

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/61/2024
WPO/1211/2023
IA NO:GA/1/2024
GA/2/2024

THE KOLKATA MUNICIPAL CORPORATION AND ORS.
VS.
AMITAVA DAS

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE PRASENJIT BISWAS

Date : May 2, 2024.

Appearance:

Mr. Biswajit Mukherjee, Adv.
Mr. Gurudas Mitra, Adv.
Mr. Swapan Kr. Debnath, Adv.
...for the Appellant/KMC.

Mr. Somnath Gangopadhyay, Adv.
Mr. Sumitava Chakraborty, Adv.
..for the Respondent

RE: GA/1/2024

The Court: This is an application for condonation of delay of 28 days in presenting the appeal.

Causes shown being sufficient, the delay is condoned.

GA/1/2024 is disposed of.

RE: GA/2/2024, APOT/41/2024

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

Kolkata Municipal Corporation (in short, 'KMC') is aggrieved by a judgement and order dated December 13, 2023, whereby the writ petition of the respondent No.1 herein being WPO/1211/2023, was disposed of by a learned Judge of this Court.

The respondent No.1 herein approached the learned Judge challenging a demand dated April 27/28, 2023, raised by Kolkata Municipal Corporation on the respondent No.1, calling upon the respondent No.1 to deposit a sum of Rs.13,13,531/- and certain other amounts on account of labour welfare cess and drainage development fees, as a pre-condition for permitting the respondent No.1 to participate in the demolition proceedings initiated by KMC under Section 400(1) of the KMC Act, 1980, in respect of alleged unauthorised construction raised by the respondent No.1.

Before the learned Judge, the respondent No.1/writ petitioner argued that there is no provision in KMC Act, 1980 or the Rules framed thereunder which authorises KMC to demand such pre-deposit. Such pre-deposit cannot be demanded on the basis of a Circular introduced by KMC. A Circular cannot be contrary to the statute or the statutory rules. The demand for pre-deposit is without the sanction of law.

On behalf of KMC, it was argued that the amount of pre-deposit that has been demanded represents 50% of the approximate fees that the writ petitioner would have to pay in case the proceedings under Section 400(1) of the KMC Act, 1980, culminates in an order allowing the writ petitioner to retain the unauthorised construction. If such retention order is not passed, but a demolition order is passed and the writ petitioner fails to demolish the illegal structure, KMC shall demolish such structure and refund the money to the writ petitioner after deducting the demolition charges. It was pointed out that the unauthorised construction has been raised infringing various provisions of the KMC Building Rules, 2009. A stop work notice has also been issued to the writ petitioner.

The learned Judge accepted the submission made on behalf of the writ petitioner. Her Ladyship held that without there being a provision in the KMC Act, 1980, or the Rules framed thereunder, KMC merely by issuing a departmental Circular, cannot demand a pre-deposit as a pre-condition for permitting the person responsible to participate in the proceedings under Section 400(1) of the KMC Act, 1980. The learned Judge referred to the decision of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries*, reported at (2008) 13 SCC 1. In that case, the Hon'ble Apex Court held that a Circular, which is contrary to the statutory provisions,

has no existence in the eye of law. The learned Judge disposed of the writ petition with the following observations:

“The Regulations imply that fees will be calculated on the basis of the rates/ onded and prescribed under the relevant heads in the Budget Schedule er the Act, nor the Building Rules or the Regulations require for pre deposit of amount prior to initiation of the demolition proceeding Till there is specifie in the Act or the corresponding Rules or the Regulations, the Corporation et demand any amount to be paid as pre deposit relying upon a departmental Circular.

For the purpose of adding anything new to the existing Act, Rules or agulations, necessary amendment is required to be made. Without the required mendment, it will not be proper for the Corporation to raise demand only relying pon the departmental Circular. The Circular can be only in the aid of the existing Rules and Regulations. The Circular cannot be relied upon for supplanting provision shich does not exist in the parent statute.

The Hon'ble Supreme Court in Ratan Melting (supra) laid down that a Circular which is contrary to the statutory provision has no existence in law. Here, the Circular relied upon demanding pre deposit is contrary to the statute.

In view of the above, the impugned action of the Corporation in raising demand for pre deposit has to be held as illegal and contrary to the provisions of law. The impugned demand does not have any legal sanction and is liable to be set aside. The same is, accordingly, set aside. However, it will be open for the Corporation to take necessary steps to deal with the unauthorized construction, in accordance with law.”

After the judgement was delivered, certain submission was made before the learned Judge and the learned Judge recorded the following order:

“Later:

After the judgment was delivered in open Court it has been submitted by learned advocate representing the Corporation that the Corporation will permit the petitioner to participate in the proceeding under Section 400(1) of the Act without insisting upon payment of the pre-deposit. It will be open for the petitioner to participate in the hearing.

Being aggrieved, KMC has come up by way of this appeal.

Mr. Mukherjee, learned advocate representing Kolkata Municipal Corporation, draws our attention to Rules 41 to 43 of the KMC Building Rules, 2009 and says that those rules clearly contemplate that KMC may call for a pre-deposit in connection with holding proceedings under Section 400(1) of the KMC Act, 1980.

Mr. Mukherjee submitted that the relevant Circular has the authority of law and is not contrary to statute.

We are not inclined to consider the questions of law raised by the parties, in this appeal, since KMC conceded before the learned Single Judge that it will permit the writ petitioner to participate in the demolition proceedings initiated under Section 400(1) of the KMC Act, 1980, without insisting on the pre-deposit. We have our doubts as to whether or not, this appeal is maintainable at all in view of the concession of KMC before the learned Single Judge. The point of validity

of the relevant Circular is left open to be decided in an appropriate proceeding. Since, prima facie, there appears to be some substance in the argument of Mr. Mukherjee, learned advocate for KMC, we clarify that the observation made by the learned Single Judge in respect of the relevant Circular shall be deemed to be confined to the facts and circumstances of this case only. In other words, we repeat that the issue of validity of the concerned Circular is left open.

The appeal and the connected application are disposed of.

Since we have not called for affidavits, the allegations made in the application are deemed not to have been admitted by the respondents.

(ARIJIT BANERJEE, J)

(PRASENJIT BISWAS, J.)

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