

**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

MAT 1146 of 2024

CAN 1 of 2024

CAN 2 of 2024

Suzana Anthony & Ors.

Vs

Sk. Ziauddin & Ors.

For the Appellants	:	Mr. R N Chakraborty Mr. M Ahmed Ms. Arpita Patra Ms. Amrita De
For the writ petitioner/ Respondent no. 1	:	Mr. Soumitra Deb Sk. Md. Wasim Akram
For the State	:	Mr. Joydip Banerjee Mr. Prantik Gorai
For the KMC	:	Mr. Biswajit Mukherjee Ms. Sima Chakraborty
Heard on	:	02.09.2024
Judgment on	:	02.09.2024

Joymalya Bagchi, J.:-

1. Appellants are the occupants of third and fourth floor which were unauthorisedly constructed on premises no. 21A Hossain Shah Road, Ward no. 79 P.S Ekbalpur.

2. On 26.11.2018 engineers attached to Borough IX noted the said third and fourth floor were being illegally constructed. A stop work notice was issued upon the persons responsible for the construction. FIR under section 401A of the Kolkata Municipal Corporation Act (for short KMC Act) was registered. In spite of stop work notice, the illegal construction continued and proposal was placed before the Mayor-in-Council for invoking emergency power under section 400(1) of the KMC Act for demolition of the unauthorised construction.

3. After considering the proposal, Mayor-in-Council resolved as follows:

“Considering the facts and circumstances as stated above in the departmental report and upon due consideration of other relevant issues, it is resolved that since the person responsible continued with unauthorised construction as indicated in the précis of the agenda item in spite of departmental action for stoppage of such unauthorised construction and since such unauthorised construction is unsafe and may lead to accident resulting in loss of human life and property, appropriate action towards demolition of such unauthorised construction be taken forthwith under section 400(8) of KMC Act 1980 with the help of local administration.” (emphasis supplied)

4. In terms of the resolution, part demolition was undertaken in 2000 but could not be completed due to local resistance. The matter was reported to Ekbalpore Police Station vide GD entry no. 1526 dated 17.2.2020.

5. As demolition proceeding could not be completed and the remaining unauthorised portion posed risk to life and property, one of the occupants

occupying the lawful portion of the building took out an instant writ petition seeking direction upon the Corporation to complete the demolition process. Accordingly, the Hon'ble Single Judge directed the Corporation to demolish the entire unauthorised portion of the building. Officer-in-Charge, Ekbalpore Police Station was directed to render assistance and remove occupiers from the unauthorised portion to enable its demolition. In light of the indolent conduct of officers of the Corporation who had failed/neglected to implement the demolition order for four years, directions were also passed to take steps against them.

6. At this juncture the appellants who are the occupants of the unauthorised portion of the building sought leave to appeal against the aforesaid order.

7. Leave is granted.

8. CAN 1 of 2024 is, accordingly, allowed.

9. Mr. Chakraborty for the appellants contends demolition order was not served upon them. No opportunity of hearing was given to them under section 400(1) of the KMC Act. No case of extreme urgency necessitating invocation of the drastic provision under section 400(8) of the KMC Act has been made out. Procedural safeguards with regard to passing of the order under section 400(8) of the KMC Act have not been followed. In fact, order under section 400(8) of the KMC Act was passed after issuance of Municipal Commissioner's circular no. 01 2019-20 dated 2nd April 2019 wherein the assistant engineers were threatened with suspension if they do not take up the matters urgently for demolition of additional floors under section 400(8) of the KMC Act. The circular, in Mr. Chakraborty's estimation amounted to

usurpation of power of the Mayor-in-Council by the municipal commissioner himself.

10. In reply Mr. Mukherjee submits additional third and fourth floor are wholly unauthorised. A stop work notice was issued to the persons responsible for such illegal construction but they continued with such unauthorised construction. FIR under section 401A of the KMC Act was registered. In this backdrop proposal was made before the Mayor-in-Council that the construction was wholly unauthorised and its continuation exposes public to several hazards like fire hazards and environmental hazards. Considering the proposal the Mayor-in-Council came to a finding that the direction was unsafe and endangered human life and property. Appellants were not occupying the unauthorised structures. Subsequent to the order of demolition did the appellants come into occupation of the unauthorised structures. They are not responsible for the unauthorised construction and thereby entitled to hearing under section 400(1) of the KMC Act. At its height, they have an opportunity to seek adequate time to vacate the unauthorised premises.

11. We have considered the rival submissions of the parties. Mr. Chakraborty strenuously argues the demolition order was prompted by the Municipal Commissioner's circular no. 01 2019-20 dated 2nd April 2019.

12. In support of his submission, he argues by the said circular municipal commissioner illegally vested the power of the Mayor-in-Council upon the assistant engineer for demolition of additional floors under section 400(8) of the KMC Act.

