

D/L
Item No. 02
13.09.2023
KOLE

**MAT 1639 of 2023
With
IA CAN 1 of 2023**

**Nalia Rauf
-Vs.-
The State of West Bengal & Ors.**

*Ms. Kabia Mukherjee,
Mr. Manas Dasgupta,
Mr. Gourav Das,*

...for the appellant.

*Mr. Rajarshi Basu,
Mr. Sanjib Datta,*

...for the State.

*Mr. Alok Kr. Ghosh,
Mrs. Sima Chakraborty*

...for the KMC.

*Mr. Suddhasatva Banerjee,
Mr. Shayak Chakraborty,*

...for the respondent no. 7.

Ms. Faryana Khatoon,

...for the respondent no. 9.

By consent of the parties, the appeal and the connected application are taken up for hearing together.

Being aggrieved by and dissatisfied with a judgment and order dated July 25, 2023, whereby the appellant's writ petition being WPA 4010 of 2023 was disposed of by a learned Single Judge of this Court, the writ petitioner has come up by way of this appeal.

The factual background of the case leading to the present appeal may be recorded briefly.

It appears that in an earlier round of litigation one Sk. Abdul Karim approached a learned Single Judge of this

Court by filing WPA 5314 of 2021 alleging illegal and unauthorized construction by the respondent nos. 7 and 8 in that writ petition. The respondent no. 7 in that writ petition is the present appellant. The allegation was that unauthorized construction was being raised at premises no. 33B, Ahiripukur Road, Kolkata 700019.

The said writ petition was disposed of by a judgment and order dated July 5, 2022, wherein the learned Single Judge elaborately recorded the relevant facts of the case. Hence, it would be helpful to extract the relevant portion of the said judgment and order herein:-

“Learned advocate representing the Kolkata Municipal Corporation submits upon instruction from the Assistant Engineer (Civil) and the Executive Engineer (Building Department), Br. VIII dated July 4, 2022 that on receipt of the complaint from the petitioner the site was inspected on February 2, 2021 and it was found that the foundation work was made as per the sanctioned plan.

The premises was again visited on March 4, 2021 and it was detected that RCC columns were constructed in the ground floor beyond the sanctioned line. A stop work notice under Section 401 of the Kolkata Municipal Corporation Act, 1980 was served.

After service of notice the construction work remained suspended for a few months. On September 21, 2021, a letter was submitted before the Corporation that the unauthorized portion had been demolished and a prayer was made for withdrawal of the stop work notice. An undertaking was also filed mentioning that no construction will be made in deviation of the sanctioned plan.

The premises was further inspected on November 25, 2021 and it revealed that the columns which were constructed in violation of the sanctioned plan were demolished by the person responsible.

Accordingly, the stop work notice was withdrawn on November 27, 2021. The construction resumed thereafter.

On January 11, 2022, the premises was again visited and it was observed that construction has been done upto the roof level of the second floor and the RCC columns were constructed on the fourth storey in deviation of the sanctioned plan and in violation of the notarized undertaking. A further stop work notice was issued on January 11, 2022.

On February 26, 2022, the premises was again visited and it was observed that RCC roof slab was cast on the fourth storey defying the stop work notice. An FIR was lodged on February 26, 2022 before the Karaya Police Station.

Hearing order under Section 400(1) of the Kolkata Municipal Corporation Act was issued on March 9, 2022 directing the person responsible to demolish all unauthorized construction, the entire third floor and the portion of the second floor covering the open terrace which has been done in deviation of the sanctioned plan within seven days.

The demolition order could not be executed in view of the interim order of injunction passed by the learned Senior Magistrate, Alipore in Misc. Case (Arb.) No.06 of 2021 directing both the parties to maintain status quo. The order of status quo is subsisting till July 26, 2022. The Building Department has already filed an application seeking leave of the learned Court for undertaking the demolition proceedings.

From the aforesaid instruction, it appears that there has been flagrant violation of the provisions of the Kolkata Municipal Corporation Act, 1980. The person responsible has repeatedly made unauthorized construction despite filing undertaking of not making any such construction in violation of the plan sanctioned.

The person responsible also approached the Court of the learned Senior Magistrate and managed to obtain an order of status quo. As there is a specific finding upon inspection

by the men and agents of the Kolkata Municipal Corporation that there has been unauthorized construction in the said premises at the instance of the person responsible, the Building Department is directed to proceed with the order of demolition which has already been issued.

The order of status quo passed by the learned Senior Magistrate, Alipore in the aforesaid case cannot and ought not stand in the way of the Kolkata Municipal Corporation to demolish any construction which has been made devoid the sanctioned plan. An order of status quo can only be passed in respect of a property which has been constructed in accordance with the provisions of law and not in deviation thereof. An unauthorized construction cannot be permitted to stand only on the basis of an order of status quo passed by the learned Court. The same will give a premium to the unscrupulous and dishonest builders to hold on to the unauthorized construction by virtue of order passed by the Court.

The Building Department has already filed an application seeking leave of the learned Court for undertaking the demolition proceeding. The Building Department is directed to bring this order to the notice of the learned Senior Magistrate, Alipore who passed order of status quo in the case mentioned hereinabove in respect of the unauthorized construction made by the person responsible.

