

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 29107 of 2023
CAN 1 of 2024

Fazle Rasul
Vs.
The Kolkata Municipal Corporation & Ors.

For the writ petitioner	:-	Mr. Subhrangsu Panda, Adv. Mr. Tirthankar Mukherjee, Adv. Ms. Madhurima Sarkar, Adv. Mr. Sumitava Chakraborty, Adv. Mr. Debottam Das, Adv.
For the State	:-	Ms. Rupsha Chakraborty, Adv.
For KMC	:-	Mr. Alak Kr. Ghosh, Adv. Mr. Dwijadas Chakraborty, Adv.
Heard on	:-	16.01.2024
Judgment on	:-	16.01.2024

Amrita Sinha, J.:-

A five-storied building has been constructed by the petitioner without obtaining a sanctioned plan. The Corporation has invoked the provision of Section 400(8) of the Kolkata Municipal Corporation Act, 1980 (in short 'the Act') and has demolished a portion of the top floor of the illegal structure. The petitioner is aggrieved by the same.

It has been submitted that on the complaint lodged by the private respondent, the Corporation initially processed the case under Section 400(1) of the Act and subsequently, converted the proceeding from Section 400(1) to Section 400(8) of the Act. The petitioner submits that the same is impermissible in law.

The fact that the demolition proceeding was initiated under Section 400(1) of the Act appears from the instruction forwarded by the engineers of the

Corporation reflected in the order dated December 1, 2023 passed in WPA 23516 of 2023 (Smt. Badrun Nessa vs. The Municipal Mayor, the Kolkata Municipal Corporation & Ors.).

The Office Circular No.07 of 2020-2021 issued by the Director General (Building), KMC dated December 16, 2020 has been relied upon. It has been submitted that since the land is a thika property, accordingly, the demolition could not have been made without intimating the Thika Controller. The notice issued by the Thika Controller for spot verification of the land has also been placed before this Court. It has been contended that prior to spot verification by the thika authority, the Corporation ought not to have demolished the structure.

Learned advocate representing the Corporation submits, upon instruction, that the instruction which was forwarded in the earlier writ petition was obtained on November 22, 2023 and Section 400(8) proceeding was approved by the Mayor on November 6, 2023.

It has been submitted that upon detection of massive unauthorized construction, the department initiated proceeding but it was not known to the concerned Executive Engineer that the matter was already forwarded to the higher authority and dealt with under Section 400(8) of the Act. Any proceeding under Section 400(8) of the Act requires an approval of the Mayor-in-Council and subsequently the Mayor. Till the approval of the Mayor is obtained, steps cannot be taken under Section 400(8) of the Act.

It has been submitted that as the entire building is without any sanctioned plan, accordingly, the Corporation invoked Section 400(8) of the Act.

Prayer has been made for dismissal of the writ petition.

I have heard and considered the submissions made on behalf of both the parties.

It is an admitted fact that the five-storied building has come up without any sanction. The person responsible for making such massive unauthorized

construction is trying heart and soul to hold on to the same. Technical pleas are agitated for the purpose of stalling the process of demolition.

It appears from the instruction forwarded by the engineers of the Corporation that the decision to invoke Section 400(8) of the Act was taken and approved by the Mayor even prior to initiation of the proceeding under Section 400(1) of the Act.

The difference between invocation of Section 400(1) and 400(8) is that, an opportunity of hearing is required to be given in a proceeding under Section 400(1), whereas, no prior opportunity of hearing is required to be given if the proceeding is under Section 400(8) of the Act.

The Corporation, upon detection of the unauthorized construction, initiated the proceeding under Section 400(8) and the same was approved by the Mayor of the Corporation. In fact, the notice as required to be issued under Section 400(1) of the Act, was not even served upon the person responsible. The petitioner never had the occasion to know as to whether the proceeding would be initiated either under Section 400(1) or under Section 400(8) of the Act. It is only relying upon the information provided by the respondent Corporation, as recorded in the order passed by this Court on December 1, 2023, that the petitioner got to know that the file has been processed under Section 400(1) of the Act.

Processing of a file does not *ipso facto* mean that proceeding under Section 400(1) has been initiated. In any case, the Corporation had no other option but to invoke either Section 400(1) or 400(8) to deal with the unauthorized construction. Upon finalization of the proceeding under Section 400(8) there was no requirement of proceeding further with the proceeding under Section 400(1) of the Act. The allegation of conversion of the proceeding from Section 400(1) to Section 400(8) does not arise. The proceeding under Section 400(1) was never born at all.

