

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Appellate Side)

F.M.A 214 of 2022

With

I.A. No: C.A.N. 1 of 2020 (Old No: C.A.N. 1414 of 2020)

The Kolkata Municipal Corporation & Ors.

Vs.

Firoza Begum & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Kausik Chanda

For the Appellants/K.M.C. : Mr. Alok Kumar Ghosh, Adv.
Mr. Mihir Kundu, Adv.

For the Writ petitioners/
Respondents : Mr. Sandip Ghosh, Adv.
Mr. Subrata Das, Adv.
Mr. Md. Salamuddin, Adv.
Mr. Debayan Ghosh, Adv.
Mr. Aziz Amin, Adv.

Heard On : 18.04.2022, 21.04.2022 & 28.04.2022

CAV On : 02.05.2022

Judgment On : 24.06.2022

Arijit Banerjee, J.:

1. A judgment and order dated December 12, 2019, whereby W.P. No. 15249(W) of 2019 was disposed of, is the subject matter of challenge in this appeal.

2. The Writ petitioners approached the learned Single Judge challenging a notice dated July 31, 2019, issued under Section 412(1) of the Kolkata Municipal Corporation Act, 1980 (in short 'the said Act'). Section 412 of the said Act reads as follows:-

“412. Power to order building to be vacated in certain circumstances.- (1) The municipal Commissioner may, by order in writing, direct that any building, which in his opinion is in a dangerous condition or is not provided with sufficient means of egress in case of fire or is occupied in contravention of Section 396 or Section 403, be vacated forthwith or within such period as may be specified in the order:

Provided that at the time of making such order, the Municipal Commissioner shall record a brief statement of the reasons therefor.

(2) If any person fails to vacate the building in pursuance of such order, the Municipal Commissioner may direct any police officer to remove such person from the building and the police officer shall comply with such direction.

(3) The Municipal Commissioner shall, on the application of any person who has vacated or has been removed from any building in pursuance of any order or any direction, as the case may be, under this section, reinstate such person in the building as soon as the circumstances permit.”

3. Before the learned Single Judge as also before us, learned Advocate for the writ petitioners/respondents argued that no reasons have been recorded in the notice impugned as to why the Municipal Commissioner is of the opinion that the building in question is in a dangerous condition. Nor is it recorded in the notice that the building is not provided with sufficient means of egress in case of fire or that the building is occupied in contravention of Section 396 or Section 403 of the said Act. Recording of a brief statement of the reasons for which such notice is issued, is a statutory mandate in the proviso to Section 412(1) of the said Act. Hence the notice is bad in law. The impugned notice reads as follows:-

“Sir/Madam,

Please take notice that you are hereby required by the Municipal Commissioner vide his approval dated 11.01.2019 issued under Section 412(1) of the Kolkata Municipal Corporation Act, 1980 to vacate your possession of the building which is already declared as unauthorised construction and the same is under your occupation. A demolition programme will be carried out on 07.08.2019 at the case premises as per order of K.M.C. Authority and physically the present condition of the building is very much dangerous and unsafe not for inmates but also the neighbours of the adjacent premises.

You are hereby directed to vacate your possession at unauthorized portion of the building at the above mentioned

premises occupied by you immediately after receiving the notice issued under Section 412(1) of the KMC Act 1980 to execute the demolition work smoothly.”

4. The learned Judge came to the conclusion that the opinion of the Municipal commissioner that the condition of the building is dangerous and unsafe for inmates is based on the premise that the building is unauthorised. He observed that an unauthorised construction does not necessarily mean that the same is in a dangerous condition or that it necessarily lacks sufficient means of egress in case of fire. The learned Judge held that the impugned notice was not in terms of Section 412(1) of the said Act and set aside the notice. However, the learned Judge noted that a notice under Sections 544/546 of the said Act had been issued invoking Section 400(8) of the said Act. His Lordship clarified that *“the Corporation might proceed in accordance with law factoring in that impugned notice is set aside.”* Being aggrieved by the quashing of the notice under Section 412(1) of the said Act, the Corporation is before us by way of this appeal.

5. Learned Senior Counsel for the Corporation submitted that the impugned notice is fully justified. He produced a resolution dated November 17, 2017 taken by the Mayor-in-Council which reads as follows:-

“Considering the facts & circumstances as stated above in the departmental report and upon due consideration of other relevant issues, it is resolved that since the Person Responsible continued with un-authorized construction as indicated in the precis of the

agenda item in spite of departmental action for stoppage of such unauthorized construction and since such unauthorized construction is unsafe and may lead to accident resulting in loss of Human Life and property, appropriate action towards demolition of such unauthorized construction be taken forthwith under Section 400(8) of K.M.C. Act 1980 with the help of local administration.”

