

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

(Appellate Side)

FMA 774 of 2019

Sohan Lal Manpuria & Ors.

-Vs.-

Kolkata Municipal Corporation & Ors.

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellants	:	Mr. Hirak Mitra, Ld. Sr. Adv. Mr. Debayan Bera, Adv. Mr. Sakti Prasad Chakrabarti, Adv.
For the K.M.C.	:	Mr. Ashoke Kumar Banerjee, Ld. Sr. Adv. Mr. Achintya Banerjee, Adv. Ms. Tanushree Dasgupta, Adv.
For the private respondents	:	Mr. Supratim Dhar, Adv. Mr. Dhananjay Nayak, Adv.
Judgment On	:	17.07.2023

Arijit Banerjee, J.:-

1. This appeal is directed against a judgment and order dated June 28, 2018, passed by a learned Single Judge whereby the appellants' writ petition being WP 23340 (W) of 2017 was dismissed.

2. The appellants claim to be the owners of two plots of land which were originally within the Jadavpur Municipality. The two plots being RS plot no. 126/165 and 124/167 measure in excess of 35 acres. The appellants submitted before the learned Single Judge as also before us that the private respondents have set up a private market on their land without obtaining sanctioned plan for the buildings which have been constructed or requisite permission of Kolkata Municipal Corporation (in short “KMC”) under section 428 of the Kolkata Municipal Corporation Act, 1980 (in short the ‘the KMC Act’). They submitted that a representation was made by them to KMC regarding the unauthorized construction and running of the private market from their land. Since the KMC Authorities failed to address their grievance, they were constrained to file a writ petition being WP No. 25492 (W) of 2016.

3. The said writ petition was disposed of by a learned Single Judge by a judgment and order dated June 6, 2017. The relevant portions of the said judgment and order are extracted hereunder:-

“.....

Now, it is the turn of the petitioner to approach this Court by filing the instant writ petition as the market is established by making illegal constructions at the aforesaid plots in gross violation of the provisions of the Kolkata Municipal Corporation Act, 1980. It is, therefore alleged that the comprehensive representation made with the Municipal Commissioner to take immediate steps is not

attended and for such inaction the direction is sought in the instant writ petition upon the said authority as stated earlier.

.....

Chapter XXIV of the said Act contains the exhaustive provisions relating to markets and the slaughter houses. The said chapter imbibed within itself the municipal markets and the private markets. Section 428 of the Act clearly provides that no place other than a municipal market shall be used as a market place unless such place has been licensed as a market by the Municipal Commissioner under Section 436 of the Act. The municipal licenses are dealt with under Chapter XXV. Section 435 thereof puts an embargo on any person to use any premises for any of the non residential purposes mentioned in Schedule V without the municipal license granted by the Municipal Commissioner. Though Article 19(1)(g) of the Constitution of India guarantees all citizens the right to practice any profession or carry on any occupation, trade or business but the same is not an absolute right which would be evident from Article 19(6) of the Constitution.

Sections 437 and 438 create an absolute prohibition against the establishment and / or opening of the market for public without the valid license. It is therefore manifest from the aforesaid provisions that the Municipal Commissioner has to form a

conclusive opinion with precision and information whether such market is established in conformity with the aforesaid provisions or not.

A plea has been taken by the Corporation that the said market was established prior to the inclusion of the Jadavpur Municipality within the Kolkata Municipal Corporation. No records pertaining to any permission granted by the Jadavpur Municipality to establish and run the market for public nor any document relating to sanction being granted for construction of the shops or the stalls are produced. If the stand of the Corporation is considered to be true and correct for the sake of argument, yet it does not absolve the Corporation from arriving at the definite opinion on the various provisions of the Bengal Municipal Act, 1932. Chapter 17 of the aforesaid Act contains somewhat similar provisions to Chapter XXIV and XXV of the Kolkata Municipal Corporation Act. Identical prohibition is provided in the aforesaid Act and therefore the illegalities cannot get cured and / or validated as the said municipality is subsequently included in the Corporation. The provisions contained under Section 626 of the Kolkata Municipal Corporation Act can be seen in this regard.

.....

The said provision indicates that the moment any area is included within the periphery of the Kolkata Municipal Corporation Act, which was earlier within the limits of the municipality, the Municipal Act governing shall be admitted to be repealed and the provisions of the Acts, Rules and Regulations framed under the Kolkata Municipal Act, 1980 shall apply except the State Government by notification may otherwise direct.

