

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT 244 OF 2022
IA No. GA 1 of 2022
WPO 2971 of 2022

Md. Ali Mirza
Vs.
Kolkata Municipal Corporation & Ors.

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellants : Mr. Arindam Banerjee, Adv.
 Mr. Arif Ali, Adv.
 Mr. Yusuf Ali Mirza, Adv.

For the KMC : Mr. Alope Kumar Ghosh, Adv.
 Mr. Gopal Chandra Das, Adv.
 Mr. Debangshu Mandal, Adv.

For the Respondent no. 7 : Mr. Shamit Sanyal, Adv.
 Mr. Sabyasachi Roy, Adv.

Judgment On : 19.10.2023

Arijit Banerjee, J. :-

1. By consent of the parties the appeal and the connected application were taken up for hearing together.

2. This appeal is directed against a judgment and order dated December 8, 2022, whereby the appellant's writ petition being WPO no. 2971 of 2022 was disposed of by a learned Single Judge.

3. Demolition proceedings were initiated by Kolkata Municipal Corporation (in short KMC) under Section 400(1) of the KMC Act, 1980, in respect of premises no. B- 6, 7 & 8 **Nawab Wajid Ali Shah Road, Word:134, Borough-xv, Kolkata 700024** (in short "the said premises"). The appellant claims to be a co-owner of the said premises.

4. The short case of the appellant is that all throughout he participated in the demolition proceedings. When on May 17, 2017, the appellant appeared before the Special Officer (Building), the hearing was not held. Thereafter time and again, the KMC officials informed the appellant that the next date of hearing would be communicated to him. However, instead of receiving any notice of further hearing, the appellant received a copy of a purported order dated May 19, 2017, passed by the Special Officer (Building). The order directed demolition of the building at the said premises on the ground of the same being unauthorised. The order was however signed on June 19, 2017. A corrigendum dated August 7, 2017, was issued by the Special Officer (Building) correcting the date of the order as June 19, 2017, instead of May 19, 2017.

5. Subsequently the appellant received a notice dated 20.09.2022 under Sections 544 and 546 of the KMC Act. Such notice was to the effect that from October 28, 2022, onwards, KMC workmen will enter the said building for the purpose of demolition of the same.

6. At this stage the appellant approached the learned Single Judge challenging the notice under Sections 544 and 546 of the KMC Act as also the demolition order dated June 19, 2017.

7. The learned Judge recorded that the notice under Sections 544 and 546 of the KMC Act mentioned on May 19, 2017, as the date of the demolition order passed by the Special Officer (Building). Upon going through the records of the case and upon considering the corrigendum issued on August 7, 2017, the learned Judge came to the conclusion that the date of the demolition order was in fact June 19, 2017. Since the notice under Sections 544 and 546 of the KMC Act mentioned the date of the demolition order as May 19, 2017, the learned Judge by an order dated November 22, 2022, set aside the notice dated September 20, 2022. The learned Judge adjourned the writ petition to enable production of the records of the case, to assist the learned Judge to decide the challenge to the demolition order.

8. On the adjourned date, the sole argument before the learned Single Judge, on behalf of the writ petitioner, was that notice of the hearing scheduled to be held on June 15, 2017, was not served upon the appellant/writ petitioner who is the person responsible for the impugned construction. The demolition order dated June 19, 2017, therefore, was passed behind the back of the appellant. The order is null and void as having been passed in breach of the principles of natural justice.

9. The learned Judge, upon perusing the records of the case found that the notice of hearing was sent through speed post on June 5, 2017. The

same was sought to be served on the writ petitioner on June 7, 2017, and June 8, 2017, and since the writ petitioner was absent at the address to which it was sent, due intimation was sent to him. However, he did not claim the envelope. This, according to the applicable law, amounted to good service.

10. Learned Advocate of the writ petitioner, with reference to Section 557 of the KMC Act, argued before the learned Judge, that service through speed post was not good service. Overruling such contention, the learned Judge disposed of the writ petition with the following observation:-

“The Court is of the opinion that the petitioner was given proper opportunity to defend himself in the demolition proceeding, which the petitioner failed to avail of.

