

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT No. 21 of 2023
IA No.GA/1/2023
IA No. GA/2/2023
IA No.GA/3/2023
WPO/7/2023

Nirmal Kumar Das also known as Nirmal Das

Vs

The Kolkata Municipal Corporation & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Appellant : Mr. Aniruddha Chatterjee, Adv.
 : Mr. Sounak Bhattacharya, Adv.
 : Mr. Sumitava Chakraborty, Adv.

For the KMC : Mr. Alok Kumar Ghosh, Adv.
 : Mr. Subhrangsu Panda, Adv.
 : Ms. Sabnam De, Adv.

Judgment On : 21.08.2023

Apurba Sinha Ray, J. :-

1. The appellant, a self-proclaimed law abiding citizen, raised a construction on a thika property without sanctioned plan from the Kolkata Municipal Corporation ('KMC' in short hereinafter) and consequently a stop work notice under Section 401 of the Kolkata Municipal Corporation Act, 1980 (in short the Act, 1980) dated 18.10.2022 was served upon the appellant but as he continued with the construction work defying the said stop work notice, an FIR was lodged against him under Section 401A of the Act, 1980. As the appellant did not stop his construction even thereafter, steps were taken by the Authorities under Section 400(8) of the Act, 1980.

2. The main grievance of the appellant/writ petitioner is that though notice under Section 401 of the Act, 1980 was served upon him no step was taken from the side of the KMC under Section 400(1) of the Act, thereby depriving the appellant of an opportunity of being heard before the concerned Special Officer (Building) of the KMC.

3. Learned Counsel appearing on behalf of the appellant, Mr. Aniruddha Chatterjee, has submitted that by virtue of the Kolkata Municipal Corporation (Amendment) Act, 2014 the Kolkata Municipal Corporation authority under Section 400(1) of the Act, 1980 has been empowered to regularize certain unauthorized construction. It is also pointed out from the side of the appellant that the Municipal Commissioner has issued Circular No. 08 of 2020-21 dated 19.01.2021 in respect of fees for retention of

unauthorized constructions which are allowed to be retained by the order of Special Officer (Building).

4. Learned Counsel of the appellant has further contended that though notice under Section 401 of the Act has been issued to the appellant/writ petitioner on 23.12.2022, no notice under Section 400(1) of the said Act was ever served upon the petitioner for hearing of regularization of alleged deviation, if any. The Director General (Building) of the Corporation issued office Circular No. 16 of 2021-22 dated 02.03.2022 specifying the stages for deposit of fees and the amount thereof before hearing in respect of unauthorized construction.

5. As the Kolkata Municipal Corporation authority has straightway adopted the process under 400(8) of the Act after issuance of notice under Section 401 of the Kolkata Municipal Corporation Act, 1980 a valuable right of hearing of the appellant, as envisaged under Section 400(1) of the Act, 1980 has been infringed and therefore the process undertaken by the Kolkata Municipal Corporation authority under Section 400(8) of the Act, 1980 which is a draconian piece of law, has seriously violated the principles of natural justice.

6. Learned Counsel has vehemently submitted that as there is no scope of hearing in respect of the process initiated under Section 400(8) of the Act, 1980, there must be some materials from the side of the KMC to show that the Mayor-in-Council and the Mayor have applied their minds in coming to the conclusion that immediate action for demolition of the concerned

building is necessary. Learned Counsel has pointed out that from the materials on record it appears that in each and every case of similar nature, a stereotyped order is passed without going into the differences in factual aspects of the cases. As the Mayor and Mayor-in-Council are used to passing stereotyped, same order in respect of similar types of cases, as per the submission of the Learned Counsel of the appellant, it can be safely concluded that there was no application of mind either by the Mayor or the Mayor-in-Council.

7. Learned Counsel for the appellant also drew the attention of this court to the Kolkata Municipal Corporation (Transaction of Business of the Mayor-in-Council) Regulations, 1986 and submitted that a bare perusal of the provisions thereof would show that the Mayor-in-Council did not consider the case of the appellant independently. Rather it passed a stereotyped order which it passes in similar types of cases. According to Mr. Chatterjee, the basic ingredients of Section 400(8) of the Act, 1980 are that the Mayor-in-Council must be of the opinion that immediate action is called for in relation to a building which is being constructed in contravention of the provisions of the Act and the reasons must be recorded in writing. In the instant case the departmental note indicating that the building may cause loss of human life and property and also may cause other hazards like fire, etc., is not comprehensive. The said report does not also reflect anything about the structural stability of the building and, therefore, placing reliance on the said report, the order under Section 400(8) of the Kolkata Municipal

Corporation Act cannot be said to have been passed in accordance with the requirement of the statute.

8. Learned Counsel also argued that the said demolition order issued under Section 400(8) dated 09.12.2022 does not contain any agenda item number or any serial number which raises a serious doubt about its existence. In any event, the order of demolition passed under Section 400(8) of the Act in respect of the premises in question was issued without considering and following the specific provisions as laid down in Kolkata Municipal Corporation (Transaction of Business of the Mayor-in-Council) Regulations, 1986 and hence is absolutely illegal, arbitrary and accordingly the said demolition order should be set aside.

9. Learned Counsel has vehemently argued that the Regulations, 1986 clearly enumerate the fact that all the cases referred to in the second schedule of the Regulations, 1986 shall be brought before the Mayor-in-Council in accordance with the provision contained in paragraph 2 thereof. The second schedule to the said Regulation which lists demolition of construction in contravention of provisions of KMC Act in serial no. 52 is the one which requires sanction of Mayor-in-Council. Regulation 13 of the said Regulations provides that a case referred to in the second schedule has to be submitted to the Mayor through the Municipal Commissioner by the department concerned with a view to obtaining the order of the Mayor for circulation of the issue or bringing up the same for discussion at a meeting

of the Mayor-in-Council. But it would be clear that such procedure was not adopted in this case.

