

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
ORIGINAL SIDE**

**I.A.NO: G.A.1 OF 2022**

**APO/55/2022**

**WITH**

**WPO/45/2018**

**NEXOME REAL ESTATE PRIVATE LIMITED**

**VS**

**SHIROMONI FLAT OWNERS' ASSOCIATION & ORS.**

**AND**

**I.A.G.A./1/2022**

**APO/56/2022**

**WITH**

**WPO/45/2018**

**THE WEST BENGAL HERITAGE COMMISSION & ANR.**

**VS**

**SHIROMONI FLAT OWNERS' ASSOCIATION & ORS.**

**AND**

**I.A.G.A./1/2022**

**APOT/92/2022**

**WITH**

**WPO/45/2018**

**MAHARAJA PRADYUT KUMAR DEB BARMAN**

**VS**

**SHIROMONI FLAT OWNERS' ASSOCIATION & ORS.**

**WITH**

**I.A.G.A./1/2022**

**OCOT/3/2022**

**MAHARAJA PRADYUT KUMAR DEB BARMAN**

**VS**

**SHIROMONI FLAT OWNERS' ASSOCIATION & ORS.**

**AND**  
**I.A./G.A/1 OF 2022**  
**APOT/100/2022**  
**THE KOLKATA MUNICIPAL CORPORATION & ORS.**  
**VS**  
**SHIROMONI FLAT OWNERS' ASSOCIATION & ORS.**

**Before:      The Hon'ble Justice Arijit Banerjee**

**&**

**The Hon'ble Justice Rai Chattopadhyay**

|                                                        |   |                                                                                                                                                                                               |
|--------------------------------------------------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Appellants / petitioner<br>in APOT / 92/ 2022  | : | Mr. Ratnanko Banerji, Sr. Adv.<br>Mr. Jishnu Chowdhury, Adv.<br>Mr. A. Kanodia, Adv.<br>Ms. Sristi Barman Ray, Adv.                                                                           |
| For the KMC                                            | : | Mr. Jayadip Kar, Sr. Adv.<br>Mr. Ranajit Chatterjee, Adv.<br>Mr. Gopal Chandra Das, Adv.                                                                                                      |
| For the appellant in APO 55 of<br>2022                 | : | Mr. Surajit Nath Mitra, Sr. Adv.<br>Mr. Reetobroto Mitra, Adv.<br>Ms. Labanyasree Sinha, Adv.<br>Ms. Nafisa Yasmin, Adv.                                                                      |
| For W.B. Heritage Commission<br>respondent Nos.26 & 27 | : | Mr. S.N. Mukherjee, Sr. Adv.<br>Mr. Prabal Mukherjee, Sr. Adv.<br>Mr. Subrata Goswami, Adv.                                                                                                   |
| For respondent no.24 in<br>APOT/92/2022                | : | Mr. Sunil Kumar Singhanian, Adv.<br>Ms. Twinkle Kaur, Adv.                                                                                                                                    |
| For respondent Nos.1 to 16 in<br>all the appeals       | : | Mr. Shyamal Sarkar, Sr. Adv.<br>Mr. Sakya Sen, Adv.<br>Mr. Anupam Das Adhikary, Adv.<br>Mr. Atish Ghosh, Adv.<br>Mr. Arindam Chandra, Adv.<br>Ms. Sumana Biswas, Adv.<br>Ms. Antara Dey, Adv. |
| For Orders on                                          | : | 13.02.2024                                                                                                                                                                                    |

**Arijit Banerjee, J. :-**

1. These four appeals and the cross objection filed in one of the appeals are directed against a judgment and order dated May 19, 2022, whereby the

writ petition of the respondent nos. 1 to 16 herein being WPO No. 45 of 2018, was disposed of by a learned Judge of this Court. Since, all these matters involve the same set of facts and common questions of law, they were heard analogously and are being disposed of by this common judgment and order.

2. The matter pertains to a property situate at 59 Ballygunge Circular Road, Kolkata 700 019, popularly known as “Tripura House”. The said property originally comprised an area of approximately 7 bighas 6 kattas and 10 chittacks along with a 2 storeyed building thereon. A building plan for construction of a G+7 storeyed building on the eastern portion of the said property, was sanctioned by Kolkata Municipal Corporation (in short ‘KMC’). The construction of such building was completed on an area of approximately 2 bighas 13 kattas and 10 chittacks by 2003-04. The said portion is now segregated from the main property by a boundary wall and is numbered as 59A, Ballygunge Circular Road.

3. On February 25, 2009, KMC declared Tripura House as a Grade-I heritage building under Section 425B of the Kolkata Municipal Corporation Act, 1980 (in short “KMC Act”). The construction on the eastern portion of the property which was renumbered as 59A Ballygunge Circular Road, did not come within the purview of the heritage building as it stood segregated prior to declaration of Tripura House as a heritage building. The heritage building and the adjacent land comprises an area of approximately 4 bighas and 12 kathas with the original two storeyed structure thereon.

4. On March 28, 2014, the owner of the said property being the appellant in APOT 92 of 2022, applied to the Heritage Conservation Committee, (in short

‘HCC’) constituted under Section 425-D of the KMC Act for permission to make a construction on the vacant portion at the western side of the property. The owner also requested for downgrading of the heritage status from Grade –I to Grade – II (A).

5. On August 11, 2014, the Mayor-in-Council (in short “MIC”) of KMC placed the matter of down-gradation of the heritage building before the HCC. The HCC rejected the proposal.

6. Sometime thereafter, the owner of Tripura House wrote to the West Bengal Heritage Commission (in short “the Heritage Commission”) for approval of a plan for construction of a G+VIII storeyed building on the western portion of the said property. This according to the owner he did, being advised by HCC that the proposal should be first approved by the Heritage Commission.

7. On December 15, 2014, the Heritage Commission wrote a letter to the owner of the property stating that it had no objection in principle to the proposed development of the western portion of the property, subject to certain modifications as stated in the said letter.

8. On January 16, 2015, a meeting of the Heritage Commission was held. Two out of the three members were present. They decided to approve the plan submitted by the owner, from the heritage perspective.

9. By a letter dated January 19, 2015, addressed to the Convenor of HCC, the Heritage Commission recorded that it had agreed to clear the revised design of the proposed building for sanction by the building department of KMC. However, KMC should verify whether the design is in conformity with the Building Rules and Regulations of KMC.

10. By a letter dated February 4, 2015, addressed to the Mayor of KMC, the Heritage Commission recorded that it had cleared the proposal for construction of the building on the said property, from heritage point of view. The Heritage Commission also suggested opening of the “Heritage Lock” in respect of the said property.

11. On December 10, 2015, the owner submitted a fresh plan for construction of a B+G+17 storeyed building, to KMC.

12. On March 22, 2017, the owner submitted a revised plan proposing construction of a B+G+13 storeyed residential building having the height of 56.80 metre.

13. On March 25, 2017, the new proposal was placed before the Municipal Building Committee (in short ‘MBC’) of KMC.

14. By a resolution dated April 18, 2017, the MBC deferred the matter as the proposal was not in conformity with the proposal approved by the Chairman of the Heritage Commission.

15. By a letter dated April 20, 2017, addressed to the owner, the Heritage Commission approved the new plan for construction of a 12 storeyed building on the western side of Tripura House on the condition that upon completion of the building, the owner shall renovate and restore the garden area of the premises. A copy of such letter was marked to the Commissioner of KMC.

16. By a letter dated May 2, 2017, addressed to the owner with a copy marked to the Municipal Commissioner, the Heritage Commission corrected an error in its earlier letter dated April 20, 2017 and accorded approval for a B+G+13 storeyed building (height 56.8 metre) as per drawing submitted, on

the western side of Tripura House. It was clarified that such approval superseded all previous NOCs issued by the Heritage Commission for the concerned project.

17. On August 17, 2017 and September 8, 2017, the West Bengal Fire and Emergency Services gave clearance for the project subject to compliance of the Fire Safety Measures and installation of a separate fire pump for the sprinkler installation of the proposed building.

18. On November 29, 2017, the MIC of KMC approved the building plan upon relaxation of Rule 62 of the KMC Building Rules, in terms of Rule 65 A of the said Rules, as per recommendation of MBC in its 538<sup>th</sup> meeting dated August 30, 2017.

19. On January 18, 2018, the building plan was finally sanctioned by KMC.

20. Soon thereafter the writ petition was filed by the respondent nos. 1 to 16 herein. In fact, the writ petition was affirmed on January 30, 2018. The essential prayers in the writ petition as originally framed were as follows:-

“(a) A writ in the nature of mandamus do issue commanding the respondent authorities to quash, cancel and rescind the sanction if issued by the corporation authorities in respect of application for sanction building plan to be constructed at premises no. 59, Ballygunge Circular Road, Kolkata – 700 019 in terms of Section 397 of the Kolkata Municipal Corporation Act, 1980;

(b) Alternatively, a writ in the nature of Mandamus do issue commanding the respondent corporation authorities to desist from taking any further steps and proceeding with the application for sanction of building permit/plan applied for by the respondent

nos. 9& 10 in respect of premises no. 59, Ballygunge Circular Road, Kolkata – 700 019;

(c) A writ in the nature of prohibition do issue directing respondent authorities to forthwith issue restraint order upon the respondent Nos. 9 & 10 for taking any steps in terms of the sanction, if issued, in respect of premises No. 59, Ballygunge Circular Road, Kolkata – 700 019 for changing the nature and character of the premises no. 59, Ballygunge Circular Road, Kolkata – 700 019 in any matter whatsoever;”

21. The writ petition was subsequently amended and prayers were incorporated for quashing of the permission granted by the Heritage Commission as also the building plan sanctioned by KMC, for developing the western portion of the said property.

