

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Before: Hon'ble Justice Shampa Sarkar

WPA 10232 of 2021

Bikash Kumar Roy

Vs.

Kolkata Municipal Corporation & Ors.

For the petitioner : Mr. Arunava Ghosh,
Mr. Tapas Kumar Sil,
Mr. Raghu Nath Chakraborty,
Mr. Mir Anuruzzaman,
Ms. Tulika Sil.

For the K.M.C. : Mr. Ranajit Chatterjee,
Mr. Subhrangshu Panda.

Hearing concluded on: 13.05.2022

Judgment on: 14.06.2022

Shampa Sarkar, J.:-

1. The petitioner has challenged the draft demand notice issued by the Assistant Engineer Building Department Borough VIII of the Kolkata Municipal Corporation. The date of issue of the said notice was March 20, 2021. The due date for payment was April 5, 2021.
2. The demand was in relation to premises no. 6/3, Anil Maitra Road, Kolkata - 700019. The claim as per the said notice was for Rs. 95,24,695/-. The claim

was against the retention charges payable for regularization of the unauthorized construction in the said premises.

3. A multi storied building had been constructed on the said premises and the petitioner had committed deviations from the sanction plan. Accordingly, a notice was issued by the Kolkata Municipal Corporation under section 400(1) of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the said Act). Demolition case number 13-D/Br.-VIII/2018-19 Borough No. VIII dated August 1, 2018 was initiated and placed before the special officer (building) of the Kolkata Municipal Corporation, for a decision. The special officer (building) was acting as a delegatee of the Municipal Commissioner.
4. By an order dated November 1, 2018, the demolition case was disposed of, upon hearing the petitioner. The total area of unauthorized construction was found to be 173.825 sqm and the change of user was in respect of an area of 183.79 sqm.
5. The demand was issued pursuant to the calculation made towards retention fees by the concerned department of the Corporation after the order of the Special officer (building), dated November 1, 2018 was passed. Such calculation was based on the direction of the Chairman, Board of Administrators and the rates mentioned in the office order dated January 19, 2021, were applied.

6. Assailing the aforementioned demand notice, Mr. Arunava Ghosh Learned Senior Counsel submitted that the petitioner was not served with the break-up of the inflated calculation. Suddenly, the purported demand notice for an amount of Rs.95,24,695/- was served. The authority miscalculated the amount of retention fee by erroneously applying the office circular no. 8 of 2021 dated January 19, 2021, issued by the Director General (Building).
7. Learned counsel further submitted that the order of the Special Officer (Building), allowing the petitioner to retain the minor deviations upon payment of the retention fee, to be calculated by the appropriate department of Kolkata Municipal Corporation, was passed on November 1, 2018. Thus, calculation of the fees should have been at the rates which were prevailing during the financial year 2018-19.
8. The decision of the Board of Administrators to calculate the retention fee on the basis of the office order dated January 19, 2021 was arbitrary, illegal and not in accordance with the relevant statute and the regulations framed thereunder. The Board of Administrators did not have any authority to dictate the method of calculation. That a subsequent office order could not be given a retrospective effect. The date of the concurrence/ approval of the Board of Administrators after more than 2 years from the date of the order of the Special Officer (Building), could not be treated as the date of the order.

9. Mr. Ghosh's contention was that the concurrence by the Mayor/Mayor-in-Council (in this case Board of Administrators) as per the Kolkata Municipal Corporation (Regularization of building) Regulation 2015 (hereinafter referred to as the said Regulation), was a mere formality. The right of the petitioner for regularisation of the unauthorized structures, namely 'the minor deviations', upon payment of fees accrued on the date of the order passed by the Special Officer (Building). Such right of the petitioner was finally determined on November 1, 2018. The fee was to be calculated at the rate applicable on the date of such order. The concurrence and/or the approval given by the Board of Administrators at a future date would not shift the date of the order of Special officer (Building) to the date of the approval.
10. He next submitted that the corporation had violated its own Regulations, by claiming the retention fees at the rate fixed by the office order dated January 19, 2021 by singling out the petitioner, whereas other unauthorized constructions were allowed to be retained on the basis of the rates prevalent during the financial year 2018-19.
11. He contended that the Board of Administrators did not have the jurisdiction to direct the department to calculate the retention fees on the basis of an administrative order which did not have any legal force. The direction of the

Chairman of the Board of Administrators was contrary to the third proviso to section 400(1) of the Kolkata Municipal Corporation Act, 1980.

