

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

FMA 310 of 2024
with
CAN 1 of 2024

Hussain Rizwi
-Vs-
The Kolkata Municipal Corporation & Ors.

For the Appellant	: Mr. Subhojit Seal
For the State	: Mr. K. J. Yusuf, learned AGP Mr. Parikshit Goswami
For the KMC	: Mr. Gopal Chandra Das Mr. Atis Kumar Biswas
Heard on	: 24.06.2024
Judgment on	: 24.06.2024

Joymalya Bagchi, J. :-

1. Appellant claims he and others had set up a Urdu Medium School in the locality. He alleges private respondent made unauthorised construction which had encroached upon the school premises. To adjudicate such grievance learned Single Judge relied on a report

submitted by the respondent Corporation which was prepared after inspection of the building by three engineers. Report states a plan to construct a four-storied building was sanctioned and a new four-storied construction is presently standing on the premises.

2. Mr. Seal contends report does not disclose the width of the construction. Learned Single Judge erred in holding the allegation of encroachment upon the school land cannot be decided by Corporation. In support of his contention he relies on the definition of the words 'public building and street' under Sections 2(70) and 2(71) of Kolkata Municipal Corporation.
3. In response Mr. Yusuf, learned Additional Government Pleader contends the building has been constructed as per sanction plan. Issue with regard to encroachment on school land is not within the jurisdiction of the Corporation.
4. We have gone through the report submitted before the learned Single Judge by the Corporation. From the report it appears a plan for constructing a four-storied building had been duly sanctioned. Inspection was made by engineers who stated a four-storied building had been constructed. Report does not state the construction is in deviation from the sanction plan. Mr. Seal strongly argues the construction has encroached upon the common passage of the school which is a public building. Common passage in a public building would fall under the definition of 'public street' under the Kolkata

Municipal Corporation Act, 1980 (KMC for short). Section 369 of the Kolkata Municipal Corporation Act imposes duty on the Corporation to remove any encroachment on a public street.

5. For better appreciation of the submission relevant provisions are set out hereunder:

“2(70). ‘public building’ means a masonry building constructed, used or adapted to be used –

- (a) As a place of public worship or as a school, college or other place of instruction (not being a dwelling-house so used) or as a hospital, workhouse, public theatre, public cinema, public hall, public concert-room, public ballroom, public lecture-room, public library or public exhibition-room or as a public place of assembly, or*
- (b) for any other public purpose, or*
- (c) as a hotel, lodging-house, refuge or shelter, where the building exceeds in cubical extent seven thousand cubic metres or has sleeping accommodation for more than one hundred persons;*

2(71). ‘public street’ means any street, road , lane , gully, alley, passage, pathway, square or courtyard, whether a thoroughfare or not, over which the public have a right of way, and includes –

- (a) the roadway over any public bridge or causeway;*
- (b) the footway attached to any such street, public bridge or causeway, and*
- (c) the drains attached to any such street, public bridge or causeway,*
and, where there is no drain attached to any such street, shall, unless the contrary is shown, be deemed to include all lands up to the outer wall of the premises abutting on the street, or, where a street alignment has been fixed and the area within such alignment has been acquired by the Corporation and the alignment has been demarcated or is capable of being demarcated up to such alignment.”

369. Prohibition of projections upon streets, etc.- (1) No person shall erect, set up, add to, or place against or in front of, any premises any structure of fixture which will –

- (a) *Overhang, jut or project into, or in any way encroach upon, and obstruct in any way the safe or convenient passage of the public along, any street, or*
- (b) *Jut or project into, or encroach upon, any drain or open channel in any street so as to interfere with in any way the use or proper working or such drain or channel or to impede the inspection or cleansing thereof."*

6. Section 2(70) of the KMC Act describes a public building which includes a school. Public street is defined under Section 2(71) of the Act and states any street, road, lane, gully, passage, pathway, courtyard over which the public has a right of way would be construed as 'public street'. Appellant contends passage way within a 'public building' i.e. school premises is to be treated as 'public street'.
7. We are unable to subscribe to this argument. No doubt a school is a 'public building' but a common passage within a public building cannot be treated as 'public street' as the public can use the passage in the school only when access is granted by the school authority and not always. For example, after school hours general public would not have a right to use the common passage in the school premises. Seen from this perspective common passage inside a school premises cannot be treated as a 'public street' where all members of the public have a right of passage at any point of time. Accordingly, alleged encroachment upon the school property cannot be treated to be an encroachment upon a public street which would necessitate intervention by the Corporation under Section 369 of the KMC Act.

8. Appellant has also raised another issue. During hearing before the learned Single Judge he intended to file a supplementary affidavit placing on record that a member of the Mayor in Council had financial interest in the project. As a result a residential building has been built instead of a school building. This issue also does not find favour with us. Nothing is placed on record to show that the plan was sanctioned for a school building and not a residential one. There is also no material to show the plan was sanctioned with a *mala fide* intent or under influence of the said member of the Mayor in Council.
9. Hence, we do not find any illegality in the order impugned.
10. We clarify that our order shall not stand in the way of the school authorities instituting appropriate civil proceeding with regard to alleged encroachment on their land, if so advised.
11. Appeal is accordingly disposed of.
12. In view of disposal of appeal, connected application being CAN 1 of 2024 is also disposed of. There will be no order as to costs.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

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