

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO 2257 of 2022

Chandra Udyog & Anr.
Vs.
Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Abhrajit Mitra, Sr. Adv. Mr. Arindam Banerjee, Adv. Mr. Chayan Gupta, Adv. Mr. Souradeep Banerjee, Adv. Mr. Dwip Raj Basu, Adv.
For the KMC	:-	Mr. Ashoke Kr. Banerjee, Sr. Adv. Mr. Arijit Dey, Adv.
Hearing concluded on	:-	16.03.2023
Judgment on	:-	12.05.2023

Amrita Sinha, J.:-

The matter relates to the premises no. 2, Camac Street presently known as Abanindranath Thakur Sarani, PS – Shakespeare Sarani, Kolkata – 700 016, under Borough –VII of the Kolkata Municipal Corporation ('KMC' for short). The petitioners, claiming to be owners of the property, submits that the said premises comprises of land measuring about two bighas two kathas eight chittaks and 28 sq. ft. along with two old buildings standing thereon, one being the main building and the other the annexe thereof. The main building and the annexe building both are three storied structures, more than ninety years old.

Sometimes in May, 2006 the petitioners, for the first time, discovered from newspaper reports, that the said property has been included in the list of heritage properties prepared by KMC under Grade – IIA. The petitioners objected to the recording of the structure as heritage. They were made to understand that the properties categorised in Grade – IIA may be permitted to make new construction in the open land within the premises in compatible manner with the heritage building,

but no external change will be permissible and in no case new construction should obstruct the view of the heritage building.

The petitioners sought permission to repair the premises in 2013 followed by reminders in 2014 but the municipal authorities did not grant permission and also prevented the petitioners from carrying on the repairing work. The petitioners allege that the main building is in a dilapidated condition and requires very urgent repairing work for maintenance of the same.

The petitioners approached the Project Management Unit of KMC with a re-development plan in 2019 but the said plan was not approved by KMC. No reasons have been put forward for disapproval of the re-development plan. Inaction on the part of KMC caused a portion of the main building to collapse in the year 2020.

After the pandemic subsided in the end of December, 2021 the petitioners engaged an expert of the Construction Engineering Department of Jadavpur University to make a health audit of the main building. The expert opined that the main building is required to be dismantled and demolished forthwith. The building is uninhabitable at present and there is no scope to restore the condition of the building by repairs. Demolition is the only option left at this stage. Armed with the aforesaid Health Assessment Report, the petitioners applied before KMC with request to pass immediate order of demolition. KMC is neither permitting the petitioners to repair the structure nor allowing the petitioners to demolish the same in aid of re-development.

It has been contended that the petitioners being owners of the subject structure is entitled to enjoy the same in accordance with their free will and desire but incorporation of the structure in the heritage list is standing in their way to utilise their property as per their requirement. Sanction for construction of new building on removal of the existing ruinous building cannot be refused as the same is an unreasonable restriction on the right of the petitioners as enshrined under Article 300A of the Constitution of India. The same is also contrary to the statutory

obligation of KMC to take steps in accordance with the provision of Section 411 of the KMC Act, 1980 read with Section 29(k) of the Act.

It has been contended that the declaration of heritage building by the resolution of KMC has been set at naught by various orders passed by this Court, and accordingly, the subject building ought not to be treated as heritage and the petitioners ought to be permitted to demolish and reconstruct the same in accordance with the plan sanctioned by KMC.

In support of the submission that the property be delisted from the list of heritage properties maintained by KMC, the petitioners rely upon the judgment delivered by this Court in the matter of **Kamal Dey –vs- Archaeological Survey of India** reported in **2015 SCC Online Cal 6605**, **Purti West Enclave Pvt. Ltd. –vs- Kolkata Municipal Corporation** reported in **(2016) 3 Cal LJ 56**, **Bimal Chandra Saha –vs- Kolkata Municipal Corporation** reported in **2017 SCC Online Cal 14783**, **Yusuf Khan –vs- State of West Bengal & Ors.** reported in **2019 SCC Online Cal 2689** and the judgment dated 25th March, 2021 in GA 1 of 2020 with APO 148 of 2019 in WPO 479 of 2017 in the matter of **Kolkata Municipal Corporation & Ors. –vs- Yusuf Khan & Ors.**

Learned senior advocate representing the KMC opposes the prayer of the petitioners.

It has been submitted that the Corporation in its meeting held on 25th February, 2009, upon perusal of the recommendation of the Heritage Conservation Committee, approved the recommendation of the Mayor-in-Council regarding the list of heritage buildings and their gradation under Grades – I, IIA and IIB. A public interest litigation has been filed by the Indian National Trust for Art and Cultural Heritage (INTACH) before this Court being WPA 12676 of 2019 involving the heritage list prepared by the Heritage Conservation Committee.

By order dated 26th July, 2019 the Hon'ble Division Bench was pleased to pass interim order in the matter with direction to file affidavits by the parties. The

Hon'ble Division Bench was pleased to pass an order of injunction restraining the respondents from giving any effect to any decision of downgrading/delisting any other building during the pendency of the writ petition and further order of injunction restraining the respondents from causing any demolition of any building declared as heritage during pendency of the writ petition. The interim order of injunction is in force till date.

The petitioners did not make any application under Section 425 O of the KMC Act, 1980 for declaration that the premises has ceased to be heritage. It has been contended that the petitioners have also not challenged the inclusion of the premises in the heritage list maintained by the Heritage Conservation Committee.