12. Hence, a prayer was made on behalf of the petitioner, for an order quashing the Draft Demand Notice dated March 20, 2021 with a further prayer to direct the respondent/Corporation to calculate the retention fee/charges on the basis of Table 8, 9 and 11 of the Schedule of Fees and Charges for the year 2018-19.
13. Mr. Ranajit Chatterjee, learned advocate appearing on behalf of the Kolkata Municipal Corporation submitted that the Special Officer (Building) had passed the demolition order under section 400(1) of the said Act, but unless the said order was approved by the Board of Administrators, the same would not have any legal effect. Reliance was placed on clause 5 of the said Regulations. According to him, the right of the petitioner for regularisation and retention of the unauthorized structures did not accrue until the Board of Administrators had approved the order. He referred to the averments made in the affidavit-in-opposition used by the Corporation, and submitted that the hearing officer merely permitted retention of the unauthorized construction and the change of user, upon payment of retention fee. The calculation was to be made by the concerned department of the Corporation, only upon obtaining concurrence of the Board of Administrators.

14. He further submitted that the order of the Special Officer (Building) dated November 1, 2018, was taken up for consideration and approved by the Board on February 20, 2021. Thereafter, the Chairman, issued a direction upon the Director General (Building) to calculate the retention fees in terms of the office order No. 15 of 2018 dated March 1, 2019, and office order No.8 dated January 19, 2021. The said direction of the Chairman of the Board of Administrators had been annexed to the affidavit in opposition filed by the Corporation.
15. According to Mr. Chatterjee, the Board of Administrators was performing the functions of the Mayor in Council. Such approval could only be accorded after the Board was constituted on May 6, 2020. The term of the Mayor in Council expired on May 7, 2020, and it was not feasible to convene a meeting prior to the May 6, 2020. The delay in granting the concurrence was unavoidable. Approval was granted by a resolution adopted on February 20, 2021, after the Board was constituted. The Board of Administrators was discharging the functions of the Mayor-in-Council as its term had expired and elections could not be held during the pandemic. Thus, Mr. Chatterjee vehemently urged that the date of the approval/concurrence of the Board of Administrators should be taken as the date of the order of the Special Officer (Building). As such, the rate prevalent on the date of such approval would be the applicable rate for

calculation of the retention charges/fees. He denied the allegations of retrospective application of the office order dated January 19, 2021.

16. Upon hearing the parties it appears that admittedly, the petitioner was not aggrieved by the order of the Special Officer (Building). The Board also approved the order. The petitioner wanted to retain the unauthorized constructions and change of user in terms of the said order and upon payment of the retention fees, to be calculated by the concerned department of the Corporation as directed in the said order. Thus, the question to be determined by this court is whether the calculation of retention fee/charges as claimed by the draft demand notice, amounting to Rs. 95,24,695/-, was in accordance with law or not.

The Special Officer (Building) upon hearing the petitioner passed the following order:-

“Considered the submissions of the representative of the P.R. present at the hearing. All the infringements/deviations are well within the premises belonging to the P.R. and they are not very serious in nature. Therefore, these deviations/infringements can be treated as "minor unauthorized erection or work" as defined in Rule 3(1) (C) of the KMC (Regularization of Building) Regulation 2015 and these deviations are regularized and retained under rule 4 of the Rule 2015 enacted under the KMC Act 1980 subject to the following preconditions:

(a) That the P.R. must furnish a Structural Certificate from a KMC empanelled Structural Engineer certifying that the structure is Stable, Safe and Sound and the materials used are as per the latest edition of National Building Code of India, within 30 days of receipt of this order.