As regards the Office Circular No.7 relied upon by the petitioner the same is primarily in favour of the thika authority. The same does not given any right to

the person responsible to raise construction over a thika land without a proper sanctioned plan. The said Circular is primarily for the identification of the land whether it is thika or not. Since it has been admitted by the petitioner that the land is a thika property, accordingly, the thika authority is the owner of the land in question. The subject structure is, however, owned by the thika tenant. The thika tenant does not have any right to raise construction over a thika land without obtaining sanction or in violation of any of the Municipal laws.

If the contention of the petitioner is to be accepted and the construction of the five-storied construction made without a sanctioned plan is permitted to stand despite an order of immediate demolition being passed, then the same will promote unauthorized construction. Neither the Corporation nor the Constitutional Court should support such illegal act of unauthorized construction.

Misplaced sympathy ought not to be shown to any person who is responsible for making unauthorized construction of such huge building disregarding the provision of law. The Act lays down that construction can be made only upon obtaining sanction and not prior thereto. The petitioner embarked on an adventurous journey of raising a five storied building without any sanction. He is bound to suffer the consequences. Slightest leniency shown to such dishonest and unscrupulous builders permitting them to hold on to such unauthorized construction will be causing disservice to the public at large. If such illegal act of the builder is not struck down, the same will set up a very bad precedent and other builders will follow suit. The faith and trust of the common people upon the judiciary and the rule of law will be lost and people will start making illegal and unauthorized construction under the mistaken impression that the construction would be legalized by approaching the Court.

Granting opportunity of hearing to the petitioner would not have made much difference, as indeed, it is an admitted fact that the construction has been made without any sanction. Law provides for obtaining sanction only for securing

planned growth and development. Haphazard raising of structures without sanctioned plan stands in the way and practically obstructs systematic development. The same is a nuisance and infringes various fundamental and constitutional rights of the citizens. There is absolutely no scope for regularization of such illegal structures. The misconceived notion of the builder that the unauthorized construction can be saved by regularization should be busted and the builder should be directed to follow and abide by the mandate of law. Strict and prompt action should be taken against any construction made illegally otherwise the illegal structure is transferred to unsuspecting buyers leading to further legal complications.

The Corporation ought to have taken steps to prevent the construction work at the very initial stage. It appears that the Corporation failed to detect the unauthorized construction till the same was brought to the knowledge of the Corporation by a complaint lodged by the private respondent. After getting knowledge of the unauthorized construction, the Corporation has taken steps and has invoked the provision of Section 400(8) of the Act for demolition of the same.

It is the discretion of the Corporation whether to invoke Section 400(1) or Section 400(8) depending upon the fact and circumstance of each case. A wrongdoer does not have the right to claim to be tried under a particular provision of law. One cannot act illegally and thereafter insist to be dealt with according to the law of his choice.

The Hon'ble Supreme Court in ***Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors.*** reported in **(2013) 5 SCC 336** in no uncertain terms clearly held that there should be no judicial tolerance of illegal and unauthorized construction by those who treat the law to be their subservient. Unauthorized construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, such construction becomes hazardous for the public and creates traffic

congestion. Therefore, it is imperative for the public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer.

The Hon'ble Supreme Court in the matter of ***Supertech Limited vs. Emerald Court Owner Resident Association & Ors.*** reported in ***(2021) 10 SCC 1*** held that the building regulations are intended to ensure that constructions which have severe negative environmental impact are not sanctioned. Hence, when planning and building regulations are brazenly violated by developers, more often than not with the connivance of the regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and dilution of the safety standards. Illegal construction has to be dealt with strictly to ensure compliance of the rule of law.

In ***Priyanka Estates International (P) Ltd vs. State of Assam*** reported in ***(2010) 2 SCC 27*** the Hon'ble Supreme Court observed that if unauthorized constructions were allowed to stand or are given a seal of approval by the Court, it is bound to affect the public at large.

It appears that in the present facts and circumstances the Corporation invoked Section 400(8) of the Act. The Court does not find any infirmity on the part of the Corporation in invoking such provision. If the Court interferes at this stage, then the same may deter and will certainly demoralise the Corporation from taking strict measures against such illegal structures in future. The Court should ensure that the law is followed and not flouted by the public. When illegality is apparent, the same ought to be dealt with strictly and not brushed aside on technical pleas. A litigant who approaches Court ought to come with clean hands. No relief ought to be granted and no mercy ought to be shown to a litigant who approaches the door of justice to save and protect an illegal act.

No relief can be granted to the petitioner in the instant case. The writ petition along with the connected application fails and is hereby dismissed.

Report filed by the Officer-in-Charge, Ekbalpur Police Station is retained with the record.

Later:

After the judgment is delivered in open Court a prayer has been made by the petitioner for stay of operation of the same. The prayer of the petitioner is considered and is rejected outright.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)