KMC has relied upon a bunch of documents in support of the submission that the resolution to enlist the properties in the list of heritage properties and the gradation thereof was in accordance with law and the same is liable to be followed strictly.

It has been submitted that the cause of action for filing the instant writ petition allegedly arose when the property in question was included in the list of heritage properties way back in the year 2005 and the petitioner has filed the present writ petition in the year 2022. The same is a mischievous act on the part of the petitioners and the writ petition is liable to be dismissed on the ground of inordinate delay in approaching the Court.

It has been argued that the petitioners, after getting knowledge of the orders passed by this Court in a couple of matters declaring the resolution of KMC approving the heritage list as bad in law, have approached this Court for commercial exploitation of the property.

It has been argued that the prayers made in the writ petition are not supported by any averment or submission. There is no foundation or basis to seek the relief prayed for and reliance has only been placed upon the judgments delivered by this Court in respect of heritage properties within the jurisdiction of KMC. In

support of the aforesaid submission reliance has been placed on the decision of ***State of Rajasthan -vs- Ganeshi Lal*** reported in ***AIR 2008 SC 690*** wherein the Court held that reliance on decision without looking into the factual background of the case is impermissible.

KMC relies upon the judgment delivered by this Court on 31st March, 2016 in ***WP 146 of 2016 ; Purti West Enclave Pvt. Ltd. -vs- KMC & Ors.***, order dated 30th August, 2017 in APO 263 of 2016 GA 2429 of 2017 with WP 146 of 2010; ***Kolkata Municipal Corporation & Anr. -vs- Purti West Enclave Pvt. Ltd. & Ors.***, judgment dated 16th July, 2018 passed in ***WP 146 of 2010; in Purti West Enclave Pvt. Ltd. -vs- KMC & Ors.***, judgment dated 21st June, 2022 in ***WPO 903 of 2022 in M/s. G. K. Soni Housing and Development Pvt. Ltd. -vs- KMC & Ors.***, judgment dated 26th July, 2022 in IA No. GA 1 of 2022 in ***APO 68 of 2022 in KMC & Ors. -vs- M/s. G. K. Soni Housing and Development Pvt. Ltd.***

The respondents pray for dismissal of the writ petition.

I have heard and considered the submission made on behalf of both the parties.

The petitioners have annexed several photographs of the subject structure in the writ petition. A mere glance of the said photographs is, *prima facie*, enough to arrive at a finding that the structural health of portions of the building in question is extremely poor. The building is in urgent need of repairs. Whether the structural health of the building can be revived by way of mere repairs or the building is required to be pulled down making way for new construction, is to be decided by the appropriate authority of KMC.

The petitioners have relied upon an expert report of a structural engineer and have approached KMC on various occasions with a prayer to permit them to demolish the existing structure in line with the advice given by the structural engineer and to sanction a building plan so that development can be made. KMC, for reasons best known, is yet to take a decision in the matter.

Both the parties have relied upon several precedents in support of their case. Whether a particular property included in the list of heritage properties is in need of urgent repairs for maintaining the heritage status, is to be ascertained by the concerned department of KMC. All heritage properties in the list may not require similar treatment as regards maintenance and repairs. There may be properties in the list which are well maintained and deserves a position in the list. At the same time, there may be properties which are left unmaintained and requires urgent repairing work. The two groups of properties in the same list are liable to be treated in diverse manner.

In the affidavit in opposition KMC has mentioned that the petitioners are yet to file an application under Section 425 O of the Act seeking removal of the property from the heritage list. It appears that though a formal application under the aforesaid Section has not been made, but the petitioners have made representations annexing copy of the structural health report of the engineer seeking permission to demolish the structure and thereafter to raise new construction thereon. KMC, instead of sitting over the prayer made by the petitioners, ought to have treated the representation as one in consonance with the provision of Section 425 O of the Act and taken a decision thereon.

By not exercising jurisdiction to either allow or refuse the prayer of the petitioners, KMC has maintained a stony silence and has left the petitioners in the lurch. The petitioners are neither in a position to effect repairs nor can demolish the structure. The petitioners are certainly being deprived of their right to enjoy their personal property according to their own wish and desire. The same cannot be permitted by the Court.

The Court, not being an expert to assess the structural health of the subject structure, has no other alternative but to remand the petitioners to KMC for taking a decision on the prayer made by them.

In view of the above, the instant writ petition is disposed of by directing the Municipal Commissioner and the concerned officer of the Heritage Conservation

Committee to take a decision on the representation filed by the petitioners in May, 2022, in accordance with law, after giving reasonable opportunity of hearing to all the necessary parties and to pass a reasoned order and communicate the same to the parties.

Prior to taking a decision in the matter the Municipal Commissioner through his delegate and a competent officer of the Heritage Conservation Committee shall conduct spot inspection of the property upon prior notice to the necessary parties to ascertain the structural health of the subject structure. The report of spot inspection shall be circulated amongst all the parties. After circulation of the spot inspection report, hearing shall be conducted to allow the parties to produce necessary documents and make submission in support of their stand. Final order shall be passed thereafter.

The entire exercise shall be conducted and concluded at the earliest, but positively within a period of twelve weeks from the date of communication of this order.

The writ petition stands disposed of.

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.)