised one as the same was constructed without any sanction plan. He further contended that the Municipal Corporation initiated a

proceeding under Section 400 of the KMC Act, 1980 and the same was concluded by passing an order of demolition of G+4 storied building. He also contended that several opportunities were granted to the writ petitioner to contest the demolition proceedings but the writ petitioner did not attend the hearing on several occasions and accordingly the order of demolition was passed. He contended that the order impugned suffers from infirmity inasmuch as no further opportunity of hearing ought to have been granted to the respondent nos. 19(a) and 19(b) in the instant appeal when they failed to avail of such opportunities earlier. He further contended that the order impugned in the writ petition is an appealable one and as such the instant writ petition ought not to have been entertained by the Hon'ble Single Judge.

Mr. Ghosh, the learned advocate for the Kolkata Municipal Corporation (for short "the KMC") drew the attention of the Court to the several orders passed by Hon'ble Single Judges as well as the order dated June 11, 2019 passed by the Special Officer (Building) in the said demolition case and contended that the Special Officer (Building) initiated a proceeding under Section 400 of the KMC Act, 1980 pursuant to an order passed by an Hon'ble Single Judge on a writ petition filed by the appellant herein. He further contended that a G+4 storied structure has been erected at the said premises without any sanction plan. He also contended that the KMC Act, 1980 provides for a remedy by way of an appeal against a demolition order and as such the Hon'ble Single Judge ought not to have set aside the order of

demolition passed by the Special Officer (Building) in exercise of powers under Article 226 of the Constitution of India.

Mr. Chatterjee learned advocate appearing for the respondent nos. 19(a) and 19(b) seriously disputed the contentions of Mr. Mitra and Mr. Ghosh. He contended that the developers who are the respondent nos. 7 and 8 herein were entrusted with the work of construction of the building at the premises in question. He also contended that neither the writ petitioner nor his heirs, who are the respondent nos. 19(a) and 19(b) in the instant appeal, are responsible for raising the construction at the premises in question. He further contended that in spite of a specific direction passed by Hon'ble Single Judge in WP No. 1700 (W) of 2019 to initiate a proceeding under Section 400 of the KMC Act, 1980 and to conclude the same in accordance with law upon granting an opportunity of hearing to the parties, such proceeding was disposed of without giving an opportunity of hearing to the writ petitioner i.e. the predecessor in interest of the respondent nos. 19(a) and 19(b) herein. He further contended that pursuant to the liberty granted by another Hon'ble Single Judge in WP No. 16865 (W) of 2019 an appeal was preferred by the writ petitioner before the Building Tribunal but the same is pending. He next contended that as the Building Tribunal is not functional the writ petitioner was virtually rendered remediless in such a situation and he had no other option but to approach the Writ Court. Mr. Chatterjee, thus, supported the judgment passed by the Hon'ble Single Judge. He assailed the order of demolition passed by the Special

Officer (Building) on the ground of violation of the principles of natural justice.

Mr. Benazir Ahmed, learned advocate for the State supported the order passed by the Hon'ble Single Judge.

We have heard the learned advocates for the parties and considered the materials placed before us.

From the order dated March 15, 2019 passed in WP No. 1700 (W) of 2019 it is evident that by an order dated January 29, 2019 on the said writ petition, a direction was passed upon the concerned officer of KMC to visit the locale upon notice to the private parties and to submit a report in the form of an affidavit. The said order further reflects that pursuant to such direction, a report was filed which revealed that an inspection was conducted and a G+4 storied RCC framed structure has been found to have been illegally erected at the concerned premises and no sanction plan was available in the office record and a stop work notice under Section 401 of the KMC Act, 1980 was also issued. By the said order, the Hon'ble Single Judge directed the competent authority of KMC to initiate proceedings under Section 400 of the KMC Act 1980 and to conclude the same in accordance with the law and upon granting an opportunity of hearing to the private parties.

It appears from the materials on record that a Demolition Case being no. 7-D/B-IX/19-20 was initiated which came up for hearing initially on May 14, 2019 when the complainant/appellant herein was present but none was present on behalf of the persons responsible. It further appears from the

record that another date of hearing was fixed by the Special Officer (Building) on June 4, 2019 on which date also the complainant was present but none of the persons responsible were present. The Special Officer (Building) after going through the materials on record passed an order that the G+4 storied building on the premises no. 4/2/H/14/1, Bhukailash Road should be demolished by the persons responsible within 30 days of the receipt of the order failing which the KMC authority will be at liberty to demolish the same at the cost and at the risk of the person responsible.