It is, therefore, apparent from the aforesaid provisions that the illegal acts under the repealed Act does not automatically get validated and / or receive legal sanction as the said Act stood repealed by virtue of the inclusion of the area within the territorial limits of the Kolkata Municipal Act, 1980. The Municipal Commissioner is required to consider those aspects, more particularly the notification issued and published by the State Government at the time of inclusion of the Jadavpur area within the territorial circumference of the Kolkata Municipal Corporation.

Neither in the writ petition nor in the opposition those facts and the documents relating thereto have been disclosed to which this Court feels and it would not be proper to delve into it.

In view of the above, the Municipal Commissioner is directed to consider the aforesaid representation in the light of the observance recorded herein above and shall decide the same after affording an

opportunity of hearing to the petitioner and all the interested persons, by recording proper reasons within 4 weeks from the date of communication of this order.”[The emphasis is ours]

4. The Municipal Commissioner passed an order dated July 16, 2017, after hearing all concerned parties. The Commissioner discussed various provisions of law including Sections 436, 626, 634, 635A of the KMC Act, Section 8 of the Bengal General Clauses Act, 1899, and the Bengal Municipal Act, 1932. The Commissioner observed that the title of the writ petitioners in respect of the concerned land is doubtful. Of course, he also opined that KMC cannot decide the question of title to the plot of land in question. Finally the Commissioner observed as follows:-

“In total consideration of the fact and circumstances and having due regard to the solemn direction of the Hon’ble Court the undersigned feels that for all practical purposes and for all time to come for removal of difficulties, the petitioners are requested to approach the Competent Authority.”

5. Appearing for the appellants, Mr. Hirak Mitra, learned senior Advocate, submitted as follows:-

(i) Hon’ble Justice Harish Tandon by the order passed on the earlier writ petition, did not authorize the Municipal Commissioner to go into the question of title of the land in question.

(ii) The respondent did not produce any sanctioned plan in respect of the concerned building either from Jadavpur Municipality or from KMC. The Commissioner was, therefore, required to go into that question of fact and pass necessary orders.

(iii) Hon'ble Justice Harish Tandon indicated the effect of repeal of the West Bengal Municipal Act, 1993, in so far as the Jadavpur Municipality was concerned and directed the Municipal Commissioner to ascertain whether or not any notification was issued by the State Government in that regard.

(iv) Since no sanctioned plan was issued either by the Jadavpur Municipality or KMC, the Municipal Commissioner ought to have made necessary inquiry to find out whether there exists any notification within the meaning of Section 626(3) of the KMC Act, 1980. The Commissioner has not gone into any of such questions and has instead raised doubt as to the appellants' title to the land in question.

(v) The effect of the repeal is a question of law which was not relegated by the Hon'ble Justice Harish Tandon to the Commissioner. He referred to Section 8 of the Bengal General Clause Act and its impact on the issues which were required to be decided by him in terms of Hon'ble Justice Tandon's Order dated June 6, 2017. It is indisputable that no question of law could be or was delegated to the Commissioner by the learned Judge.

6. Mr. Mitra then submitted that the order of the Municipal Commissioner is a nullity since the Commissioner addressed questions which were not referred to him and failed to consider issues which were referred to him. In this connection reliance was placed on a passage in the celebrated case of ***Anisminic Ltd. v. Foreign Compensation Commission & Ors., reported at [1969] 2 A.C 147.*** At page 171 of the reported decision, the House of Lords speaking through Lord Reid observed as follows:-

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction” has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something

which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.”

7. On the point of unauthorized construction, Mr. Mitra relied on the observations of the Hon’ble Supreme Court in paragraphs 156 and 161 to 169 of the reported decision in the case of ***Supertech Limited v. Emerald Court Owner Resident Welfare Association & Ors., reported at (2021)10 SCC 1*** .-

8. Finally, learned Senior Counsel submitted that even on equitable ground, the impugned construction cannot be allowed to stand. Equitable relief is available, only for bona fide construction. In the present case, the construction has been raised without filing any application for sanction of building plan. The private market is being run without obtaining requisite license from the Municipal Commissioner. Everything is being done forcefully by the so-called ‘Nagarik Committee’, taking law into its own hands. In this connection reference was made to the plaint in Title Suit No. 57 of 2017 filed by one of the private respondents (Dhirendra Nath Mandal) in the court of the learned 5th Civil Judge (Senior Division) at Alipore. Mr. Mitra submitted that in the plaint, only a story of taking forceful possession of the land by influential persons in the garb of ‘Nagarik Committee’ and treating the land as vested has been narrated. Nothing is said about obtaining permission for construction or for running a private market. The vesting order was set aside by this Court in writ proceedings by order dated

September 24, 1992 which was confirmed by the Hon'ble Supreme Court on April 16, 2003. Only thereafter, the recorded owners transferred the lands in favour of the appellants in 2004.