10. A quasi judicial authority, according to Learned Counsel of the appellant, exercising such a function must record its reason as to why and on the basis of what an order has been passed. A bare reading of the order shows that there is nothing which will be a safeguard against the ipse dixit of the decision maker. The problem as has been recorded in the said order cannot be logically provided by the corporation in any manner whatsoever. The corporation is conferred with sweeping power under Section 400(8) in issuing directions which are grossly against the requirement of the statute. Presumably and admittedly, no building can be constructed without a sanctioned plan but even then it cannot be the reason for invoking the provisions of Section 400(8) of the Act unless and until the precondition for invocation of the said section is found to exist by statutory authority.

11. Learned Counsel cited the decision in the case of **Sunil Chandra Dey Vs. State of West Bengal & Ors. reported at (2007) 2 Cal LJ 674** in support of the contention that for more than last 17 to 18 years orders passed under Section 400(8) of the Kolkata Municipal Corporation Act, are all stereotyped and mechanical orders. The contents of each and every order under Section 400(8) are same which casts a shadow of doubt as to the functioning of the Corporation. It was also argued that the respondent corporation in its alleged demolition order under Section 400(8) has miserably failed to establish the immediate and emergent reason for

invocation of the said provision. Learned Counsel placed reliance in this regard on the judgment of **Saif Impex Private Limited and Anr. Vs. The Kolkata Municipal Corporation & Ors. reported at 2014 SCC OnLine Cal 16044** and **Smt. Icchu Devi Choraria Vs. Union of India & Ors. reported at (1980) 4 SCC 531**. Learned Counsel for the appellant further submitted that the appellant has taken out another application being IA No. 3 of 2023 wherein the appellant has brought on record the prayer made by the appellant before the respondent corporation for regularization of the unauthorized construction on February 22, 2023 and the said regularization prayer has been made keeping in mind the provisions of the Kolkata Municipal Corporation (Regularization of Building) Regulations, 2015 by which the Corporation has regularized various structures within its jurisdiction, similar to that of the present appellant.

12. Learned Counsel Mr. Alok Kr. Ghosh, representing the KMC has vehemently argued that if massive unauthorized constructions are detected and the construction works are found in progress, the Mayor-in-Council can adopt the process laid down in Section 400(8) of the Act, 1980. Immediate action does not mean demolition forthwith. Immediate action means immediate decision for demolition. Implementation of the decision for demolition may be halted for variety of reasons. In case of demolition of unauthorized construction the recording of reasons should be as such, particularly after failure of the person responsible to produce any valid document in support of the impugned construction on the date of initial

inspection of the premises and also even after issuance of stop work notice upon detection of unauthorized construction.

13. Learned Counsel has further pointed out that public safety, disruption of essential services, fire hazards etc. are the reasons behind introducing a provision like Section 392 in the Kolkata Municipal Corporation Act. Learned Counsel has also submitted that if a construction is made without complying with the provisions of Kolkata Municipal Corporation Act, 1980 and the National Building Code, wherever necessary, a reasonable presumption as regards structural instability of the building, endangering of public safety etc. can be drawn. So far as regards the allegation as to the nature of the order being stereotyped under Section 400(8) of the Kolkata Municipal Corporation Act, 1980, Learned Counsel submitted that there is no falsification in making such order since the nature of the order and writing thereof may be identical and similar having regard to the subject issue being impugned construction without sanction or without the validity of law and as such there is no scope to provide different reasons in identical and similar nature of cases.

14. Learned Counsel Mr. Ghosh has pointed out that except minor nature of unauthorized construction work, which may be allowed to be retained in terms of third proviso to Section 400(1) of the Kolkata Municipal Corporation Act, 1980, all unauthorized constructions may be dealt with under Section 400(8) of the Act, 1980.

15. Learned Counsel has further argued that there has been no infraction of Transaction of Business Regulations, 1986 since the concerned department prepared the memorandum indicating the salient facts of the case precisely with points for decision and such memorandum having been approved by the Mayor, after it was brought to him through the Municipal Commissioner, the same cannot be said to be irregular as similar orders were passed in different cases. Moreover, even if it is found that there are some infractions in complying with the said regulations, the same cannot vitiate the decision/resolution as there was substantial compliance with the provisions of the said regulations, and the infraction being merely procedural in nature may be considered for upholding the resolution/decision. Learned Counsel has further argued that the petitioner has no legal right for protection in praying for a writ of mandamus since the petitioner did not acquire any right over the property unauthorizedly created. According to learned counsel of the KMC, the court has a very limited scope to make judicial review of the decision of the Mayor-in-Council under Section 400(8) of the Act, 1980 since the petitioner/appellant does not enjoy any right to approach this Hon'ble Court with a writ petition to protect or enforce any legal right. The Learned Counsel of the Kolkata Municipal Corporation has referred to the following case laws in support of his contention reported at **(2001) 6 SCC 392 (State of UP Vs. Harendra Arora & Anr.)**, **(2008) 2 SCC 280 (Oriental Bank of Commerce Vs. Sunder Lal Jain & Anr.)**, **AIR 1977 SC 276 (Mani Subrat Jain Vs. State of Haryana & Ors.)**, **AIR 1964 SC 685 (State of Orissa Vs. Ram Chandra**

Dev & Ors.), (2006) 7 SCC 597 (Royal Paradise Hotel (P) Ltd. Vs. State of Haryana & Ors.), 2000 SCC OnLine Cal 519 (C.M.C & Anr. Vs. Abid Hossain), (1990) SCC OnLine Cal 9 (Maula Bux & Ors. Vs. State of West Bengal & Ors.)