22. The writ petitioners are the owners of flats in a building situate at 60/1 Ballygunge Circular Road, Kolkata-19. The building is called Shiromoni. It is a B+G+17 storeyed building. The writ petitioner no. 1 is the Shiromoni Flat Owners’ Association. Shiromoni is situate next to Tripura house. The two properties share a common boundary wall.

23. Originally the primary ground on which the proposed construction on the western portion of Tripura House was challenged by the writ petitioners was that such construction would interfere with their right to enjoy air and light. By subsequent amendment, further grounds were introduced in the writ petition. Primarily, it was contended that the Heritage Commission had no jurisdiction or power to approve the building plan. In any event, the Chairman of the Heritage Commission purported to grant such approval and

not the Commission. The Chairman had no such authority. It was further contended that KMC could not have relaxed the requirement of Rule 62 by invoking Rule 65A of the KMC building Rules. The same was done although the pre-conditions for such relaxation were not satisfied, only to favour the owner (Appellant in APOT 92 of 2022) and the developer (Appellant in APOT 55 of 2022).

24. In the affidavit-in-reply filed before the learned Single Judge a case was pleaded by the writ petitioners that the Heritage Commission and more particularly its then chairman and the KMC authorities in unholy entente with the owner and developer have unlawfully permitted development of the aforesaid heritage property.

25. The respondents in the writ petition naturally denied the allegations made by the writ petitioners and sought to justify the permission granted for the said project. They also challenged the locus standi of the writ petitioners to maintain the writ application. The arguments advanced on behalf of the respective parties before the learned Single Judge were essentially the same as have been advanced before us which we will note a little later in this judgment.

26. By the judgment and order impugned in these appeals and the cross objection, the learned Single Judge upheld the *locus standi* of the writ petitioners to maintain the writ application and held that the sole idea of the owner / developer “was to make money from the heritage property”. Some relevant portions of the impugned judgment read as follows:-

“ .....



*There is a provision in the KMC Act whereby the Municipal Commissioner if satisfied on receipt of information that the owner of the heritage building fails to preserve and conserve the heritage building, may take over the management and control of the said building. Such was not the case made out by the owners. The sole idea was to make money from the heritage property. In reality, parts of the heritage structure i.e., the gate, portico, fountain, driveway, garden etc. had to be demolished for allowing the construction to be made. Firstly, permitting the heritage structure to be demolished and thereafter directing reconstruction is starkly contrary to conservation and preservation of the heritage structure. Instead of protecting the heritage structure, the same was permitted to be brought down to facilitate the new construction.*

*Accounts were not placed before the Court. The amount required for maintenance, preservation and control of the said property has not been disclosed. The amount of revenue generated from sale of the newly constructed multi-storey building has also not been revealed. But the fact that the property is situated in a very prime location is enough to conclude that a fair amount of money has exchanged hands.*

*.....*

*This is a fit case where order of demolition of the new construction ought to have been passed. In usual course, the Court would have passed order for demolition of the entire construction, but keeping in mind that the matter relates to a heritage building and the work of*

*demolition may cause more harm than good to the heritage structure, the Court exercises judicial restraint. The Court feels that it is the duty and obligation of the citizens to preserve and conserve their heritage and to ensure that the same is preserved strictly in the manner laid down in law.*

*The newly constructed building has resulted in felling of a good number of trees and greenery of the area. It is the turn of the owner and developer both to compensate the wrong committed by them by parting with a portion of their 'earnings' for maintaining the green coverage. As many as twenty-two flats were constructed over the heritage building. The owner as well as the developer are directed to deposit a sum of rupees one crore each on account of each flat that has been constructed, i.e., the owner is required to pay rupees twenty-two crore and the developer has to put in rupees twenty-two crore, totalling rupees forty-four crore.*

*On failure to deposit the aforesaid amount, KMC is directed to take steps for stopping any further construction over the said property and the KMC is restrained from issuing the Completion Certificate in respect of the newly constructed structure notwithstanding the fact that all formalities for issuance of the Completion Certificate is complied. The owner and developer will also not be permitted to transfer the newly constructed flats to the prospective buyers. It is made abundantly clear that payment of the aforesaid amount will not give a stamp of sanction to the construction that has been made. The same shall also not be construed as a means or mode to*

*regularise the construction so made. Message should go out loud and clear to all concerned that tweaking Rules for obtaining sanction plan does not pay in the long run. The manner in which the building rules are flouted, with impunity, at the instance of the people in position and power with the aid, assistance and connivance of the builders, promoters and developers is a matter of concern and if the same is not nipped at the bud it will grow up in magnanimous proportions in no time. Law is meant to be complied in its strict sense otherwise there will be no rule of law and the entire system will collapse leading to the breakdown in the State machinery. The judiciary will not fail in its duty to protect the rights of the citizenry and uphold the law.*

*As the Court has come to a considered opinion that both the members of the Commission acted as public servants at the time of adopting the resolution to permit construction and both acted hand in gloves with the owner and developer and triggered the process of sanction of the building plan by approving the proposal for making construction over a Grade I heritage structure, accordingly, they are liable to be dealt with appropriately in accordance with law. It is evident from records that the proposal was approved for the sake of 'earnings' from the said property. It does not at all appear that the members of the Commission acted in good faith and in the interest of preservation, conservation and restoration of the heritage structure. In such facts and circumstances the Court feels it expedient to direct investigation in the matter to unearth the money*

*trail involved in obtaining the approval of the plan proposal for making construction over a Grade I heritage property. The investigation shall be carried out under strict supervision of the Regional Head, Central Bureau of Investigation. It will be open for the investigating officer(s) of the Central Bureau of Investigation to peruse the original records and documents pertaining to the sanction of the building plan by the Kolkata Municipal Corporation which are lying in the safe custody of the Registrar, Original Side of this Court and the records and documents lying in the office of the Heritage Commission. The members of the Heritage Conservation Committee, the officers of the Kolkata Municipal Corporation involved with the sanction of the building plan, the concerned members of the Heritage Commission, the owner, developer and the representatives of the petitioners are directed to render all sorts of cooperation and assistance to the investigating officer(s) of the Central Bureau of Investigation for conducting the investigation. The investigation report shall be submitted in a sealed cover before the Registrar General of this Court within 20th June, 2022 and the same shall be forwarded before this Bench immediately thereafter.”*

27. The learned Judge also directed how the money to be deposited in terms of Her Ladyship’s order, was to be utilised by the Director General, Parks & Squares, KMC and the Principal Secretary, Department of Sundarban areas with each of whom Rs.22 Crore was to be deposited.

28. Being aggrieved, the owner, the developer, KMC and the Heritage Commission have come up by way of four separate appeals. The writ

petitioners have filed a cross objection in the owner's appeal, being aggrieved by the learned Single Judge's decision not to direct demolition of the building in question.

29. We may now record the submissions made on behalf of the parties. First we will record the arguments advanced on behalf of the writ petitioners, Shiromoni and others.

30. **Argument made on behalf of Shiromoni**

The following points were urged on behalf of Shiromoni:-

- (i) On a perusal of Sections 2(42A), 2(42B), 202 (2) (d), 205 (e), 411 (1) proviso 425A to 425P and 396 of the KMC Act, it would appear that in respect of a heritage building, HCC alone has the power to sanction any building plan. No plan can be sanctioned by the MIC without the recommendation of the HCC. The whole object of chapter XXIIIA of the KMC Act is to get any building plan relating to a heritage building vetted by independent professionals to preserve such a building. The Heritage Commission has no such power under the 2001 Act.
- (ii) The Municipal Building Committee by its resolution dated August 30, 2017, recommended the concerned building plan for sanction subject to "approval of the competent authority for decision for sanction of the proposal in a heritage premises as proposed by DG (PMU) dated 8/5/2017 and dated 04/08/2017 and subject to compliance of above and other departmental requisitions and compliance of department circulars, if any." Such approval of the

competent authority was never obtained. Sanction of the plan was in violation of MBC's recommendation.

- (iii) The Heritage Commission has nothing to do with sanction or approval of a new building plan. In respect of a heritage building, the building plan is to be recommended by the HCC. The West Bengal Heritage Commission Rules, 2007 and in particular Rules 3,5,7, 8 and 9 provide that the function of the Commission is only to advise local authorities on a reference by the local authority for preservation and conservation of a heritage building. It is not concerned with construction of a new building.

The West Bengal Heritage Commission Regulations, 2004, and in particular Regulation 9 lays down the procedure for declaring a building as heritage building. There is no provision for approval of a new building plan.

Article 243(W) read with Schedule 12 Item 2 of the Constitution of India, provide that construction of buildings is within the absolute domain of the Municipalities, in the present case, the KMC. Under the Constitution or under the 2001 Act, no power has been conferred on the Heritage Commission to regulate or sanction construction of buildings or approve any building plan.

There is no conflict between the KMC Act, 1980, and the 2001 Act. The two statutes operate in different fields. A Division Bench of this Court in the case of **Selvel Advertising Pvt. Ltd. & Anr. v. Kolkata Municipal Corporation & Ors., reported at(2013) 3**

**CLJ 561** has held that in so far as those two statutes are concerned, there are no overlapping fields of operation.

- (iv) The new building on the eastern side of Tripura House was completed in the year 2004. At the time of separation of that building from the mother premises and renumbering of that building as 59A, the HCC by its order dated March 29, 2012, had directed that “the rest of the property, open space should be kept as the land appertaining to the heritage structure and under no circumstances, the property should be truncated and sold with further separation of the open space prescribed”. In view of such direction, KMC could not sanction any plan for constructing any new building on the western side of Tripura House.

The owner applied to the Municipal Commissioner by letter dated May 24, 2013, to make construction on the vacant land on the western side of the property. The application was referred to the HCC which inspected the property on September 5, 2013 and rejected the proposal on August 11, 2014, following its earlier resolution dated March 29, 2012.

On March 28, 2014, the owner applied to HCC for amending the gradation list and downgrading Tripura House from Heritage Grade I to Heritage Grade IIA. The Mayor referred the matter to HCC which referred the matter to MIC. The records do not show that any decision was taken for downgrading the heritage status of Tripura House.