The demolition order passed in June, 2017 has attained finality by now and the same is liable to be implemented in accordance with law.

As it appears that the notice under Sections 544 and 546 of the Kolkata Municipal Corporation Act, 1980 made in the present writ petition mentions a wrong date of the order passed in the demolition proceeding, accordingly, the said notice cannot be acted upon.

The Kolkata Municipal Corporation is directed to take fresh steps for execution of the order of demolition in accordance with law.”

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

12. The sole point urged before us by learned Advocate appearing for the

appellant is that service through speed post is not envisaged by Section 557(1) of the KMC Act. Hence there was no good service or even attempted service of the notice of hearing scheduled on June 15, 2017, on the appellant. The relevant portion of section 557(1) of the KMC Act 1980, reads as follows:-

“557. Service of notices, etc.”(1) Every notice, bill, summons requisition or other document required or authorised by this Act or the rules or the regulations made thereunder to be served or issued by or on behalf of the Corporations or by any of the municipal authorities referred to in Section 3 or any officer, or employee of the Corporation shall, save as otherwise provided in this Act or the rules or the regulations, made thereunder be deemed to be duly served—

(a) where the person to be served is a company, if the document is addressed to the Secretary of the company at its registered office or at its principal office or place of business and is either—

(i) sent by registered post, or

(ii) delivered at the registered office or at the principal office or place or business of the company;

(b) where the person to be served is a partnership, if the document is addressed to the partnership at its principal place of business identifying it by the name or style under which its business is carried on, and is either—

- (i) sent by registered post, or
- (ii) delivered at the said place of business;
- (c) where the person to be served is a public body, Corporation, society or other body, if the document is addressed to the secretary, treasurer or other officer of such body, Corporation or society at its principal office, and is either—

- (i) sent by registered post, or
- (ii) delivered at that office;

- (d) in any other case, if the document is addressed to the person to be served and—

- (i) is given or tendered to him, or
- (ii) if such person cannot be found is affixed on some conspicuous part of his last known place of residence or business, if within Kolkata, or is given or tendered to some adult member of his family or is affixed on some conspicuous part of the land or building, if any to which it relates, or
- (iii) is sent by registered post to such person.”

13. Learned Advocate argued that the appellant had a constitutional right to be heard on June 15, 2017. Such meeting not having been notified to him, his valuable constitutional right has been infringed. Consequently, the demolition order dated June 19, 2017, is a nullity in the eye of law.

14. In this connection learned Counsel relied on the following decisions:

(i) Nawabkhan Abbaskhan v. The State of Gujarat, reported at (1974) 2 SCC 121, paras 8, 18.

(ii) Indian Airlines Ltd. v. Prabhad D. Kanan, reported in (2006) 11 SCC 67 para 9.

(iii) Bharati Reddy v. State of Karnatak & Ors., reported at (2018) 6 SCC 162.

(iv) Decision of this bench rendered on February 3, 2023 in MAT 1862 of 2022 (Smt. Kajal Majumder v. Sk. Mansur Ali & Ors.).

(v) CMC and Anr. v. Abid hossain, reported at 2001 (1) CHN.

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15. I will revert to these cases later in this judgment, if necessary.

16. Appearing for KMC, Mr. Alope Kumar Ghosh, learned Senior Counsel, argued that the first proviso to Section 400(1) of the KMC Act contemplates, prior to any demolition order being passed, granting of a reasonable opportunity to the person responsible for showing cause why demolition order shall not be made, by means of a notice served in such manner as the Municipal Commissioner may think fit. He submitted that in the present case sufficient opportunity to show cause was given to the appellant. He submitted that in response to the Special Officer's show cause notice dated March 31, 2017, the appellant's Advocate filed a written representation dated May 11, 2017, which was duly considered by the Special Officer while passing the demolition order.