Court's Decision

16. If we consider the argument placed on behalf of the appellant, we shall find that according to him even there is unauthorized construction without sanctioned plan, the person responsible is entitled to a notice of hearing under Section 400(1) of the Act, 1980, and as such the procedure adopted by the KMC under Section 400(8) of the Act, 1980 after issuance of notice under Section 401 of the said Act, is arbitrary and contrary to the provisions as laid down in the third proviso to Section 400(1) of the said Act. The appellant has also pointed out that after insertion of third proviso to the above Section, relevant circulars were issued stating the amount of fees and stages for deposit of such fees for the purpose of retention of such unauthorized construction subject to the order of Special Officer Building. From the said argument, it transpires that as if all the unauthorized constructions under the jurisdiction of KMC can be regularized or at least prayer for regularization of all unauthorized constructions can be made by virtue of the third proviso of Section 400(1) of the Act, 1980.

17. For the purpose of proper understanding of the issue I would like to quote the third proviso to Section 400(1) of the KMC Act, 1980:-

“ 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.”

18. From a cursory glance over the said proviso, on which the appellant has placed his argument to a great extent, it appears that the said third proviso does not include nor is meant to include all unauthorized constructions irrespective of their nature and extent but, is confined to “minor unauthorized erection” or “execution of any minor work without sanction” or “minor deviation from the sanctioned plan or work in contravention of any sanction plan”. As such the said proviso does not relate to huge or massive unauthorized construction or erection but the same relates only to minor erection or minor deviation etc. The appellant has utterly failed to show that his unauthorized construction is merely a minor one.

19. The appellant has also drawn the attention of this court to the Kolkata Municipal Corporation (Regularization of Building) Regulations, 2015 in support of his contention. Now if we go through the said Regulations we shall find the term “minor deviation” has been defined in Regulation 3(1)(b) as hereunder”:-

19.1. “ ‘Minor Deviation’ means deviation as will be determined by the Municipal Commissioner or any of its officer delegated by him, in consideration of the terms and conditions mentioned in clause 4 of these regulations.

Regulation 3(1)(c) has also defined minor unauthorized erection or work as follows:-

Minor unauthorized erection means:-

- (1) Execution of any minor work without sanction,
- (2) Minor erection or work in contravention of any sanctioned plan in consideration of the terms and conditions mentioned in regulation 4 of these regulations.”

20. If we go through clause 4 of the said Regulations, 2015 we shall find that in the said clause, terms and conditions for regularization under the Regulations, 2015 have been specifically mentioned and for the purpose of our present discussions, it would be helpful for us to note the opening paragraph of the said clause which is as follows:-

“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.....”

21. From the above it is crystal clear that third proviso to Section 400(1) of the Act, 1980 and the Regulations, 2015 formulated by virtue of the said proviso, that is KMC (Regularization of Building) Regulations, 2015, deal with minor unauthorized erection or work or minor deviation etc. and they do not include any construction other than minor construction or erection. In order to avail of the benefit as provided under third proviso to Section 400(1) of the KMC Act, 1980 or KMC (Regularization of Building)

Regulations, 2015, the appellant is to show prima facie before this appellate forum that his erections were minor in nature which can be sanctioned by the Special Officer Building if he was actually allowed to appear before him. There is no material from the side of the appellant to show that he actually raised a minor erection or construction without sanctioned plan.

22. On the other hand, the KMC has argued that the appellant has raised massive construction without any sanctioned plan and such construction is comprised of several floors on the property in question. The relevant affidavit containing report, photographs of the said building show that there are merits in the contention of the Learned Counsel of the KMC. Therefore, the contention of the appellant that by virtue of KMC (Amendment) Act, 2014 the KMC authority under Section 400(1) of the Act, 1980 has been empowered to regularize unauthorized constructions irrespective of its nature or the same can be retained on payment of prescribed fees, subject to the order of the Special Officer (Building), is not tenable.

23. The appellant has also submitted that as the provisions of Section 400(8) do not provide any opportunity of hearing to the person responsible, the steps under Sub-section (8) of Section 400 of the Act should be adopted by the KMC with great care and caution. In this regard the Learned Counsel has referred to the case law reported at **2007 SCC OnLine Cal 613 (Sunil Chandra Dey V. State of West Bengal & Ors.)**. By referring to the said decision Learned Counsel for the appellant has submitted that stereotyped orders are being passed by the KMC authority for last 17/18 years. This

attitude was deprecated in the said case law and in this case also there is a stereotyped order and certain serious inconsistencies are found in complying with the Transaction of Business of Mayor-in-Council Regulations, 1986. As such, it was urged that the order passed by the Mayor-in-Council asking the authority to take immediate action for demolition is bad in law.

24. I have gone through the above case law and I find that a Learned Judge in the said decision has seriously deprecated the issuance of stereotyped order in several demolition of building matters. According to the Hon'ble Judge, "in terms of Section 400(8), Mayor-in-Council is the sole Judge of facts. However, the factual finding arrived at by it that immediate action is called for, in terms of the statutory mandate must have the support of reasons. It is no doubt true that in terms of the procedure prescribed by the said regulations, it has to proceed on the note prepared by the department concerned but this court finds to its utter dismay that the Mayor-in-Council had abdicated its statutory duty in the present case by according disproportionate weight to such note. No wonder, the impugned resolutions suffer from the vice of irrationality."

25. However, a contrary view adopted by a Division Bench of this Court in **C.M.C & Another Vs. Abid Hossain with C.M.C Vs. Maula Bux with Ziauddin Vs. Mayor-in-Council (Building) and Arif Iqbal Vs. State of West Bengal, reported in 2001 (1) CHN 4** was not considered by the Learned Single Judge in the decision reported at 2007 SCC OnLine Cal 613.

