

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO 170 of 2024

M/s. Madan Gopal Board House Private Limited & Anr.
Vs.
The Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Biswajit Mukherjee, Adv. Mr. Supratick Shyamal, Adv. Ms. Sabarnee Chatterjee, Adv.
For KMC	:-	Mr. Alak Kumar Ghosh, Adv. Mr. Fazlul Haque, Adv. Mr. Dwijadas Chakraborty, Adv.
Hearing concluded on	:-	01.05.2024
Judgment on	:-	10.05.2024

Amrita Sinha, J.:-

The petitioner no. 1 is a private limited company and the petitioner no. 2 is the director thereof. The company is a tenant in respect of a godown measuring about 900 sq. ft. approximately in the ground and mezzanine floor of premises no. 9, Antony Bagan Lane under the private respondent nos. 7-9. The tenanted premises is used for commercial purpose.

The petitioners claim that after the cyclone Amphan the roof of the godown of the petitioners got severely damaged but due to paucity of funds, the petitioners were not in a position to repair the roof immediately. The petitioners obtained permission from the landlords for repairing the existing roof with concrete slab above the asbestos roof. The petitioners have averred

in the writ petition that the old and ruinous asbestos shed were replaced with RCC slab in the ground floor for the purpose of safety from rain and various other natural calamities.

The petitioners allege that the men and agents of the Kolkata Municipal Corporation ('KMC' for short) visited the subject premises on 2nd January, 2024 and demolished the concrete roof as well as asbestos shed of the godown of the petitioners. The petitioners, on enquiry, came to learn that a complaint was lodged against the repairing work done by the petitioners and an intimation to the concerned police station was filed. Notice under Sections 544 and 546 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as 'the Act') was issued for complying the order of demolition dated 13th May, 2023 passed under Section 400(1) of the Act.

It has been submitted that the demolition proceeding was initiated against one Mantu Saha. KMC did not issue any notice of the demolition proceeding either on the owners or the person responsible for making construction. The said Mantu Saha is neither a tenant nor occupier or owner of the said premises. The petitioners claim that they do not have any relationship with the aforesaid Mantu Saha and submits that there is no person by the aforesaid name in the subject premises.

It has been submitted that the petitioners intimated the Corporation in advance about the repairing work that was sought to be done by them. Without considering the said prior intimation made by the petitioners, KMC ought not to have conducted the proceeding and further ought not to have

executed the order of demolition that was passed ex parte. The petitioners applied before KMC seeking repairing of the roof and restoring it to its original state.

Prayer has been made for directing KMC to repair the demolished roof of the godown and to restore the same to its original form. Further prayer has been made to set aside and/or cancel the demolition order dated 13th May, 2023 passed under Section 400(1) of the KMC Act, 1980 and the subsequent notice issued under Sections 544 and 546 of the KMC Act, 1980 dated 29th December, 2023.

Learned advocate representing KMC opposes the prayer of the petitioners by filing an affidavit. It has been submitted that in the instant case a telephonic complaint was received informing unauthorised construction being made at the subject premises. The Sub-Assistant Engineer of the borough visited the premises and found that several number of RCC beams had been constructed over the existing brick built structure and RCC slab was cast over the constructed RCC beams.

During inspection several persons were found involved with the construction work. The persons present at the spot were asked to produce valid documents in support of the construction. One of the persons identified himself as Mantu Saha and the Sub-Assistant Engineer, on bona fide understanding, that the said Mantu Saha with others was causing the erection, initiated proceeding under Section 400 against him. The said Mantu Saha was treated as the person responsible for making construction.

As in terms of Section 400 of the Act it was found that Mantu Saha was the person responsible for making construction, accordingly, all notices were sought to be served upon the said person. As the aforesaid Mantu Saha refused to sign the notice under Section 400(1) of the Act, accordingly, the notice Section 400(1) of the Act was affixed on the wall of the unauthorised construction for information of all concerned. As none appeared at the time of hearing of the demolition proceeding, the Executive Engineer passed order on 12th August, 2023 and pasted the order of demolition on the outer wall of the structure for information of all concerned. As the time period within which the self demolition was directed to be carried out expired, accordingly, notice under Sections 544 and 546 of the Act was issued and demolition took place on the scheduled date.

The aforesaid facts came to the knowledge of the Executive Engineer (Civil)/Building/Borough – IV and V who is currently holding the said post from the materials available on record. The erstwhile Executive Engineer is no longer holding the subject post.

The notice under Section 401 of the Act, the complaint lodged by the Assistant Engineer (Civil)/ Building Department, Borough – IV and V before the Officer-in-Charge, Amherst Street police station on 5th June, 2023 intimating about the unauthorised construction, the service return notice dated 5th June, 2023, the notice under Section 400(1) of the Act, the show cause notice under Section 400(1) of the Act dated 7th August, 2023 along with the infringement statement dated 7th August, 2023 and the demolition

order under Section 400(1) of the Act have been annexed with the affidavit filed on behalf of KMC.

It has been submitted that there was no mala fide intention on the part of KMC while passing the interim order of demolition. KMC on good faith and bona fide intention served the notice upon the person found at the spot at the time of inspection and continued the proceeding in the name of the said person. Admittedly, the petitioners failed to produce any sanction prior to casting the RCC roof. Casting of the RCC beams and roof slab without any sanction from the Corporation is impermissible in law and as such the order of demolition was passed and subsequently executed.

Prayer has been made for dismissal of the writ petition.