6. Learned Advocate argued that not only the impugned notice mentions that the building is in a dangerous condition, it says that it is unauthorised. Which means that there is violation of Sections 396/403 of the said Act. Section 396 mandates a construction to be made strictly in accordance with a sanctioned plan. Section 403 says that a completion certificate must be obtained from the Corporation before anybody occupies the newly constructed building. Violation of either of these two Sections also entitles the corporation to issue a notice under Section 412(1) of the said Act. Hence, the learned Single Judge ought not to have interfered with the said notice.

7. Learned Counsel also submitted that the writ petitioners, as purchasers of the building in question having two unauthorizedly constructed floors without any sanctioned plan, cannot challenge the validity of a notice under Section 412(1) of the said Act. In this connection learned Counsel relied on decisions of two concurrent benches of this Court in the cases of ***Ram Awatar v. Calcutta Corporation: AIR 1982 Calcutta 314 and C.M.C & Anr. v. Abid Hossain: 2001(1) CHN 4.*** Reliance was also placed on the decision of a learned Single Judge of our Court in the case of

Sanjay Mehta & Ors. v. The Kolkata Municipal Corporation & Ors.: 2006 (2) CLJ (Cal) 574.

8. Learned Counsel appearing for the writ petitioners/respondents, in support of his contention that the impugned notice is not an adequately reasoned one, relied on the observations of the Hon'ble Apex Court in Paragraph 31 of the judgment in the case of ***C. B. Gautam v. Union of India & Ors.: (1993) 1 SCC 78*** which reads as follows:-

“31. The recording of reasons which lead to the passing of the order is basically intended to serve a two-fold purpose:

(1) that the “party aggrieved” in the proceeding before (sic the appropriate authority) acquires knowledge of the reasons and, in a proceeding before the High Court or the Supreme Court (since there is no right of appeal or revision), it has an opportunity to demonstrate that the reasons which persuaded the authority to pass an order adverse to his interest were erroneous, irrational or irrelevant, and

(2) that the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers.”

9. Learned Counsel also relied on the decision of the Hon'ble Supreme Court in the case of ***Gorkha Security Services v. Government (NCT of***

Delhi) & Ors.: (2014) 9 SCC 105. He relied on paragraph 21 of the reported judgment which reads as follows:-

“21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.”

10. Learned Counsel finally submitted that demolition of a building or asking an occupant of a building to vacate so that the same may be demolished are drastic measures and have extremely adverse consequences for the occupant of the building. Hence, the elementary principles of natural justice warrant that before such a notice is issued, the occupant of the building must be granted an opportunity of hearing. This not having been done in the present case, the impugned notice is bad in law.

11. We have considered the rival contentions of the parties.

12. The text of the notice impugned before the learned Single Judge has been set out hereinabove. The notice is under Section 412(1) of the KMC Act, 1980 which has been extracted above. Section 412 refers to Sections 396 and 403 of the KMC Act, which, in so far as relevant for the present purpose, reads as follows:-

“ **396.** (1) The Municipal Commissioner shall sanction the erection of a building or the execution of a work unless such building or work would contravene any of the provisions of sub-section (2) or sub-section (3) of this Section or the provisions of Section 405 or Section 406:

Provided that no such sanction shall be accorded without the prior approval of the Mayor-in-Council in case of any building, except a residential building, proposed to be erected or re-erected on a plot of 500 square metres or less of land, or a heritage building:

Provided further that the Mayor-in-Council shall consider the recommendations of the Municipal Building Committee and those of the Heritage Conservation Committee shall finalize its decision after such consideration.”

403. Completion certificates. – (1) Every person giving notice under Section 393 or Section 394 or every owner of a building or a work to which such notice relates shall, within one month after the

completion of erection of such building or execution of such work, deliver or send or cause to be delivered or sent to the Municipal Commissioner a notice, in writing, of such completion accompanied by a certificate in the form specified in the rules made in this behalf and shall give to the Municipal Commissioner all necessary facilities for inspection of such building or work.

(2) No person shall occupy or permit to be occupied any such building or use or permit to be used any building or a part thereof affected by any such work until permission has been granted by the Municipal Commissioner in this behalf in accordance with the rules and regulations made under this Act:

Provided that if the Municipal Commissioner fails, within a period of thirty days of receipt of the notice of completion, to communicate his refusal to grant such permission, such person may make a representation in writing to the Mayor.”

13. We have also set out the resolution dated November 17, 2017 passed by the Mayor-in-Council of KMC. The said resolution clearly records that the unauthorised construction in question is unsafe and may lead to accident resulting in loss of human life and property. We are surprised that even after such resolution was passed by the Mayor-in-council way back in November 2017, no prompt action was taken by KMC ensuring that the unauthorised construction is demolished. The impugned notice was issued more than one and a half years later.

14. The learned Single Judge held that just because the impugned construction is unauthorised, it does not necessarily follow that the same is in a dangerous condition or is not provided with sufficient means of egress in case of fire. On that ground alone, the learned Judge quashed the impugned notice. The learned Judge however failed to take note of the fact that a notice under Section 412(1) of the KMC Act can be legitimately issued by the Corporation if a building or part of it is occupied in contravention of Section 396 or Section 403 of the KMC Act. In other words, the Corporation will be well within its rights and powers to issue a notice under Section 412(1) of the KMC Act if a building or part of it has been constructed without a sanctioned plan or is occupied without there being a completion certificate in respect thereof.

