

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION**

APPELLATE SIDE

**W.P.A. 5763 of 2016
IA No. CAN 1 of 2017 (Old No. CAN 2467/2017)
IA No. CAN 2 of 2017 (Old No. CAN 7510/2017)
IA No. CAN 3 of 2019 (Old No. CAN 8783/2019)**

Swami Santadas Institute of Culture & Ors.

Versus

Kolkata Municipal Corporation & Ors.

For the Petitioners : Mr. Raghunath Chakraborty, Adv.
Mr. Bratin Kr. Dey, Adv.
Mr. Pradeep Pandey, Adv.

For the KMC : Mr. Alok Kr. Ghosh, Adv.
Mr. Swapan Kr. Debnath, Adv.

For the Respondent Nos.
7 & 8 : Mr. Partha Sarathi Deb Barman, Adv.
Mr. Amit Gupta, Adv.
Mr. Dwaipayan Basu Mallick, Adv.
Mr. Swarajit Dey, Adv.
Mr. Subhadeep Basak, Adv.

Hearing concluded on : 13.07.2022.

Judgment On : 20.07.2022

Saugata Bhattacharyya, J.:

This writ petition centers around nature of construction carried out in premises no. 101, Dr. Meghnad Saha Sarani, Kolkata – 700029, under the jurisdiction of Kolkata Municipal Corporation.

It has been submitted by Mr. Raghunath Chakraborty, learned advocate representing the petitioners a notice under section 400 (1) of The Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the “said Act of 1980”) was issued to the petitioner no. 2 on 2nd April, 2012. Subsequently, the matter was considered by Joint Municipal Commissioner (REV) and an order was passed on 2nd August, 2012 wherein it has been held that entire construction at the 2nd floor and 3rd floor of the said premises is unauthorized as per the structures marked in the D-Sketch. It was also found by the said Joint Municipal Commissioner that the entire building was sanctioned for residential purpose but according to the report the portions at the 2nd floor and 3rd floor are being used for non-residential purpose. On finding such facts relating to erection of unauthorized construction the Joint Municipal Commissioner passed an order directing the Person Responsible (PR) to demolish the said unauthorized constructions at the 2nd floor and 3rd floor of the said premises within fifteen days. Such decision of the Joint Municipal Commissioner dated 2nd August, 2012 has been questioned by the writ petitioners by preferring an appeal before the Municipal Building Tribunal, KMC and subsequently, the said appeal being B.T. Appeal No. 91 of 2012 was dismissed vide order dated 25th

February, 2016. The appellate authority being the Chairman of the Municipal Building Tribunal, KMC while dismissing the appeal has upheld the decision of Joint Municipal Commissioner.

The said order of the appellate authority dated 25th February, 2016 upholding the decision of the Joint Municipal Commissioner dated 2nd August, 2012 whereby direction was given to demolish illegally constructed portions at 2nd and 3rd floor of the premises in question, is under challenge in the present writ petition.

It has been argued on behalf of the petitioners who is a tenant of the said premises that show-cause notice dated 2nd April, 2012 did not accompany précis and D-Sketch which violates the established procedure and denying the right of the petitioners to present their case before the appellate authority. It has also been submitted that the address of the premises is 200 C.I.T. Scheme but the notice under section 400(1) of the said Act of 1980 was issued in connection with premises no. 101, Dr. Meghnad Saha Sarani. According to the petitioners since the address of the said premises is 200, C.I.T. Scheme such notice in relation to premises no. 101, Dr. Meghnad Saha Sarani is not maintainable. It has further been argued that it appears from the said notice dated 2nd April, 2012 that though under section 400(1) notice has been issued for initiation of demolition proceeding but there is no notice under section 416(5) of the said Act of 1980 in relation to change of user since a case has been made out before the concerned authorities of the municipality that a residential building has been unauthorizedly used by the petitioners for commercial

purpose. According to the petitioners in absence of the valid notice under section 416(5) of the said Act of 1980 the order passed by the appellate authority dated 25th February, 2016 cannot stand. The next point taken on behalf of the petitioners again on reference to the notice dated 2nd April, 2012 that though certain Building Rules have been referred to while issuing notice under section 400(1) on the allegation of infringement of such Building Rules but on perusal of the order of the appellate authority it does not appear that while taking decision against the writ petitioners any finding has been made based on violation of such Building Rules as indicated in the notice dated 2nd April, 2012. Lastly, it has been argued that there is error on the part of the KMC authorities in identifying the Person Responsible (PR) for such unauthorized construction at the premises in question. According to the petitioners deceased owner of the said premises namely Gita Dutta made such unauthorized construction but the petitioners have been found to be Person Responsible (PR) which is impermissible. Based on such submission point of non-joinder of party has been raised to the extent of non-participation of owner of the premises.