A Division Bench of this Court has observed in paragraph 12 of the said judgment as follows:-

“12. It is true that right to property is recognized as a right of a citizen in the Constitution itself. A citizen may be deprived of such right only by the authority of Law. This right to property cannot be construed in abstract. A building erected by a person, who owns the land or who is authorized to erect a building on a piece of land, has a right to property in the building erected on such land. If a person erects a building on a land which belongs to the public, he has no right to property in the building. Similarly the building must be erected in accordance with the sanction. If a building has been erected without sanction, such erection being an illegal erection, no right to property flows therefrom. Similarly a person, who is authorized to erect a building in accordance with sanction, erects a building in excess of the sanction or contrary to the sanction, to the extent the erection is beyond sanction or contrary to sanction, the person concerned cannot be said to have any right to property therein. By sub-section (8) of section 400 of the Act, power has been vested to demolish only such portion of the erection in which there is no right to property. The demolition of a dilapidated building or a part thereof is not at all comparable with demolition of an unauthorized erection. In the case of demolition of a dilapidated building or a part thereof, but not an unauthorized building, the right to property is affected. The right to property in such a dilapidated building can be taken away having regard to public safety. Appropriate provisions therefore have been made in the Act itself. In the instant case we are considering totally unauthorized erection for the same is either without sanction or in contravention or contrary to or in deviation of sanction. There is no right to property in such erection.”

26. The Division Bench also made certain observations in paragraphs 13 and 14 of the judgment which may be helpful to note for our present discussion:-

“.....If it appears that an erection is being made without sanction on a land owned by the person, who is making the erection, thereby causing public inconvenience, and

notice has been given to stop such erection, but the person concerned does not stop such erection, would it be proper for the Corporation to remain a mute spectator? In the normal circumstances such stop-work order is enforced by the Police, but then the Police Personnel are not under the control of the Corporation. Therefore, if by reason of either the connivance of the Police Personnel or taking advantage of their carelessness or ineffectiveness, the person concerned refuses to comply with the stop-work order, would the Corporation remain an idle spectator? In order to exercise the power the person exercising the power must subjectively determine that the exercise of power is of immediate necessity. Therefore, in the section itself enough guidelines have been given as to when extraordinary power has to be exercised under sub-section (8) of section 400 of the Act either in lieu of exercise of power under sub-sections (1) to (7) of section 400 of the Act or in addition thereto. The purpose and object of exercise of power in both the situations are one and the same, to prevent contravention of the provisions of the Act in relation to a building or a work being carried on. The extraordinary power has not been granted to the Municipal Commissioner. The same has been granted to the Mayor-in-Council which is the second highest body entrusted to carry out the duties of the Corporation. That itself is a safe-guard. And in any event if this safety valve does not save the person in question, as aforesaid, the person may be compensated adequately. Sub-section (8) of section 400 therefore, cannot be struck down on the ground that conferment of such power is arbitrary. In a given case, however, it may be shown that user of such power was not proper and power under sub-section (1) of section 400 ought to have been used. In such circumstances too the person affected may be adequately compensated.

14. As pointed above, conceptually it is not conceivable that a citizen in India has personal liberty to make an unauthorized construction. In that view of the matter, it cannot be said that sub-section (8) of section 400 of the Act is violative of Article 21 of the Constitution.”

27. From the above it is crystal clear that the appellant has no absolute right to claim that his valuable right of hearing has been violated by the corporation by taking steps under Section 400(8) of the Act, 1980.

28. Now let us consider what prompted the KMC to take such drastic action against the present appellant under sub-Section (8) of Section 400 of the Act, 1980.

29. From the materials on record it appears that after receiving a telephonic complaint from higher authority the concerned officer inspected the relevant premises and found that the person responsible constructed some columns on ground floor and on demand the person responsible failed to produce any sanctioned plan in respect of such construction. Accordingly, a stop work notice under Section 401 of KMC Act 1980 was issued on 18.10.2022 asking the person responsible to stop the illegal construction immediately. It was also found on 20.10.2020 after inspection that the person responsible resumed the unauthorized construction by defying the stop work notice under Section 401 of the KMC Act, 1980 and as such, an FIR against the person responsible was lodged from the side of KMC under Section 401(A) of the KMC Act, 1980. Even then the construction work was not stopped. On 28.11.2022 it was reported from the side of the concerned Executive Engineer (Civil), Building Department, Borough – I, KMC that during inspection it was found that the said unauthorized construction was carried on beside a water body and portion of the said unauthorized construction was raised on a part of the water body. A report was also sent to the Environment and Heritage Department for taking necessary action. In spite of taking action under Section 401 and 401A of the KMC Act, 1980 the construction work was being carried on, on the date of submission of the

said report dated 28.11.2022 and accordingly, request was made for processing the matter under Section 400(8) of the KMC Act, 1980.

30. From the above it transpires that the person responsible was time and again asked to stop the construction work but he did not pay any heed threats. Thereafter, an FIR was lodged but the same also failed to deter him from carrying on with the construction. Stop work notice was issued on 18.10.2022 but from the materials on record it transpires that the construction work was being continued even on 28.11.2022. From the photographs supported by affidavit dated 27.04.2023 it appears that the construction was not a minor one. When a stop work notice was issued from the side of the KMC, the person responsible should have stopped the construction work and approached the KMC authority. Admittedly he was carrying on the construction without sanctioned plan in violation of the provisions as laid down in Sections 392 and 393 of the KMC Act. The said Sections may be quoted as hereunder:-

“392. Prohibition of building without sanction.- No person shall erect or commence to erect any building or execute any of the works specified in section 390 except with the previous sanction of the Municipal Commissioner and in accordance with the provisions of this Chapter and of the rules and the regulations made under this Act in relation to such erection of building or execution of work and on payment of such fee as may be determined by the Corporation.

