

OD-21

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

ORIGINAL SIDE

I.A. G.A. No. 3 of 2024

WPO/949/2023

M/S. ELITE ESTATES

-Versus-

KOLKATA MUNICIPAL CORPORATION & ORS.

BEFORE:

The Hon'ble JUSTICE KAUSIK CHANDA

Date : 3rd July, 2024.

Appearance:

Mr. Sumitava Chakraborty, Adv.
..for the Petitioner.Mr. Alak Kr. Ghosh Adv.
Mr. Subhrangsu Panda, Adv.
Ms. Ira Bhattacharyya, Adv.
...for KMC.

The Court: The writ petitioner has prayed for a direction upon Kolkata Municipal Corporation to implement a retention order. By the said order dated September 24, 2020, the Special Officer (Building), allowed retention of certain unauthorized constructions at premises no. 78/3, Bade Raipur Road, Kolkata- 700 092 Ward No. 96 Borough - X.

The relevant part of the said order is quoted below:

"Considering all the available information & document placed with the file, statement of P.R. and keep due regards to the spirit of Law, the structure deviating from sanction plan at G +IV storied residential building as shown in D./Sketch Plan is allowed to retain and change of

use at ground floor is allowed. AS reported area of change of use is 45.636 Sqm. & area of unauthorized construction is 97.736 Sqm.

Demand of fees may be issued only after concurrence for Authority.

P. R. have to deposit the demand fees after due concurrence of authority within 30 days from the date of issue of order, failing which action for demolition will be taken on approval of authority cost of demolition may be recovered from P. R. on approval of authority,"

It is not in dispute that the said retention order was approved by the Municipal Commissioner on September 30, 2021, and was directed to be processed by the Director General (Building) and to put up the issue as a Mayor-in-Council agenda item before the Board of Administrators for taking a decision.

The order of retention was considered by the Mayor-in-Council, and by a resolution dated February 8, 2023, the Mayor-in-Council directed the matter to be placed for "review". The Mayor-in-Council further resolved to direct the Director General (Building) to take necessary action.

Following the said resolution dated February 8, 2023, the matter was again taken up by the Special Officer (Building), and by an order dated April 18, 2023, the said Special Officer (Building) directed as follows:

"I am inclined to pass order after reviewing the matter further as ordered by authority as follows:-

Part A: Office spaces is to be reduced so that one parking space could be provided at front side for ease of movement of car parking.

Part B: Guard room deviating from sanction plan is to be removed for providing manoeuvring of parking at rear side.

Part C: After completion of Part A & B within 30 days from the date of communication of order other deviations may be allowed to retain to payment of fees U/S 400(1) & 416 as applicable to be paid on actual basis

within 30 days from the date of communication of order failing which action will be taken by department and cost will be recovered. Demand notice will be issued after compliance of Part A and B.

The previous order U/S 400(1) dated 24/09/2020 is superseded by the order.

Order may be communicated to all concerned.

D/Sketch will be part and parcel of order.

Any person aggrieved by this order u/s 400(1) may be appeal against this order to Municipal Building Tribunal within stipulated time in accordance with the provision of KMC act 1980.

Order of Hon'ble court if any must be completed."

To challenge the said order dated, April 18, 2023, passed by the Special Officer (Building) it has been contended by the learned advocate appearing for the petitioner that the Mayor-in-Council did not have the power to review an order passed by the Special Officer (Building) for regularisation of an unauthorised construction. Therefore, the said order dated April 18, 2023, should be set aside and the original order dated September 24, 2020, should be implemented.

To buttress his argument, the learned advocate appearing for the petitioner has placed reliance upon Kolkata Municipal Corporation (Regularisation of Building) Regulations, 2015 (hereafter referred to as the "Regulations of 2015"). The attention of this Court has been drawn to Regulations 5, 6, and 7 of the said Regulations of 2015.

It has been argued by the learned advocate appearing for the petitioner that Regulation 6 stipulates that if the Municipal Commissioner so thinks that the process of hearing was not followed in regularising an unauthorised construction, he may pass further order after review or recalling of the earlier order. The power to review is vested with the

Municipal Commissioner only. The Mayor-in-Council of the Corporation should not have exercised the power to review as has been done in the present case.

Learned advocate appearing for the petitioner has placed reliance upon a judgement passed by a co-ordinate Bench of this Court in 2022 SCC OnLine Cal 1589.

In my view, the said judgment is not an authority for the proposition that the Mayor-in-Council is not competent to disapprove or pass an order for a review of a retention order passed by the Special Officer (Building).

Regulation 7 has also been pressed into service to argue that once an order of regularisation has been passed, no second order of regularisation can be passed for an unauthorised construction. Therefore, the second order of regularisation dated April 18, 2023, is nonest in the eye of law.

On behalf of the Corporation, it has been submitted that the Regulation of 2015 has been framed in terms of the third proviso to Section 400(1) of Kolkata Municipal Corporation Act, 1980. It has been argued by the Corporation that the first order of regularisation dated September 24, 2020, was never communicated to the petitioner. The order was placed before the Mayor-in-Council for its approval. Therefore, the order dated September 24, 2020, did not reach its finality and it did not assume the character of an order issued by the Corporation. It has been submitted by the Corporation that only the second regularisation order dated April 18, 2023, can be said to be an order of the Corporation and the petitioner could not have challenged the order dated September 24, 2020.