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

The petitioners contend to have made construction relying on an intimation served upon KMC to repair the damaged roof at the subject premises. The petitioners have admitted in the writ petition that the roof was an asbestos shed which got demolished with the passage of time and also because of the Amphan cyclone. The petitioners further admit that for safety reasons the asbestos shed was replaced with RCC slab. Apart from the intimation served in the borough office of KMC the petitioners have not been able to produce any evidence to show that permission was actually granted to the petitioners for replacing the asbestos shed with RCC slab.

As per Rule 3(2)(e) of the KMC Building Rules, 2009 permission is not required if minor repairs and re-flooring of an existing damaged roof is done without changing the character and dimension of such roof. The first proviso to the aforesaid Rule mentions that the character of a damaged roof may be allowed to be changed and its reconstruction permitted by permission in writing of the Commissioner on such terms as he may consider fit upon application being made to him along with three copies of plan on payment of requisite fees and on submission of structural stability certificate from the structural engineer, architect or a Licensed Building Surveyor as the case may be.

The second proviso to the aforesaid Rule mentions that no work referred to in clause (e) shall be undertaken without giving the Municipal Commissioner fifteen days' notice in writing stating the nature of work proposed to be undertaken.

There is nothing on record to suggest that application was made before the Commissioner to obtain permission to change the character of the roof. Mere intimation that repairing work will be done does not imply that the character of the roof can be changed without obtaining permission. Hence, it can be concluded that replacing the asbestos shed with that of RCC slab, without permission, amounts to unauthorised construction liable to be dealt with in accordance with the provisions of law.

The next issue that has been raised by the petitioners is that no notice of the proceeding to deal with the unauthorised construction was ever

served upon either the owner or the person responsible for making construction. In the present case the petitioners claim that the private respondent nos. 7-9 are the owners of the subject premises. It has, however, been admitted by the petitioners that the record of the Corporation does not contain the names of the aforesaid respondents as owners. On the contrary, the property in question has been recorded in the names of persons who have not been impleaded as parties in the writ petition. The persons, who the petitioners claim to be the owners, are not represented in the instant writ proceeding.

According to the first proviso of Section 400(1) of the Act, no order of demolition shall be made unless the person at whose instance the construction work has been commenced or is being carried on has been given a notice of showing cause as to why such order shall not be made. The Executive Engineer has averred in the affidavit that at the time of spot inspection one person, who identified himself as Mantu Saha, was found responsible for making the construction work. The said Mantu Saha did not disclose either the name of the owner or the name of any person at whose instance the construction work was being made. As the aforesaid Mantu Saha was found actually responsible for making the construction work, accordingly, notices of the proceeding were issued in his name.

It has also been averred in the affidavit that as the aforesaid Mantu Saha refused to accept the notices, as such, the precise of the unauthorised construction and the hearing notice was pasted on the wall of the

unauthorised construction. The order of demolition was also affixed on the wall for knowledge of all concerned.

It appears that the notice under Section 401 of the Act to stop construction was issued on 5th June, 2023, notice to show cause within 24 hours was issued on 7th August, 2023 and the order of demolition was passed on 12th August, 2023. The demolition actually took place on 2nd January, 2024. The petitioners who claim to be the tenants of the subject premises and who accepts the responsibility of making the construction cannot and ought not feign ignorance of the demolition proceeding as it has been averred that all the notices were affixed on the wall of the subject structure.

The demolition took place more than four months after the order of demolition was passed. It may be that the petitioners were aware of the proceeding but deliberately did not participate in the same. Practically it cannot be accepted that the fact of visit of the engineers of the Corporation at the site in the month of June, 2023 could have escaped their knowledge as the men and agents of the petitioners were present at the site where construction was being made.

Learned advocate representing the petitioners have vociferously contended that as the details of the complainant who intimated the engineer of the Corporation as regards the unauthorised construction were not mentioned in the prescribed format of the complaints details as annexed to the affidavit filed by KMC and the infringement statement does not indicate

the violations to the building Rules, accordingly, it has to be taken that the proceeding was a defective one and no remedial steps could have been taken relying on the same.

On a perusal of the complaint details it appears that the same is truly an incomplete one. The infringement statement also does not mention the relevant Rules that have been violated, but the details of the unauthorised construction clearly mentions that 88 sq. mtr. construction has been made by erecting several number of RCC beams and casting RCC slab in the ground floor of the subject premises without building sanctioned plan. The same is enough description of the unauthorised construction made by the petitioners. Not indicating the particular Rule(s) that has/have been violated does not vitiate the proceeding as long as the violation itself has been identified and is described in the infringement statement.

For maintaining proper records, the details of the complainant should have been clearly recorded; but there is no denying the fact that the construction did take place in an unauthorized manner. Not mentioning the proper details of the complainant does not render the proceeding fatal. The engineer of the Corporation suo motu could have lodged complaint of unauthorised construction and the same is permissible in law. Even anonymous complaint is maintainable. At times identity of the complainant is required to be kept secret for safety reasons; that does not mean that the complaint becomes bad or the action taken in response to the same becomes illegal.

It is an herculean task for a couple of engineers to get details of all the constructions that are made within a borough. The public at large are the eyes and ears of the engineers. More often than not it is from the information received from the members of the locality that the engineers get knowledge of the unauthorized construction that are made and the authority acts on the basis of the said complaint. There is no bar in law to act in response to an anonymous complainant.

The Court has not been made aware whether the entire unauthorized construction has been demolished or not. If all the unauthorized construction has not been pulled down as yet, then the KMC is directed to afford an opportunity of hearing to the petitioners, being the persons responsible for making construction, prior to carrying on any further demolition.

The prayer made by the petitioners for directing the KMC to repair the demolished roof stands disallowed as the Court has come to a conclusive finding that the construction which had been demolished was an illegal and unauthorized one.

The writ petition stands disposed of. No 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.)