9. Appearing for KMC, Learned Senior Advocate Mr. Ashoke Kumar Banerjee and learned Advocate Mr. Achintya Banerjee referred to the Hon'ble Supreme Court's decision in the case of ***State of Rajasthan v. Ganeshi Lal, reported at AIR 2008 SC 690*** and in particular paragraphs 14 and 15 of the reported judgment which are to the effect that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases; one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. This case was cited in support of the submission that the decision of the Hon'ble Supreme Court in the case of ***Supertech Limited (supra)***, does not apply to the facts of the present case.

10. Learned Counsel then referred to Sections 17 to 19 of the Chandernagore (Merger) Act, 1954. We fail to see the relevance of those provisions in the facts of the present case.

11. Reference was then made to Sections 634, 635 and 635A of the KMC Act, 1980. Learned Counsel submitted that Section 634 provides for removal of difficulties. In the facts of the present case the Commissioner faced difficulty in deciding the issues referred to him and asked the parties to approach the appropriate authority being the State Government. Referring to Section 635 of the KMC Act, learned Advocate submitted that the same is

not a saving clause as regards unauthorized construction, etc. As a saving clause, that section touches upon the revenue aspect only. Section 635A pertains to the assessment aspect only. It does not say what KMC can do in respect of illegal construction made before 1984 when the land in question was within Jadavpur Municipality.

12. Learned Advocate then referred to Section 204 of the West Bengal Municipal Act, 1993 which provides that no building will be constructed without prior sanction of the Board of Councilors of the concerned municipality.

13. Learned Counsel then referred to Sections 318 and 319 of the Bengal Municipal Act, 1932. Section 318 provided as to when permission to construct a building or execute a work would be granted and when the same would be refused. Section 319 pertained to deemed sanction, if within the time period prescribed in Section 318, the Commissioners neither granted nor refused to grant permission to execute the concerned work. Learned Counsel submitted that though by Section 441 of the West Bengal Municipal Act, 1993, the Bengal Municipal Act, 1932, stands repealed, there might have been deemed sanction for construction of the building on the concerned land which houses the private market. He finally submitted that KMC cannot look back beyond January 1984 when the KMC Act, 1980, came into force.

14. Learned Counsel relied on the observation of the Hon'ble Supreme Court in paragraph 4 of the decision in ***State of Madhya Pradesh & Ors., v. Rameshwar Rathod, reported at (1990) 4 SCC 21*** in support of his

submission that it is a fundamental rule of law that no statute should be construed to have retrospective operation unless such a construction appears very clearly in terms of the Act, or arises by necessary implication, direct or indirect. The normal rule of construction is that a provision in a statute is prospective but in case of statutes which are merely declaratory or which relate to only matters of procedure or of evidence, it may have retrospective effect if there are indications to that effect or the manifest purpose compels one to construe the Act as such. Learned Counsel submitted that the KMC Act, 1980, cannot be construed to have retrospective operation.

15. Learned Advocate for KMC then referred to the decision of the Hon'ble Supreme Court in the case of ***Corporation of Calcutta, v. Mulchand Agarwala, reported at AIR 1956 SC 110*** in support of his submission that even if a statute permits the authorities to demolish illegal construction, after a long lapse of time, such demolition may not be in public interest. In that case the provisions of Calcutta Municipal Act, (3 of 1923) were being considered by the Hon'ble Supreme Court. The Hon'ble Court observed that it would be most unfortunate and the interest of the public will greatly suffer, if a person could with impunity break the building rules, put up a construction and get away with it on payment of fine. However, the Hon'ble Court went on to observe in the facts of that case that though the demolition proceedings had been initiated within the time period prescribed by statute, since nearly 5 years had elapsed since the building in question was

completed, an order for demolition was not called for in the interest of the public.