In support of the case made out in the writ petition following judgments have been relied upon by the petitioners:-

- i) (2011) 6 SCC 570 (J.S. Yadav vs. State of Uttar Pradesh And Another); paragraph 31;
- ii) 2015 (3) CHN (Cal) 637 (Bhagirath Pasari vs. Municipal Commissioner, Kolkata Municipal Corporation); paragraph 15;

- iii) 2011 (2) CHN (Cal) 36 (Padrone Marketing vs. Controller of Thika Tenancy); paragraph 31;
- iv) 2006 (4) CHN 136 (Laddu Gopal Bajoria & Anr. vs. Kolkata Municipal Corporation & Ors.); paragraph 52;
- v) Unreported judgment of coordinate Bench on writ petition being WPA 647 of 2017 (M/s. Anjanli Jewellers Vs. Kolkata Municipal Corporation and Ors.);

Mr. Alok Kumar Ghosh, learned advocate is representing the Kolkata Municipal Corporation has defended the decisions first taken by Joint Municipal Commissioner dated 2nd August, 2012 and subsequently by the Chairman, Municipal Building Tribunal being the appellate authority dated 25th February, 2016. It has been submitted on behalf of the KMC that there is no error on the part of the appellate authority in identifying the petitioners as Person Responsible (PR) and has drawn attention of this Court to the relevant part of the decision of the appellate authority dated 25th February, 2016 wherein the appellate authority made the finding that Gita Dutta being the owner of the said premises may have made the construction on the 2nd and 3rd floor of the said premises unauthorizedly but the petitioners are beneficiaries to such unauthorized construction and the expense of such construction was borne by the petitioners. It has been submitted that the appellate authority has rightly found the petitioners being Person Responsible (PR) for carrying out such unauthorized construction in the premises in question. It has further been submitted on behalf of the KMC that the said premises was originally numbered as 200,

C.I.T. Scheme and subsequently renumbered as 101, Southern Avenue and lastly renumbered as 101, Dr. Meghnad Saha Sarani. Therefore, there is no flaw as it has been submitted in issuing notice in connection with premises no. 101, Dr. Meghnad Saha Sarani under section 400(1) of the said Act of 1980 to the petitioner no. 2.

It has also been submitted on behalf of the KMC that two proceedings were initiated against the petitioners one under section 400(1) for making unauthorized construction and another for change of user since the premises was scheduled to be used for residential purpose but without obtaining any necessary permission from the concerned authority of the KMC the said premises was used for commercial purposes for which a proceeding under section 416 of the said Act of 1980 was also contemplated. On relying upon the notice dated 2nd April, 2012 it has been argued for the KMC that this is not only a notice under section 400 at the same time this notice ought to be construed also under section 416 since it has been stated in the said notice itself that there is an infringement of provision under section 416. Submissions have been made that there is no express bar in issuing joint notice under section 400 and section 416 of the said Act of 1980. Lastly it has also been submitted on the point taken by the petitioners on absence of notice under section 416 that even if the said notice dated 2nd April, 2012 to be construed to be a notice only under section 400 and if the proceeding initiated under section 416 is abandoned by no stretch of imagination petitioners can be permitted to use and enjoy the construction made on the 2nd and 3rd floor of the said premises in question since such

construction has been made without obtaining sanctioned plan from the KMC as it has been found by the appellate authority while passing order dated 25th February, 2016.

Private respondent nos. 7 and 8 are represented by Mr. Partha Sarathi Deb Barman, learned advocate who has submitted that Gita Dutta since deceased was a trustee and premises in question is a trust property. Subsequently, respondent nos. 7 and 8 have been inducted as trustees. Respondent no. 7 has participated in the proceeding as it appears from the order dated 2nd August, 2012 passed by the Joint Municipal Commissioner which reveals that respondent no. 7 made written complaint against such unauthorized construction made by the Person Responsible (PR) without obtaining sanctioned plan from the concerned authorities of KMC. Therefore, it has been contended that the point of non-joinder of parties as taken by the petitioners in the context of demise of Gita Dutta who made the illegal construction as argued by the petitioners cannot stand since the respondent nos. 7 and 8 have stepped into the shoes of said Late Gita Dutta on being inducted as trustees and the proceeding may not fail on the ground of non-joinder of necessary/proper parties.

