

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side**

Present :- Hon'ble Justice Amrita Sinha

WPO 2321 of 2022

Goutam Das & Ors.

Vs.

The Kolkata Municipal Corporation & Ors.

For the writ petitioner	:-	Mr. Partha Sarathi Deb Barman, Adv. Mr. Amit Gupta, Adv.
For the KMC	:-	Mr. Alak Kr. Ghosh, Adv. Mrs. Sima Chakraborty, Adv. Mr. Suranjan De Sarkar, Adv.
For respondent nos. 5 to 8 & 10	:-	Mr. Samrat Chowdhury, Adv. Mr. Anit Dey, Adv.
Hearing concluded on	:-	06.04.2023
Judgment on	:-	28.04.2023

Amrita Sinha, J.:-

The petitioners, inter alia, pray for a direction upon the Special Officer (Building), Kolkata Municipal Corporation ('KMC' for short) not to reopen the demolition case no. 29-D/Bldg/Br-II/19-20 and to act in accordance with the order passed on 21st October, 2019 in the said demolition case.

The petitioners pray for a further direction upon the respondents not to proceed any further with the notices issued by the Special Officer for reopening the aforesaid demolition case.

The petitioners claim to be the heirs and legal representatives of the recorded thika tenant in respect of the premises no. 63B, Raja Naba Krishna Street, Kolkata 700005. Though rent receipt was issued in favour of the predecessor in interest of the petitioners from the regional thika tenancy office, but petitioners have annexed document to show that final determination of thika

under the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 is pending consideration till date.

The petitioners claim that due to heavy rainfall and natural calamity in the year 2019, first floor of the subject premises got heavily damaged. The building became inhabitable; accordingly, the petitioners took steps to repair the said building. When the repairing work was ongoing, a notice was issued upon the petitioners holding them responsible for making unauthorised construction and demolition case no. 29-D/Bldg/Br-II/19-20 was initiated against them.

The private respondents, claiming themselves to be the owners of the subject property, filed a writ petition before this court being WP No. 8834 (w) of 2019 praying for a direction upon KMC to take steps for demolition of the unauthorised construction at the subject premises. The petitioners were arraigned as party respondents in the said writ petition. By an order dated 1st August, 2019 the court directed the Corporation to take steps under Section 400 of the Act and complete the entire proceeding within three months from the date of communication of the order.

In compliance of the direction passed by the court, the Special Officer heard the matter on 2nd September, 2019. The petitioners were represented by their learned advocate but none were present on behalf of the private respondents i.e, the petitioners in the earlier writ petition. Another date of hearing was fixed on 12th September, 2019 when also learned advocate for the petitioners were present but none appeared on behalf of the private respondents. As last chance date was fixed on 30th September, 2019 when also none represented the private respondents. Finding no other alternative, the Special Officer concluded the hearing on the said date. The petitioners placed documents and made necessary submissions in support of their stand.

The Special Officer recorded the facts of the case. It was recorded that the petitioners being persons responsible constructed RCC columns in the ground floor and RCC slab on the first floor after demolishing the existing two storied tin

shed structure. The front and side open spaces required to be maintained were infringed. The total area of unauthorised construction is 64 sq. mts. The persons responsible pleaded for regularisation of the infringements/deviations under the provisions of the Act and the Rules.

The Special Officer opined that the deviations were well within the premises belonging to the persons responsible and they are not very serious in nature. The said deviations were treated as 'minor unauthorised erection or work' and the deviations were permitted to be regularised and retained subject to the conditions as mentioned in the order passed by the Special Officer on 21st October, 2019.

The first condition was that the persons responsible must furnish a structural certificate certified by KMC empanelled structural engineer certifying that the structure is stable, safe and sound and the materials used were as per the latest edition of the National Building Code of India. The second condition was that the persons responsible must pay the fees for retention of the said construction within thirty days of the receipt of the calculation sheet to be prepared by the respective department of KMC. The third condition was that the person responsible must furnish an affidavit declaring on oath that they will not make any construction whatsoever in the impugned premises without prior sanction from KMC. Non-compliance of any of the above conditions would invite demolition of the unauthorised construction at the cost and risk of the persons responsible.

Copy of the order was directed to be served on the concerned parties for information and necessary action.

The petitioners admit that the copy of the order of the Special Officer was never served upon them. The calculation sheet according to which the fees for retention was to be paid by the petitioners was also not forwarded to them. As the fees liable to be paid by the petitioners was not intimated, the petitioners could not pay the amount on account of retention of the said unauthorised construction.

