IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

<u>WPO 32 of 2024</u>

Shahbaz Ayubi
Vs.
The State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Bikash Ranjan Bhattacharya, Sr. Adv. Mr. Raghunath Chakraborty, Adv. Ms. Amrita De, Adv.
For the KMC	:-	Mr. Biswajit Mukherjee, Adv. Mr. Gurudas Mitra, Adv. Mr. Gopal Chandra Das, Adv.
For the State	:-	Mr. Arindam Ghosh, Adv.
Heard on	:-	04.04.2024
Judgment on	:-	22.05.2024

<u>Amrita Sinha, J.:-</u>

The petitioner is aggrieved by the demand raised by the Corporation directing the petitioner to pay a sum of Rs. 8,68,23,808/- only for sanction of the plan proposal submitted by the petitioner. The petitioner is particularly aggrieved by the demand of miscellaneous charges amounting to Rs. 8,00,44,267/- assessed for sanction.

The petitioner submits that there is no provision in law under which miscellaneous charges may be imposed for sanction of plan proposal. It has been submitted that an old dilapidated structure exists at premises no. 98, Collin Street under Borough VI of the Corporation. The petitioner intends to demolish the old structure and raise new construction thereon. The petitioner intends to obtain benefit under Rule 142 of the Kolkata Municipal Corporation Building Rules, 2009.

Rule 142 provides for certain relaxations which are available at the time of construction of new buildings in place and instead of the existing building after demolition thereof. The schedule of fees and charges for sanction of building permit is specified and there is no scope for demanding miscellaneous charges for sanction of the building plan proposal.

Prayer has been made for setting aside the impugned demand and to direct the Corporation to issue the sanctioned building plan upon levying the prevailing fees.

The Corporation has filed a report by way of affidavit wherein it has been disclosed that the plan proposal submitted by the petitioner was placed in the meeting of the Municipal Building Committee and the same was examined by the Building Committee in details. It was noted that the plan proposal involves rehabilitation of eight tenants. The proposal for raising construction has been made in such a manner that there will be infringement of the mandatory side open spaces practically on all four sides. The total existing floor area is 1715.815 sq. mts. out of which the tenants' area is 1575.942 sq. mts.. The permissible top elevation is 56.99 mts. The area of the plot is 860.533 sq. mts. (physical) and the width of the abutting road on the western side of the plot is 9.296 mts..

Considering the rehabilitation of tenants under Rule 142 the Committee suggested that the applicant has to comply the required mandatory open spaces as per Rule 62 of the building Rules. The Committee recommended that the applicant has to obtain revised FSR before commencement and the area is to be re-checked before demand. The recommendation of the Municipal Building Committee was required to be approved by the MMIC (Building)/the Mayor, in order to enable the department to process the plan proposal for sanction.

The resolution of the meeting of the Building Committee was placed before the Mayor and the Mayor adopted resolution on 29th May, 2023 that the proposal for sanction of G+11 storied assembly building of height 38.475 mts. under Section 393 of the Kolkata Municipal Corporation Act, 1980, read with Rule 142 of the Building Rules, 2009 and the Circular issued is taken up for consideration and approved.

The resolution records that the applicant has to pay necessary fees and charges as per KMC schedule of rates and the applicant has to pay additional fees and charges for violation of the mandatory open spaces as detailed in the agenda item considering the IGR value as per the schedule of rates of KMC. The applicant has to obtain revised FSR before commencement. The DG (Building) was directed to take necessary action.

On approval of the plan proposal the charges required to be paid for sanction of the plan was calculated. At the time of calculation, the fees and charges for violation of the mandatory open space under Section 400(1) of the Act was prepared. Relying upon the calculation dated 11th July, 2023, demand was raised on 13th July, 2023 and the due date for payment mentioned in the demand notice was 28th July, 2023.

The instant writ petition has been filed on 16th January, 2024 alleging that imposition of miscellaneous charges is bad in law. Charges under Section 400(1) of the Act could not have been imposed prior to sanction of the building plan. Steps under Section 400(1) of the Act can be initiated only after erection of a building or execution of any construction work has been commenced. Prior to commencement of construction, Section 400(1) of the Act cannot be invoked.

Prayer has been made for setting aside the demand and to sanction the plan proposal which stood approved by the Mayor.

The Corporation has vehemently opposed the prayer of the petitioner. It has been submitted that the plan proposal submitted by the petitioner has been directed to be approved subject to the conditions mentioned in the resolution of the Mayor. Without fulfilment of the conditions prescribed in the resolution, the Corporation ought not to be directed to sanction the plan proposal submitted by the petitioner.