- (v) Even assuming that the Heritage Commission had the power to approve the concerned building plan, the Chairman alone could not have exercised that power of the Commission. The concerned building plan for the B+G+13 storeyed building was purportedly approved by the Chairman of the Heritage Commission alone.

The building plan was never recommended or approved by the HCC. HCC was deliberately by-passed, which vitiates the impugned decision making process.

Under Regulation 5 of the West Bengal Heritage Commission Regulations, 2004, 7 members of the Heritage Commission shall form a quorum. The secretary and other officers of the Commission may be present during a meeting of the Commission. Regulation 8 provides that the secretary shall in consultation with the Chairperson prepare the agenda for each meeting of the Commission and shall cause notice thereof to be prepared. The agenda paper shall be circulated amongst the members at least two clear days in advance. Regulation 10 provides that the minutes of each meeting shall be recorded by the secretary or any other officer as may be directed. None of the aforesaid regulations was followed by the Chairman. All the procedural requirements of the Regulations have been violated and the plan was approved by the Chairman of the Heritage Commission personally, illegally and without jurisdiction. KMC, contrary to its own records, sided with the Chairman of the Heritage Commission, which indicates extraneous circumstances and co-lateral purposes.



The Heritage Commission had three members only for the period 14/09/2014 to 26/08/2015. The website of the Heritage Commission and the list of notifications disclosed by the Commission in Court on 8/5/2023, shows that on and from 18/01/2017, there were 19 members on the Committee of the Heritage Commission. Hence, as on 2.5.2017, when the Chairman of the Commission alone purported to approve the building plan, a 19 member Committee was there, but no minutes of the meeting of the Commission has been disclosed.

The decision taken by the Chairman of the Heritage Commission alone to approve the concerned building plan was beyond his powers under the 2001 Act and ultra vires. In this connection reliance was placed on the decisions in ***Partha Pratim Ishor @ Partha Pratim Isore. V. Cooch Behar Municipality & Ors., (2018) SCC online Cal 7548 (paras 2,6,7) and Smt. Kanak Lata Saxena v. Uttarpara Kotrung Municipality & Ors., reported at (2010) SCC OnLine Cal 500 (paras 4-7).***

A statutory authority can Act only in terms of the parent statute and within the four corners thereof unlike a natural person who can do anything excepting what is forbidden by law. Reliance was placed on the decisions in ***Scots (p) Ltd. & Ors. v. Corporation of Calcutta & Ors., reported at 79 CWN 883 (paras 9, 12, 13) and Manibuddin Bepari, v. The Chiarmen of the Municipal Commissioners, Dacca., reported at 40 CWN 17 (page 18, RHC).***

- (vi) In a writ petition, a party raising a point must plead and annex evidence. If such evidence is not pleaded and annexed, the Court will not entertain the point. Reliance was placed on the decision in the case of ***Bharat Singh & Ors. v. State of Haryana & Ors., reported at (1988) 4 SCC 534 (Para 13)***.
- (vii) Section 396 of the KMC Act empowers the Municipal Commissioner to sanction erection of a building pertaining to a heritage property, inter alia, with the prior approval and recommendation of HCC. Sections 425B and 425E of the KMC Act provide that in respect of a heritage building, HCC shall have the power to function independently of the Municipal Building Committee. Therefore, the Municipal Commissioner or the MIC had no jurisdiction to consider erection of the building in question or grant any relaxation in the building plan without the approval /recommendation of the HCC. The alleged relaxation of Rule 62 of the KMC Building Rules, 2009, by the MIC by the resolution dated 29/11/2017 was without jurisdiction.

Further, the HCC having rejected the proposal of new construction on the western side of Tripura House by its resolutions dated 29/3/2012 and 11/8/2014, which was binding on the MIC, the approval of the building plan by the MIC on relaxation of Rule 62 of the 2009 Rules was in violation of Section 396 of the KMC Act 1980 read with Section 425E thereof.

In any event, the decision to relax the requirement of Rule 62 of the 2009 Rules does not disclose any reason. Even an

administrative decision must be supported by reasons, in the absence whereof, the decision becomes arbitrary and violative of Article 14 of the Constitution of India. Reliance was placed on the decisions in ***M/s. Kranti Associates Pvt. Ltd. & Anr. Sh. Masood Ahmed Khan & Others, reported at (2010) 9 SCC 496 (para 47)*** ***Ravi Yashwant Bhoir v. District Collector, Raigad & Ors. reported at (2012) 4 SCC 407 (paras 21, 22, 38, 39, 41, 42 and 46)*** and ***Selvel Advertising Pvt. Ltd. & Anr. V. Kolkata Municipal Corporation & Ors., reported at (2013) SCC On Line CAL 22945 (paras 3,7,17,18,22)***. The relaxation granted by the resolution of the MIC dated 29.11.2017, without assigning any reason, is arbitrary and void. Hence, the plan sanctioned is also void.

- (viii) The 2009 Building Rules of KMC provide that no external change can be made in respect of a Grade I heritage property and the HCC will be the final arbiter on a case to case basis. In any event, Rule 65A applies to a heritage building and does not apply in respect of a proposed new building as in the present case.
- (ix) For exercise of the power of relaxation under rule 65A, a pre-condition is that the existing heritage building occupies at least 25 per cent of the land area. Such pre-condition was not satisfied in this case. Hence, the relaxation granted by KMC was illegal and without jurisdiction.

According to the records of KMC, the area of the existing heritage structure is 1223.78 sq m. including an outhouse measuring about

50 Sq. m. which has been demolished. Hence, the existing heritage structure has an area of 1173.78 Sq m. . In the impugned building plan, the existing ground floor area has been falsely shown as 1455.127 Sq. m. and a purported structure on the North - East Corner of the property has been falsely shown to get the building plan illegally sanctioned.

Against the total area of land of 5775.62 Sqm, the heritage structure has an area of only 1173.78 sq m. or approximately 20.32 per cent of the total land area. Therefore, the pre-condition for exercise of power under rule 65A of the 2009 Building Rules, is not satisfied. The purported sanction granted to the building plan by KMC is in violation of the Building Rules and is liable to be revoked.

- (x) For construction of the new building on the eastern side of Tripura House, the owner had obtained sanctioned plan from KMC declaring the entire ground area available at the mother premises including the entire western side, as drive way or mandatory car parking space as per Rule 61 of the KMC building Rules. Open space prescribed for one project cannot be used for another project. The impugned building plan was submitted for sanction suppressing the fact that the place where construction is to be made, was open space and car parking space for 18 cars in respect of another project.
- (xi) The learned Single Judge has directed CBI enquiry against Shri Shuvoprasanna and Sri Sovan Chattopadhyay the then Chairman

of the Heritage Commission and Mayor of KMC respectively. They have not challenged the order under appeal. The appellants cannot espouse their cause. The direction for CBI enquiry is unchallenged and should not be interfered with. The CBI has jurisdiction to conduct preliminary enquiry which is not an investigation.

- (xii) The appeal Court interferes not when the order under appeal is not right but when it is clearly wrong. No patent illegality has been shown by the appellants in the order impugned. The appeal Court should not interfere.
- (xiii) As regards the issue of the locus standi of Shiromoni to maintain the writ petition, a neighbour has the right to object to the sanction of a building plan if such sanction has been granted violating the provisions of the KMC Act and the KMC Building Rules. The rights of the residents in any particular area are invaded by an illegal construction made in such area. All the residents in the area have a right to see that the KMC performs its duty in terms of the statute. Substantial interest of the residents of an area is injured by illegal constructions. Reliance was placed on the decisions reported at **(1974) 2 SCC 506 (paras 26-30) and (2000) SCC OnLine Cal 301 (paras 11, 13 17).**
- (xiv) As regards the argument of the appellants that the order under appeal travels beyond the pleadings filed before the learned Single Judge, in as much as there was no pleading of collusion or extraneous consideration in the writ petition, it was submitted on behalf of Shiromoni that the writ petition was filed as a *quia timet*

action. Shiromoni was not aware as to whether or not the plan had already been sanctioned. After affidavits were filed by the respondents in the writ petition before the learned Single Judge, Shiromoni came to know of the illegalities, which were then pleaded in its affidavit-in-reply. The learned Judge granted liberty to the respondents in the writ petition, being the appellants herein, to file affidavit dealing with Shiromoni's affidavit-in-reply. Excepting the owner, none of the appellants herein filed any such rejoinder affidavit. The pleadings made in the affidavit in reply of Shiromoni were known to the appellants herein. The points raised in the affidavit-in-reply should be treated as part of Shiromoni's pleadings. Reliance was placed on the decision in ***Srila Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras and Anr. reported at AIR (1965) SC 1578 (para 17)***.

Pleadings of collusion and extraneous consideration are there in the affidavit-in-reply of Shiromoni filed before the learned Single Judge. Such allegations were not denied or disputed by the appellants other than the owner and should be deemed to have been accepted by them on the principle of *non-traverse*. Reliance was placed on the decision in ***Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam v. Atmaram Kumar reported at (1993) 4 SCC 6 (paras 14. 15 19)***

- (xv) With regard to the argument of the Heritage Commission that if there was any irregularity in the decision taken by the Commission, the same was regularised by ratification by the

Commission at the meeting dated 5/5/2022, it was submitted on behalf of Shiromoni that ratification is a principle of contract of agency. The principle of ratification does not apply to statutory functions. Reliance was placed on the decision in the case of ***Marathwada University v. Seshrao Balwant Rao Chavan reported at (1989) 3 SCC 132.***

- (xvi) It was submitted that in the ratification minutes dated 5/5/2022, many persons shown as present at the meeting were not members of the Heritage Commission but were out-siders.
- (xvii) As regards Section 7 of the West Bengal Heritage Commission Act, 2001, it was submitted that the same provides that no act of the Commission shall stand vitiated by any defect in the constitution of the Commission. However, Shiromoni never urged such a point. The point urged is that the Commission did not take any decision. It was the Chairman of the Commission who acted alone which, he had no power to do under the 2001 Act.
- (xviii) Big trees, bushes, shrubs, etc, have been cut to make room for the new construction at Tripura House. A mere look at the Forest permission obtained after disposal of the writ petition shows that it was procured and unseen faces of influential people lurk behind the same. The penalty was imposed by the learned Single Judge on the principle of 'pollutor pays'.
- (xix) As regards, the contention of the appellants that the entire property known as Tripura House is not heritage and that only the

old structure standing thereon was declared as heritage property, it was submitted on behalf of Shiromoni that the resolutions of HCC dated 29/3/2012 and 11/8/2014 make it clear that the entire property was declared to be heritage. Further, the definition of 'heritage building' in Section 2(42A) of KMC Act also makes it clear that the entire premises is heritage building.