(b) That he must pay the fees for retention of the regularized construction within 30 days of receipt of the calculation sheet to be prepared by the respective department of the KMC.

(c) That he must furnish an affidavit declaring on oath that he will not make any construction whatsoever in the impugned premises without prior sanction from the KMC authority.

(d) That they must submit N.O.C. from W.B.F. & E.S. before issuance of D. Sketch Plan.

The conversion of the Residential area measuring 183.79 Sqm. into Mercantile Business (Proposed) area is also regularized under the provisions of Rule 2015.

Noncompliance of any of the conditions stated above will invite demolition of the unauthorized constructions by the KMC authority at the cost and at the risk of the P.R. The permission for conversion of the Residential area into Mercantile + Business (Proposed) area will also stand withdrawn.

Let a copy of this order be served on the concerned parties for information and necessary action.

Munshi Md. Faruque

Special Office (Building) K.M.C”

17. In order to decide the issues raised by Mr. Ghosh, the relevant provisions of the law need to be considered.

18. Some portions of Section 400 of the said Act are quoted below:-

“400. Order of demolition and stoppage of buildings and works in certain cases and appeal.- (1) 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 this Act, or the rules and regulation 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 has been commenced or is being carried on or has been completed or within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to such person, as may be specified in the order:

Provided that no order of demolition shall be made unless person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made :

Provided further that where the erection or the execution has not been completed, the Municipal Commissioner may by the same order or by as separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within an appeal against the order of demolition, if made, may be preferred under subsection (3).

Provided also that the **Municipal Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulation, regularize the minor unauthorized erection or execution of any minor work without sanction under this Act, or minor deviation from the sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan under this Act or the rules or the regulations made hereunder, as the case may be.**

Explanation.- For the purpose of this section, 'minor deviation' shall be such as may be determined by regulations.

Explanation.- In this chapter, "the person at whose instance" shall mean the owner, occupier or any other person who causes the erection to any building or execution of any work to be done, including alternations or additions if any, or does it by himself.

(2) The Municipal commissioner may make an order under sub-section (1) notwithstanding the fact that the assessment of such building has been made for the levy of the [Property tax]

(3) Any person aggrieved by an order of the Municipal Commissioner made under sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under Section 415."

19. Section 400(1) of the said Act, authorizes the Municipal Commissioner to pass an order of demolition in case any structure is erected contrary to the provisions of the Act, Rules and Regulations.
20. The law also permits delegation of such power to any other authority. In this case, the power of the Municipal Commissioner was delegated to the Special Officer (Building) and the demolition case was placed before the Special

Officer (Building), Kolkata Municipal Corporation, for adjudication. The Special Officer (Building) found the unauthorized constructions and the unauthorized change of user, to be 'minor' and allowed retention of the same, upon payment of fees and upon fulfilment of certain other conditions. The concerned department was asked to make the calculation, so that the petitioner could fulfil his obligation in terms of the order.

21. The third proviso to the said Section empowers the Municipal Commissioner to pass an order of regularization of 'minor deviations' on such terms and conditions and on payment of such fee, as may be prescribed by the said Regulations.
22. The said Regulation of 2015, deals with the terms and conditions of regularization, payment of fee etc. Clause 4 and 5 thereof, are quoted below:-

“4. Terms and condition for regularization:

Any unauthorized erection or work may be regularized by the Municipal Commissioner or any of its officer delegated by him, provided that the erection or work is determined by the Municipal Commissioner or any of its officer delegated by him as “minor” as per regulation 3(1)(b) and 3(1)(c) of this regulation keeping regard to the following things:

- a) Objections raised by any local inhabitants of the construction in question.
- b) Road width and communication facilities
- c) Drainage system of the surrounding locality.
- d) Other civic infrastructures.
- e) Clearance from Fire and Emergency Services Department and Pollution Control Board, if required.
- f) Reasons beyond the control of the person responsible,

- g) Social interest,
- h) Facilities of ingress and egress,
- i) Infrastructural supports at site,
- j) Structural safety,
- k) Fire safety, if required,
- l) Environmental aspects,
- m) Local complaints,
- n) National loss in case of demolition,
- o) Availability of other statutory clearances as will be required etc. with due regards to the spirit of law, any court order, as well as provisions of Kolkata Municipal Corporation Act, 1980 as amended up to date.