Provided that in case of allowing incremental Floor Area Ratio over and above the prescribed limit of Floor Area Ratio in the prescribed manner, rate or fee or charge payable for additional Floor Area Ratio shall be decided in terms of "Circle Rates" of State Government, and the formula for this purpose shall be finalized by the State

Government, and all such additional rate or fees or charges to be collected on account of granting of additional Floor Area Ratio will be payable to the State Exchequer directly, and as may be decided by the State Government, a portion of the collected rate or fees or charges shall be allotted or transferred to the Corporation for undertaking developmental schemes.

393. Erection of building- Every person who intends to erect a building shall apply for sanction by giving notice in writing of his intention to the Municipal Commissioner in such form together with such fees including Drainage Development fee and containing such information as may be prescribed:

Provided that the Corporation may also levy fees under this section with retrospective effect.”

31. As the person responsible carried on the relevant construction defying the stop work notice and constructing several floors without giving due regard to the provisions as laid down in Sections 392 and 393, one cannot expect that the KMC authority will remain idle and allow the person responsible to carry on with the unauthorized construction without sanctioned plan merely because a beneficial regulation have been brought into force for regularizing minor erection works. If the person responsible thinks that whatever be the nature and extent of his erection work, he can raise construction defying the stop work notice and defying the allegations made against him in the FIR only because that there are certain beneficial provisions for regularizing unauthorized constructions, he has committed a grave mistake and the KMC authority certainly has powers to demolish the unauthorized structure even without giving him any opportunity of hearing.

32. Needless to mention that unauthorized construction has become a menace to our civilized society and the extent and magnitude of such unauthorized construction in every nook and corner of our country has reached an alarming proportion. To curb the menace the Hon'ble Supreme Court as well as the High Courts have shown zero tolerance to such unauthorized constructions. The unauthorized constructions, which jeopardise planned development, have been seriously deprecated since the same are against the societal interest of our country. The society has certainly a right against citizens; not to make any unauthorized construction, since it militates against the planned development, environmental issues and so on. As a custodian of societal interest, the municipal authorities have been empowered by the municipal laws to see and check that no such unauthorized construction is made under their respective jurisdiction so that societal interest can be preserved for the sake of the public at large. This aspect of societal interest cannot be ignored and in several judicial decisions such interest of the society has been kept in the forefront. In our case in the provisions of KMC (Regularization of Building) Regulations, 2015, we shall find that this societal interest has been given a very important place. Regulation 4 of the said Regulations, 2015 provides that any unauthorized erection or work may be regularized by the municipal commissioner or any of its officer delegated by him provided that the erection 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 the Regulations, 2015 having regard to several factors, inter alia, social interest,

environmental aspects etc. Therefore, the appellant has also a duty towards the public or society at large not to make unauthorized construction and he cannot claim that as the third proviso to Section 400(1) of the Act, 1980 has been added he can raise construction as per his whims and caprice. The KMC indeed has a duty to protect the social interest aspect and can certainly demolish the unauthorized construction under Section 400(8) if it affects societal interest as aforesaid.

33. Another contention of the appellant is that the procedure for passing an order under Section 400(8) of the Act, 1980 was not properly followed by the Mayor-in-Council and therefore the said order is illegal and arbitrary. It is claimed that stereotyped orders are being passed by the Mayor-in-Council for last 17/18 years in respect of similar cases. The appellant has also doubted the authenticity of the resolution of Mayor-in-Council as there is no memo/agenda no. & date and other particulars mentioned in the relevant order which was allegedly placed before the Mayor.

34. He has also referred to Regulation 13(1) and (2) of Regulations, 1986 wherein the provisions are as follows:-

“(1) All cases referred to in the Second Schedule to those regulations shall be submitted to the Mayor through the Municipal Commissioner after consideration by the department concerned with a view to obtaining his orders for circulation of the case or for bringing up for consideration at a meeting of the Mayor-in-Council.

(2) The Mayor may direct that any case referred to in the Second Schedule to these regulations may, instead of being brought up for discussion at a meeting of the Mayor-in-Council be circulated to the Members for opinion and if all the Members are unanimous and the Mayor thinks that

a discussion at a meeting of the Mayor-in-Council is not necessary, the case shall be decided without such discussion. If the Members are not unanimous or if the Mayor thinks that the discussion at a meeting is necessary, the case shall be discussed at a meeting of the Mayor-in-Council.”

35. Learned Counsel for the appellant had doubted the resolution taken in Mayor-in-Council in respect of the instant matter as there is no mention of number of memorandum of outside agenda in the said resolution with date. It is true that though the agenda for Mayor-in-Council meeting on 09.12.2022 was mentioned memorandum of outside agenda as 19.2 but the same was not mentioned in the resolution adopted by the Mayor-in-Council Kolkata Municipal Corporation on 09.12.2022. In my considered opinion, the said resolution was taken on the notes prepared by the department and signed by Executive Engineer (Building), Borough – I, Deputy C.E. (Building/North), DG (Building) and the Municipal Commissioner which contains the number of memorandum of outside agenda as 19.2 and in the bottom portion of the said notice the resolution of the Mayor-in-Council was noted down. Absence of number and date in the resolution of Mayor-in-Council should not be doubted as the attendance register shows that the Mayor and the other members of the Mayor-in-Council attended the meeting concerning the memorandum of outside agenda being MOA 19.2 on 09.12.2022 at 4:30 p.m. Agenda Items Register of Mayor-in-Council has also supported this conclusion since the said Register shows that the subject of the said meeting was to consider the proposal regarding unauthorized construction at premises no. B/1/1/H/11/1 Dum Dum Road, Ward No. 2,

Borough – I, P.S. Sinthi. Therefore, there is no doubt that even if there is no MOA number and date in the resolution adopted by the Mayor-in-Council, the absence of such particulars in the relevant portion does not cast a doubt as to holding of meeting in connection with the property of the appellant.