**31. Submission made on behalf of the owner, appellant in APOT No. 92 of 2022:-**

- (i) It was submitted that the allegation of infringement of the rights of the writ petitioners to enjoy uninterrupted access to air and light by the new construction has not been pressed in course of argument and has been abandoned. Hence, no legal right of the writ petitioners has been infringed.
- (ii) As regards relaxation of Rule 62 by exercising power under Rule 65A of the KMC Building Rules, it was submitted that the learned Judge has made comment on the manner in which the decision was taken to sanction the building plan by permitting relaxation under Rule 65A. However, the learned Judge did not come to a finding that such relaxation or sanction of the building plan is bad in law or illegal.
- (iii) The total area of Tripura House is 5775.62 sq. m. The total area of the building and the structures is 1455.27 sq. m. which is more than 25 per cent of the total ground coverage. This will be evident from the building plan sanctioned for the new building, dated 18/01/2018. The calculation of the area of the heritage building



has been made by KMC and no evidence has been adduced by Shiromoni as to why such calculation should be disbelieved.

- (iv) Tripura House was declared as a heritage building in 2009. The plans prior to that i.e., the plans of 1996/2001/2004, are not relevant. The concerned structures were there even at those times but not shown in those plans as the property had not been declared as heritage at that time and there was a possibility of demolishing such structures and showing car parking space in that area.
- (v) Shiromoni's argument that only the building area is to be taken into account for calculating the 25 per cent requirement under Rule 65A is fallacious and in-consistent with Shiromoni's stand that the fountain, durwan's room, iron gate, boundary wall, are also heritage.

Rule 65A has been applied for reduction of side space as specified under Rule 62 after necessary approval from the fire department, dated 08/09/2017. It is a permissible relaxation. On 29/11/2017, approval was given under Rule 65A and Rule 62. Finally the plan was sanctioned on 18/01/2018 which also records MBC's recommendation dated 30/08/2017.

- (vi) In the impugned judgment there is no finding as to which provision of the KMC Act or the Rules framed there-under has been violated. The existence of Rule 65A in the KMC Building Rules would itself show that construction is possible at a municipal premises where

there is a heritage building and Shiromoni's argument to the contrary is misconceived.

- (vii) Had dispensation under Rule 65A not been granted, then the present building which has been constructed would have had to follow the requirements of Rule 62 and would have been narrower and taller. It is not that construction could not have been made.
- (viii) The learned Judge has penalised the land owner and the developer for the manner in which the building plan was sanctioned in hot haste. This finding is incorrect. The whole process had commenced in 2014 and the plan came to be sanctioned only in 2018. Further, when no violation of any of the building rules could be demonstrated, it is not clear how the writ petitioners have a cause of action.
- (ix) All the concerned expert bodies including the Heritage Commission, KMC and Fire Services applied their minds and approved the proposed construction. The High Court ought not to conduct a re-examination of the factual aspects leading up to such approval. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Jal Mahal Resorts P. Ltd. v. K.P. Sharma & Ors., reported at (2014) 8 SCC 804 (paras 137, 140)*** to show the narrow scope of judicial review of decisions of expert bodies in the writ jurisdiction.
- (x) As regards the allegation that the new construction has been made on the parking space designated for 59/1 Ballygunge Circular Road, it was submitted that such allegation is completely baseless.

Originally Tripura House comprised an area of 146 kathas. A portion (53 kathas) was developed by Gopal Bajoria /Mayavati Trading Private Limited by raising a building called Tripura Enclave at 59/1 Ballygunge Circular Road. The present writ petition has been filed at the behest of the said Gopal Bajoria. The respondent no. 10 is Sanjay Bajoria who is a nephew of Gopal Bajoria. Gopal Bajoria unsuccessfully claimed rights to develop the property which is presently in issue but lost right up to the Hon'ble Apex Court.

- (xi) Although the owner's request for downgrading Tripura House from Grade 1 to Grade IIA heritage building was turned down by HCC, there is no prohibition for development of or construction on surplus land adjacent to a Grade I heritage building.
- (xii) In any event, the Heritage Commission wrote to HCC on January 19, 2015, informing them that it has gone through the design of the proposed multi-storeyed building at Tripura House and agreed to clear it for sanction by the building department of KMC. Even though the downgrading request was pending before HCC, it did not object to the approval granted by the Heritage Commission.
- (xiii) As regards the allegation of felling of innumerable trees and cutting of bushes and shrubs, no particulars have been furnished by Shiromoni, nor any evidence adduced. The finding of the learned Single Judge on that score and imposition of penalty of Rs. 44 Crore on that account is perverse.

The appellant in APO 55 of 2022 (the developer) obtained requisite permission from the forest department for felling of 12 trees. The developer was instructed to plant 128 saplings within Tripura House, which has been done. The permission granted by the Forest Department has not been challenged by Shiromoni in its cross objection. This issue was also not argued before the learned Single Judge.

- (xiv) No material has been brought on record to substantiate the allegation of Shiromoni that the heritage structures in Tripura House have been demolished including the portico, fountain area, and heritage gate. Such allegation is wholly baseless.
- (xv) After the West Bengal Heritage Commission Act, 2001, came into force, that has been the statute governing heritage properties. The learned Judge held that the Heritage Commission had no jurisdiction to approve the concerned building plan. The fact is that the Heritage Commission merely approved the design of the proposed new building since it had to be in consonance with the existing heritage building. The building plan was sanctioned by the KMC authorities following due process.
- (xvi) Section 11 of the 2001 Act starts with a *non obstante* clause giving that Section overriding effect over all existing laws on the subject. Section 29 of the 2001 Act also provides that the Act will have overriding effect over any other law for the time being in force, providing for heritage buildings. KMC was obliged to implement the advice given by the Heritage Commission. In this connection reference was made to the decision of the Hon'ble Supreme Court

in the case of **Godawat Pan Masala Products I.P. Ltd. & Anr. v. Union of India & Ors., reported at (2004) 7 SCC 68 (paras 40, 41, 42, 77).**

- (xvii) As regards the allegation of lack of quorum for the meetings of the Heritage Commission, reliance was placed on Section 7 of the 2001 Act which provides that “no act or proceedings of the Commission shall be deemed to be invalid by reason merely of any vacancy in or any defect in the constitution of the Commission.” Reliance was placed on the decisions in **B.K. Srinivasan & Another etc. v. State of Karnataka & Ors., reported at (1987) 1 SCC 658 (paras 11 to 18)** and **Gulzari Lal Agarwal v. The Accounts Officer, reported at (1996) 10 SCC 590 (paras 16, 17, 20, 38).**
- (xviii) Regulation 5 of the West Bengal Heritage Commission Regulations, 2004, is intended to be applicable when the Commission has full strength of members. It is not part of the Act but a subordinate legislation. The intention cannot be that when the number of members of the Commission is less than 7, the Commission will not function. The learned Single Judge has completely misread Section 4 of the 2001 Act by holding that the Commission shall consist of not less than 21 members. The Section actually provides that the Commission shall consist of not more than 21 members.
- (xix) As regards the allegation that the letters dated 20/04/2017 and 02/05/2017 were issued by the Chairman of the Heritage Commission alone without any meeting of the Commission having been held, it was submitted that approval for the construction had

already been granted on 04/02/2015, after the Commission's meeting on 16/01/2015. The letters dated 20/04/2017 and 02/05/2017 were issued only for the purpose of reduction of the height of the building from 17 to 13 storeys. The Commission had already cleared the proposed construction from the heritage point of view at its meeting dated 16/01/2015. For reduction of the height of the proposed construction, no further meeting of the Commission was necessary.

- (xx) The building plan was scrutinised by several departments of KMC i.e, building department, survey department, municipal building committee and mayor in council. It was also examined three times by the fire department before it issued no objection. MBC comprises of representatives of the Municipal Commissioner, Director General of Building, KMDA, DC (Traffic), Kolkata Police, West Bengal Fire and Emergency Services, Council of Architecture ITPI and WBPCA).
- (xxi) The acts of the Chairman done on behalf of the Commission have repeatedly been ratified by the Heritage Commission itself. The Commission filed affidavit dated March 8, 2021, in the writ petition before the learned Single Judge ratifying the acts of the Chairman. The Heritage Commission has also preferred an appeal being A.P.O. No. 56 of 2022 affirming the acts of the Chairman. They have also disclosed minutes of the meeting dated 5.5.2022 affirming the acts of the Chairman. Any act of a body which lacks quorum or lacks authority can be ratified subsequently which has

been done in this case by the Heritage Commission. Reliance was placed on the decisions in ***Parmeshwari Prasad Gupta vs. The Union of India, reported at (1973) 2 SCC 543 (para 14); National Institute of Technology & Anr. v. Pannalal Choudhury & Anr., reported at (2015) 11 SCC 669; (paras 29 to 34); High Court of Judicature for Rajasthan v. P.P. Singh & Anr., reported at (2003) 4 SCC 239 (para 42).***

- (xxii) There was no argument before the learned Single Judge on the issue of CBI investigation. There is no pleading in the writ petition to justify such investigation. There was no prayer nor pleadings by the writ petitioner for disclosure of accounts. All findings of the learned Single Judge on those counts are based on surmises and conjectures.