The Kolkata Municipal Corporation shall ensure that the order of demolition is executed at the earliest but positively within a period of eight weeks from the date of communication of this order.”

It appears that subsequent to passing of the said judgment and order a memorandum of understanding was entered into between one Amar Kathi, who is the present respondent no. 7 and the writ petitioner in the earlier writ petition whereunder the said writ petitioner being, Sk. Abdul Karim, received a substantial sum of money from Amar

Kathi, who is the concerned developer. The appellant herein claims to be the owner of the land.

With the grievance that the respondent no. 7 has raised unauthorized construction at the aforesaid premises, the appellant approached the learned Single Judge in the present round of litigation by filing WPA 4010 of 2023. Apart from praying for implementation of the demolition order, the writ petitioner also prayed for cancellation of a building plan that had been sanctioned by the Corporation for raising the building at the concerned premises and on the basis whereof the respondent no. 7 constructed the building in question, according to the appellant, in deviation from the sanctioned plan. A series of orders was passed on the said writ petition on diverse dates namely February 24, 2023, March 30, 2023, May 19, 2023, June 30, 2023 and finally on July 25, 2023 when the order impugned in this appeal was passed. We do not deem it necessary to discuss the contents of each of those orders. Suffice it to say that by the first order the learned Judge directed demolition of the entire unauthorized construction. On the next day, the Corporation came back to the learned Judge and said that the demolition activities had started but was not complete. On subsequent dates submissions were made to the effect that major part of the unauthorized construction has been demolished and finally it was submitted that the demolition activity was 'almost' complete. By the order dated July 25, 2023, the learned Judge while disposing of the writ petition observed as follows:-

“Photographs have been placed before this Court to show that the unauthorized columns standing in the 3rd floor of the subject structure is yet to be demolished.

Learned Advocate representing the Corporation submits, upon instruction that, necessary steps will be taken to demolish the same.

It appears that the entire 3rd floor and portions of the 2nd floor covering the open terrace have been held to be unauthorized. Substantial demolition has already taken place.

The Corporation is directed to conclude the demolition of the structure which has been held to be unauthorized in its entirety at the earliest.

As regards the unauthorized constructions detected lately, the Corporation shall take necessary steps in accordance with law to deal with the same.

The Corporation shall issue notice in respect of each and every proceeding relating to unauthorized construction at the subject premises to all the necessary parties including the petitioner as the plan in question stands in the name of the petitioner.”

Being aggrieved, the writ petitioner has come up before us by way of this appeal.

We have heard learned counsel for the parties at length.

Learned Advocate for the appellant, with reference to various documents and photographs annexed to the said application, says that even as on date unauthorized construction is there.

Learned Advocate for the Corporation says that almost the entire unauthorized construction has been removed. Some portion remains as demolition of the same

may cause danger to the immediate neighbours. So the same is being demolished very slowly but demolition will be completed in due course.

Learned Advocate for the private respondent no. 7 says that he has rendered full cooperation to the Corporation for demolition of the unauthorized portion. His client has no objection if the entire unauthorized portion is removed. However, only such portion of the building should be demolished which is covered by proceedings under Section 400 (1) of the KMC Act, 1980 and the demolition order resulting therefrom.

Having heard learned Counsel for the parties, we are of the view that ends of justice will be served if we pass the following directions:-

- (i) Admittedly, the appellant has made a representation to the Municipal Commissioner dated January 9, 2023 for cancellation of the building plan sanctioned in favour of the appellant and the respondent no. 8, since by mis-utilizing the plan the respondent no. 7 has made unauthorized construction. However, no decision has been taken on that representation till date. We direct the Municipal Commissioner or his delegate to decide such representation in accordance with law by passing a reasoned order within a period of eight weeks from the date of communication of the order to the Municipal Commissioner, after

granting opportunity of hearing to the appellant herein as also the private respondents.

- (ii) The Commissioner or his delegate shall ensure that the entire unauthorized construction at the concerned premises is removed at the earliest and definitely within a period of eight weeks from date. We, however, clarify that only such portion of the building in question which has been found to be unauthorized in a proceeding under Section 400 (1) of the KMC Act shall be demolished.
- (iii) If the Corporation authorities find that there are constructions which are unauthorized but not covered by the proceeding which was initiated under Section 400 (1) of the KMC Act, 1980, then fresh proceedings will immediately be initiated in respect of such unauthorized construction.
- (iv) We make it clear that under no circumstances, any unauthorized construction which is not supported by a duly sanctioned building plan can be allowed to stand.
- (v) In view of the submission made on behalf of the appellant that the structural stability of the building in question is highly doubtful, we direct the Municipal Commissioner to look into the matter so that no untoward incident or

accident happens in the form of the building collapsing or in any other manner and to take necessary safeguard or remedial step in that regard.

- (vi) The private respondents are restrained from making any further construction at the concerned premises till the Municipal Commissioner disposes of the representation of the appellant for cancellation of the building plan.

The order under appeal stands modified to the aforesaid extent.

Since we have not called for affidavits, the allegations made in the stay application are deemed not to be admitted by the respondents.

The appeal and the connected application are, accordingly, disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)