36. Learned Counsel has also submitted that stereotyped orders are being made in every meeting of Mayor-in-Council in respect of demolition of buildings having similar types of allegations. I would like to reproduce the resolution taken by the Mayor-in-Council in this case:-

“Considering the facts and circumstances as stated above in the departmental report and upon due consideration of other relevant issues, it is resolved that since the person responsible continued with the unauthorized construction as indicated in the précis of the Agenda Item as identified by the concerned department. Since such unauthorized construction is unsafe and may lead to accident resulting in loss of human life and property, appropriate action towards demolition of such unauthorized construction be taken forthwith under Section 400(8) of the KMC Act, 1980 with the help of police force.”

37. If we go through the Transaction of Business of the Mayor-in-Council Regulation, 1986, we shall find that by Regulation 15(1) it has been specifically mentioned as hereunder:-

“When it has been decided to bring a case before the Mayor-in-Council, the department to which the case belongs shall, unless the Mayor otherwise directs, prepare a Memorandum indicating with sufficient precision the salient facts of the case and the points for decision. Such Memorandum and such other papers as are necessary to enable the case to be disposed of shall be circulated to the Members after the Municipal Commissioner has seen them. If a case concerns more than one department, the Members supervising the works of concerned departments shall attempt by previous discussions to arrive at an agreement.”

38. From the above it is clear that unless the Mayor otherwise directs, the concerned department to which the case belongs, shall prepare a memorandum indicating with sufficient precision the salient facts of the case and also the points for decisions. Therefore, it goes to show that the department to which the case belongs shall state the facts of the case precisely and mention the points for decision, that means, the department has been given power to consider the factual aspects of the case and also to specify the points on which the decision on a particular case has to be taken. It is not that the Mayor-in-Council will decide the issues. Rather, Mayor-in-Council along with the Mayor have been entrusted to see whether the facts and the points on which decision is going to be taken in a particular case are being confirmed by them or not. In fact the Mayor-in-Council is entrusted as a final authority to concur or not to concur with the departmental note or the suggested points for decision as specified by the department. The Mayor-in-Council is to check as a final authority whether the factual aspects and the proposed decision are, in their opinion, correct or not. Therefore, as the matter in every case relates to unauthorized construction without sanctioned plan and the demolition thereof, there is no scope for the Mayor-in-Council to give or to use different language or different parts of speech for every case in disclosing that they are ad idem with the proposed decision. Therefore, even if the languages are same, the same cannot be doubted. On the other hand it is to be seen whether or not

the departmental note actually depicted the correct position of the factual issues. The departmental note in this case is as hereunder:-

“This is a case of unauthorized construction of one storied RCC framed structure along with RCC stair and casting of RCC columns over one storied. On demand, P.R. could not produce any valid document in support of such work. The area of unauthorized construction is 248.00 sqm (approx.). Accordingly, this department issued stop work notice u/sec, 401 of the KMC Act, 1980 on 18/10/2022 along with police Intimation sent to Sinthee Police Station on 18/10/2022. Upon further inspection it was found that the P.R resumed the work defying stop work notice for which this department lodged F.I.R under Section 401A of the KMC Act, 1980 on 20/10/2022.

The PR has continued with the unauthorized construction at the captioned site defying all the actions taken by KMC.

Department also prepared proposal u/sec. 400 of the KMC Act, 1980 along with D-Sketch and infringement statement. The proposal infringes several KMC Bldg. Rules, 2009.

Moreover, the said unauthorized construction, if allowed to stand, may collapse at any moment of time leading to accident resulting in loss of human life and property and will also create several hazards like fire hazards and environmental hazards etc.

Considering the gravity of the situation and safety of public in general, department recommends demolition of unauthorized structure forthwith under Section 400(8) of the KMC Act, 1980.

The matter is placed before the meeting of Mayor-in-Council, KMC for approval.”

39. The above departmental note had depicted the audacious attitude of the appellant. Such audacity of the appellant is palpable since though there exists specific provisions under Section 392 of the Act 1980 prohibiting the construction or erection or commencement of erection of any building

without any sanctioned plan, the appellant started construction in the relevant property without any sanction from the Corporation. He was also served with a notice under Section 401 of the Act, 1980 asking him to stop the unauthorized construction but he did not stop. An FIR was lodged against him under Section 401A of the Act, 1980 but this also failed to stop him and he carried on his construction up to several floors. If that be so, how such a recalcitrant person can be stopped from carrying on such unauthorized construction in a corporation area? If all the initial legal procedures failed to deter the appellant from proceeding with his unauthorized construction work, the KMC can certainly take steps under Section 400(8) of the Act, 1980 without any further notice to the appellant, since there is chance of constructing more additional floors or creating third party interest etc. For the purpose of the present discussion we should reproduce the provisions under Section 8 of Section 400 as under:-

“Notwithstanding anything contained in this chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or a work carried on in contravention of the provisions of this Act it may for reasons to be recorded in writing, cause such building or work to be demolished forthwith.”

40. It is found from the said provision that there is no pre-requisite condition mentioned in sub-section (8) of Section 400, that there must be some grave emergency or imminent danger to public safety or something like that. In my considered opinion it is a settled principle of law of interpretation that when letters of law are not ambiguous or are not susceptible to different meanings, neither any word or sentence can be

added to such clear unambiguous provisions of law. Taking a cue from the said rule of interpretation, in my view, if the Mayor-in-Council opines that immediate action is required for demolition of a building or work which is being carried on in contravention of the provisions of the Act, 1980 the Mayor-in-Council after recording reasons may ask the concerned department to proceed with the demolition work forthwith. The said provision of law does not require the Mayor-in-Council to consider whether or not there exists any grave emergency towards public safety or imminent danger for such unauthorized construction. But on the other hand, it is sufficient that if, after considering the contraventions made by the person responsible, the Mayor-in-Council is of the opinion that immediate action for demolition of the building or work as aforesaid is necessary. The case in hand is one of the instances when such immediate action has been directed to be taken on the basis of opinion of the Mayor-in-Council.