CBI investigation should not be directed unless some exceptional circumstance is made out. CBI cannot be directed to conduct a roving enquiry as to whether or not any unlawful act has been committed. The Court has to reach a conclusion on the basis of pleadings and materials on record that a prima facie case of commission of a crime has been made out. The Court cannot direct the CBI to find out as to whether or not a person has committed an offence. Reliance was placed on the decisions in ***Sujatha Ravi Kiran v. State of Kerala & Ors., reported at (2016) 7 SCC 597 (para 9); Secretary, Minor Irrigation And Rural Engg. Services, U. P. & Ors. v. Versus Sahngoo Ram Arya & Ors., reported at (2002) 5 SCC 521 (paras 5,6); State of Punjab V.***

***Davinder Pal Singh Bhullar & Ors., reported at (2011) 14 SCC 770 (paras 71 to 75); Common Cause, A registered Socceity v. Union of India & Ors., reported at (1999) 6 SCC 667 (para 173, 174 and 178)***

(xxiii) The writ petitioners do not have locus standi to maintain the writ application. They have sought to challenge the owner's right to develop his own property after obtaining necessary approvals from KMC, the Heritage Commission and other concerned authorities. The owner has a constitutional right to deal with his property in accordance with the relevant and applicable local laws. No personal rights of the writ petitioners have been affected in any manner.

KMC and the Heritage Commission have affirmed on oath in their respective affidavits that all necessary approvals have been granted after due scrutiny and assessment.

The manner in which the writ petition has been filed and pursued in spite of all the concerned statutory authorities affirming that the building plan has been sanctioned as per the applicable law, shows the ulterior purpose and personal vendetta of the writ petitioners. They have not been prejudiced in any manner by the new construction. They are nothing but interlopers who are not entitled to invoke the writ jurisdiction of this Court. Reliance was placed on the decisions in ***Jasbhai Motibhai Desai v. Roshan Kumar, Haji Basir Ahmed & Ors., reported at (1976) 1 SCC 671 (paras 37-49); Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & Ors., reported at (2013) 4 SCC***



**465(paras 9, 10, 14-17); Smt. Rinkoo Mitra v. State of West Bengal & Ors., reported at (2003) 2 Cal LT 588 (paras 1, 12, 22-30, 33-37).**

32. **Submission made on behalf of the West Bengal Heritage**

**Commission:-**

Learned Advocate General appearing on behalf of the Heritage Commission submitted that the Commission has preferred appeal against the learned Single Judge's judgment and order being aggrieved by the adverse comments and observations made by the learned Judge in that order. He submitted as follows:-

(i) The learned Judge erred in law and on facts by failing to appreciate that the Heritage Commission constituted under the 2001 Act was re-constituted with effect from July 1, 2014, by way of notification dated September 11, 2014. The Commission was a valid and legally constituted body to discharge powers and functions under Section 11 of the 2001 Act.

(ii) The learned Judge failed to consider the ramification of Section 7 of the 2001 Act which provides that "no act or proceedings of the Commission shall be deemed to be invalid by reason merely of any vacancy in or any defect in the constitution of the Commission."

(iii) By a resolution taken at a meeting of the Commission held on May 5, 2022, the present body of the Commission unanimously reconfirmed and ratified the earlier approval given by the Commission through the Chairman with regard to Tripura House.

(iv) Since the concerned property is a notified heritage property, the owner made a representation to the Heritage Commission. The Commission suggested modifications to be made in the building plan and thereafter the Commission in its meeting held on January 16, 2015, approved the building plan, from the heritage point of view.

(v) Section 4 of the 2001 Act provides that the Commission shall consist of not more than 21 members. No requirement has been stipulated for maintaining a minimum number of members. Decision was taken at the meeting dated January 16, 2015, by the majority of the members present, being two out of three, on the basis of the then notified constitution of the Commission. The writ petitioners have not challenged the relevant notification by which the members of the Heritage Commission were named.

(vi) As regards Regulation 5 of the West Bengal Heritage Commission Regulations 2004, the prescription that 7 members shall form a quorum, presumes that the Commission consists of its maximum strength of 21 members. The requirement of fulfilling the quorum is directly proportional to the number of members of the Commission and accordingly no fault can be found on that score.

(vii) In view of the notification dated September 11, 2014, on the date of the meeting held on January 16, 2015, the Commission consisted of only 3 members and accordingly the decision taken by

the Chairman and one available member, being two-third of the members present, cannot be faulted.

(viii) Learned Advocate General referred to the notifications dated July 16, 2010, July 1, 2011, September 11, 2014, August 27, 2015, January 18, 2017, December 2, 2021, November 10, 2022 and December 19, 2022 regarding constitution and re-constitution of the Heritage Commission.

**33. Submission on behalf of Kolkata Municipal Corporation:-**

(i) On February 25, 2009, KMC declared Tripura House as a Grade – I Heritage Building. As on that date, Tripura House consisted of an area of approximately 4 bighas 12 kathas with a two storeyed structure thereon. On the eastern portion of the premises, a building had come up which was segregated and renumbered as 59/1Ballygunge Circular Road.

(ii) On March 28, 2014, the owner applied to HCC seeking permission to develop the western portion of Tripura House and also sought amendment of the heritage status from Grade I to Grade II(A). The MIC placed the matter of down gradation of heritage status before the HCC. On August 11, 2014, the HCC rejected the proposal.

(iii) By a letter dated January 19, 2015, addressed to the convenor of HCC, the Heritage Commission recorded that it had agreed to clear the revised design of the proposed building for submission to the building department of KMC for sanction. By a letter dated February 4, 2015, the Heritage Commission informed

the Mayor that from the heritage point of view the Commission had no objection to the construction of the proposed building. The Commission also suggested unlocking of the heritage lock.

(iv) On December 10, 2015, the owner submitted a fresh plan for a B+G+17 storeyed building. On February 8, 2016, the building department recorded on a note sheet that the premises is adjacent to a military campus, hence, permission may be required.

(v) On March 22, 2017, the owner submitted a revised plan for a B+G+13 storeyed residential building. KMC inspected the premises. FAR and car parking space calculation was found to be in accordance with the provisions of the Building Rules 2009. On March 25, 2017, the matter was placed before the Municipal Building Committee. The MBC, upon considering the matter on April 18, 2017, deferred the matter as the proposal was not in conformity with the proposal approved by the Chairman of the Heritage Commission.

(vi) On May 2, 2017, the Heritage Commission sent a revised proposal approving the B+G+13 storeyed building on the western side of Tripura House with a direction to renovate and restore the garden area on completion of the building.

(vii) On August 17, 2017, and September 8, 2017, the West Bengal Fire and Emergency Services cleared the project subject to the compliance of Fire Safety Measures and installation of separate fire pumps for the sprinklers.

(viii) On November 29, 2017, the MIC approved the plan by relaxing Rule 62 of the 2009 Building Rules. The building plan was sanctioned on January 18, 2018.

(ix) Learned Counsel referred to the various provisions of the West Bengal Heritage Commission Act, 2001, including Section 11 thereof. He submitted that the power given to the Heritage Commission under that Act is much wider than the power of the HCC under Chapter XXIIIA of the KMC Act, 1980. The Heritage Commission has the power to advice on development of a heritage property including the land thereof. HCC does not have this power. Further, by reason of the *non-obstante* clause contained in Section 11 of the 2001 Act, HCC has lost its power as regards identification, restoration and preservation of heritage buildings, vis-a-vis the Heritage Commission. Section 16 of the 2001 Act makes the advice of the Heritage Commission binding on the HCC and the local Authority. If they wish not to accept the Commission's advice, under Section 12 of the 2001 Act, an appeal lies to the State Government.

(x) It was submitted that chapter XXIII A of the KMC Act, 1980, stands overridden by Section 11 of the 2001 Act. With regard to the effect of a non-obstante clause, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Yakub Abdul Razak Menon v. State of Maharashtra (2013) 13 SCC 1 (para 1554-1555).***

(xi) Once the advice was received by KMC from the Heritage Commission in terms of its last letter dated May 2, 2017, KMC had two options. Either it could accept the advice and implement the same or it could prefer an appeal to the State Government. KMC decided to accept the advice and accordingly proceeded to implement the same.

(xii) Sanctioning a building plan is the exclusive privilege of KMC. The 2001 Act has no manner of application in that regard. The building plan in question has been sanctioned strictly in accordance with Section 396 of the KMC Act, 1980, by the MIC taking into consideration the recommendation of the Municipal Building Committee and the advice of the Heritage Commission. In this case, the plan was not placed before the HCC since the Heritage Commission had already approved it from the heritage point of view and HCC did not have further jurisdiction to sit over the said advice or to give any recommendation contrary to such advice of the Heritage Commission.

(xiii) In sanctioning the concerned building plan, the provision of Rule 62 of the 2009 Building Rules was relaxed as regards the front open space and side open spaces. Rule 65A of the 2009 Rules empowers the MIC to allow such relaxation on the recommendation of the Municipal Building Committee. This power under rule 65A can be exercised only in case of a heritage building and/or land having water body. This relaxation is given with a

view to preserving the heritage building/water body and at the same time reducing the hardship of the owner of such property.

(xiv) In the present case, the West Bengal Fire and Emergency Service cleared the project with certain conditions which are to be complied with by the owner. The 25 per cent ratio as is the requirement of the Rule has been maintained in sanctioning the building plan. In relaxing the front open space and side spaces no illegality has been committed. There has been no relaxation in respect of the rear open space.