It has also been submitted on behalf of the private respondent nos. 7 and 8 that two proceedings one under section 400 and another under section 416 have been initiated against the petitioners and according to the said private respondents the notice dated 2nd April, 2012 is a combination of notice under section 400 as well as under section 416 of the said Act of 1980. In reference to the relevant provisions of the said Act of 1980 it has

also been submitted that there is no express bar in issuing combined notice one under section 400 and another under section 416. Therefore, according to the respondent nos. 7 and 8 the said notice dated 2nd April, 2012 cannot be faulted.

Furthermore, on placing reliance on the order passed by the Chairman, Municipal Building Tribunal dated 25th February, 2016 it has been submitted that all the points taken by the petitioners in order to throw challenge to such decisions have been taken care of by the appellate authority while confirming the decision of the Joint Municipal Commissioner dated 2nd August, 2012. Therefore, it has been submitted that the decision of the appellate authority may not be interfered with.

This Court has heard the learned advocates representing the parties and perused the relevant materials available on records.

Considering submissions made on behalf of the petitioners while throwing challenge to the decision of the appellate authority dated 25th February, 2016 it has been argued that notice did not accompany précis and D-Sketch which violates principle of natural justice. If this Court presumes that D-Sketch plan and précis were not supplied along with the said notice but how does it prejudice the petitioners in defending their case before the concerned authorities of KMC has not been demonstrated before this Court in spite of posing query to the learned advocate representing the petitioners. The relevant part of the order of the appellate authority goes to show that the D-Sketch plan contained the signature of Assistant Engineer (Civil) which is part of the case record however, it has been fairly admitted

by the respondents that such D-Sketch plan though was signed by the Assistant Engineer (Civil) does not bear date. It has also been stipulated therein that there is no other D-Sketch plan apart from the same which forms the part of the case record. There is nothing on record which goes to show that the petitioners made an approach to the authorities for supply of D-Sketch plan and it has not been demonstrated before this Court that how non-supply of D-Sketch plan and précis had prejudiced the petitioners. It has also been duly recorded in the order of appellate authority that the petitioners filed written submission dated 11th May, 2012/10th May, 2012 through the learned advocate and was given opportunity of being heard.

Another aspect which has to be taken into consideration while adjudicating the issue involved in this writ petition is whether permission was obtained from the concerned authority of Kolkata Municipal Corporation while erecting construction at the 2nd and 3rd floor of the said premises in question. This Court has perused the relevant documents including orders passed by the appellate authority as well as the Joint Municipal Commissioner wherefrom it does not appear that there is grant of sanction plan in favour of the petitioners or trustee of the said premises or the then trustee of the said premises namely, Gita Dutta since deceased. In absence of sanction plan being accorded in favour of the petitioners or erstwhile trustee nothing turns on non-supply of D-Sketch plan and précis to the petitioners and it does not appear to this Court that the outcome of the proceeding initiated under section 400 would have been different had the petitioners been permitted to deal with the said D-Sketch plan and

précis. Fact remains that petitioners were given opportunity to participate in the proceeding and accordingly they participated and in the said proceeding the concerned authority of KMC found that the construction made by the erstwhile trustee/ owner of the said premises which was financed by the petitioners cannot be maintained in absence of necessary permission.

In this context this Court is tasked to consider other points taken on behalf of the petitioners. It has been argued by the petitioners that combined notice under section 416(5) and section 400(1) is not permissible but on perusal of relevant provision of the said Act of 1980 it does not appear that there is any express bar in issuing such notice. In addition thereto if it is presumed that the proceeding initiated under section 416 is abandoned in that event also petitioners cannot be permitted to use the construction made at the 2nd and 3rd floor of the premises in question since the same was erected without obtaining necessary sanction plan. Therefore, in appreciation of the facts it appears to this Court that the proceeding initiated under section 400(1) was required to be brought to logical conclusion.

