

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/384/2023
WITH
WPO 1595 of 2023
GA/1/2023

NIRANJAN KUMAR SEN & ANR.
VS
THE KOLKATA MUNICIPAL CORPORATION & ORS.

BEFORE:
The Hon'ble JUSTICE ARIJIT BANERJEE
AND
The Hon'ble JUSTICE APURBA SINHA RAY
Date : October 16, 2023.

Appearance:

Mr. Rupak Ghosh, Advocate
Mr. Sankarsan Sarkar, Advocate
Mr. Abhijit Sarkar, Advocate
Mr. Abhik Chitta Kundu, Advocate
....for Appellants

Mr. Gopal Chandra Das, Advocate
Mr. Dwijadas Chakraborty, Advocate
....for KMC.

Ms. Sabarnee Chatterjee, Advocate
... for Respondent no.7

THE COURT: Affidavit of service filed in Court today, be kept with the records.

By consent of the parties, the appeal and the connected application are taken up for hearing together.

A judgement and order dated October 6, 2023, whereby the writ petition of the appellants being WPO/1595 of 2023 was dismissed, is the subject matter of challenge in this appeal.

The appellants/writ petitioners appear to be the owners of flat No.3B on the third floor of premises No.140, Sri Aurobinda Sarani, Ward No.11, Borough-II within the territorial limits of Kolkata Municipal Corporation. They say that they reside in that flat and that is their only place of residence. It appears that stop work notice was issued under Section 401 of the Kolkata Municipal Corporation Act, 1980 (in short, 'KMC Act'), in the year 2014 in respect of the construction that was being raised at the aforesaid premises by the person responsible. Subsequently, a demolition case was initiated. The Special Officer (Building) vide order dated May 30, 2022, directed demolition of the entire fourth floor and a portion of the third floor, which is under the occupation of the appellants.

When the demolition order was sought to be implemented, the appellants say that for the first time they came to know of such order. Learned advocate for the appellants submits that the appellants purchased the flat in the year 2015. Mutation was effected in the Corporation records in favour of the appellants in the year 2019. However, no notice of the demolition case was ever served on the appellants. This would amount to a flagrant breach of the principles of natural justice. Section 400(1) of the KMC Act specifically requires that an occupier of the premises in question would be afforded an opportunity to show cause. In the present case, there has been gross statutory violation on the part of KMC authorities.

Learned advocate for KMC says that as per his instructions, the demolition case was initiated at a time when the appellants were not in the picture or at any rate, their names did not appear in KMC records. Hence no question of issuing notice to the appellants could arise. Further, the owner of the property and the developer being the persons responsible, were granted sufficient opportunity of hearing and in fact, they participated in the demolition proceedings before the Special Officer (Building). Even assuming that the names of the appellants appeared in the KMC records, it was not necessary for Corporation to issue notice to the appellants to enable them to take part in the demolition case.

We reject the submission made on behalf of KMC outright. Firstly, learned advocate is wrongly instructed by KMC officials that the demolition case was initiated prior to the appellants purchasing the property or having their names mutated in the KMC records. The demolition order passed by the Special Officer (Building) itself reflects that notice under Section 400(1) of the KMC Act was issued on March 24, 2021. There is no dispute that the concerned flat was mutated in the KMC records in the names of the appellants in 2019. The appellants have been paying property tax since they became the owner of the flat in 2015. Hence as on the date of initiation of the demolition case, the names of the appellants clearly appeared in the records of the KMC. KMC definitely should have issued notice to the appellants of the demolition case under Section 400(1) of the KMC Act to enable the appellants to appear before the Special Officer (Building).

Learned advocate for KMC says that just because KMC received property tax from the appellants, that per se did not entitle the appellants to a notice under Section 400(1) of the KMC Act. We are not for a moment suggesting that just because the appellants have been paying property tax, they have a right of hearing before the Special Officer (Building). The statute gives such a right to the appellants. The relevant portion of Section 400(1) reads as follows:

“400. Order of demolition and stoppage of buildings and works in certain cases and appeal.-*(1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in section 396 or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Municipal Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been completed within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to such person, as may be specified in the order:*

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made.”

The second explanation under Section 400(1) provides that “in this Chapter ‘the person at whose instance’ shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done, including alterations or additions, if any, or does it by himself.”

Therefore, an occupier clearly has a right to receive show cause notice under Section 400(1) of the KMC Act before KMC takes any coercive action against any alleged unauthorised construction.

It is also pertinent to note that in the demolition order issued by the Special Officer (Building), it is stated, inter alia, that “now there are several flat owners including land owner.” The Special Officer (Building) was, therefore, completely aware that apart from the landlord, other parties were in occupation of the property in question.

In view of the aforesaid, this appeal succeeds. The demolition order passed by the Special Officer (Building) is set aside only in so far as the appellants are concerned. We do not set aside the order in its entirety. However, no action shall be taken against the appellants on the basis of such order. The Special Officer (Building) shall provide an opportunity of hearing to the appellants prior to taking any coercive action or passing any adverse order in respect of flat No.3B on the third floor of premises No. 140 Sri Aurobinda Sarani, Kolkata. Sufficient advance notice of such hearing shall be given to the appellants who shall be entitled to place such documents as they may be advised before the Special Officer (Building). Upon hearing the appellants, the Special Officer (Building) shall pass a reasoned order, in accordance with law and the applicable rules and regulations. The entire exercise shall be completed within a period of three months from date. Learned advocate on record for KMC shall immediately communicate this order to the Special Officer (Building) for early action.

We clarify that we are not binding the hands of the Special Officer (Building) to pass the reasoned order in any particular manner and an informed decision shall be taken by the Special Officer (Building), in accordance with law observing the principles of natural justice.

We are told that the landowner had carried the demolition order issued by the Special Officer (Building) to the Municipal Building Tribunal by way of a statutory appeal which was dismissed and the demolition order was affirmed. Notwithstanding the aforesaid, since the appellants were not parties to those proceedings, no action will be taken in respect of the aforesaid flat No.3B, without first carrying out the exercise directed above.

The appeal and the connected application are disposed of accordingly.

Since we have not called for affidavits, the allegations made in the application are deemed not to have been admitted by the respondents.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)