(xv) As regards car parking space, KMC has strictly followed Rule 78. There are provisions of 3 car parks for each of the 22 flats in terms of Rule 78(2) (d). In total, 66 Car parking spaces have been provided for the 22 flats.

(xvi) In so far as FAR is concerned, Rule 69 of the Building Rules has been strictly followed. Contrary to what has been submitted on behalf of the writ petitioners, Sections 391, 396 and 425 of the KMC Act have been strictly followed.

(xvii) The scope of judicial review of administrative action is restricted to the decision making process and does not extend to the decision itself. In deciding to sanction the concerned building plan, KMC meticulously followed the law which governs sanction of building plans. On the scope of judicial review in such a case, reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of ***State of U.P. Anr. v. Jhori Mal, reported at (2004)4 SCC 714 (paras 28-30) and Nirmala J. Jhala v. State***

***of Gujarat & Anr., reported at (2013) 4 SCC 301 para 22-24.***

The discretion exercised by an administrative authority like KMC strictly within the four corners of the parent statute, does not call for any interference in judicial review, unless it is shown that exercise of such discretion is perverse or illegal.

(xviii) The learned Judge failed to appreciate that the opinion of the Heritage Commission was binding on KMC. The building plan was supported by the permission of all relevant statutory authorities. The plan was sanctioned strictly in accordance with the provisions of the KMC Act and the Building Rules. The learned Judge resorted to wholly unwarranted speculation, surmises and conjectures in incorrectly holding that the actions of KMC and its officers were vitiated by extraneous consideration and for the purpose of ‘earnings’, that ‘a fair amount of money has changed hands” and that ‘ money power was strong enough to blow the rulebook away’.

(xix) Finally it was submitted that all the observations/findings recorded by the learned Judge in the impugned order in respect of the officers of KMC are without any basis and should be treated as non-est and expunged from the impugned judgment. The direction regarding CBI investigation into the role of the KMC officers in sanctioning the concerned building plan is totally un-warranted and defies all logic and reasoning. The order under appeal should be set aside.



**34. The arguments made on behalf of the developer, Nexome Real Estate Private Limited (appellant in APO No. 55 of 2022) :-**

Learned Senior Advocate for Nexome adopted the submissions made on behalf of the owner of the concerned land. The gist of his argument is as follows:-

(i) The writ application has been engineered by one Gopal Bajoria through his nephew Sanjay Bajoria. Gopal made an unsuccessful attempt to enforce an alleged agreement giving him the right to develop the portion where Nexome has constructed the concerned building. It is a mala fide writ petition filed with oblique motive.

(ii) The only thrust in the writ petition is on procedural infirmity, i.e, the new construction has injured the rights of the neighbouring residents of the building called Shiromoni, FAR has not been maintained and the building does not have adequate number of car parking spaces. All these grounds have been demonstrated to be baseless and frivolous.

(iii) An attempt was made by the writ petitioners to insinuate the predominance of the Heritage Conservation Committee, a department of KMC, over a specialised statutory body like the Heritage Commission. In this connection submission made on behalf of KMC as regards the primacy of the Heritage Commission over the HCC, was adopted.

(iv) The new building has been constructed after obtaining all necessary clearances from the concerned authorities.

(v) The penalty of Rs. 22 Crore imposed by the learned Single Judge for planting of trees is completely unsustainable. Clearance from the Forest Department was duly obtained in accordance with law for felling 12 number of trees. In the course of protracted oral arguments advanced by the writ petitioners, the issue of destruction of greenery was never taken up. The penalty imposed by the learned Judge is unsupported by pleadings or arguments and is patently contrary to records.

(vi) The Court cannot appoint an investigating agency like the Central Bureau of Investigation to find out whether or not a crime has been committed. There is no allegation of commission of any such crime. On the basis of mere suspicion unsupported by a shred of evidence, CBI could not have been directed to conduct investigation in the matter. The engagement of the Central Agency without any offence being *prima facie* established or even alleged, is clearly *dehors* the statute and the law laid down in this regard.

(vii) *The learned Judge proceeded on the basis of the following incorrect facts:-* a) That the Shiromoni building has come up on a portion of the premises known as Tripura House. This is an incorrect fact. Shiromoni is neither situated at nor concerned with any portion of Tripura House. Shiromoni has been constructed on a completely separated tract of land which was never a part of Tripura House and hence the question of its separation from the mother premises could not arise. Shiromoni was never

renumbered after alleged separation from Tripura House as held by the learned Judge.

(b) The FAR available for Tripura House could not have been utilised by Shiromoni which is situate on the adjacent plot of land completely separate and distinct from the Tripura House premises. The learned Judge completely mis-directed herself in recording such wrong facts.

(c) The utilisation of the driveway or the car parking spaces of Tripura House has absolutely nothing to do with nor in any manner concerned with that of Shiromoni. The learned Judge has misread, mis-applied and mis-understood the case.

(d) The learned Judge has proceeded to hold that the heritage structure had been demolished and had been directed to be reconstructed which is contrary to statute. Such finding is contrary to the admitted facts and also completely at variance with the case made out by the writ petitioners.

(viii) The learned Judge has found that there is no revelation as to the amount of revenue from the sale of the flats in the newly constructed multi-storeyed building. Hence, there could not be any assessment as to the quantum of money which has been directed to be paid as penalty. The penalty of Rs. 22 Core has been imposed without any basis or justification.

(ix) The issue regarding the locus standi of the writ petitioners to maintain the writ application was not addressed at all by the learned Judge. The finding on that issue is based on a decision

relied upon by the learned Judge, (Deepak Mukherjee's case) which was not cited by any of the parties during the prolonged hearing.

(x) As regards FAR, car parking space and leaving open space on the front, rear and the sides of the concerned premises, learned Advocate made substantially the same argument as was made on behalf of the owner of Tripura House and KMC.

(xi) Nexome has complied with all statutory requirements in obtaining the sanctioned plan including Rules 61, 62 and 65 of the KMC Building Rules, 2009. It made full disclosure with proper figures and measurements to KMC all of which were taken into account for the purpose of calculating the FAR. No portion of the heritage building has been demolished or damaged in the course of constructing the new building. Nexome has provided for the mandatory car parking spaces and has not caused violation of any right of the writ petitioners.

(xii) No legal right of the writ petitioners has been infringed by construction of the new building. Hence the writ petitioners could not have maintained the writ application. Reliance was placed in this connection on the decisions of the Hon'ble Supreme Court in the cases of ***Ghulam Qadir v. Special Tribunal & Ors., reported at (2002) 1 SCC 33 (para 38), Ashok Kumar Pandey v. State of West Bengal, reported at (2004) 3 SCC 349 (para 31) and State of Orissa v. Madan Gopal Rungta, reported at AIR 1952 SC 12 (para 5).***

(xiii) The writ petitioners are residents of the Shiromoni building which is admittedly situate at a distance of more than 50 feet from the new construction which has been raised by Nexome. This fact has been stated by Nexome in its affidavit in opposition filed before the learned Single Judge and not denied by the writ petitioners. Hence, there could be no interference with the writ petitioners' enjoyment of light or air.

(xiv) The demand of the writ petitioners for demolition of the new building is vexatious. The construction is not unauthorised. It has been duly sanctioned by KMC. The demand for demolition is also wholly beyond the scope of the prayers in the writ petition and also beyond the jurisdiction of the Court in the absence of any finding that the construction is unauthorised. In this connection reliance was placed on the decision in the case of ***Dipak Kumar Mukherjee v. Kolkata Municipal Corporation & Ors., (2013) 5 SCC 336*** (paras 2, 5-8) and order dated April 17, 2017, passed in APO no. 88 of 2015, by this Court.

(xv) Reliance was placed by learned Counsel on the decision in the case of ***ITC Limited Versus Chowringhee Residency Private Limited, reported at(2015) 4 CHN 293*** to demonstrate the circumstances under which easementary rights to light and air can be protected by Court. It was submitted that the writ petitioners do not fulfil any of the criteria expounded in the said judgment.

(xvi) The Court should not lightly interfere with decisions of expert bodies like KMC and the Heritage Commission. Reliance was placed on the decisions of the Hon'ble Supreme Court reported in the cases of ***P. Kasilingam v. P.S.G. College of Technology*, reported at (1981) 1 SCC 405 (paras 11, 12), *Sterling Computers Ltd. v. M/s. M & N Publications Ltd. & Ors.*, reported at (1993) 1 SCC 445(para 17), *Peerless General Finance & Investment Co. Ltd. & Anr. v. Reserve Bank of India & Ors.*, reported at (1992) 2 SCC 343(para 31) and *V. Ramana v. A.P. SRTC & Ors.*, reported at (2005) 7 SCC 338 (para 1).**

(xvii) The documents disclosed in the present proceedings all relate to official acts of statutory authorities. Since nothing contrary to the law of the land has been shown by the writ petitioners, the Court should presume the correctness of the facts enumerated in such documents. In this connection reliance was placed on the decisions in the cases of ***Villianur Iyarkkai Padukappu Maiyam v. Union of India & Ors.*, reported at (2009) 7 SCC 561 para 170, *Municipal Corporation of Delhi v. Qimat Rai Gupta & Ors.*, reported at(2007) 7 SCC 309 (para 17-18) and *Mohd. Shahabuddin v. State of Bihar & Ors.*, reported at (2010) 4 SCC 653 (para 208).**

(xviii) In conclusion it was submitted that the impugned order suffers from excess of jurisdiction, incorrectness of facts, misapplication of law and travels beyond the scope of the writ

petition. The learned Judge has proceeded with a pre-determined mind from the very inception and has foisted financial liability on Nexome which is totally far-fetched and baseless. The learned Judge has failed to address the issue of *locus standi* of the writ petitioners. The impugned order goes far beyond the writ petition and the prayers made therein and is therefore wholly without jurisdiction. The impugned order has been passed in *terrorem*. The order should be set aside.

