

05. 09.01.2024
Court No.6
(Tanmoy)

MAT 1973 of 2023

**Suprabhat Basu
-Versus-
The State of West Bengal & Ors.**

**With
IA No: CAN/1/2023**

Mr. Raghunath Chakraborty, Adv.,
Mr. Swarvanu Saha, Adv.,
Ms. Nandini Chatterjee, Adv.

...for the appellant/
writ petitioner.

Mr. Jayanta Samanta, Adv.,
Ms. Indumouli Banerjee, Adv.

...for the State.

Mr. Alak Kumar Ghosh, Adv.,
Mr. Dwijadas Charaborty, Adv.,
Mr. Sundar Gopal Bhattacharyya, Adv.

...for the Kolkata Municipal
Corporation.

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

A judgment and order dated September 29, 2023, whereby the appellant's writ petition being WPA 23522 of 2023, was dismissed by a learned Judge of this Court, is the subject-matter of challenge in this appeal at the instance of the writ petitioner.

The writ petitioner approached the learned Single Judge challenging a "stop-work" notice issued by Kolkata Municipal Corporation (in short, 'KMC') on February 3, 2023, in respect of a construction at premises no. 15/H/1, Narkeldanga North Road, Kolkata,

which KMC found to be completely unauthorized and not backed by any sanctioned Building Plan. The further prayer in the writ petition was that no coercive action be taken in respect of the impugned construction as was being threatened by KMC and for which KMC had asked for Police help.

The learned Judge noted that the unauthorized construction continued defying the stop-work notice and a four-storeyed structure had come up. Her Ladyship also noted that the matter was placed before the Mayor-in-Council which, at a meeting held on March 1, 2023, resolved to take recourse to the emergency provision of Section 400(8) of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the 'KMC Act').

It was submitted on behalf of the writ petitioner that there was no necessity for invoking Section 400(8) of the KMC Act since the construction in question has been in place for quite some time and no immediate action is warranted.

It was submitted before the learned Judge on behalf of KMC that part-demolition has taken place and demolition of the remaining portion would follow soon. The learned Judge dismissed the writ petition with the following observations:-

“Upon hearing the parties, it appears that the Corporation detected unauthorized construction in February and on 1st March, 2023 decision to invoke 400(8) of the Act was taken. There is hardly any delay on the part of the Corporation to take steps in the matter.

The engineers of the Corporation have opined that the construction, if allowed to stand, will create hazards including fire and environmental hazards.

After noticing the conduct of the petitioner in raising construction without obtaining any sanction plan, the Court refuses to exercise jurisdiction in the matter. The Corporation is directed to take steps for demolition of the entire unauthorized construction immediately.”

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

When the appeal was first taken up for consideration on October 5, 2023, no copy of the impugned order was available as we were told that the same had still not been uploaded on the server. We were of the view that since an appeal has been filed which may or may not have any merit, before taking a decision on the appeal, we should have a look at the order impugned. Accordingly, limited *interim* protection was granted on October 5, 2023.

On October 10, 2023, we had extended the *interim* protection and had called upon KMC to file a report in the form of affidavit responding to three points urged before us on that date on behalf of the appellant. The points were, firstly, there was no urgency in the matter. Notice under Section 401 of the KMC Act was issued on February 3, 2023, but action under Section 400(8) was proposed to be taken several months later in October, 2023. Secondly, Office Circular No. 07/2020-21 dated 16.12.2020, issued by the Director General (Building), KMC, which lays down the procedure to be followed

where unauthorized construction is detected on *thika* land, has not been followed by KMC. Thirdly, notice under Section 401 of the KMC Act was addressed to one Raja Ali, who has been described as the person responsible. The appellant has no connection with such person and has no idea who that person is.

On October 18, 2023, a report in the form of affidavit was filed by KMC.

On November 29, 2023, the appellant's exception to the report filed by KMC was taken on record.

On December 15, 2023, we recorded an order expressing our dissatisfaction as regards the report filed by KMC. We found that the points raised by the appellant had not been sufficiently addressed by KMC. Accordingly, we adjourned the matter to enable learned Advocate for KMC to obtain further instructions in that regard. The *interim* order was also extended.

Today, we have heard the matter at length.

Mr. Ghosh, learned senior Counsel representing KMC, submitted that the Office Circular dated December 16, 2020, does not lay down any inflexible rule that whenever an unauthorized construction is found to have been made on land which appears to be *thika* property, KMC must necessarily inform the *Thika* Controller. The Circular has been issued for administrative convenience. If it appears to KMC that the illegal construction is on *thika* land, intimation may be sent to the *Thika*

Controller to say whether or not the land is in fact *thika* land. Further, the format of notice to be sent to the *Thika* Controller indicates that in the event the land is found to be *thika* land, and KMC has decided to initiate demolition proceedings under Section 400(1) of the KMC Act, the *Thika* Controller should depute some responsible person from his Office to be present at such proceedings so that he may answer any relevant query that may arise in the course of such proceedings.