16. Appearing for the private respondents, Mr. Supratim Dhar, learned Advocate referred to the plaint of one of the seven suits pending in the Alipore Court. One of such suits is by the Nagarik Samity. The other six suits are by individual shop owners in the private market. The appellants are defendants in those suits. KMC is also a party to the suits. A status quo order has been passed in those suits which continue till date. The prayers in all the suits are similar and are to the following effect:-

- “a) Decree of declaration that the plaintiff is the permanent allottee of the suit property described in Schedule “B” wherefrom he is running his business uninterruptedly since 28.11.1994;
- b) Decree for declaration that the proforma defendant No. 12 is the owner of the premises in suit described in Schedule “A” under which society the plaintiff is one of the permanent allottees in respect of the shop room wherefrom he is running his business;
- C) Decree for declaration that either in the premises-in-suit or in the suit property the defendant Nos. 1 to 9 had/have no right, title and interest;
- d) Decree for permanent injunction restraining the defendant Nos. 1 to 9 their men and agents from taking possession of the suit property forcefully or otherwise and from causing any disturbance in running business thereat by the plaintiff;

e) Decree for permanent injunction restraining the defendant Nos. 10 and 11 from acting adversely against the plaintiff in the matter of plaintiff's running of the business from the suit property by way of not renewing trade licence, passing order of demolition or in any manner whatsoever;"

17. The stand of KMC in the written statements filed in those suits is that it did not permit the Nagarik Samity to set up the market. The private market has been functioning since prior to January 4, 1984, when the KMC Act came into force. Learned Counsel submitted that any observation by this Court will adversely affect the interest of shop owners in the pending civil suits.

18. Learned advocate then submitted that there is no perversity in the judgment and order under appeal and hence this Court should not interfere. In this connection reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***T.C. Basappa v. T. Nagappa & Anr., reported at AIR 1954 SC 440***. In particular paragraphs 7 and 8 of the reported judgment were referred to. The observations in the said two paragraphs of the judgment pertain to the fundamental principles governing the issuance of a writ of certiorari. Paragraphs 7 and 8 of the judgment read as follows:-

"7. One of the fundamental principles in regard to the issuing of a writ of certiorari, is that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by

administrative bodies or other authorities or persons, obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L. J. thus summed up the law on this point in –Rex v. Electricity Commissioners, 1924 - KB 171 at p. 205(c).

“whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”

The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of certiorari the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order of proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide per Lord Cairns in – Walsall’s Overseers v. L & N. W. Rly. Co. (1879) 4 AC 30, at P. 39(D).

8. The supervision of the superior court exercised through writs of certiorari goes on two points, as has been expressed by Lord Sumner in – *King v. Nat Bell Liquors Ltd.* (1922) 2 AC 128 at p. 156 (E). One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.”

19. Referring to the decision of the Hon’ble Supreme Court in the case of ***Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar & Anr., reported at AIR 1963 SC 786***, learned Counsel submitted that since State is not a party to the present proceedings, no writ of certiorari can be issued against the State. Learned Counsel also referred to the decision of the Hon’ble Supreme Court in the case of ***Hari Vishnu Kamath v. Syed Ahmad Ishaque and Ors., reported AIR 1955 SC 233***. The said decision discusses what the proper grounds are for issuance of a writ of certiorari. In our opinion that decision does not have much relevance to the facts of this case.

20. In reply Mr. Mitra learned Senior Advocate representing the appellants submitted that questions of fact were referred to the Commissioner by Hon’ble Justice Tandon, including the issue of existence or otherwise of a building plan in respect of the private market and whether or not there is a

notification under Section 626(1) of the KMC Act. Questions of law were not referred to the Commissioner. Yet the Commissioner purported to decide certain questions of law which is beyond his competence. Even if the concerned structures were lawful as per the provisions of the Bengal Municipal Act but fall foul of the provisions of the KMC Act, the same must be demolished.

21. It was further submitted with reference to Section 313 of the Bengal Municipal Act that it was not permissible to erect any building otherwise than in accordance with the provisions of Chapter IX of that Act and of any Rule made under the Act.

Court's view

22. Being aggrieved by alleged unauthorized construction made by the private respondents on the land of the appellants and alleged illegal running of a private market from such premises without obtaining requisite permission of the KMC Authorities, the appellants had made a representation dated February 15, 2016, addressed to the Mayor and the Commissioner of KMC as also to the Chairperson, Borough No. XII, KMC. The appellants requested the authorities to look into the matter and demolish the unauthorized construction as also stop the running of the market.