### **Court's view**

35. Although lengthy arguments have been made on behalf of the parties, the issues involved in the present proceedings are few. Shiromoni approached the learned Single Judge complaining of the new construction at 59 Ballygunge Circular Road, Kolkata. Initially, the case in the writ petition was that the building would interfere with the writ petitioners' right to free enjoyment of air and light. Subsequently, the writ petition was amended and other prayers were added including one for cancellation of the building plan sanctioned by KMC for making the new construction.

36. In the affidavit in reply filed on behalf of Shiromoni before the learned Single Judge, a case of collusion between the owner/developer of the property and KMC and the Heritage Commission, has been sought to be made out. It is not the case of Shiromoni that the new construction has been made without any sanctioned building plan or in deviation from the sanctioned building plan. Its case is that no sanction could have been granted by KMC. No approval also could be granted by the Heritage Commission. KMC and the Heritage Commission have favoured the

owner/developer of the property in question obviously for illegal gratification.

37. A point of maintainability of the writ petition has been raised by the appellants and in particular the owner and the developer. It has been argued that no legal right of the writ petitioners has been infringed by raising the new construction at the Tripura House premises. Therefore, the writ petitioners did not and do not have the locus standi to maintain the writ application. They are mere interlopers and the writ petition should be dismissed in limine. Let us address this issue first.

38. The doctrine of locus standi has undergone a sea change over the years. It is a much more relaxed principle now. However, although the principle has been watered down, it has not suffered obliteration. Any and everybody cannot maintain a lis in respect of any and every matter. A person approaching the Court must demonstrate that in some way or the other he has been prejudiced. Of course this principle does not apply to public interest litigations where a person not having any personal interest in a matter can file a writ application for the benefit of others who for one reason or the other, are not in a position to approach the Court for redressal. However, we are dealing with a private interest litigation. Unless the writ petitioners can show some prejudice that has been caused to them by the construction of the new building, they will not have the standing to maintain the writ petition.

39. Let us consider the law on this subject. The Hon'ble Supreme Court has laid down in a number of decisions that in order to have the locus standi to invoke the High Court's extra ordinary jurisdiction under Article



226 of the Constitution of India, an applicant should ordinarily have a personal or individual right in the subject matter of the application. This of course may not apply in the case of writs like habeas corpus or quo-warranto. However, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him locus standi in the matter.

40. In ***Jasbhai Motibhai Desai v. Roshan Kumar, Haji Basir Ahmed & Ors., supra***, a four Judge Bench of the Hon'ble Supreme Court speaking through Sarkaria J. at paragraphs 37 to 39 of the reported judgment held as follows:-

“37.It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved';(ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer-circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved".

39. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something"?

Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

41. It is often said that only a person aggrieved can approach the writ Court. The Hon'ble Supreme Court in the case of ***Ayaubkhan Noorkhan Pathan v. State of Maharashtra & Ors., Supra, at paragraphs 9 and 10 of the reported judgment observed as follows:-***

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for

enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the Courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. In fact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide : *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12; *Saghir Ahmad & Anr. v. State of U.P.*, AIR 1954 SC 728; *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & Ors.*, AIR 1962 SC 1044; *Rajendra Singh v. State of Madhya Pradesh*, AIR 1996 SC 2736; and *Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors.*, (2009) 2 SCC 784).

10. A “legal right”, means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, “person aggrieved” does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been

adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361)”

42. In the case of ***Ghulam Qadir v. Special Tribunal & Ors., supra, the Hon’ble Supreme Court, at paragraph 38 of the reported judgment observed as follows:-***

“38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea-change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. If a person approaching the Court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his having not the locus standi. In other words, if the person is found to be not merely a stranger having no right

whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi.”

43. In the case of the ***State of Orissa v. Madan Gopal Rungta, supra***, a six Judge Bench of the Hon’ble Supreme Court, while discussing Article 226 of the Constitution, observed that existence of a legal right in favour of the writ petitioner is the foundation for the exercise of jurisdiction of the Court under Article 226, for protection of such right.

44. From the above discussion we find that a person to be able to maintain a lis must have a real interest in or connection with the subject matter of the lis. In other words, he should be able to demonstrate to the Court that some act or order of the respondents in the legal action has caused or is likely to cause some degree of prejudice to that person by infringing or threatening to infringe some legal right that exists in favour of that person. Unless he can demonstrate that, the Courts would hold that he has no locus standi to maintain the action. The concept of locus standi was developed in common law to keep away busy-bodies from the Court. A person not suffering any loss, damage or prejudice by what has been sought to be challenged in the legal proceedings, cannot be said to be a person aggrieved clothing him with the right or standing to challenge an act or order of any authority or any other person. It has happened that a person has initiated a legal action in respect of a subject matter in which he has no real interest only to create nuisance for the defendant/respondent in the legal proceedings. This would be with the oblique motive of forcing the defendant/respondent to come to a financial settlement with the plaintiff/petitioner, rather than fighting a long drawn legal battle. That way,

the person instituting the proceedings would make some quick money. We hasten to clarify that we are not for a moment suggesting that the writ petitioners instituted the present proceedings with any such dishonest motive. However, it needs to be seen if the writ petitioners have been able to show that they are in any manner prejudiced by the new building having been constructed at the Tripura House premises. After all, although the strict approach to the concept of locus standi has given way to a liberal approach, the doctrine of locus standi is not dead or obsolete.

45. In the present case, in the pleadings filed by the appellants, it has been stated that there is a gap of at least 50 feet between the Shiromoni building and the newly constructed building. This has not been denied by the writ petitioners. The writ petitioners approached the writ Court with a case that the proposed building will interfere with the easementary rights of the writ petitioners. They contended that their right to enjoyment of free air and light would be infringed by the new building. However, this case was given a complete go-bye. Neither before the learned Single Judge, nor before us any argument was advanced on behalf of the writ petitioners as to how the new building would interfere with their easementary right. We do not find any apparent reason as to why the writ petitioners should be aggrieved. Hence, in our opinion, the writ petitioners do not have the locus standi to maintain the writ application.

45A. Having abandoned their original case of their easementary right being interfered with by the concerned construction, the writ petitioners concentrated on alleged violation of statutory provisions on the part of KMC and the Heritage Commission and on alleged collusion between those two

authorities on the one hand and the owner and developer on the other. The writ petitioners have not been able to show that they have suffered injury to any of their legal rights or have been prejudiced in any manner by the new construction at the Tripura House premises. They have not been successful in demonstrating that they are “persons aggrieved”. We must bear in mind that this is not a public interest litigation where the question of locus standi would pale into insignificance. The writ petitioners were required to show some personal prejudice suffered by them by reason of the impugned construction being raised. They have failed on that count.

46. The learned Single Judge upheld the locus standi of the writ petitioners relying on the decision of the Hon’ble Supreme Court in the case of ***Dipak Mukherjee, supra***. That was a case where admittedly the person responsible had constructed two extra storeys beyond what was permitted by the sanctioned plan. The learned Single Judge in that case directed demolition of such unauthorised construction. The Division Bench reversed the order of the learned Single Judge and directed the Municipal Authorities to take action in accordance with the applicable law. It was the opinion of the Division Bench that the Court should not usurp the powers of the Municipal Authorities. The matter being carried to the Hon’ble Apex Court, the order of the learned Single Judge was restored. The Hon’ble Court referred to several of its earlier decisions and expressed its concern as regards the increasing incidence of unauthorised construction in the city of Kolkata either without obtaining any prior sanction or in gross deviation from and violation of the sanctioned building plan. The Hon’ble Court observed that this was affecting the planned development of the city.



However, there was no discussion about the locus standi of the writ petitioner in that case to maintain the writ application. We are of the view that the reliance placed by the learned Single Judge on the decision in ***Dipak Mukherjee's case***, may not have been appropriate, for the purpose of upholding the locus standi of the writ petitioners to maintain the writ application.

47. However, we do not want to dispose of these appeals only on the ground of lack of locus standi of the writ petitioners. Since we have heard the parties on merits, we would like to address all such issues.

48. Learned Counsel for the appellants argued that the scope of judicial review is generally very limited and more so when the decision of an expert body is called in question before the writ court. Judicial review is more concerned with the decision-making process rather than the merits of the decision. If a fair procedure is adopted by an authority in arriving at a decision, the writ Court will not sit in appeal over such decision.

49. In the case of ***Chief Constable of the North Wales Police v. Evans reported at [1982] 3 All ER 141***, it was observed that the purpose of judicial review is to ensure that the aggrieved individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court.

50. Professor Bernard Schwartz in his book Administrative Law, 3<sup>rd</sup> edition, dealing with the status of judicial review in the American context, observed that if the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the Courts. That

would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the Court should not rubber-stamp agencies; the scope of judicial enquiry must not be so restricted that it prevents full enquiry into the action of legality. In the final analysis, the scope of review depends on the individual Judge's estimate of the justice of the case.

51. In the case of ***State of U.P. Anr. v. Jhori Mal, (supra)***, a three Judge bench of the Hon'ble Supreme Court, at paragraphs 28 to 30 of the reported judgment, observed as follows;-

“28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the *suprema lex* to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put is:

- (i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies;

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn Vs. State of Ellinois*, 1876 (94) US (Supreme Reports) 113)

29. In Wade's Administrative Law, 8th edition at pages 33-34, it is stated:

“Review, Legality and discretion

The system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review,

the Court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the minister to do what he did and that he was in some way exceeding or abusing his powers.

Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the court may simply declare that the revocation is null and void. Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered

to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the court requiring the issue of the licence. If administrative action is in excess of power (*ultra vires*), the court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision."

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can re-appreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first

evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.”

52. In the case of ***Nirmala J. Jhala v. State of Gujarat & Anr., supra***, speaking on the scope of judicial review, the Hon’ble Supreme Court at paragraphs 22 to 24 of the reported judgment, observed as follows:-

“22. It is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. (Vide: *State of T.N. & Anr v. S. Subramaniam*, AIR 1996 SC 1232; *R.S. Saini v. State of Punjab*, (1999) 8 SCC 90; and *Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan*, AIR 2006 SC 1214).

