

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO 634 of 2023

M/s. Kzar Properties Pvt. Ltd. & Anr.
Vs.
The Kolkata Municipal Corporation & Ors.

For the Writ Petitioner	:-	Mr. Raghunath Chakraborty, Adv. Ms. Sabnam Sultana, Adv.
For the KMC	:-	Mr. Gopal Chandra Das, Adv. Ms. Manisha Nath, Adv.
For the State	:-	Mr. Malay Krishna De, Adv. Mr. Debjit Mukherjee, Adv. Ms. Susmita Chatterjee, Adv.
Hearing concluded on	:-	17.03.2023
Judgment on	:-	23.03.2023

Amrita Sinha, J.:-

The matter relates to certain unauthorised construction at the premises no. 25A, Beniapukur Lane, Ward No. 61, Borough VI, under jurisdiction of Kolkata Municipal Corporation ('KMC' for short). A G+5 storied residential building was sanctioned by KMC with benefit under Rule 142 of the KMC building rules for construction at the subject premises.

KMC issued notice under Section 401 of the KMC Act, 1980 ('the Act' for short) on 20th February, 2023 and directed the petitioner to forthwith stop construction including any addition or alteration at the subject premises as the same was constructed in deviation of the approved plan. Despite issuance of the aforesaid notice the petitioner continued raising unauthorised construction and constructed an additional floor without obtaining any sanction.

A first information report was lodged before the police station under Section 401A of the Act on 21st February 2023.

The aforesaid incident of making unauthorised construction was included for discussion in the agenda of the meeting of the Mayor in Council on 1st March 2023. The agenda mentions that it is a case of unauthorised construction by encroachment of mandatory open spaces and shuttering done for one additional floor over sanctioned G+5 storied residential building. The area of unauthorised construction is approximately 621.09 m² and shuttering made for area 242.150 m². Construction has been made at the subject premises defying all the actions taken by KMC.

The Department prepared proposal under Section 400 of the Act along with demolition sketch and infringement statement. The construction infringes several building rules of the Corporation. The agenda records that if the unauthorised construction is allowed to stand, the same may collapse at any moment leading to accident resulting in loss of human life and property and will also create several hazards like fire and environment hazard.

Considering the gravity of the situation and safety of the public in general, the Department recommended demolition of the unauthorised structure forthwith under Section 400(8) of the Act. Agenda was placed in the meeting of the Mayor in Council for approval. The said agenda was approved by the Mayor and it was resolved that appropriate action for demolition of the unauthorised construction be taken forthwith under Section 400(8) of the Act with police force. The resolution was forwarded to the Director General (Building) for execution.

The petitioner is aggrieved by the same.

It has been contended that KMC ought not to have invoked the emergent provision for taking action against the alleged unauthorised construction. KMC ought to have given a reasonable opportunity of hearing to the petitioner to defend the construction made and ought not to have taken sudden action under Section 400(8) of the Act.

It has been submitted that as notice was issued under Section 401 and steps taken under Section 401A, accordingly, consequent proceeding under Section 400(1) ought to have followed. Instead of the same, KMC invoked the emergent provision to demolish the structure. Without subjective satisfaction that the construction is unsafe and may cause accident leading to loss of life and property, the impugned notice ought not to have been issued.

The authority does not have unbridled and unfettered power to invoke the emergent provision and ought to have satisfied themselves that such an action is the only alternative to deal with the issue. The department followed a stereotyped agenda and adopted the resolution to invoke emergent provision without proper application of mind. There is nothing on record to show that the authority assessed the immediate risk of the unauthorised construction for which the impugned notice has been issued.

As the emergent provision takes away the right of the petitioner to defend the construction made, the authority ought to have exercised the said provision with caution and only as a last resort and not in a casual manner. By the same the valuable right of the petitioner to protect his property is taken away. The right of preferring statutory appeal is also lost if the construction is demolished. Such sweeping power is to be exercised very sparingly and not on a regular basis in pre-printed format.

The act of the authority is contrary to the KMC (Transaction of Business of the Mayor in Council) Regulations, 1986. The provision for post facto regularisation of the construction made becomes redundant if the construction is demolished prior to consideration of the application for regularisation.

The impugned order has been passed in violation of the principles of natural justice, equity and fair play.

In support of the aforesaid submission the petitioner relies upon the various provisions of the Act, the building rules and the Regulations. Reliance has been laid

on the judgment delivered by this court in the matter of ***Saif Impex Pvt. Ltd. and another -versus- The Kolkata Municipal Corporation and others reported in (2014) 3 CAL LT 706 (HC)*** wherein the Court opined that the municipal authority need not resort to the provision contained in Section 400(8) as there is nothing on record to show the existence of immediate threat to public safety.

Reference has been made to the judgment delivered by this court in ***Sri Prahlad Singh Jaggi and others -versus- Kolkata Municipal Corporation and others reported in (2017) 4 CAL LT 564 (HC)*** wherein the Court held that Section 401 is in essence a preparatory action in aid of a proceeding under Section 400(1) of the Act.