As regards the addressee of the notice under Section 401 of the KMC Act, Mr. Ghosh submitted that the notice was served through the local Police Station. KMC did not know who the actual owner of the premises was. The notice was served on Raja Ali and others who were found to be present at the premises in question. However, there is no doubt and it is an admitted position that the impugned construction has been raised without any sanctioned Building Plan at all.

Mr. Chakraborty, learned Advocate representing the appellant/writ petitioner, reiterated his submission that there is no such grave urgency in the matter as would justify KMC taking recourse to the draconian provision of Section 400(8) of the KMC Act. It may be that order under Section 400(8) was passed on March 1, 2023; however, action in terms of such order was sought to be taken several months later only in October, 2023. KMC could have easily initiated proceedings under Section

400(1) of the KMC Act in the meantime, in which case, the appellant would have had a chance of participating in the proceedings.

Mr. Chakraborty, further submitted that since the property is a *thika* property, any final decision in respect of the impugned construction should be taken in the presence of the *Thika* Controller. Learned Advocate referred to Regulation 7 of the West Bengal *Thika* Tenancy (Acquisition and Regulation) Rules, 2004, which reads as follows:-

“7. Procedure in case of contravention of the provision of the Act or the rules. – (1) *The Controller or any officer authorised in this behalf by the State Government or the Controller may, after giving 24 hours’ notice, enter upon the land or any part thereof to inspect or enquire into the condition of the land, or the structures or other erections thereon, if any, or inspect and enquire about any structure, building or erection thereon in the course of its construction or making and for all other reasonable purposes.*

(2) *If there is any breach of, or non-compliance with, any of the terms and conditions as aforesaid or the provision of the Act or these rules, the thika tenant shall, in addition to any other penalty or disqualification of occupation of the land, with effect from the date on which an order in this behalf is made in writing by the Controller after giving him a reasonable opportunity of being heard.*

(3) *Upon such forfeiture, the occupant shall be treated as a trespasser and the Controller or any officer authorised by him may, after giving 3 days’ notice, enter the land, building or other erections therein, if any, and take vacant possession thereof.”*

Learned Advocate submitted that in view of the aforesaid, any action that may be taken in respect of the impugned construction should be only after consultation with the *Thika* Controller.

We are not impressed with the submission made on behalf of the appellant. We agree with Mr. Ghosh, learned Advocate for KMC, that the Office Circular dated December 16, 2020, does not necessarily oblige KMC to inform the *Thika* Controller of any unauthorized construction detected on *thika* property. That Circular, in any event, would be relevant where KMC decides to initiate proceedings under Section 400(1) of the KMC Act. In a case where KMC resolves to invoke Section 400(8) of the KMC Act, that Circular would not be germane in any manner whatsoever.

As regards the notice under Section 401 of the KMC Act, it happens quite frequently that when such a notice is sought to be served on the person responsible at the site where unauthorized construction is in progress, the person responsible is not found there. The notice is then normally served on the persons who are found to be present there. In the normal course it is expected that the person responsible will come to know of such notice. Even otherwise, in our view, there is no requirement under the provisions of the KMC Act which would oblige KMC to serve a notice under Section 401 of the KMC Act on the person responsible before deciding to take action under Section 400(8) of the KMC Act. It may often be difficult to ascertain the particulars of the person responsible for the illegal construction and according to us, it would be sufficient, in such a case, to serve the

notice on the persons who are found to be involved in the unauthorized construction at the concerned site.

As regards the delay in action taken by KMC after the order under Section 400(8) of the KMC Act was passed, we definitely do not approve of the same. KMC ought to have executed the order under Section 400(8) of the KMC Act with more diligence than it actually did. However, such delay on the part of the concerned KMC Officers cannot create any legal right in favour of the appellant.

No construction can be allowed to stand which has been raised without obtaining due permission from the Competent Authority. If the law is otherwise, there will be complete chaos in the society.

We find no reason to interfere with the order under appeal.

The appeal being MAT 1973 of 2023 and the connected application being IA No: CAN/1/2023 are accordingly dismissed.

The *interim* order stands vacated.

Urgent photostat certified copy of this order, if applied for, be made available to the parties, upon compliance with all requisite formalities.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)

LATER:-

After the judgment is delivered in open Court, prayer is made for stay of operation of the judgment and order.

The prayer is considered and refused.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)