The writ petitioner i.e. the predecessor-in-interest of respondent nos. 19(a) and 19(b) herein preferred a writ petition being WP No. 16865 (W) of 2019 alleging that the order of demolition passed in respect of the premises in question was never served upon the writ petitioner nor any opportunity of hearing was granted to the writ petitioner. The writ petitioner approached the writ court alleging gross violation of the principles of natural justice. That writ petition initially came up for hearing on August 29, 2019 whereby the petitioner and the respondent were directed to collect the order of Special Officer (Building) dated June 11, 2019 from the office of the Supervisor Building, Borough- IX by seven days from the date of order and thereafter prefer statutory appeal before the appellate tribunal within fifteen days. The said writ petition again came up for hearing on September 30, 2019 when a supplementary affidavit was filed by the writ petitioner herein thereby bringing on record the fact that the writ petitioner herein has already preferred a statutory appeal against the order of the Special Officer and the

said appeal was fixed on November 13, 2019. The Hon'ble Single Judge was thus, pleased to dispose of the writ petition since the Building Tribunal was in *seisin* of the matter.

The writ petitioner in paragraph 13 of the writ petition has also specifically pleaded that pursuant to the direction and liberty granted vide order dated August 29, 2019 the petitioner has preferred a statutory appeal and the same is pending.

It further appears from the averments made in paragraph 15 of the writ petition that another writ petition being WPA No. 7614 of 2020 was dismissed by an order dated September 29, 2020 as some material facts were suppressed by the writ petitioner herein in the said writ petition.

In spite of the fact that an Hon'ble Single Judge after observing that there is no evidence whether the writ petitioner received the Special Officer's order dated June 11, 2019 passed an order dated August 29, 2019 directing the writ petitioner to collect the said order from the office of the Supervisor Building, Borough- IX and also that the writ petitioner by filing a supplementary affidavit on a subsequent date stated that the petitioner has already preferred a statutory appeal against the order of the Special Officer (Building), the writ petitioner herein filed the instant writ petition with the self-same allegation that the order of demolition has not been communicated to the petitioner till the date of filing of the instant writ petition. When the writ petitioner herein have accepted the order dated August 29, 2019 passed in WP 16865 (W) of 2019 whereby the writ petitioner was directed to collect the order of the special officer

dated June 11, 2019 from the office of the Supervisor Building, Borough - IX, the writ petitioner herein was under an obligation to collect the same as directed by the Hon'ble Single Judge. He cannot now turn around and again complain that the respondent authorities have not communicated the order passed by the Special Officer (Building).

The Hon'ble Single Judge entertained the instant writ petition being persuaded by the averments made in the writ petition as well as the submission of the learned advocate for the writ petitioner that though the writ petitioner has preferred a statutory appeal before the Municipal Building Tribunal but the writ petitioner was virtually rendered remediless as the Building Tribunal was not functional at that point of time and also that the order of demolition is passed without hearing the petitioner. The Hon'ble Single Judge was thus, pleased to set aside the order of demolition as the same was passed without hearing the petitioner.

It would be evident from the order dated March 5, 2021 passed in this appeal that after an order was dictated directing the appellant to file an affidavit that the respondent nos. 19(a) and 19(b) shall not press the appeal before the Municipal Building Tribunal, on the basis of submissions made in course of hearing, Mr. Chatterjee, at a later stage, submitted on instructions, that no appeal has been preferred by the respondent nos. 19(a) and 19(b) herein before the Municipal Building Tribunal challenging the order of demolition passed by the Special Officer (Building), KMC.

Prior thereto an impression was given to the Hon'ble Single Judges dealing with different writ petitions on the self- same subject matter that a statutory appeal has indeed been preferred by the present writ petitioner challenging the demolition order passed by the Special Officer (Building) dated June 11, 2019. Thus, the writ petitioner is guilty of making misleading and distorted averments in the writ petitions as well as in the affidavits filed in connection to the writ petitions.