A notice was served upon the petitioners for a hearing in connection with the same construction in respect of the self same demolition case. On receipt of the said notice the petitioners, through their learned advocate, submitted a representation before the concerned Special Officer in August 2021 clearly mentioning that as the matter was already disposed of in 2019 and no appeal was preferred from the same, accordingly, there is no scope to reopen or review the said order. The same amounts to violation of the principles of natural justice.

Similar notices of hearing were given to the petitioners by the Special Officer (Building) in November 2021 and March 2022. The petitioners, through their learned advocate, filed objection before the concerned authority challenging the action of the Special Officer to reopen the demolition case all over again. None of the objections were replied by KMC.

Anticipating further action on the part of KMC to reopen the demolition case, the petitioners filed the present writ petition.

It is the specific case of the petitioners that the Special Officer, could not under any circumstances, review his own order till law in this regard permits to do so. It has been contended that after the matter has been disposed of by the Special Officer, the said officer becomes *functus officio* and loses the right and authority to reopen the case file of the demolition case all over again. The same will cause serious miscarriage of justice and there will be no finality of proceedings initiated by KMC under the Act.

In support of the aforesaid submission advocate for the petitioners rely upon the judgment delivered by the Hon'ble Supreme Court of India in the matter of ***Dr. (Smt.) Kuntesh Gupta versus Management of Hindu Kanya, Mahavidyalaya, Sitapur (UP) & Ors.*** reported in ***(1987) 4 SCC 525*** (paragraph 11).

Petitioners pray for implementation of the order passed by the Special Officer.

Learned advocate representing the private respondents vehemently oppose the prayers of the petitioners. According to the private respondents they are the joint owners of the subject property which comprises of land with single storied tin shed structure, but presently, two storied pucca, illegal and unauthorised construction at the behest of the petitioners is standing thereon. A complaint was lodged before the local police station seeking an order of restraint to restrain the petitioners from continuing with the unauthorised construction. As the petitioners did not stop the unauthorised construction, accordingly, the private respondents were compelled to approach this court by filing writ petition wherein the court was pleased to pass direction upon the Corporation to take immediate steps against such unauthorized construction, in accordance with law.

According to the private respondents, despite order being passed by the Hon'ble court, the Corporation did not take steps to comply the same. The private respondents, through their learned advocate, served notice upon the Corporation requesting them to act in accordance with the order passed by the court.

The private respondents contend that the proceeding allegedly initiated by the Special Officer was not brought to their notice, and as such, the private respondents remained unrepresented in the hearing conducted by the Special Officer. The entire proceeding was initiated and concluded without service of notice upon the private respondents.

It has been submitted that the notice in connection with the demolition proceeding was served at the address of the petitioners and not at the address of the private respondents. The private respondents though being the owners of the said property, do not reside at the said property but they reside at a different address. No notice was served at the address of the private respondents. As the private respondents could not attend the proceeding on account of non-service of the hearing notices, accordingly, it was not possible for them to point out the illegalities and irregularities in the construction made by the petitioners.

It has been argued that the initial construction was a tin shed structure, which was demolished by the petitioners and a pucca construction raised thereon without obtaining any sanction/permission either from the owners or from the Corporation. The said construction being illegal and unauthorised is liable to be demolished.

Prayer has been made for dismissing the writ petition with further direction to rehear the demolition proceeding afresh upon giving proper opportunity of hearing to all the parties.

KMC opposes the prayer of the petitioners. It is the case of the Corporation that though the Special Officer prepared and signed the order on 21st October, 2019 the said order was not formally communicated to either of the parties. The file was returned to the Deputy Chief Engineer (Building) for calculation of fees/charges for retention of the subject structure. It was detected at that point of time that there was no mention about the measurement of the area of unauthorised construction in the demolition sketch and as such the file was returned to the concerned borough for preparation of demolition sketch.

A further spot inspection was conducted for preparation of revised demolition sketch and the infringement statement as per the present status of the building with a note forwarded to the Director General (Building) for taking decision in the matter. The Director General, upon consideration of the relevant papers and documents, issued instruction for rehearing of the demolition case as it was noticed that the earlier proceeding was decided ex parte because the notice of hearing could not be served upon the private respondents as they reside at a different residential address. Moreover, the earlier order prepared and signed by the Special Officer was not yet officially published/served upon the persons responsible.

KMC denies that the demolition proceeding is to be reopened. It is the submission that the proceeding is continuing and yet to be concluded. As there were certain errors in the earlier proceeding, accordingly, to prevent further

miscarriage of justice, multiplicity of legal proceedings and to abide by the principles of natural justice, decision was taken to rehear the matter after giving opportunity of hearing to all the necessary parties.