To appreciate the controversy, it is necessary to quote Section 400(1) of the Kolkata Municipal Corporation Act, 1980 and rules 4, 5 and 6 of the Kolkata Municipal Corporation (Regulation of Building), 2015.

“400. Order of demolition and stoppage of building and works in certain cases and appeal.- (1) 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.

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made.

Provided further that where the erection or the execution has not been completed, the Municipal Commissioner may by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-section (3).

[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 unauthorised 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.

[Provided also that the Municipal Commissioner may, by order, delegate his powers and functions under the first proviso and the third proviso of this sub-section to the Special Officers, appointed by the Municipal Commissioner with the approval of the State Government on such terms and conditions as may be

determined by the Corporation, and expenses for payment of such officers shall be borne on the Municipal Fund."

"4. Terms and condition for regularization:

Any unauthorized erection or work may be regularized by the Municipal Commissioner or any of its officer delegated by him, provided that the erection or work is determined by the Municipal Commissioner or any of its officer delegated by him as 'minor' as per regulation 3(1)(b) and 3(1)(c) of this regulation keeping regard to the following things:

- a) Objections raised by any local inhabitants of the construction in question.*
- b) Road width and communication facilities.*
- c) Drainage system of the surrounding locality.*
- d) Other civic infrastructures,*
- e) Clearance from Fire and Emergency Services Department and Pollution Control Board, if required.*
- f) Reasons beyond the control of the person responsible.*
- g) Social interest.*
- h) Facilities of ingress and egress,*
- i) Infrastructural support at site,*
- j) Structural safety,*
- k) Fire safety, if required,*
- l) Environmental aspects,*
- m) Local complaints,*
- n) National loss in case of demolition,*
- o) Availability of other statutory clearances as will be required etc. with due regards to the spirit of law, any court order, as well as provisions of Kolkata Municipal Corporation Act, 1980 as amended up to date.*

Explanation:

'local inhabitants' means the next door neighbor, or inhabitant of same locality, mohalla or otherwise connected to site of the construction.

"Person Responsible"- means any person responsible for the unauthorized construction in question or any of his power of attorney holders or representatives.

- 5. Payment of fees for regularization:*** *Before calculation of fees, order issued by the officer delegated by the Municipal Commissioner, shall be placed before Mayor/Mayor-in-Council for necessary concurrence/approval. Thereafter, the Municipal Commissioner may by order charge fees as will be calculated on the basis of rates/fees provided and prescribed under the relevant heads in the*

Budget Schedule under Section 131(3) of the Kolkata Municipal Corporation Act 1980.

6. Review of the order: *If the Municipal Commissioner so thinks that the process of hearing was not followed properly, he may pass further orders after review/recall the earlier order."*

A bare perusal of the aforesaid provisions of Regulation of 2015, particularly, Regulation 5 thereof, make it clear that before the calculation of fees for regularisation, the order of retention issued by the Special Officer (Building) should be placed before the Mayor/Mayor-in-Council for necessary concurrence and approval. After the approval or concurrence is accorded, the Municipal Commissioner may charge fees as will be calculated on the basis of rates/fees provided and prescribed under the relevant heads in the Budget Schedule under Section 131(3) of the Kolkata Municipal Corporation Act, 1980.

The aforesaid provisions make it clear that unless a retention order is approved by the Mayor-in-Council, the same cannot be given effect to.

It is a trite law that an authority vested with the power to approve something has the implicit power not to approve the same. Therefore, the power of the Mayor-in-Council not to approve a retention order passed by the Special Officer (Building) can easily be traced to Regulation 5 of the Regulations of 2015.

I also find substance in the submission advanced by the Corporation that the initial order of retention dated September 24, 2020 given, cannot be said to be an order issued by the Corporation, as the same was not approved by the Mayor-in-Council. An order of retention attains its finality only upon approval of the Mayor-in-Council in terms of Regulation 5 of the

Regulations of 2015. Therefore, there was no jurisdictional error by the Mayor-in-Council in directing the order of the Special Officer to be reviewed.

It also should be noticed that by the initial order dated September 24, 2020, the Special Officer allowed retention of the entire unauthorised construction, but in his final order dated April 18, 2023, he allowed the unauthorised construction to be retained with a reduction of the office space and removal of the guard room on the ground floor.

In my view, at this juncture, this Court should not interfere with or give any findings with regard to the second retention order since the said order also requires to be approved by the Mayor-in-Council.

Accordingly, this writ petition is disposed of with a direction upon the Corporation to place the retention order dated April 18, 2023, before the Mayor-in-Council. It is desirable that the Mayor-in-Council shall consider the said order of the Special Officer (Building) in its next meeting and pass the necessary order. The final order should be communicated to the petitioner within a period of one week thereafter. If the petitioner is aggrieved by the order, it will be at liberty to challenge the same in accordance with law.

WPO/949/2023 and I.A. G.A. No.3 of 2024 are accordingly disposed of.

(KAUSIK CHANDA, J.)

dg/