The other ground on which the writ petitioner approached this Hon'ble Court is that the order of demolition was passed without giving an opportunity of hearing to the writ petitioner. Similar grievance was made by the writ petitioner in the writ petition being WP 16865 (W) of 2019 and the Hon'ble Single Judge after taking note of such submission of the learned advocate for the writ petitioner gave liberty to the petitioner to file a statutory appeal before the Building Tribunal within a time limit. The said order passed by the Hon'ble Single Judge in WP No. 16865 (W) of 2019 attained finality as the same was not challenged before any higher forum. Thus, a second writ petition on similar and identical allegation challenging the self-same order of demolition was, thus, not maintainable.

It would be pertinent to mention here that the writ petitioner chose not to appear on the dates fixed by the Special Officer (Building) for hearing of the demolition case. It is evident from the record that the writ petitioner herein, for reasons best known to him, did not attend the hearing on May 14, 2019 and also on June 4, 2019. Thus, the Special Officer (Building) was left

with no other alternative but to decide the demolition case upon hearing the complainant/appellant herein and on the basis of materials on record. Thus, it cannot be said that the principles of natural justice has been violated in the instant case while deciding the demolition case on the ground that the writ petitioner was not heard.

Subsection 3 of Section 400 of the KMC Act, 1980 provides that any person aggrieved by an order of the Municipal Commissioner made under Subsection (1) may, within 30 days from the date of order, prefer an appeal against an order to the Municipal Building Tribunal constituted under Section 415 of the KMC Act. In the instant case, the writ petitioner herein was granted liberty by an Hon'ble Single Judge to prefer a statutory appeal within a time limit fixed by the Hon'ble Judge. The writ petitioner all along took the stand that a statutory appeal has indeed been preferred by the writ petitioner herein against the order of demolition passed by the Special Officer (Building) but only at the later stage of hearing of the instant appeal on March 5, 2021 the writ petitioner disclosed that no statutory appeal has been preferred at the instance of the writ petitioner herein against the said order of demolition.

The writ petitioner herein failed to bring his case within the exceptions for entertaining an application under Article 226 of the Constitution of India in view of the availability of alternative efficacious remedy of a statutory appeal. The writ petitioner took a conscious decision not to prefer a statutory appeal even after obtaining a liberty from the writ court on an earlier occasion.

This court by an order dated March 3, 2021 granted an opportunity to the writ petitioner herein to produce the sanctioned plan in respect of the impugned construction but the learned advocate for the writ petitioners/ respondent nos. 19(a) and 19(b) in course of hearing on March 5, 2021 submitted that the said respondents cannot produce the sanctioned plan as, according to the said learned advocate, the sanctioned plan is with the developers.

It is evident from the record that the developers have also not appeared in this appeal in spite of being duly served. The learned advocate appearing for the KMC submitted that no sanction plan in respect of the impugned construction is available in the office record.

The writ petitioner/respondent nos. 19(a) and 19(b) are the expected custodians of the sanctioned plan. They did not produce the same before this court. No sanction plan is also available in the records of the KMC.

Subsection (1) of Section 400 of the KMC Act, 1980 provides that where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in Section 396 or in contravention of any of the provisions of the Act or the rules and the regulations made thereunder, the Municipal Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the

erection or the work has been commenced or is being carried on or has been completed.

The writ petitioner/ respondent nos. 19(a) and 19(b) to this appeal are knocking the doors of this Hon'ble Court only when steps are being taken by the KMC for demolition of the impugned construction. Even in this appeal, the said respondents did not urge any point as to why the order of demolition could not have been passed save and except that they were not heard by the Special Officer (Building).

It is evident that the impugned construction commenced and was proceeded with without any sanction plan. The concerned authority initiated a demolition case and passed an order of demolition on the basis of materials on record. This Court is of the considered opinion that the order passed by the Special Officer (Building) does not suffer from any infirmity.

For the reasons as aforesaid this court is of the considered view that the Hon'ble Single Judge erred in law by entertaining the instant writ petition and ultimately setting aside the order of demolition passed by the Special Officer (Building) dated June 11, 2019.

The order dated November 5, 2020 passed by the Hon'ble Single Judge in WPA 9212 of 2020 is set aside thereby restoring the order of demolition dated June 11, 2019 passed by the Special Officer (Building) in Demolition Case no. 7-D/B-IX/19-20. The appeal being **MAT 799 of 2020** stands **allowed**. Accordingly, the applications being **IA No. CAN 1 of 2020** and **IA No. CAN 2 of 2021** also stand **disposed of**.

There shall be, however, no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Subrata Talukdar, J.)

(Hiranmay Bhattacharyya, J.)