Municipal Commissioner's circular no. 01 2019-20 dated 2nd April 2019 reads as follows :

“After detection of unauthorised construction of addition of one or more floors in any premises in KMC area, the concerned Sub-Assistant Engineer or Assistant Engineer should issue stop work notice under section 401 of the KMC Act 1980 followed by intimation to the local police station. The concerned Sub-Assistant Engineer or Assistant Engineer in turn shall bring it to the notice of Ex/ Engineer (Building) or Dy. Chief Engineer (Building) along with Demolition Sketch Plan without any delay.

Concerned Assistant Engineer with prior approval of Ex. Engineer (Building) or Dy. Chief Engineer (Building) will file FIR under section 401A of the KMC Act 1980 if the work is continued without paying heed to the stop work notice. Ex Engineer (Building) or Dy. Chief Engineer (Building) of the concerned Borough should take up the matter urgently for demolition of the additional floors under section 400(8) of the KMC Act 1980 with the approval of the authority if the unauthorised floor area exceeds 10 Sq. M.”

13. A perusal of the circular would not persuade us to subscribe to Mr. Chakraborty's submissions. The circular is in the nature of a reminder to assistant engineers that wherever unauthorised construction of one or more floor exceeding 100 sq. meter is detected, FIR under section 401A of the KMC Act is registered and illegal work is continuing inspite of issuance of stop work notice, the matter must be urgently placed for approval of authority concerned for demolition. Needless to mention the authority concerned is none but the Mayor-in-Council. In such view of the matter the circular cannot be read as understood to usurp discretion of the Mayor-in-Council to invoke the drastic provision for demolition under section 400(8) of the KMC Act and vest it upon the assistant engineers. On the other hand it seeks to put indolent engineers on notice that they would face

disciplinary proceeding if they do not initiate urgent steps where unauthorised construction of additional floors are being built notwithstanding the stop work notice and registration of FIR. The circular does not confer independent right on the engineers to pass orders under section 400(8) of the KMC Act *dehors* the Mayor-in-council.

14. Factual matrix of the case would also lead us to the same inference. Upon noticing unauthorised construction of third and fourth floor without sanction plan, the assistant engineer issued stop work notice and lodged FIR under section 401A of the KMC Act against persons responsible for the construction. Notwithstanding the stop work notice, the unauthorised construction continued. This factual matrix leaves no doubt in one's mind with regard to requisite urgency to invoke the drastic provision for demolition under section 400(8) of the KMC Act. Accordingly, the proposal was placed before the Mayor-in-Council, *inter alia*, stating that the unauthorised construction if allowed to stand would create several hazards including fire hazards and environmental hazards. The Mayor-in-Council noted in spite of issuance of stoppage of unauthorised construction the persons responsible continued the unauthorised construction of additional floors and recorded its satisfaction that the unauthorised construction was unsafe and may lead to accidents resulting in loss of lives human life and property. Accordingly, the Mayor-in-Council resolved to pass demolition order under section 400(8) of the KMC Act. Demolition order was passed in 2019 and partly executed in 2020. However, demolition of the entire unauthorised construction could not be completed due to local resistance

and the matter was reported to police. Taking advantage of the illegal resistance to execution of the demolition order, the appellants came into possession of the unauthorised structure. These circumstances lead to the irresistible conclusion that the appellants were aware of the illegality of the construction and had made an opportunistic move to shift to the unauthorised portion of the building and thereby hinder the demolition process.

15. Admittedly, the appellants were not the persons responsible for the unauthorised construction. They have come into possession of the unauthorised construction after demolition order had been partly executed. Section 400(1) of the KMC Act inter alia provides for demolition of unauthorised building after giving notice and opportunity of hearing to the person at whose instance the unauthorised building had been erected. The said provision fell for interpretation in *Bijay Biswakarma Vs. Rajkumari Devi Singh & Ors.*¹ wherein a co-ordinate Bench after considering the relevant law on the subject came to a finding that an occupant who is not responsible for erection of the unauthorised building is not entitled to hearing under the aforesaid provisions of law. Appellants are subsequent occupants of the unauthorised structure in respect of which the demolition order had already been issued and partly executed. By no stretch of imagination they can argue they were deprived of opportunity of hearing and principles of natural justice had been violated so far as they are concerned. At this belated stage appellants who had come into possession of the remaining unauthorised structure which had survived cannot assail

¹ MAT 2279 of 2023

the legality of the demolition order under section 400(8) of the KMC Act passed in 2019.

16. Be that as it may, Mr. Chakraborty as a last ditch effort refers to the demolition order and submits the decision to invoke section 400(8) suffers from jurisdictional error as it had not been taken by the Mayor in Council but the mayor himself. In view of the submission and to satisfy our conscience whether the demolition order directed to be implemented suffers from patent lack of jurisdiction, we called upon Mr Mukherjee to produce the proposal and the resolution of the Mayor-in-Council to demolish the unauthorised path. Necessary documents have been placed before us which show that resolution was adopted by the Mayor-in-Council on the strength of the proposal given by the engineer concerned and the said decision does not suffer from inherent lack of jurisdiction.

17. In view of the aforesaid discussion, we are of the opinion appeal is wholly unmerited and the same is dismissed.

18. There shall be no order as to costs.

19. Urgent Photostat certified copy of judgment, order if applied for be given to the parties on compliance of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)