23. Alleging that their representation did not receive the attention of the authorities, the appellants filed WP 25492 (W) of 2016 before a learned Single Judge of this Court. By a judgment and order dated June 16, 2017,

such writ petition was disposed of. Relevant portions of that judgment and order have been extracted above. In short, the learned Judge directed the Municipal Commissioner to take a reasoned decision on the appellants' representation and particularly to consider the following three points:-

- (i) Whether or not the private respondents obtained sanctioned plan for the buildings they have set up on the land in question;
- (ii) Whether or not permission of Kolkata Municipal Corporation under Section 428 of the KMC Act for running a private market was obtained by the private respondents;
- (iii) Whether or not there is any notification of the State Government under Section 628 of the KMC Act excluding the applicability of the provisions of the KMC Act to the private market in question after the market came within the jurisdiction of KMC.

24. Pursuant to such judgment and order, the Municipal Commissioner heard the parties and passed an order dated July 16, 2017. Apart from dilating on the legal implications of certain provisions of the KMC Act, 1980 and the Bengal General Clauses Act, 1899, the Municipal Commissioner also made observations as regards title of the appellants in respect of the land in question. Such observations are, inter alia, to the following effect:-

“The writ petitioners have not produced L.R record of rights showing that their names have been recorded in the record of right with the classification of land.

The petitioners have also not appraised me of the fact as to whether the land in question are hit by the provisions of West Bengal Urban (Ceiling & Regulation) Act, 1976. On a careful reading of Section 626 of the Kolkata Municipal Corporation Act, 1980, it appears to me, does not nullify the action/step/deed already taken place before the area in question included within the limit of Kolkata Municipal Corporation with effect from 07-01-1984.

Admittedly the Kolkata Municipal Corporation cannot decide the title of the plot of land in question. The various authorities including the State Government is empowered to decide the matter on the basis of material on record as well as the order passed in favour of the writ petitioners after taking into account the present facts and circumstances as well as the operation of law in regard thereto.

It further appears that the plots of lands are situated within the added area of Kolkata Municipal Corporation and as such incorporation of petitioners name would be required to be mutated in the Record-of-Right first to proceed further in the matter. The KMC authority does not have any authority and/or jurisdiction to go into all such aspect.”

25. Challenging the aforesaid order of the Municipal Commissioner the appellants approached the learned Single Judge in the present round of litigation.

26. The learned Judge by the judgment and order impugned dismissed the writ petition. The relevant portion of the impugned judgment and order reads as follows:-

“On the question of unauthorized construction, the Municipal Commissioner is of the view that, the area in which the plots are situated was added to the municipal area on January 7, 1984. He finds that, the constructions are existing since 1977. He relies upon the averments of the plaintiffs in suits filed by the individual shop owners to find that the constructions are of 1977. According to him, since the constructions are of 1977, that is, prior to the date of the Kolkata Municipal Corporation Act, 1980 coming into effect, so far as the area in which the plots concerned are located, the constructions of 1977, in such plots, cannot be adjudged on the touchstone of the provisions of the Act of 1980. Moreover, according to him, such point requires consideration by the appropriate authorities under Section 634 of the Act of 1980. In his view, there is ambiguity with regard to the law applicable so far as the constructions made in areas which were added to the municipal limits of Kolkata Municipal Corporation subsequently.

The views expressed by the Municipal Commissioner and the findings returned as recorded in the impugned order are plausible views and findings. As rightly pointed out on behalf of the private respondents, a writ Court need not act as a Court of Appeal, reappraise the evidence made available to the adjudging authority

and substitute its own findings with that of the adjudging authority.

The impugned order does not stand vitiated by breach of principles of natural justice or any known canons of law which requires setting aside of such order. The allegations of perversity in the impugned order have not been substantiated.

Dipak Kumar Mukherjee (supra), is the case where demolition was ordered after finding that, the construction was unauthorized. In the present case, the authorities are yet to arrive at a finding that, the constructions are unauthorized.”

27. We agree with the principle of law reiterated by the learned Judge to the effect that unless the order of an authority impugned in a writ petition is perverse or without jurisdiction or has been passed in breach of the principles of natural justice or is vitiated by any one or more of the other established grounds for judicial review, the writ Court would ordinarily not interfere. However, we are of the view that the Municipal Commissioner while passing the order impugned in the writ petition, was bound to consider and act in terms of the observations made by the learned Judge in the earlier writ petition being W.P. 25492(W) of 2016. The Municipal Commissioner was obliged to address the issues indicated by the learned Judge in the order disposing of the earlier writ petition. We have summarized such issues in paragraph 23 herein above. The Municipal Commissioner failed and/or neglected to apply his mind to those issues.