15. In the present case admittedly the impugned construction was made without a sanctioned plan being obtained therefor. Consequently, no question of the Corporation issuing a completion certificate could or did arise. There having been violation of Sections 396 and 403 of the KMC Act on the part of the respondents/writ petitioners, in our opinion, the Corporation was justified in issuing the impugned notice under Section 412 (1) of the KMC Act.

16. In the case of **CMC & Anr. v. Abid Hossain: 2001 (1) CHN 4 (supra)** a Division Bench of this Court held that although the right to property is recognised as a valuable constitutional right of a citizen who may be deprived of such right only by the authority of law, such right to property cannot be construed in abstract. If a person erects a building without

sanction of the competent authority, such erection being an illegal erection, no right to property flows therefrom. Similarly, if a person, who is authorised to erect a building in accordance with a sanctioned plan, erects a building in excess of the sanction or contrary to the sanction, to the extent the erection is beyond sanction or contrary to sanction, the person concerned cannot be said to have any right to property therein.

17. Since admittedly in the present case, the impugned construction was made without the sanction of the Corporation, the respondents/writ petitioners, who are transferees of such impugned construction cannot be said to have any right to property in respect thereof.

18. The respondents/writ petitioners argued that before issuance of the impugned notice, the Corporation ought to have granted an opportunity of hearing to them. Section 412 of the KMC Act is, like Section 400(8) and unlike Section 400(1) of the said Act, an emergency provision. Just as Section 400(8) of the Act does not contemplate any prior hearing before action being taken against an unauthorised construction, whereas Section 400(1) does so, in our view, Section 412 of the Act also does not envisage any such prior hearing. In any event, in our opinion, if at all anyone can claim to be entitled to prior hearing before action being taken under Section 412 of the Act, it is the person responsible for making the impugned construction. In the case of ***M.M. Dutt and Monoj Kumar Mukherjee, JJ.:*** ***AIR 1982 CAL 314*** a Division Bench of our Court while discussing section 414 of the Calcutta Municipal Act, 1951 held that the expression “person responsible” does not include an occupier of the unauthorised construction

who has nothing to do with the works of such construction or any addition to it. This stands to reason since it is only a person who is responsible for or associated with an alleged unauthorised construction, may be in a position to offer explanation, if at all, with respect to such construction. A transferee of an unauthorised building, who may be occupying the same, will not be in a position to offer any explanation. However, this discussion is academic since in our view no hearing is required to be given by the Corporation to the owner or occupier of a building or any part of it, before issuing notice under Section 412 of the KMC Act.

19. In view of the aforesaid, we are of the opinion that the learned Judge ought not to have quashed the impugned notice. Unauthorised constructions which pose a threat to anybody must be removed and it is the statutory duty of the Corporation to do so.

20. There is a proliferation of unauthorised buildings and unauthorised extensions/additions to existing buildings at the instance of unscrupulous builders. This carries with it the risk of accidents happening causing loss of life and limbs. Such cases must be dealt with firmly. The Corporation has been statutorily empowered to ensure removal of unauthorised construction. Such power when exercised by the Corporation, ought not to be lightly interfered with by the Courts unless of course on the face of it exercise of such power is tainted with illegality, mala fides or arbitrariness.

21. Learned counsel for the respondents/ writ petitioners relied on the decision of the Hon'ble Supreme Court in the case of **C. B. Gautam, (supra)**

in support of the proposition that reasons must be recorded in an order of an authority as to why such order is being passed. He has also relied on the decision of the Hon'ble Apex Court in the case of **Gorkha Security Services, (supra)** in support of the proposition that a show-cause notice must be sufficiently clear and convey to the noticee as to why such notice is being issued and the nature of action proposed to be taken if sufficient cause is not shown.

As propositions of law, there cannot be any quarrel with the aforesaid and indeed, the law laid down by the Hon'ble Apex Court is binding on us. However in the facts of this case, in our view, there has been no infraction of the aforesaid principles of law which are now considered to be limbs of the principles of natural justice. The impugned notice indicates with sufficient clarity the reasons for issuance thereof and the action proposed to be taken by the Corporation.

22. The order under appeal is set aside. The appellant Corporation shall be entitled to take appropriate action in respect of the impugned construction in accordance with law.

23. Accordingly, FMA 214 of 2022 along with CAN 1 of 2020 is disposed of. There will be no order as to costs.

24. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(KAUSIK CHANDA, J.)

(ARIJIT BANERJEE, J.)

Later

After the judgment is delivered, the private respondents pray for stay of operation of the judgement and order. The prayer is considered and refused.

(KAUSIK CHANDA, J.)

(ARIJIT BANERJEE, J.)