It has been contended that until and unless the order is formally communicated to a party it cannot be said that the same was actually passed or published. The demolition proceeding remained at a dormant stage. The same can, at best, be treated as an internal document, yet to be finalised and no cognizance can be taken relying on the same.

The decision to review was taken at a higher level by the Director General in accordance with the KMC (Regularisation of Building) Regulations, 2015, wherein Regulation 6 lays down that if the Municipal Commissioner so thinks that the process of hearing was not followed properly, he may pass further orders after review/recall of the earlier order.

In support of the contention that till the order is formally communicated or published the authority reserves the right to review the same, learned advocate representing KMC relies upon the following decisions: ***Chhattisgarh State Electricity Board versus Central Electricity Regulatory Commission and Others*** reported in ***(2010) 5 SCC 23***, ***State of Uttaranchal and Another versus Sunil Kumar Vaish and Others*** reported in ***(2011) 8 SCC 670***, ***State of Punjab versus Khemi Ram*** reported in ***AIR 1970 SC 214*** and ***Bachhittar Singh versus State of Punjab and Another*** reported in ***AIR 1963 SC 395***.

Prayer has been made to permit the authority to pass order after giving opportunity of hearing to both the parties.

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

In the present case the Special Officer initiated proceeding for demolition of the unauthorised construction on the basis of a complaint lodged by the private respondents being the owners of the subject property against the petitioners

being the thika tenants. Due to non-service of notice at the proper address of the private respondents, the demolition proceeding remained unattended by the private respondents. In the meantime, the Special Officer concluded the proceeding and passed direction in the matter. The said direction was, however, not communicated to either of the parties.

The Special Officer permitted retention of the alleged unauthorised construction, however, subject to fulfilment of certain conditions and upon payment of the retention charges. The petitioners are aggrieved as notice of further hearing in connection with the self-same demolition proceeding has been issued.

What is to be answered is whether directing the petitioners to again appear for hearing in the demolition proceeding after the same was allegedly concluded by the Special Officer is permissible or not. Will the same amount to review of the proceeding which allegedly stood concluded?

According to the petitioner the same is impermissible. The private respondents and the Corporation both contends that the proceeding was not over as the order of the Special Officer was not published or communicated to the parties. Till the direction is formally communicated to the parties, the same cannot be treated as an order requiring compliance.

The fact that the order of the Special Officer remained uncommunicated is admitted by the petitioners. According to the Corporation, as the area of unauthorised construction was not properly assessed, accordingly, a revised demolition sketch with proper measurement was required to be prepared. At that point of time it was revealed that the private respondents, being owners of the subject premises were not issued the notice of hearing at the proper address for which the private respondents remained unrepresented. The file was forwarded to the Director General who opined for rehearing of the case.

As the petitioners somehow came to learn that the Special Officer opined in support of retention of the unauthorised construction they are naturally opposed to the reopening of the case file. Fact remains that the demolition proceeding was initiated on the basis of the complaint lodged by the private respondents. The owners of the subject property certainly have a say in any construction made at the subject premises. Admittedly, the notice of hearing before the Special Officer was not served upon the private respondents.

When the matter went up before the Director General he opined that the matter be heard afresh after notice to all the parties. According to Regulations, 2015 the Municipal Commissioner, if he so thinks that the process of hearing was not followed properly, may pass order for review/recall of the earlier order. It appears that in the present case the Municipal Commissioner delegated the power to decide the demolition proceeding upon the Special Officer. The said officer though concluded the demolition proceeding and was in favour of retention, but for reasons best known, the said direction was not communicated to either of the parties. As the direction was not communicated, the parties could not act upon the same.

The petitioners insist upon implementation of the direction of the Special Officer. The Corporation asserts that the recording of the Special Officer was yet to take the shape of an order and at this stage it is a mere file recording. The proceeding is yet to be concluded.

The petitioner relies upon Kuntesh Gupta (*supra*) in support of the submission that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. In the present case, Regulation 2015 confers power upon the Municipal Commissioner to review/recall the earlier order if the process of hearing was not followed properly. The Special Officer, being the delegatee of the Municipal Commissioner, has the power to review or recall the earlier order. Here the superior authority was of the specific finding that the process of hearing was

not followed properly as notice of hearing could not be served upon the complainant being the owners of the subject property. It cannot be said that the power of review does not exist.

In *Bachhittar Singh (supra)* the court was of the opinion that until the order is communicated to the person affected by it, it would be open to consider the matter over and over again and therefore till the order is communicated the same cannot be regarded as anything more than provisional in character. The order has to be communicated to the person who would be affected by that order. In the case at hand, the private respondents would be vitally affected if the order is passed behind their back as it was upon their complaint that the demolition proceeding was initiated. Natural justice demands that an opportunity of hearing should be given to the complainants.