It also appears that attempt has been made on behalf of the petitioners to the extent of issuing notice in connection with premises no. 101, Dr. Meghnad Saha Sarani which according to the petitioners is impermissible since the premises in question was initially numbered as 200, C.I.T. Scheme. Such issue has been deliberated upon by the appellate authority as it appears from its order dated 25th February, 2016 wherein it has been recorded that the premises in question was initially numbered as

200, C.I.T. Scheme and subsequently renumbered as 101, Southern Avenue and lastly renumbered as 101, Dr. Meghnad Saha Sarani. In view of such finding which has been made by the appellate authority on consulting its record it does not appear that the notice issued in connection with premises no.101, Dr. Meghnad Saha Sarani is flawed.

The argument advanced on behalf of the petitioners that there is mistake on the part of the respondent authorities in identifying the petitioners as Person Responsible (PR) when construction was made by erstwhile trustee/owner Gita Dutta, is in desperation. It has been rightly pointed out by Mr. Ghosh, learned advocate representing KMC that apart from the petitioners being the tenant of the said premises no other persons are coming forward in support of the construction made at the 2nd and 3rd floor of the said premises in question which is without any sanction plan; that goes to show that the present petitioners are only interested parties to protect such unauthorized construction notwithstanding the exercise being made by the appellate authority in identifying the petitioners as Person Responsible (PR). The effort made by the petitioners by instituting the present writ petition in order to retain the unauthorized construction goes long way to show that it has been rightly identified by the concerned authorities of KMC that the petitioners are the Person Responsible (PR).

In addition thereto it has also been found that present trustee being respondent no. 7 has participated in the proceeding and the petitioners being Person Responsible (PR) as rightly pointed out by the authorities of KMC; petitioners failed to substantiate the point of non-joinder of parties as

argued. Therefore, paragraph 31 of J. S. Yadav (Supra) is of no help since the proceeding initiated by the KMC authority as it is found by this Court does not suffer from non-joinder of parties. Other aforementioned judgments relied upon on behalf of the petitioners do not come in aid since ratio decided therein are on different context and it is well settled that the judgment is an authority on what it decides and not what can be deduced therefrom.

Lastly, this Court by passing order dated 6th June, 2022 directed the concerned authority of the KMC to inspect the premises in question and to submit a report whether in terms of third proviso to section 400(1) of the said Act of 1980 regularisation of alleged construction can be made or not? Pursuant to such direction Municipal Commissioner, KMC submitted a report dated 30th June, 2022 which was filed before this Court on 5th July, 2022. The relevant part of the said report is reproduced below:-

“From the said report as submitted by Deputy Chief Engineer (Civil)/Bldg./North it highlights that on inspection several unauthorized construction made with fibre shed as well as asbestos shed and the unauthorized structures have been constructed at ground floor, 2nd floor and 3rd floor. Furthermore, D-Sketch plan vide D-Case No. 02-D/VIII/2012-13 is found wherefrom the unauthorized construction area approximately 298.396 sq.m. The report also reflects that the condition of the said unauthorized structure are in a very much dilapidated which may cause any accidental hazards during any cyclonic storm with heavy rainfall and in the said report it is clear that the said unauthorized structure as raised cannot be regularized by

applying third proviso of section 400(1) of the KMC Act, 1980 read with Kolkata Municipal Corporation (Regularization of building) Regulation, 2015.

From the D-Sketch drawing as produced before me wherefrom it reflects that the said unauthorized construction has been raised at ground floor, 2nd floor and 3rd floor its total area admeasuring 298.396 sq.m. equivalent to 3212 sq.ft. which may not be treated as minor deviation as because the actual sanction granted in the said premises is 713.25 sq.m. equivalent to 7677 sq.ft. The percentage of unauthorized construction is 41.84% approximately.”

This Court gave direction upon the concerned authority of the KMC to submit a report whether on applying third proviso to section 400(1) of the said Act of 1980 the alleged construction can be regularized or not instead of giving effect to the decision of the appellate authority dated 25th February, 2016. Surprisingly on perusal of the report which indicates the magnitude of unauthorized construction carried out by the petitioners being Person Responsible (PR) with the help of erstwhile trustee/owner since deceased it would be improper to pass an order which would impinge upon the said decision of the appellate authority dated 25th February, 2016 thereby permitting the petitioners to enjoy such unauthorised construction perpetually.

Accordingly, this Court does not find any merit in the writ petition and same stands dismissed. Applications, if pending, also stand dismissed. However, there shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Saugata Bhattacharyya, J.)