17. Mr. Ghosh then submitted that the object of speed post and registered post is the same. Both are equally secure methods of service. The appellant did not suffer any material prejudice by reason of service of the notice of hearing being effected through speed post. The appellant chose not to respond to the intimations sent to him by the postal department. He chose not to collect the envelope from the post office. By his own act he disabled himself from appearing before the Special Officer (Building) on June 15, 2017. He cannot be permitted to argue that the demolition order was passed behind his back and is therefore *non-est* in the eye of law.

18. Learned Counsel then submitted that the notice under Sections 544 /546 of the KMC Act cannot be taken to be the cause of action for the appellant to challenge the Special Officer's demolition order passed in June 2017. The appellant approached the learned Single Judge challenging the demolition order on November 16, 2022. There is undue delay and unexplained laches on his part in approaching the Court. He cannot complain of breach of the principles of natural justice, five and a half years after the demolition order was passed. His remedy under the statute i.e., appeal to the Municipal Building Tribunal under Section 400(3) of the KMC Act, became barred by limitation long time ago. He had 30 days from the date of the demolition order to prefer statutory appeal. A time barred remedy cannot be revived by filing a writ petition.

19. In this connection learned Counsel relied upon the following cases:-

(i) *Ashok Kumar Sonkar v. Union of India & Ors.* reported at (2007) 4 SCC 54. This decision discusses the useless formality

theory in the context of breach of the principles of natural justice.

(ii) *Nagar Palika, Natar v. U.P. Public Services Tribunal, Lucknow & Ors.*, reported at (1998) 2 SCC 400.

(iii) *Union of India & Anr. v. M/s. Jesus Sales Corporation.*, reported at 1996 AIR SCW 1575.

These two decisions were relied upon for the proposition that observance of the principles of natural justice does not necessarily mean that personal hearing has to be afforded to the party concerned. It is sufficient if that party's case is considered adequately by the decision maker.

(iv) *Bar Council of India v. High Court of Kerala*, reported at 2004 AIR SCW 2684. This decision is also on the principles of natural justice and the extent to which the same is required to be observed.

(v) *A.V. Venkateswaran, Collector of Customs Bombay v. Ramchand Sobhraj Wadhwani & anr.* reported at AIR 1961 SC 1506.

This case was relied upon in support of the submission that if a petitioner has disabled himself from availing of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot be permitted to urge that as a ground for the Court dealing with his petition under Article 226 to exercise its discretion in his favour.

(vi) *Calcutta Electric Supply Corporation. Ltd. & Anr. v. Kalavanti Doshi Trust & Ors.*, reported 2011 (1) CHN (CAL) 182. This decision is to the effect that when the writ petitioner did not avail of the

efficacious alternative statutory remedy of preferring appeal against the order of final assessment made by the electric supply authorities thereby allowing such remedy to become time barred, the Writ Court should not entertain his application, particularly when there is no provision for condonation of delay for preferring statutory appeal against the order of final assessment.

(vii) Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission & Ors. reported at (2010) 5 SCC 23. This decision was relied upon in support of the submission that if a statute prescribes a time period for preferring an appeal but does not provide for extension of such time by condonation of delay, the Court cannot enlarge the statutory time period for preferring appeal.

20. Learned Counsel for the private respondent referred to Section 27 of the General Clauses Act, 1897 which reads as follows:-

“27. Meaning of service by post.—Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

According to learned Counsel, service by speed post and registered post are substantially the same.

21. Learned Advocate also referred to Section 114 of the Evidence Act, 1872, which provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (f) under that section provides that the Court may presume that the common course of business has been followed in particular cases. Learned Counsel submitted that it can be presumed that once the notice of hearing was sent by speed post to a correct address, such notice, following the usual course, reached the addressee.