It has been argued that miscellaneous charges have been imposed in view of the fact that certain extra benefit is being given to the petitioner. For rehabilitating eight tenants, in usual course of events, only seven floors could have been sanctioned. The petitioner has prayed for sanction of eleven floors. The plan proposal mentions that the proposed construction will be of an assembly building. For rehabilitating eight tenants there is no requirement of obtaining sanction for construction of an assembly building.

The definition of assembly building mentioned in the Act has been placed before the Court. The relevant rules relating to grant of relaxation for construction of new buildings by demolishing the old ones and the provision for maintaining the mandatory side open spaces at the time of raising construction have also been relied upon.

It has been contended that the plan proposal is at the stage of 'offer and acceptance'. If the petitioner is unwilling to accept the offer of the Corporation, then a separate plan proposal may be submitted by the petitioner by following the provisions of the Act and the Rules which may be considered by the department. If the petitioner intends to obtain the benefit of extra four floors from the eighth to the eleventh floor, then the miscellaneous charges which have been demanded are required to be paid.

Prayer has been made not to entertain the writ petition.

I have heard and considered the submissions made on behalf of both the parties and have perused the documents placed before this Court.

"Assembly building" as per the Act and the Rules means, any building or part thereof where group of people congregate or gather for amusement or recreation or for social, religious, patriotic, civil, travel, sports and similar other purposes; such buildings shall include theatres, motion picture houses, drive-in-theatres, city halls, town halls, auditoria, exhibition halls, museum, skating rinks, gymnasium, restaurant, seating houses, hotels, boarding houses, lodging or rooming houses, guest-houses, dormitories, places of worship, dance halls, club rooms, gymkhanas, passenger stations and terminals of air, surface and other public transportation services, recreation piers, multiplex and stadia.

Rule 64 of the KMC Building Rules, 2009 lays down the minimum open spaces required to be maintained in respect of assembly buildings. For construction of a G+11 storied assembly building of height 38.47 mts., the front open space ought to be 6 mts., the open spaces on the right and left side should be 6.5 mts. each and the rear open space should be 9 mts.

The Municipal Building Committee noted that in the plan proposal submitted by the petitioner there is an infringement of Rule 64. The plan proposal contains front open space of 4.022 mts. instead of 6.0 mts., side 1 open space is 5.0 mts. instead of 6.5 mts., side 2 open space is 5.0 mts. instead of 6.5 mts., rear open space is 6.0 mts. instead of 9.0 mts. Open spaces on all four sides have been sought to be infringed.

Rule 142 of the Rules lays down the provision for relaxation of the Building Rules for construction of existing buildings after demolition thereof. The petitioner intends to avail the benefit of relaxation.

According to Rule 142(1)(a) additional floor-area ratio to the tune of 100% of the area presently occupied by the tenants will be allowed over and above the floor-area ratio presently utilised in the existing structure. The Corporation has already disclosed that in usual course of events if the relaxation is permitted, then the petitioner would be eligible for sanction of only G+7 storied structure.

According to Rule 142(1)(b) normally the height of the re-erected building shall not be allowed to be more than 15.5 mts. unless the applicant is otherwise so entitled. The restriction on height, however, may be relaxed provided proposal for re-erection complies with fire laws and provided further that additional car parking space as may be recommended by the Municipal Building Committee is made available.

Section 400 of the Act deals with the order of demolition and stoppage of buildings and works in certain cases and appeal. Section 400 (1) of the Act lays down that 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.

The third proviso to Section 400 mentions that provided also that the Municipal Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulation, regularize the minor unauthorized erection, or execution of any minor work without sanction under this Act, or minor deviation from the sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan under this Act or the rules or the regulations made hereunder, as the case may be.

Submission of the petitioner that Section 400(1) can be invoked only after construction is commenced appears to be proper, but the plan proposal of the petitioner is such that from the very first step of construction, there will be infringement of the mandatory side open spaces. As the plan proposal seeks relaxation of the provision for relaxation, the construction is bound to violate the building Rules. The violation will be such that the same cannot be treated as minor deviation to be regularized subsequently upon payment of fees.

It is as if, the Corporation is permitting the builder to break the laws upon payment of fees in advance. Allowing relaxation over and above the permissible limit is illegal and Corporation ought not to indulge the same. Moreover, law does not empower the Corporation to grant further relaxation of the mandatory provision of the Rules and it is for this reason there is no provision in law to charge fees in anticipation of flouting the building rules.

The minimum open spaces as required to be maintained is for a particular purpose. The open space is required for evacuation at the time of accidents like natural calamity, fire or otherwise or at the time of an emergency. The minimum side open spaces have to be taken as mandatory and ought not to be relaxed further by the Corporation because the same would amount to infringement of the rights of the occupants of the subject structure to enjoy the said spaces. The Corporation cannot permit the same to be curtailed on acceptance of fees in advance.