Explanation:

"local inhabitants' means the next door neighbour, or inhabitant of same locality, mohalla or otherwise connected to site of the construction,

"Person Responsible" means any person responsible for the unauthorized construction in question or any of his power of attorney holders or representatives.

5. Payment of fees for regularization: Before calculation of fees, order issued by the officer delegated by the Municipal Commissioner, shall be placed before Mayor/ Mayor-in-Council for necessary concurrence/approval.

Thereafter, the Municipal Commissioner may by order charge fees as will be calculated on the basis of rates/fees provided and prescribed under the relevant heads in the Budget Schedule under Section 131(3) of the Kolkata Municipal Corporation Act 1980. ”

23. Clause 4 empowers the delegatee of the Municipal Commissioner to determine and permit regularisation and retention of ‘minor deviations’ or ‘erections’ as per clauses 3(1)b and 3(1)(c) of the said Regulations, upon giving due regard to conditions “a” to “o” of clause 4.
24. Conditions “a to o” of Clause 4 enumerate certain features which would have to be taken into account by the Municipal Commissioner or his delegatee,

before permitting retention of unauthorized construction or deviations on the ground of the same being ‘minor’.

25. Under clause 3(1)(b) “minor deviation” has been defined as such deviation that would be determined by the Municipal Commissioner or any of the officers delegated by him, in terms of clause 4 of the said Regulations.
26. Clause 5 of the said Regulations empowers the Municipal Commissioner to charge fees for retention. The clause provides that before calculation of the fee, the order issued by the Special Officer (Building) who had been delegated the power of the Municipal Commissioner, shall be placed before the Mayor/Mayor-in-Council for necessary concurrence/approval. Thereafter, the Municipal Commissioner may by order, charge fees as may be calculated on the basis of the rate/fee provided and prescribed under the relevant heads in the budget schedule prepared in terms of Section 131(3) of the Kolkata Municipal Corporation Act, 1980.
27. A harmonious reading of the third proviso to Section 400(1) of the said Act and clauses 3, 4 and 5 of the said Regulation persuades the Court to hold that either the Municipal Commissioner or the officer delegated by him to hear a demolition case, has the power to pass an order of regularization of minor deviations on certain terms and conditions and on payment of such fees as may be prescribed by Regulations. Before such order is passed, the conditions laid down under serial “a” to “o” of Clause 4, would have to be taken into consideration. Conditions “a” to “o” of Clause 4 provide certain

checks and balances for determination of 'minor deviations' and regularization thereof. Calculation of the retention fee was to be made in terms of the rates prescribed in the budget schedule, by the concerned department.

28. On the other hand, the said office circular No.8 of 2021 dated January 19, 2021 provided a method for calculation of the retention charges. The calculation was to be made on the market value of the area covered either by the unauthorized change of user or by unauthorized construction. The market value was at the rate determined by the Directorate of Registration and Stamp Revenue, Finance department, Government of West Bengal.
29. The IGR value as published in the website of the Registration department was to be followed while arriving at the calculation. In the said circular, the corresponding height of the building and the proportionate market value (percentage) was to be considered as per the formula.
30. Thus, neither the Statute nor the said Regulations authorize the Mayor/Mayor-in-Council to determine the minor deviations or regularize the same by permitting retention thereof. What deviations would be considered to be 'minor' in terms of the said Regulations and whether such deviations could be regularised upon taking note of conditions 'a' to 'o' of Clause 4 of the said Regulations, were solely within the domain of the Municipal Commissioner or the officer delegated by him to discharge his function in this regard. Before the computation of the fees as per the budget schedule, the order is to be

placed before Mayor-in-Council, for necessary concurrence. The power of the Mayor/Mayor-in-Council is limited to the extent of according concurrence/approval. This is an act subsequent to the decision of the order of the Special Officer (Building).