41. The decision reported at 2007 SCC OnLine Cal 613 has thoroughly discussed the provisions of KMC Act, 1980 as well as Transaction of Business of the Mayor-in-Council Regulations, 1986. In the said case law the Mayor-in-Council under Section 400(8) has been described as the sole judge of the facts but if we take a conjoint reading of Section 400(8) of the Act, 1980 and Regulations 1986, we shall find that on the factual aspects as depicted in the departmental note with points for decision, the Mayor-in-Council under Section 400(8) of the Act has been asked to opine whether or not the department should proceed with immediate action for demolition of the building or a work which is being carried on in contravention of the

provisions of this Act. The Mayor-in-Council has to form an opinion on the factual aspects reflected in the note prepared by the department concerned. The said sub-section (8) of Section 400 of the Act, 1980 requires the opinion rather than the decisions of the Mayor-in-Council and undoubtedly, but the provisions of the Act, 1980 have precedence over the Regulation, 1986. The said sub-section (8) of Section 400 nowhere asks the Mayor-in-Council to make a judicial decision or to judge on the factual aspects or points for decisions as prepared by the department. If there is no such requirement under sub-section (8) of Section 400 of the Act, 1980, in my considered view, Mayor-in-Council cannot be required to act as a Judge on the factual aspects and points for decisions prepared by the department concerned.

42. If we consider the provisions of the KMC Act, 1980 harmoniously, we shall find that it is the legislative intention that nobody shall erect or commence to erect any construction or building without having a sanctioned plan. If that be so, it is not desirable that a person without applying for a sanctioned plan shall carry on unauthorized construction on a plot of land and even after he is served with a stop work notice from the KMC authorities. All such acts of defiance and all contraventions of law are being sought to be justified by the appellant that as the third proviso to Section 400(1) of KMC Act has been inserted, he deserves a notice of hearing before the KMC can proceed with any demolition process of his unauthorized construction. We have already discussed that such proviso and relevant regulations pertaining thereto are related to minor work or minor erection or minor deviation from the sanctioned plan etc. In this case there is a massive

construction, as rightly pointed out by the learned counsel of the KMC, and, therefore, this construction of the appellant is not covered by the third proviso of Section 400(1) of KMC Act, 1980. The Learned Counsel for the appellant has drawn to our attention the relevant circular of the KMC authority where unauthorized construction made to the height of 10 meter to 25 meter are alleged to be retained on payment of retention fees. But such argument is feeble since under clause 4 of regulation 2015 the concerned authorities are to consider not only the height of the building but also several factors which are categorized under the heading terms and conditions for regularizing such unauthorized construction. Therefore the height of an unauthorized construction is not the sole factor to be considered before permitting retention of the unauthorized construction. In fine, I think there is no apparent infirmity in the relevant judgment and order passed by the Learned Single Judge in connection with WPO No. 7 of 2023. Considering all the aspects we are inclined to dismiss the present appeal along with the connected applications. The impugned judgment passed by the Learned Single Judge is hereby affirmed and the instant appeal is dismissed with costs assessed at Rs. **50,000/- (Fifty Thousand Only)** to be paid to the KMC within four weeks from date.

(APURBA SINHA RAY, J.)

I agree.

(ARIJIT BANERJEE, J.)

Arijit Banerjee, J.:

1. I have had the benefit of going through the judgment authored by my learned Brother. I completely agree with the observations made and conclusion reached by my Brother. However, I take this opportunity of adding a few words of my own.

2. The undisputed facts of the case are that:

- (i) The appellant raised a construction without obtaining sanctioned building plan from Kolkata Municipal Corporation (in short 'KMC');
- (ii) Stop work notice was issued to the appellant by KMC under Section 401 of the Kolkata Municipal Corporation Act, 1980 (in short 'KMC Act')
- (iii) The appellant, in defiance of such stop work notice continued with the construction;
- (iv) Since the appellant violated the stop work notice, an FIR has been lodged against him under Section 401(A) of the KMC Act.

3. In the aforesaid factual scenario, KMC took steps against the appellant under Section 400(8) of the KMC Act.

4. One of the arguments advanced by learned Advocate for the appellant is that the provisions of the Transaction of Business of the Mayor-in-Council Regulations 1986, were not adhered to by the respondent authorities. My learned Brother has dealt with the said argument in details and has rightly

rejected that contention of the appellant. We had called for the relevant records of the case. KMC produced such records. We have found sufficient compliance with the provisions of the 1986 Regulations.

5. Another point urged on behalf of the appellant was that the facts of this case did not justify invocation of the emergency power under Section 400(8) of the KMC Act. According to the appellant, Section 400(1) of the KMC Act should have been resorted to by KMC. This means that proceedings should have been set in motion permitting the appellant to participate in such proceedings. The appellant contended that had proceedings been initiated under Section 400(1) of the Act, he would have had a right of hearing. According to him, before an order is passed adversely affecting his property rights in the impugned construction, principles of natural justice ought to have been observed by the KMC authorities.

6. My learned Brother has again rightly rejected the aforesaid argument. No doubt, right to property is a valuable right of a citizen. Although it is no more a fundamental right, it is none the less a constitutional right enshrined in Article 300(A) of the Constitution. However, such a right can be claimed by a person only in respect of a construction lawfully made. A building can be lawfully raised only upon obtaining prior permission from the concerned authority, in this case, the KMC.

7. It is not in dispute that the appellant did not bother to obtain any prior sanction from KMC. This makes the entire construction made by the

appellant wholly illegal. No property right can be claimed in respect of an illegal construction.