The Corporation intends to relax the mandatory side open spaces upon payment of fees demanded as miscellaneous charges. The petitioner alleges that there is no provision to charge miscellaneous charges; which is actually so, because law does not permit relaxation of the mandatory provisions. The charges have been demanded to shower the petitioner with extra benefit which the law does not permit. The same is absolutely impermissible in law. Only by paying money to the Corporation, an illegal act ought not to be legalised. There is hardly any scope for relaxation of the mandatory side open spaces.

The Corporation ought not to allow relaxation solely for the purpose of filling up its coffers as the same may have gone dry. If the mandatory requirements are relaxed, then the very purpose of adherence to the Building Rules gets diluted and the builders develop a trend to violate the Rules on the understanding that the illegalities may be regularised upon payment of money. Double relaxation will result in double jeopardy to the public at large.

An assembly building is meant to accommodate far more people than a domestic building. Apart from the regular residents there will be convergence of more visitors and guests who will assemble in the building. The provision for maintaining the mandatory open spaces should not be tinkered with in any manner keeping in mind the safety concerns of the people who are either residents of the building or may visit the building for any purpose. In the event of an untoward accident, the occupants will not have enough space to rush out of the building because of the constricted space. The same may result in a stampede causing loss of valuable life.

The Hon'ble Supreme Court in the matter of ***Supertech Ltd. –vs- Emerald Court Owner Residents' Association*** reported in ***(2021) 10 SCC 1*** observed that the purpose of stipulating a minimum distance is a matter of public interest in planned development. The residents who occupy constructed areas in housing projects are entitled to ventilation, light and air and adherence to the fire safety norms. The purpose of stipulating a minimum distance comprehends several concerns. These include safeguarding the privacy of the occupants and their enjoyment of basic civic amenities including access to well-ventilated areas where light and air are not blocked. The prescription of a minimum distance has a bearing on fire safety. In the event of a fire, flame would rapidly spread if the structures are closely constructed. Without the minimum spaces, it would be difficult for the fire fighting machinery to reach out. The very purpose of prescribing the minimum distances will be defeated if the minimum spaces are not maintained.

The Hon'ble Supreme Court in the matter of ***Dipak Kumar Mukherjee –vs- Kolkata Municipal Corporation & Ors.*** reported in ***(2013) 5 SCC 336*** held that while preparing master plans/zonal plans, the planning authority takes into consideration the prospect of future development and provides for basic amenities like water, electricity lines, drainage, sewerage etc. Unplanned development causes unbearable burden on the basic amenities and facilities provided by the public authority.

In the instant case as per the prevailing Rules, sanction can be granted only for construction of a G+7 storied building. The Corporation has agreed to change the mode of use of the subject premises from residential to assembly subject to the payment of fees and upon relaxation of the building Rules. The petitioner cannot claim relaxation as a matter of right. Relaxation is permissible only in accordance with the relevant laws. Here, the Corporation is trying to provide additional relaxation over and above the relaxation as permissible in law. The aforesaid act of the Corporation cannot be permitted in the interest of law and justice and also in the interest of the occupants of the proposed structure.

The Court shudders to think as to what would have happened had the instant writ petition not landed up before the Court. In that case, the party concerned would have paid the amount demanded and may have proceeded with the construction work. There may be several other instances where the Corporation is permitting similar relaxation, devoid the Rules, upon acceptance of fees.

The Corporation ought to review the issue in a holistic manner and think beyond replenishing the dwindling resources of the Corporation. By this manner the Corporation is encouraging illegal constructions by relaxing the mandatory provisions of law, completely ignoring the safety issues of the public at large. At the same time, it will be highly improper for the Corporation to permit relaxation in one case and refuse the same in respect of others for non-payment of the fees demanded. The same would amount to discrimination. Assuming the wrongdoer is agreeable to pay the charges, then there would be no requirement of abiding the building rules because the wrong would be made right on making payment, collected in the name of fees and charges. The decision to approve the plan proposal has been taken in a myopic way upon total misappreciation of the legal provision.

The time period within which the payment ought to have been made as per the demand is long over. The offer by the Corporation has not been accepted by the petitioner. As on date the said offer does not exist in the eye of law. Moreover, an offer contrary to law cannot be treated as a valid one.

In view of the discussion made herein above, the impugned demand raised by the Corporation is liable to be set aside and is, accordingly, set aside. The resolution of the Municipal Building Committee held in its meeting no. 615 dated 13th April, 2023 and the subsequent resolution of the Mayor, KMC dated 29th May, 2023, taken in connection with the subject property, are also set aside and quashed.

The Commissioner is directed to place the matter before the Municipal Building Committee to revisit the issue in the light of the observations made herein above. A decision shall be taken in the matter at the earliest but positively within a period of twelve weeks from the date of communication of this order.

The writ petition stands disposed of.

No order as to costs.

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.)