28. The relevant order of this Court directed the Municipal Commissioner to take a reasoned decision on the representation of the appellants after ascertaining certain factual issues like whether or not there was a sanctioned plan for the construction raised by the private respondents, whether or not the private respondents had obtained permission of the Corporation authorities under Section 428 of the KMC Act for running a private market and whether or not any notification was issued by the State Government under Section 628 of the KMC Act, excluding the applicability of the provisions of the KMC Act to the private market in question. The Municipal Commissioner did not address any of those factual issues. On the contrary, the Commissioner purported to decide points of law including making an observation that on a reading of Section 626 of the KMC Act it appears that the same does not nullify actions/steps taken by the private respondents before the area in question was included within the territorial limits of KMC with effect from January 7, 1984. Similarly, the Commissioner observed that on a reading of Section 8 of the Bengal General Clauses Act, 1899, it appears that whatever acts took place prior to the KMC Act, 1980, coming into force, cannot be nullified.

29. We are of the opinion that prior to passing any order on the representation of the appellants, the Commissioner should have addressed the factual issues indicated by the learned Judge in His Lordship's order passed on the earlier writ petition and thereafter come to a finding on such factual issues. After considering such factual aspects, the Commissioner may perhaps have expressed his opinion on points of law, although we have

serious doubts regarding that also. However, the Commissioner could have expressed his view as to why the impugned constructions cannot be ordered to be demolished or the private market cannot be closed down even if the findings on the factual issues were against the private respondents.

30. We are of the definite view that not having followed the directions in the order dated 16th July, 2023, passed on the earlier writ petition, the order of the Commissioner cannot be sustained although on the face of it the order may appear to be reasoned, not perverse and not suffering from any of the recognized vices that would make it liable to interference by the writ court. However, once the Commissioner's order is juxtaposed against the order passed on the earlier writ petition, serious infirmity in the Commissioner's order would be evident. When a competent court orders an officer of the executive to decide the representation of a citizen in the light of the observations made by the Court in that order, the officer cannot take a decision de hors such observations/directions. Such a decision would be incurably bad.

31. The order passed on the earlier writ petition clearly directed the Commissioner to consider whether or not the relevant provisions of the Bengal Municipal Act, 1932, were complied with for raising the impugned constructions assuming that the same were made before the area in question was included within the territorial limits of KMC with effect from January 7, 1984. The Commissioner did not apply his mind to this issue at all. There is no finding of the Commissioner as to whether or not any notification under Section 628 of the KMC Act was issued by the State

Government excluding the applicability of the provisions of the KMC Act to the private market in question. There is also no finding as to whether or not the private respondents obtained permission under Section 428 of the KMC Act for running the private market in question.

32. We are not unmindful of the fact that 7 civil suits are pending before the competent civil Court in connection with which there subsists an order of status quo in respect of the premises in question, passed by a coordinate bench of this Court. The appellants herein and KMC are party defendants in such suits. We have set out the prayers in those suits hereinbefore in the judgment. If the plaintiffs in the said suits succeed, the grievance of the present appellants will have no legs to stand upon. We also agree with the private respondents that we should not make any observation in this judgment which may adversely affect their rights in the pending civil suits. However, because of the reasons aforestated, we are of the opinion that this is a fit case for remand of the matter to the Municipal Commissioner for taking a fresh decision on the representation of the appellants in the light of the observations of the learned Single Judge in the judgment and order dated June 6, 2017, passed on the earlier writ petition being WP 24292 (W) of 2016. We accordingly so direct. The Municipal Commissioner shall take a fresh reasoned decision on the representation of the appellants within 12 weeks from the date of communication of this order to him, after giving reasonable opportunity of hearing to all concerned parties. The judgment and order of the learned Single Judge impugned in this appeal and the order

of the Municipal Commissioner challenged before the learned Single Judge are set aside.

33. We however make it clear that we are not binding the hands of the Municipal Commissioner to pass a fresh order in any particular manner. However, the Municipal Commissioner must keep in mind the observations made in the judgment and order dated June 6, 2017 passed in WP 24292(w) of 2016. The factual findings of the Commissioner on the issues which we have indicated at paragraph 23 of this judgment may be placed before the learned Court which is in seisin of the civil suits between the parties. The suit Court, if it deems appropriate, may admit such findings in evidence subject to complying with the relevant rules of procedure and evidence.

34. The appeal is, accordingly, disposed of. There will however be no order as to costs.

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

(ARIJIT BANERJEE, J.)

I agree.

(APURBA SINHA RAY, J.)