22. Learned Counsel then said that after coming to know of the demolition order, merely writing the letter dated August 2, 2017, through his Advocate, addressed to the Mayor and the Special Officer (Building), was not sufficient action on the part of the appellant. Merely making representation to the Authority instead of pursuing the statutory remedy, will not bail out a person. In this connection reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***K. V. Rajalakshmiah Setty and Anr. v. State of Mysore & Anr., reported at AIR 1967 SC 993***. Particular reliance was placed on paragraph 13 of the reported judgment which reads as follows:

“**13.** There is also a good dead of force behind the contention that the appellants are guilty of laches. After the passing of the order of

May 17, 1950, they should have made an application within a reasonable time thereafter. Merely because the Chief Engineer had espoused their cause and was writing letters from time to time to the State Government to do something for them did not mean that they could rest upon their oars if they were really being discriminated against. As we cannot hold that the appellants were entitled to any particular indulgence or concession, the only way of meting out equality to all surveyors who had been promoted to the cadre of Assistant Engineers would be to say that promotions should in all cases be effective from the date of the notification. This is obviously beyond our powers.”

23. Finally, learned Advocate for the private respondent relied on the decision of the Hon’ble Supreme Court in the case of ***Madhya Pradesh Industries Ltd. v. Union of India & Ors., reported at AIR 1966 SC 671*** and in particular on paragraph 10 of the reported judgment, in support of the submission that in all cases, personal hearing need not be given. Paragraph 10 of the reported judgment reads as follows:-

“10. As regards the second contention, I do not think- that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that a quasi- judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, R. 55 of the Rules, quoted supra, recognizes the said principle and states that no order shall be passed against any

applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural Justice.....”

24. In reply, learned Advocate for the appellant submitted that the provisions of Section 557 of the KMC Act will apply with full force because the first proviso to Section 400(1) of the Act does not provide the specific manner of service of a show cause notice like some other provisions of the Act, e.g., Section 184(4) explanation (as it stood before amendment). Learned Counsel submitted that a show cause notice as contemplated by the first proviso to Section 400(1) of the 1980 Act, was received and replied to by the appellant. The service of such a notice may be at the discretion of the Municipal Commissioner. But in so far as notices of subsequent hearings are concerned, the manner of service would be governed by Section 557(1) of the KMC Act.

Court's view

25. The only issue before us is whether or not the appellant had due notice of the demolition proceedings before the Special Officer (Building) under Section 400(1) of the KMC Act.

26. The relevant portion of Section 400(1) of the KMC Act reads as follows:-

“(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.”

27. The statute has, therefore, left it to the wisdom of the Municipal Commissioner to decide the manner of service of notice under the first proviso to Section 400(1) of the KMC Act. In the instant case, service was initially affected by speed post. The appellant received such notices and attended the hearings. Notice for the hearing scheduled to be held on June 15, 2017, was sent through speed post on June 5, 2017. The post man did not find the appellant at the relevant address when he tried to deliver the envelope on June 7, 2017 and June 8, 2017. Due intimation was sent to the appellant. The appellant, however, did not make any effort to collect the envelope from the post office. According to us, this amounted to good service in law.

28. The appellant, relying on Section 557(1) of the KMC Act which has been extracted above, contended that the only recognised mode of service is registered post. We are unable to accept such contention of the appellant. Section 557(1) is a deeming provision. It provides as to when a notice/bill/summons/ other document required to be served on behalf of the Corporation, will be deemed to be duly served. When service is to be on a natural person, the notice can either be tendered to that person or if he cannot be found, the notice can be affixed on a conspicuous part of his last known place of residence or business, if within Kolkata or can be sent by registered post to such person. In either of these cases, even if the person refuses to accept the notice when tendered to him or the notice sent by

registered post actually does not reach that person, still, the notice will be deemed to have been duly served.

29. A deeming provision creates a legal fiction. Where a statute provides that certain state of affairs would be deemed to exist subject to satisfaction of certain conditions, if such conditions are satisfied, then by legal fiction, such factual position will be presumed to exist although in fact the same may not exist. Section 557(1) of the KMC Act is by no means an exhaustive provision. It does not provide that a notice can be served on behalf of the Corporation only or exclusively in the manner mentioned in the said Section. The Section only enables KMC to take advantage of deemed service, even when the noticee may be avoiding or evading service.

