

APOT/252/2023
with
WPO/1385/2023
IA No.GA/1/2023

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

SOURASIS NAG

-Versus-

THE KOLKATA MUNICIPAL CORPORATION & ORS.

Appearance:

Mr Nirmalya Dasgupta, Advocate
Mr. Chanchal Kumar Dutta, Advocate
Ms. Kirshna Mullick, Advocate,
...for the Appellant

Mr. Raghunath Chakraborty, Advocate
...for Respondent no.6

Mr. Debjit Mukherjee, Advocate
Ms. Susmita Chatterjee,, Advocate
...For KMC.

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE APURBA SINHA RAY

Date: August 31, 2023.

THE COURT: A judgement and order dated July 19, 2023, whereby the appellant's writ petition being WPO 1385 of 2023 was dismissed by a learned Single Judge of this Court, is under challenge in this appeal at the instance of the writ petitioner.

It appears that the appellant is a promoter and is the person responsible for constructing a G+5 storied building along with part construction on the sixth floor. The sanction was for constructing a G+4 storied building.

Upon a complaint being lodged by the private respondent herein, who is the owner of the adjoining premises, a demolition case was initiated under Section 400(1) of Kolkata Municipal Corporation Act, 1980 (in short, “KMC Act”). The said proceedings culminated in a demolition order being passed by the Special Officer (Buildings), directing the appellant to demolish the unauthorised construction.

The appellant carried such demolition order in appeal before the Municipal Building Tribunal by filing BT Appeal No.50 of 2022. The Tribunal dismissed the appeal. Challenging the order of the Tribunal, the appellant approached the learned Single Judge by way of the present writ application.

The learned Judge noted that the deviation from the sanctioned plan was substantial. Several infringements of the building rules were noted as follows:

Rule	Required/sanction	Provided	Remarks
Front open space [R-62]	5.00 M	0.50 M	Infringed
Side open space-I [R-62]	5.00 M	0.45 M	Infringed
Side open space-II [R-62]	5.00 M	0.60 M	Infringed
Rear open space [R-62]	6.50 M	1.20 M	Infringed
FAR [R-62]	2.278	4.73	Infringed
Ground coverage [R-70] q	57.36% [122.37 sq.m]	81.99% [174.33 sq.m]	Infringed
Height [R-74]	15.50 M	21.55 M	Infringed
Car parking [R-78]	87.46 sq.m.	57.62 sq.m	Infringed
Fire fighting [R-122]	Unknown		
Structural stability [R-133]	Unknown		
Quality of materials used & workmanship [R-134]	Unknown		

The total area of unauthorised construction is 522.49 sq.m.

The writ petitioner argued before the learned Single Judge that the opinion of the technical member of the Tribunal, which was relied upon by the Tribunal in dismissing the appeal, was not made available to him prior to the dismissal order being passed. This amounted to breach of the principles of natural justice rendering the Tribunal's order null and void. The learned Judge dealt with such argument in the following words:

“The Court is not inclined to accept the submission of the petitioner that the opinion of the learned technical member ought to have been given in advance to the appellant to file exception to the same. The Tribunal after hearing the parties and upon perusal of the

documents dismissed the appeal. The opinion of the technical member is recorded in the order and the same forms part of the order. It could not have been provided in advance to the parties.

There is hardly any scope for a litigant to file an exception to the opinion of the member of the Tribunal. The technical member of the Tribunal is not the adversary of the petitioner. The said member is a part of the statutory adjudicatory authority.”

The learned Judge then dismissed the writ petition with the following observations:

“According to the provisions of the Act, construction can be made only after obtaining sanction and not prior thereto. The Office Circular relied upon by the petitioner is of the year 2015. The petitioner obtained sanction for raising construction in the year 2019. Had the petitioner intended to construct a G+6 storied building, the petitioner ought to have applied for obtaining sanction for G+6 storied building and ought not to have obtained sanction for G+4 storied building and thereafter construct two additional floors without any sanction, that too, relying upon an ante dated Office Circular of the Corporation.

The act of the petitioner in raising two additional floors and encroaching the mandatory side open spaces with the intention to get the same regularised in future relying upon an Office Circular is an absolute mala fide attempt on the part of the petitioner to get an illegal construction regularised.

The Kolkata Municipal Corporation Act does not permit regularisation of two additional floors constructed beyond the sanction plan without maintaining the engineering norms. There is no provision in the Act to regularize such illegal construction.

If such attempt of the builders is accepted, then the general trend will be to raise construction without obtaining sanction and thereafter approach the Corporation for regularisation. The same cannot be permitted by the Court. An errant builder cannot expect leniency from the Court and seek regularization of any construction made illegally. Showing misplaced sympathy to builders who dare to raise construction without sanction will weaken the morale of the honest ones who care to obtain sanction prior to making construction and those who raise construction in accordance with the plan sanctioned.”

Being aggrieved, the writ petitioner is before us by way of this appeal.

We have heard Mr. Nirmalya Dasgupta, learned advocate representing the appellant, at some length. Mr. Dasgupta vociferously argued that since the Tribunal's order dismissing the present appellant's appeal was based entirely on the opinion of the technical member, without affording an opportunity to the appellant to deal with such opinion, the Tribunal should not have passed the dismissal order. He also argued that the Office Circular No.02 of 2015-16 dated July 11, 2015, issued by the Building Department, Kolkata Municipal Corporation, permits the appellant to apply for *post-facto* sanction of at least an extra floor beyond what was sanctioned by Kolkata Municipal Corporation. He says that opportunity should be granted to the appellant to explore that avenue.

We have not called upon the respondents to make submission.

In so far as the first argument of breach of the principles of natural justice is concerned, we are completely in agreement with the learned Single Judge. The technical member is a part of the Municipal Building Tribunal. Forming of his opinion is a part of the adjudicatory process. Hence, the question of favouring the appellant or any party to the appeal with copy of such opinion in advance, does not arise. In any event, we must remember that the principle of natural justice is not a straightjacket formula. There may be cases as has been indicated by the Hon'ble Apex Court where, remanding the matter on the ground of breach of principles of natural justice would serve no useful purpose at all, and would be an empty formality. In the present case, the nature and extent of the unauthorised construction is such that absolutely no purpose will be served by remanding the matter to the Tribunal for fresh consideration. In fact, the Tribunal has observed, in our opinion rightly, that the unauthorised construction is of such a magnitude that it is incapable of regularisation.

As regards the other argument, we are not inclined to grant any time to the appellant for exploring any avenue for regularisation of the unauthorised construction in question. If the appellant had any *bona fide* intention of taking recourse to the Office Circular of 2015,

he should have done so much before. A Court of equity does not indulge reckless citizens who have no regard for law and make unauthorised constructions without bothering to obtain permission from the sanctioning authority. In this connection, we have adequately expressed our views in the case of Nirmal Kumar Das vs. The Kolkata Municipal Corporation & Ors. (APOT 21/2023). In any event, the amendment to the KMC Act brought in 2014, contemplates regularisation of minor deviation. The statutory rules framed in 2015 also are meant for regularising minor deviation. By no stretch of imagination it can be said that an extra additional floor is a minor deviation. An Office Circular cannot override the statutory rules or statutory provisions.

In view of the aforesaid, we see no reason to interfere with the order of the learned Single Judge.

The appeal and the connected application are, accordingly, dismissed.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)