Stress has been laid on the decision passed by this court in ***Sunil Chandra Dey -versus- State of West Bengal and others reported in 2007 (2) CLJ 674.***

Prayer has been made to set aside the impugned order and to restrain KMC from taking any coercive step against the subject structure.

Learned advocate representing KMC opposes the prayer of the petitioner. It has been submitted that the petitioner has admittedly raised construction of additional floor without obtaining any sanction. The mandatory side open spaces have not been maintained. Even though stop work notice was issued, the petitioner continued with the unauthorised construction. The decision to demolish by invoking the emergent provision, has been taken in the meeting of the highest body of the KMC.

It has been contended that an offender does not have the right to choose under which provision action is to be taken for the offence committed by him. The department after considering all documents of the case and taking note of the fact that the unauthorised construction is unsafe and may cause accident leading to loss of life and property took the decision to invoke the provision of Section 400(8) of the Act. The said action of the authority ought not to be interfered with by the court.

Prayer has been made for dismissal of the writ petition.

I have heard and considered the rival submissions made on behalf of both the parties. On perusal of the averments made in the writ petition and the documents annexed thereto it is clear that the petitioner has practically admitted making unauthorised construction. The question is whether the provision of Section 400(1) or Section 400(8) is to be invoked for dealing with such unauthorised construction.

Section 400 of the Act deals with order of demolition and stoppage of buildings and works in certain cases and the appeal. The said Section has eight sub-Sections. Section 400(1) lays down that where a building has been constructed without or contrary to the sanction or in contravention of any of the provisions of the Act or the rules or the regulations made thereunder, the municipal Commissioner may make an order directing demolition of such erection with a copy of the order of demolition with a brief statement of the reasons therefor.

The first proviso to the aforesaid sub-Section lays down that no order of demolition shall be made without giving a reasonable opportunity to the person responsible for making construction to show cause as to why such order shall not be made.

The second proviso to the aforesaid sub-Section lays down that where the erection has not been completed, the municipal Commissioner may direct such person to stop the construction until the expiry of the period within which an appeal against the order of demolition may be preferred.

Section 400(3), 400(4), 400(7) deals with the provisions for appeal. Section 400(8) of the Act lays down that notwithstanding anything contained in the Chapter, if the Mayor in Council is of the opinion that immediate action is called for in relation to the building which has been constructed in contravention of the provisions of the Act, it may, for reasons to be recorded in writing, cause such building to be demolished forthwith.

In the instant case KMC found that the building constructed by the petitioner is in contravention of the sanctioned plan and also the Act and the supporting rules. KMC issued stop work notice to the petitioner but the petitioner continued with the construction work in violation of the said notice. KMC thereafter lodged complaint before the police station. Despite the above, the petitioner merrily continued with the construction work. It was in such a situation that KMC placed the matter before the Mayor in Council for taking a decision with regard to invoking the provision of the Act so that immediate steps can be taken to stop and remove the unauthorised construction made at the instance of the petitioner.

Petitioner cries foul citing that opportunity of hearing was not given to him and he did not have any chance to defend the construction made. It appears from the contents of the writ petition that the petitioner has not claimed that he raised construction of the additional floor after obtaining sanction from KMC. Sanction was granted for construction of G+5 storied building and not beyond that.

According to Section 392 of the Act, no person shall elect or commence to erect any building except with the previous sanction of the municipal Commissioner and in accordance with the Act and the rules and regulations framed thereunder. Section 393 of the Act makes it clear that every person who intends to erect a building shall apply for sanction. For constructing additional floor, the petitioner was obliged to obtain sanction prior to commencing execution of the work.

The petitioner, even after being made aware that the construction which he was making was contrary to the Act and the corresponding rules, ignored the stop work notice and carried on with the construction work. It was absolutely impermissible for the petitioner to continue with the construction work contrary to the stop work notice. It appears that the petitioner was under the impression that, by the time KMC actually takes steps in the matter, the construction will be over and thereafter there will be no requirement to demolish the same.

The petitioner was completely caught unaware when the KMC issued the notice for forthwith demolition of the offending structure. To avoid the demolition proceeding the petitioner is presently raising issues with regard to the provision of law which the authority ought to have invoked. It is not the case of the petitioner that the additional floor that has been constructed does not require a sanction. The petitioner is aggrieved because immediate action has been directed to be taken without granting an opportunity of hearing to him prior to passing the order of demolition.

Currently, it has become a growing trend to raise construction prior to obtaining a sanction and thereafter if, by chance, the offence is detected then reluctantly seek for regularisation. More often than not such unauthorised construction remains undetected, or if it is detected at all, then the same somehow gets settled/regularized in lieu of monetary gratification. The offenders are always in the lookout of soft targets to grease their palms so that the unauthorised construction is left untouched.

Should an offender be given the liberty to choose under which provision of law he is to be tried or prosecuted? Should it not be the duty and responsibility of the controlling body to invoke the appropriate provision to punish an offender? The statutory body is the competent authority to take a decision in the matter. Any act done in contravention of the legal provision attracts punishment. Depending upon the gravity of the offence, punishment is imposed. The action of the authority is, however, open for judicial review at the instance of an aggrieved party.