31. In Black's Law Dictionary (5th Edn.), the word "approval" has been explained thus:-

"Approval.—The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another."

32. Following the decision in ***U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd.*** reported in ***1995 Supp (3) SCC 456***, The Apex Court in the matter of ***High Court of Judicature of Rajasthan Vs .P.P Singh*** reported in ***(2003) 4 SCC 239***, held that:-

"40. When an approval is required, an action holds good. Only if it is disapproved it loses its force. Only when a permission is required, the decision does not become effective till permission is obtained."

33. In this case too, the decision of the Special Officer (Building) stood good as there was no disapproval. The said Regulations also do not provide that the order would not take effect before the concurrence or approval was given by the Mayor/Mayor-in-Council. This is not a case where permission was required. The said Regulation is also silent about the consequences in case the Mayor/Mayor-in-Council did not approve the decision of Special Officer (Building). Only the Municipal Commissioner has the power to review the order, as per the said Regulations. Thus, the grant of approval or concurrence was a mere formality, in the nature of ratification of the decision of the Special Officer (Building).

34. Had the regulations provided for obtaining a prior approval or permission from the Mayor/Mayor-in-Council, in such event, the order would not be final or effective without such prior approval or prior permission [***U.P. Avas Evam Vikas Parishad (supra), P.P. Singh (supra)***].
35. The Special Officer (Building) had the power to determine the terms and conditions for regularisation, upon payment of fees. Such order was passed. The petitioner was ready and willing to comply. The department was directed to make the calculation. All that was left to be done was to obtain a formal approval/concurrence of the Board of Administrators for the limited purpose of the calculation of fees by the department as per the budget schedule adopted in terms of Section 131(3) of the Said Act. The department before making the calculation, was required to take the concurrence of the Board, but the law did not cast any obligation upon either the Municipal Commissioner or his delegatee to obtain approval of the order.
36. No additional power has been conferred by the said Act or by the said Regulations upon the Mayor/Mayor-in-Council (in this case Board of Administrators) to decide either on the terms and conditions for regularisation or on the rates/fees payable as retention charges. The order having received the approval/concurrence, stood good and final as on November 1, 2018. The same became legally enforceable on November 1, 2018. The right of the petitioner to pay the fees and retain the unauthorized construction crystallized on November 1, 2018. The calculation rates provided under the heads of the budget schedule under Section 131(3) of the said Act was a ministerial job.

37. Section 131(3) of the said Act provides that the budget estimate shall state the rate at which various taxes, charges and fees shall be levied by the corporation in the year next following. In this context, the court finds that the rate/fee for regularization should be such as prescribed under the relevant heads in the budget schedule of 2018-2019.

Section 131(3) is quoted below:-

“The budget estimate shall state the rates at which various taxes, surcharges, cesses and fees shall be levied by the Corporation in the year next following.”

38. In this case, the year next following would be the financial year 2018-2019 during which period, the order was passed. At the relevant point of time, the Mayor/Mayor in Council was in office and as such the court does not find any reason why the Corporation waited till 2021, for the approval/concurrence of the Board of Administrators. The court further holds that the act of granting concurrence or approval to the order of the Special Officer (Building) has to be a simultaneous act with the passing of the order itself. There must be contemporaneity in the actions, by the authorities, or else the order becomes ineffective and unimplementable.
39. The argument of Mr. Chatterjee that irrespective of the date of the order, the date of concurrence should be the actual date, does not impress the court. It is completely unjust to apply a higher rate prescribed by a subsequent office

order, issued more than two years after the order of regularization and retention was passed. Concurrence given two years later, that is, on February 20, 2021 would relate back to the date of the order. The order had been approved and holds good from its date, as there was no disapproval. Moreover this is also not a case of taking prior approval or prior permission. The statute does not confer any power upon the Mayor/Mayor-in-Council in this regard. The Municipal Commissioner or his delegatee is the sole authority to allow regularization and retention under the said Act. Regulations cannot override the law. Clause 5 of the said Regulations is a procedure laid down with regard to payment of fees and calculations thereof. It cannot override the substantive provisions of the statute. The petitioner, for no fault of his own, cannot be made to pay retention charges at a rate four times higher than the rate prevailing as per the budget schedule of the financial year 2018-2019. The concurrence on February 21, 2020 has to relate back to the order dated November 1, 2018, in order to do complete justice.