30. In any event, the first proviso to Section 400(1) of the KMC Act has left it to the Municipal Commissioner to decide the manner of service of show cause notice on the person responsible for the unauthorised construction. In the instant case, the Municipal Commissioner decided to cause service through speed post. We find nothing unreasonable about the same. Speed Post is presently an universally accepted mode of sending mail. Significantly, from the very inception of the demolition proceedings, it was through speed post that notices were sent to, received by and acted upon by the appellant. He never raised any objection or grievance regarding the KMC adopting that mode of service. It was only in respect of the last notice which carried the information that a meeting was scheduled to be held on June 15, 2017, that the appellant has raised the point that service through speed post is not an acceptable mode of service under the KMC Act. We find this contention to be

lacking in bona fide. And it is almost certainly an afterthought. Obviously such a contention has been raised to try and nullify the demolition proceedings including the demolition order resulting from such proceedings.

31. Learned Advocate for the appellant sought to argue that even if the first proviso the Section 400(1) of the KMC Act vested the Municipal Commissioner with the discretion to decide the manner of service of the show cause notice, all notices of subsequent hearings were required to be sent by registered post as contemplated by Section 557(1) of the Act. We do not find any merit in such contention. There is no such requirement in the first proviso to Section 400 (1) of the Act. There is also no warrant to read such requirement into the said provision of law. In fact, Section 400(1) does not even contemplate a hearing. It envisages that the person responsible has to be given a reasonable opportunity of showing cause why an order should not be made for demolition of the impugned construction. However, in this case hearings were held and notices of such hearings were duly served on the appellant.

32. This brings us to another point urged by Mr. Ghosh, learned Senior Counsel representing KMC, that Section 400(1) of the Act does not require the Municipal Commissioner or his delegate being the Special Officer to afford opportunity of personal hearing to the person responsible. According to him, an opportunity to show cause does not necessarily mean an opportunity to personally appear and show cause. In the present case the appellant responded in writing to the show cause notice. Such reply of the appellant was duly considered by the Special Officer (Building) prior to

passing the order of demolition. The cause shown not being sufficient, order of demolition was passed.

33. In this connection it may be noted that in the case of Ashok Kumar Sonkar (*supra*), the Hon'ble Supreme Court, in the context of discussing the principles of natural justice, observed that the person concerned may not always be given an oral hearing but may be allowed to make a representation in writing. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Madhya Pradesh Industries Ltd. (supra)***. The relevant observations in the judgment in that case have been extracted above.

34. We need not dilate on this point as in the facts of the present case, hearing was offered to the appellant.

35. We also accept the submission made on behalf of KMC that the appellant having not availed of the alternative remedy of statutory appeal before the Municipal Building Tribunal and thereby having allowed such remedy to become time barred, the writ Court should not entertain his application. This is particularly so because there is no provision in the KMC Act for condonation of delay for preferring statutory appeal against the demolition order. The Court cannot also extend the statutory time period for preferring such appeal. In this connection reference may be made to the decision of the Hon'ble Supreme Court in the case of ***Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission & Ors., (supra)*** and the decision of our Court in the case of ***Cal. Electric Supply Corpn. Ltd. & Anr. v. Kalavanti Doshi Trust & Ors. (supra)***.

36. The appellant by his own choice has placed himself in a position where he cannot avail of the statutory remedy any further. He cannot be permitted to urge such disability as a ground for the writ Court to exercise its discretion in his favour. In this connection one may refer to the decision of the Hon'ble Supreme Court in the case of **A.V. Venkateswaran, Collector of Customs, Bombay, (supra)**.

37. In the facts of this case, we are satisfied that due notice of all the hearings in the demolition proceedings was served on the appellant by KMC. There was no breach of the principles of natural justice. The appellant was afforded full opportunity to present his case in the demolition proceedings. The learned Judge set aside the notice under Sections 544 and 546 of the KMC Act since the same mentioned a wrong date of the demolition order and directed KMC to take fresh steps for execution of the order of demolition in accordance with law. We see no infirmity in the order of the learned Single Judge. It is a well considered and reasoned order. We affirm the order and dismiss the appeal. There will be no order as to costs.

38. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)