IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO 1211 of 2023

Amitava Das
Vs.
State of West Bengal & Ors.

For the writ petitioners	:-	Mr. Sumitava Chakraborty, Adv. Ms. Ipsita Ghosh, Adv.
For the KMC	:-	Mr. Subhrangsu Panda, Adv.
Heard on	:-	29.11.2023
Judgment on	:-	13.12.2023

Amrita Sinha, J.:-

The demand of Rs. 13,36,382/- requiring security deposit money to be paid before proceeding under Section 400 (1) of the KMC Act, 1980 (hereinafter referred to as 'the Act') against the unauthorized construction at premises no. 176/14/22, Raipur Road, Regent Estate, Kolkata 700092, Ward No. 96, Borough X of the KMC as per Office Circular no. 16 of 2021-22 dated 2nd March 2023 of the DG (Building), KMC is impugned in the present writ petition.

The security deposit is 50% of the amount of fees and charges payable for retention of the unauthorized construction.

The petitioner has averred in the writ petition that he has raised a temporary structure made of steel struss covered with tin shed with sliding glass panel made of aluminium. Originally the property comprised of G+4 storied pucca brick built structure raised according to sanctioned plan issued by the Corporation.

The primary ground for challenge of the demand notice is that there is no provision in the Act and the corresponding Rules for demand of pre deposit for taking steps under Section 400 (1) of the Act.

The petitioner contends that in the absence of specific provision in the Act and the supporting Rules, the Circular could not have been relied upon by the Corporation demanding pre deposit for conducting hearing.

The petitioner has placed the provisions of the Act, the building Rules and Kolkata Municipal Corporation (Regularization of building) Regulations, 2015 which came into effect from 20th June, 2015.

It has been submitted that in the absence of specific mandate in the Act requiring pre deposit, the same could not have been imposed upon by the Corporation solely relying upon a Circular of the Corporation.

The petitioner relies upon the decision delivered by the Hon'ble Supreme Court in the matter of ***Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries*** reported in ***(2008) 13 SCC 1*** wherein the Court held that a Circular which is contrary to the statutory provisions has really no existence in law.

Prayer has been made for setting aside the demand notice.

Learned advocate representing the Corporation opposes the prayer of the petitioner.

It has been submitted that the structure at the subject premises suffers from unauthorized construction as the same has been constructed in deviation of the sanctioned plan. There has been infringement of Rules 62, 69, 70, 74, 133 and 134 of the KMC Building Rules, 2009 and several other provisions. A stop work notice was issued and thereafter proceeding was initiated under Section 400 (1) of KMC Act. On issuance of the demand notice dated 27th April, 2023, the petitioner filed representation before the authority which is pending consideration. The prayer made in the writ petition is for consideration and disposal of the said representation.

The demand has been raised by the Corporation relying on the Circular of the Corporation as per the resolution adopted by the Mayor in Council duly approved by the Mayor. The security deposit amount has been calculated on the IGR value in respect of the unauthorized area that has been constructed.

The 50% pre deposit is the fees for retention of the unauthorized construction and/or unauthorized change of use prior to initiating proceeding under Section 400 (1) of the Act. The person responsible will be liable to deposit the balance 50% amount if the order for retention of the unauthorized construction is passed. In the event of an order of demolition being passed, KMC will refund the 50% amount initially deposited upon demolition of the unauthorized construction. If the person responsible fails to demolish the unauthorized construction, KMC will demolish the same and refund the amount held by the Corporation after deducting the cost of demolition.

The Corporation defends their action in issuing the demand notice requiring pre deposit to be made prior to initiation of the demolition proceeding.

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.

Section 400 of the Act authorizes the Municipal Commissioner to make an order directing demolition of the erection work if the same is without or contrary to the sanction issued by the Corporation. The third proviso to Section 400(1) was incorporated with effect from 15th January 2015 mentioning 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 construction, or execution of any minor work without sanction under the Act or the Rules or the Regulations made. Section 416 of the Act prohibits change of use of building. The Regulations, 2015 was enacted for hearing and regularization of cases under Section 400 (1) and Section 416 of the Act.

The Regulations prescribe that before calculation of fees, order issued by the officer delegated by the Municipal Commissioner, shall be placed before the

Mayor/Mayor in Council for necessary concurrence/ approval. Thereafter, the Municipal Commissioner may by order charge fees as will be calculated on the basis of rates/ fees provided and prescribed under the relevant heads in the Budget Schedule under Section 131 (3) of the Act.

The Regulations imply that fees will be calculated on the basis of the rates / fees provided and prescribed under the relevant heads in the Budget Schedule. Neither the Act, nor the Building Rules or the Regulations require for pre deposit of any amount prior to initiation of the demolition proceeding. Till there is specific provision in the Act or the corresponding Rules or the Regulations, the Corporation cannot demand any amount to be paid as pre deposit relying upon a departmental Circular.

For the purpose of adding anything new to the existing Act, Rules or Regulations, necessary amendment is required to be made. Without the required amendment, it will not be proper for the Corporation to raise demand only relying upon the departmental Circular. The Circular can be only in the aid of the existing Rules and Regulations. The Circular cannot be relied upon for supplanting provision which does not exist in the parent statute.

The Hon'ble Supreme Court in Ratan Melting (supra) laid down that a Circular which is contrary to the statutory provision has no existence in law. Here, the Circular relied upon demanding pre deposit is contrary to the statute.

In view of the above, the impugned action of the Corporation in raising demand for pre deposit has to be held as illegal and contrary to the provisions of law. The impugned demand does not have any legal sanction and is liable to be set aside. The same is, accordingly, set aside. However, it will be open for the Corporation to take necessary steps to deal with the unauthorized construction, in accordance with law.

The writ petition stands allowed.

No costs.

Later:

After the judgment was delivered in open Court it has been submitted by learned advocate representing the Corporation that the Corporation will permit the petitioner to participate in the proceeding under Section 400(1) of the Act without insisting upon payment of the pre-deposit. It will be open for the petitioner to participate in the hearing.

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.)