40. The vested right of the petitioner cannot be taken away by a subsequent office order. Clause 5, clearly states that the rates as per the Budget Schedule for the financial year should be applied. The Budget was passed as per Section 131(1) of the said Act. The office order which was issued subsequently by the Director General (Building) could not substitute the budget schedule prepared

for the financial year 2018-2019. The financial year and the budget schedule relevant in this case would be 2018-19 as the order was passed on November 1, 2018. The relevant portion of clause 5 of the Regulation is reiterated again:-

“5. Payment of fees for regularization: Before calculation of fees, order issued by the officer delegated by the Municipal Commissioner, shall be placed before Mayor/ Mayor-in-Council for necessary concurrence/approval. Thereafter, the Municipal Commissioner may by order charge fees as will be calculated on the basis of rates/fees provided and prescribed under the relevant heads in the Budget Schedule under Section 131(3) of the Kolkata Municipal Corporation Act 1980.”

41. The process of approval/concurrence by the Board of Administrators was not in the nature of an appeal from the order of the Special Officer (Building). The rates had been fixed under different heads in the budget schedule for the relevant financial year. The approval of the Board of Administrators related back to the date of the order passed in the demolition case. The said principle is applied in order to avoid any injustice that may have been caused to the petitioner on account of the delay in according approval and in calculating the retention fee. The petitioner is not responsible for such delay. The office order dated January 19, 2021, cannot be applied in this case.
42. The right of retention having been decided and adjudicated in November, 2018, the petitioner's cause of action arose on the said date. His entitlement to such retention also relates back to the said date, even if the approval was

given much later. The action of the Chairman in dictating that the rate of fees must be calculated on the basis of the office circular dated January 19, 2021, amounts to rewriting the law and the said Regulations. The calculation as per such dictation cannot be sustained in law. The demand raised is illegal.

43. The decision of ***State of West Bengal vs. Tera Firma Investment & Trading Pvt. Ltd*** reported in ***(1995) 1 SCC 125*** cited by Mr. Ranajit does not apply in the facts of this case. In that case, an amendment brought in by introducing Section 398-A in the K.M.C Act, which imposed a bar in submitting applications for sanction of building plans exceeding 13.5 metres in height for a period of one year from December 1989, was under challenge. The Hon'ble Apex Court held that the High Court was in error, in declaring the provision to be unconstitutional. The Apex Court held that mere submission of a plan for construction of a building yet to be sanctioned by the competent authority would not create any right in favour of the applicant. The Apex Court further held that no malice could be imputed to the legislature in bringing the amendment.
44. In the case in hand, the facts are completely different. The legal principles laid down in ***Tera Firma (supra)*** are also different. The order of November 1, 2018 had vested the right of regularisation and payment of fees upon the petitioner. Only the ministerial act of calculation of the amount payable for

such retention was pending. The said Regulations restrict such calculation to the budget estimates as per Section 131(3). Thus, the rates prescribed could not be altered, supplemented or enhanced either by a subsequent office order or at the dictates of the Chairman of the Board of Administrators.

45. Under such circumstances and for the reason as aforesaid, the writ petition is allowed to the extent that the draft demand notice dated March 20, 2021 being annexure "F" is set aside and cancelled. The matter is sent back to the concerned department of the corporation for recalculation of the retention fee at the rate prevailing in the budget schedule of the financial year in which the order of retention was passed, i.e., 2018-2019.
46. The petitioner shall pay the fees within 30 days from service of the calculation and the demand notice arising there from in terms of this order and also comply with the other conditions as contained in the order dated November 1, 2018.
47. The allegation of discrimination fails, in the absence of pleadings and supporting documents.
48. Accordingly, the writ petition is disposed of.
49. However, there will be no order as to costs.
50. Parties are to act on the server copy of this judgment.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

(Shampa Sarkar, J.)