8. It was also argued on behalf of the appellant that there was no such urgency in the matter as would warrant pressing into service of Section 400(8) of the KMC Act. It was submitted that it is nobody's case that the impugned structure is in such a dangerous condition as to be a threat to the safety of the persons in and around that building.

Section 400(8) of the KMC Act reads as follows:-

“400(8) Notwithstanding anything contained in this Chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or a work being carried on in contravention of the provisions of this Act, it may, for reasons to be recorded in writing, cause such building or work to be demolished forthwith.”

Nowhere in the aforesaid provision of law is it mentioned that only when a building is in a dangerous condition, the powers under that provision can be exercised. In my considered opinion, if a person, in defiance of stop work notice issued under Section 401 of the KMC Act, continues with illegal/unauthorized construction, the same would be ground enough for KMC to take action in terms of section 400(8) of the Act.

9. The Kolkata Municipal Corporation Act, 1980, is a regulatory piece of legislation. That statute not only empowers but also imposes an obligation

on Kolkata Municipal Corporation to exercise supervisory control over any kind of construction raised by anybody within the territorial limits of KMC. Under the statute, no building or structure apart from a few exceptions spelt out in the Act, can be put up within the Corporation area without prior sanction of KMC. KMC has framed building rules, in accordance with which building plans are sanctioned. The State Legislature has promulgated the 1980 Act, to not only regulate construction of buildings and structures but also to provide civic services in the form of water, drainage, sewerage, collection, removal and disposal of solid waste, fire prevention and fire safety, maintenance of street and public places etc in the municipal area. The rules that KMC lays down, in exercise of power conferred on it under the Act, are statutory rules having the force of law. When a citizen is faced with such a rule, he is obliged to follow the same and not act in violation or derogation thereof. Illegal constructions also have an adverse effect on the environment in general.

10. The emergency power in Section 400(8) of the KMC Act, 1980 has been reserved to the Mayor-in-Council to take immediate action for demolition of a building not only when such unauthorized structure is an imminent threat to the safety and security of life and property around the same but also, in my opinion, when an adamant builder continues with unauthorized/illegal construction, defying stop work notice issued by the civic authority in exercise of statutory power and in discharge of statutory function. If an unscrupulous or recalcitrant builder is permitted to carry on

with unauthorized construction with impunity, in violation of stop work notice, an important object of the 1980 Act will be defeated. This cannot be permitted.

11. The incidence of illegal construction has assumed alarming proportions, at least within the territorial limits of KMC. Reckless and unscrupulous persons, having no regard for law and order, construct buildings without obtaining requisite sanction from KMC. Such unauthorized construction not only puts the lives and limbs of people in an around such building at great risk. Such unauthorized construction also jeopardizes the planned development of the City of Kolkata and puts undue pressure on the civic amenities like sewerage etc. Such builders who take law into their own hands must be dealt with strictly. The message - loud and clear - should go out to all and sundry that a construction made in contravention of the applicable building laws and rules, will not be tolerated. Rule of law must prevail at any cost.

12. I therefore find no irregularity or illegality in KMC having taken action against the appellant under Section 400(8) of the KMC Act. I fully agree with my learned Brother that the appeal deserves to be dismissed with costs.

13. Before parting I would like to address another aspect of the matter. In a huge number of cases, we find that a number of floors have been constructed by the person responsible, either without a sanctioned building plan at all, or in substantial deviation from the sanctioned building plan,

before KMC initiates demolition proceedings in respect of such unauthorized construction under section 400(1) of the KMC Act, 1980, or takes action under the emergency provision of Section 400(8) of the Act. Obviously such constructions do not come up overnight or within a short span of time. A question naturally arises as to how unauthorized constructions to considerable extents are raised when it is the duty and obligation of KMC to ensure that illegal constructions are nipped in the bud? Is KMC failing to discharge its statutory functions in right earnest?

14. We have seen that KMC takes action, when it does, under the relevant provisions of the KMC Act, in respect of unauthorized constructions, not only upon complaints being lodged by other parties, but also on its own. This would indicate that there are officers in KMC who are assigned the duty of keeping vigil over constructions being made within the territorial limits of KMC and the report to the competent authority if they find any unauthorized construction. The fact that illegal constructions of significant proportions are allowed to be made, before any action is taken, if at all, raises a reasonable doubt in our mind as to the sincerity, efficiency, competence and even integrity of the concerned officers/employees of KMC who are responsible for detecting unauthorized constructions and taking prompt action in respect thereof, in accordance with law.

15. In the light of the aforesaid observations, we direct the Commissioner, KMC, to make necessary enquiry and file a preliminary report before the

Registrar, Original Side, of this Court, within 8(eight) weeks from date, clarifying the following issues:

- (i) How does KMC monitor the issue of detecting unauthorized construction within its territorial limits? Are officers /employees of KMC designated for that purpose or assigned such duty? If so, how many of them? Full particulars should be furnished.
- (ii) If there are such officers/employees of KMC who are given the responsibility of keeping a track of unauthorized constructions being made, what is the explanation for such constructions coming up to the extent of several floors before any action is taken by KMC, if at all?
- (iii) To which authority do such officers/employees report in case they come across an unauthorized construction?
- (iv) Is there any system/procedure in place to ensure that the officers/employees of KMC entrusted with the duty of detecting unauthorized construction, discharge their duties sincerely and honestly?
- (v) Has any action ever been taken by the competent authority in KMC against officers/employees of KMC who are responsible for detecting and taking action in respect of unauthorized construction, for dereliction of their duties? If so, then, what action and to what effect?

16. Although this appeal along with the connected applications are disposed of, the appeal will be listed under the heading “To be mentioned” 9

(nine) weeks hence when the Registrar, Original Side, of this Court will place the report of the Commissioner, KMC, before us.

17. 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.)