In *Chhattisgarh State Electricity Board (supra)* the Hon'ble Supreme Court reiterated the settled principle that a decision cannot properly be said to be passed until it is some way pronounced or published under such circumstances that the parties affected by it has a reasonable opportunity of knowing what it contains. The knowledge of the party affected by such decision is an essential element which must be satisfied before the decision can be said to have been concluded and binding. Here, the direction of the Special Officer was not communicated to either of the parties. The decision of the Special Officer can be taken to be a recording in the file, yet to take the shape of a final order passed in conclusion of a demolition proceeding and at this stage the same can be reviewed /recalled to prevent further miscarriage of justice.

In *Sunil Kumar Vaish (supra)*, the court held that a decision gets culminated into an order affecting rights of the parties only when it is expressed in the name of the President or the Governor and a noting or even a decision can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of power of judicial review. In the present case the issue is not with regard to the authority which passed the

order. The Special Officer is the competent authority to pass the order in the demolition proceeding. The issue here is whether the direction of the Special Officer, which is yet to be communicated, can be treated as an order and whether the same can be reviewed by the said officer. Accordingly, the ratio laid down by the Hon'ble Supreme Court referred to in this context will not be applicable in the facts and circumstances of the present case.

In Khemi Ram (supra) the Hon'ble Supreme Court noted that the ordinary meaning of the word 'communicate' is to impart, confer or transmit information. Mere dispatching the order does not mean that the order is communicated. In the present case the hearing notices were dispatched to the private respondents but at a different address for which the hearing notices never reached the hands of the private respondents. Not giving an opportunity of hearing to the owner/complainant at the time of taking a decision regarding illegal and unauthorised construction at the tenanted premises in the hands of the tenants/petitioners will result in infringement of the principle of natural justice.

Fact remains that the direction of the Special Officer is yet to be implemented. There is no reason why a reasonable opportunity of hearing will not be granted to the owner of the subject premises prior to passing a final order in the demolition proceeding. Whether a tenant can make construction without the express permission of the landlord and in the absence of the landlord's permission without any order of court, is an issue raised by the private respondents. A tin shed structure existed at the subject premises which was demolished by the petitioners and RCC columns with RCC slab constructed on their own without the permission or consent of the private respondents and without sanction from the Corporation. The private respondents do have a very important role in the matter and it will be extremely unfair and unjust not to allow the private respondents an opportunity to represent before the Special Officer who was hearing the demolition proceeding.

The petitioners have not disclosed the source of obtaining the information of the direction/opinion of the Special Officer recorded in the file. Till the same is formally communicated, the petitioners cannot insist that order was passed or direction issued requiring compliance. A quasi judicial authority ought to act in a judicious manner and not perpetrate the wrong that may have been committed. The proper procedure would be to immediately rectify the same after detection. Not affording opportunity of hearing to the private respondents even after revelation of the fact that notice was not served upon them will not only amount to sheer miscarriage of justice but the same will be contrary to the principle of *audi alteram partem*. The stage where the defect was discovered shows that the proceeding is yet to be over and there is no legal bar in reviewing and rectifying the error that has cropped up in the process. Not rectifying the mistake at this stage will cause greater injustice to the private respondents than justice to the petitioners.

The petitioners are overly zealously trying to hold on to the opinion of the Special Officer for retention. It is possible that after hearing both the parties the Special Officer may be of the same view. For substantial justice to be done and to prevent further litigation in the matter, the demolition proceeding ought to be heard afresh after giving reasonable opportunity of hearing to both the parties so that everybody gets a fair chance to defend their case. It does not appear that the Director General acted erroneously in opining rehearing of the demolition case upon notice to both the parties. On the contrary, it appears that for the ends of justice, equity and fair play opportunity should be given to the private parties to put forth their case before the hearing officer.

In view of the above, the instant writ petition is disposed of by directing the Municipal Commissioner or his delegate to rehear the demolition proceeding afresh after giving reasonable opportunity of hearing to all the necessary parties, in accordance with law at the earliest but positively within a period of twelve weeks from the date of communication of this order. A spot inspection shall be

conducted upon prior notice to all the parties to ascertain the nature and extent of unauthorized construction. Copy of the inspection report shall be supplied to all the parties. A reasoned order shall be passed and communicated to all the parties.

The writ petition stands disposed of.

No order as to costs.

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

(Amrita Sinha, J.)