KMC has inflicted the highest punishment to the petitioner for which the petitioner lost the opportunity of hearing and also lost the chance to prefer appeal against the order of demolition. The said order has been passed taking note of the fact that the construction made is an unsafe one and may lead to accident resulting in loss of human life and property. If any construction is found to be unsafe, the same should not be permitted to stand. But prior to forming an opinion that the

construction is unsafe, the authority must be doubly sure that the said opinion is formed on proper application of mind and upon consideration of all necessary facts.

At the time of inflicting the most stringent punishment, there is no scope to pass order without verifying and scrutinising all facts and figures as after implementing the order there will hardly be any scope to revert to status quo ante. The same will cause irreparable loss to the party who may have suffered the order which ought not to have been passed under the given set of facts.

In the instant case affidavits are yet to be called for. The court did not have the opportunity to scrutinise the documents relying upon which the impugned order has been passed. The court would like to believe that the order impugned was passed upon verification of all the documents and upon subjective and objective satisfaction that the construction is an unsafe one and is required to be brought down immediately for safety reasons. The Mayor in Council, being the highest body of KMC which is the repository of all documents relating to the construction made, is the appropriate authority to take a decision in the matter.

It will not be proper for the writ Court to interfere with the impugned order without itself verifying the documents relying upon which the same was passed. The purpose for invoking Section 400(1) is different from invoking Section 400(8). In case of construction made in contravention of the Act and the rules, Section 400(1) is invoked but if immediate action is required to be taken, then Section 400(8) is applied. It is for the authority being the expert body to decide which provision to invoke and not for an offender to choose under which provision he is to be tried. Only if an immediate action is called for, then recourse to Section 400(8) is taken. It is not necessary that in all cases Section 400(1) has to be applied for dealing with cases of unauthorised construction.

Prior to depriving a party an opportunity of hearing and shutting away the forum for preferring appeal, necessary ground work is mandatorily required to be done. There should be a conclusive substantive opinion that if the offending

structure is not brought down immediately, then accident may occur causing loss of valuable life and property. If the imminent threat to life and property is absent, then such a course ought not to be availed of at the very first stage. Order of demolition can also be passed after giving the offender an opportunity of being heard. Demolition is the ultimate aim of the authority to get rid of an unauthorised structure.

In *Saif Impex (supra)* the Court was of the opinion that as there is nothing on record to show the existence of immediate threat to public safety, accordingly, the authority need not resort to Section 400(8) of the Act.

The issue in *Sri Prahlad Singh (supra)* is not similar to the issue at hand. As such, the ratio laid down therein cannot be made applicable in the facts and circumstances of the present case.

In *Sunil Chandra Dey (supra)* the Court held that exercise of power under Section 400(8) cannot be arbitrary or capricious but must satisfy the test of reasonableness. Recourse to Section 400 is not to be adopted in all cases, but only sparingly, in cases of great emergency. For exercise of the drastic power under Section 400(8) the Corporation do not enjoy unbridled and unfettered discretion but a duty is cast on them to discharge certain statutory obligations, and in the process to act reasonably.

It seems that the authority being unable to stop the petitioner from continuing with the unauthorized construction, took the ultimate step to demolish the unauthorized construction being oblivious of the provision of law. The respondent authority being a statutory body is bound to act reasonably, in terms of the statute and cannot apply the law to the disadvantage of an individual. Even an errant offender is to be dealt with in accordance with the statutory provisions and not on impulsive decision taken without adhering to the settled principle of law. The authority ought to act diligently to prevent unauthorized construction at the very

initial stage and not permit the construction to come up to a considerable level before taking action to stop it.

Keeping the matter pending and calling for affidavits will be time consuming. The very purpose for invoking the emergent provision will be frustrated if the matter remains hanging in the records of this court for an indefinite period.

In view of the above, the court thinks it fit to remand the matter back to the KMC to re-verify the documents and the necessary facts and figures to come to a fresh decision as to whether there is any requirement of invoking provision of Section 400(8) of the Act. Only if there is grave emergency and immediate demolition is the only remedy keeping in mind the safety issue, then the authority may move ahead with the said demolition; but if the immediate security threat is not there, then an opportunity of hearing shall be given to the petitioner for defending the unauthorised construction.

Steps shall be taken in the matter at the earliest but positively within a period of eight weeks from the date of communication of this order. Till a decision is taken in the matter, the impugned order of demolition shall be kept in abeyance. Further construction at the subject structure in any manner whatsoever may aggravate the risk factor, and as such, the petitioner is required to abstain from making any construction at the disputed site. The petitioner is, accordingly, restrained from making any construction in the subject structure till a final decision is taken as indicated herein above. The Officer in Charge, Beniapukur police station is directed to keep strict vigil over the property to ensure that no construction in any manner whatsoever is carried out at the subject structure and no third party right is created till a final decision is taken by KMC.

It is made clear that the court is not at all dissuading the Mayor in Council in passing order under Section 400(8) of the Act, but is only drawing the attention of the authority that the said provision may be invoked only after subjective and objective satisfaction is recorded about the immediate threat to safety. The emergent

provision may be resorted to only in emergent situations and not in ordinary course of events.

Writ petition stands disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)