23. In *Zora Singh v. J.M. Tandon & Ors.*, AIR 1971 SC 1537, this Court while dealing with the issue of scope of judicial review, held as under: (SCC page 838 para 10)

“10.... The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence.”

24. The decisions referred to hereinabove highlight clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court

of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from mala fides, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene”.

53. In the case of ***P. Kasilingam v. P.S.G. College of Technology, supra***, a three Judge Bench of the Hon’ble Supreme Court, at paragraphs 11 and 12 of the reported judgment, held as follows:-

“11. The High Court has viewed the matter from a wrong perspective. In quashing the order of the Government, the High



Court observes that its finding is based on no evidence but proceeds on conjectures and surmises. In doing so, it ignores the long line of decisions starting from *T. C. Basappa v. T. Nagappa & Anr.* laying down that the supervision of the High Court exercised through writs of certiorari goes on two points. One is the area of jurisdiction and the qualifications and conditions of its exercise, the other is the observance of law in the course of its exercise. Such writs are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act, omission, error or excess has resulted in manifest injustice. It was rightly observed in Basappa's case that a writ of certiorari will not issue as a cloak of an appeal in disguise. It does not lie to bring up an order or decision for re-hearing. It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown.

12. It is clear beyond doubt that the High Court had transgressed its jurisdiction under Art. 226 of the Constitution by entering upon the merits of the controversy by embarking upon an enquiry into the facts as to whether or not the letter of resignation submitted by the appellant was voluntary. The question at issue as to whether the resignation was voluntary was a matter of inference to be drawn from other facts. The question involved was essentially one

of fact. It cannot be questioned that the Government undoubtedly had the jurisdiction to draw its own conclusions upon the material before it.”

54. In the case of ***Sterling Computers Ltd. v. M/s. M & N Publications Ltd. & Ors., supra***, at paragraph 17 of the reported judgment, the Hon’ble Supreme Court observed as follows:-

“17. It is true that by way of judicial review the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book Administrative Law, Prof. Wade has said:-

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the Court's function to look further

into its merits. With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."

But in the same book Prof. Wade has also said:-

"The powers of public authorities are therefore 'essentially different from those of private persons. A man making his will may, subject to any rights of the dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void."

55. In the case of ***Peerless General Finance & Investment Co. Ltd. & anr. v. Reserve Bank of India & Ors., supra***, where an economic policy of the Reserve Bank was under challenge, the Hon'ble Supreme Court held that the function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not

to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.

56. In the case of **V. Ramana v. A.P. SRTC & Ors., supra**, the Hon'ble Supreme Court held that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in *Wednesbury's* case, the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

57. In the case of **Jal Mahal Resorts P. Ltd. v. K.P. Sharma & Ors., supra**, making an observation on the Court's limited competence to enter into the merits of technical and/or administrative decisions, the Hon'ble Supreme Court, at paragraphs 137 and 140 of the reported judgment, held as follows:-

“ 137. From this, it is clear that although the Courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the

theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities specially if it based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the Court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra judicial ombudsmen questioning the entire exercise undertaken by an extensive body which includes administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in the matter of *M.P. Oil Extraction v. State of M.P.*, (1997 7 SCC 592 at page 611) has unequivocally observed that:( SCC para 41)

“41. the power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about

the role of judiciary in out stepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which polity is so deeply committed cannot function properly unless each of three organs appreciate the need for mutual respect and supremacy in their respective fields”.

140. At this juncture, we take note of two overriding considerations which combined, narrow the scope of review. The first is that of deference to the views of administrative experts and the other we take assistance from the words of Chief Justice Neely who expressed as follows:

“I have very few illusions about my own limitations as a Judge and from those limitations I generalise to the inherent limitations of all appellate courts reviewing rare cases.”

The learned Chief Justice further observed as follows:

“I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinized by the non-expert Judge. It was suggested that the alternative for the court is to desist itself from interference on technical matters, where all the advantages of expertise lie with the agencies. If the

court were to review fully the decision of an expert body such as State Board of Medical Examiners, 'it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the pharmacopoeia'."

58. Therefore, it is fairly well settled now that views of the experts or their decisions should not be lightly interfered with by the courts. Of course, if any decision of an expert body is *ex facie* arbitrary or illegal or *Wednesbury* unreasonable or perverse, the court may surely interfere. However, in the facts of the present case we do not find either the decision of the Heritage Commission to approve the concerned building plan from the heritage point of view, or the decision of KMC to sanction the building plan, to be arbitrary or illegal or unreasonable or perverse in any manner. On more than one occasion KMC Officers visited the site in question as would appear from the records. Officers of fire services also visited the site more than once. Being fully satisfied that the draft building plan conforms to the provisions of KMC Act, 1980, the rules and regulations framed thereunder and all other applicable rules, the competent authority sanctioned the building plan. We find no reason to interfere with such decision of KMC in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. We must keep in mind that KMC is the expert body which has been entrusted by the State legislature with the power to decide whether or not a particular building should be permitted to be constructed within its territorial limits.

59. Let us now take up the grievances raised by Shiromoni, one by one. The first major complaint of Shiromoni is that the concerned building plan for the new building that has come up, could not have been sanctioned

without the approval of the Heritage Conservation Committee. The 2001 Act does not empower the Heritage Commission to sanction building plans. The power of sanction still remains with KMC. Since the concerned property is a heritage one, without Heritage Conservation Committee's approval the Mayor-in-Council could not have permitted the plan to be sanctioned and the Municipal Commissioner could not have accorded final sanction to the plan.

60. Let us note the relevant provisions of Chapter XXIIIA of the KMC Act, 1980. Sections 425A to 425E, 425N, 425O and 425P, which are the relevant Sections, read as follows:

**“425A. Owner to maintain, preserve and conserve heritage building.**—Every owner or occupier of any heritage building declared as such by the Corporation shall maintain, preserve and conserve it and shall not change its use in contravention of the provisions of this Act or the rules or the regulations made thereunder for its maintenance, preservation or conservation.

Explanation I.—The word "maintain", with its grammatical variations and cognate expressions, shall include fencing, covering, repairing, restoring or cleansing, or doing of any act which may be necessary for the purpose of preserving or conserving, of, or securing convenient access to, a heritage building.

Explanation II.—"Owner" shall, notwithstanding anything contained elsewhere in this Act. include, for the purposes of this



chapter, (a) a joint owner of a heritage building vested with the power of management thereof on behalf of himself and any other joint owner, or successor-in-title of any such joint owner, or (b) a manager, or trustee, vested with the power of management of a heritage building, or successor-in-office of such manager or trustee.

**425B. Power of Corporation to declare a building as a heritage building.**—Where the Corporation, on the recommendation of the Heritage Conservation Committee and also of the Mayor-in-Council, is of the opinion that any building in Kolkata should be preserved and conserved for historical, architectural, environmental or ecological purpose, it may declare such building as a heritage building :

Provided that during the period when any proposal for declaring a building as a heritage building is under consideration of the Heritage Conservation Committee or the Mayor-in-Council, no owner of such building, or no lessee or sub-lessee to whom such building has been leased out, shall transfer such building by way of sale, lease or mortgage without the prior approval of the Municipal Commissioner.

**425C. Gradation of heritage building.**—The gradation of a heritage building according to its historical, architectural, environmental or ecological purpose shall be such as may be prescribed.

**425D. Heritage Conservation Committee.**—(1) The Mayor-in-Council shall constitute a Committee to be called the Heritage Conservation Committee with the Municipal Commissioner as its Chairman and an officer of the Corporation as its Convenor.

(2) The Committee shall have, in addition to the Chairman and the Convenor, seven other members of whom— (a) one shall be a nominee of the Calcutta Metropolitan Development Authority,

(b) one shall be the Director of the Development of Archaeology, Government of West Bengal, or his nominee,

(c) one shall be an eminent architect,

(d) one shall be an artist,

(e) one shall be an environmentalist.

(f) one shall be a historian, and

(g) One shall be the Chief Valuer and Surveyor of the Corporation,

(3) The Committee may co-opt one person to be nominated by the concerned department of the State government while dealing with any land or building under the management of the said department.

(4) The committee shall, in accordance with the provisions of this Act and the rules and the regulations made thereunder, scrutinize every application or proposal for declaration of a building as a heritage building, and recommend to, and also advice, the Mayor-in-Council in respect of the preservation and conservation of such building as a heritage building.

(5) The committee shall meet at such periodical interval as may be determined by the Mayor-in-Council.

(6) The Municipal Commissioner shall, in the case of emergency, take such measures as may be necessary for the preservation and conservation of a heritage building, provided that such measures shall be required to be approved by the Heritage Conservation Committee at its meeting.

**425E. Powers and functions of Heritage Conservation**

**Committee.**—The Heritage Conservation Committee shall have the power to function independent of the Municipal Building Committee for the purpose of preservation, conservation and maintenance of heritage buildings in so far as such power does not offend any other provisions of this Act or the rules made thereunder relating to construction or use of building:

Provided that for erection or re-erection in a heritage building or part thereof, or for restoration of any heritage building to its old shape, design or beauty in the case of unlawful demolition, or for making any change of internal or external wall, structural pattern, floor, roof, interior or exterior architectural floor, facade or skyline, or for any other change, of a heritage building, the provisions of Chapters XXII and XXIII of this Act and the rules made thereunder shall apply mutatis mutandis.

**425N. Taking over management and control of heritage**

**building.**-1) If the Municipal Commissioner, on receipt of any information, is satisfied that the owner of a heritage building fails

to preserve or conserve the heritage building, the Municipal Commissioner may, when the heritage building is vacant and after hearing the owner, by order in writing take over the management and control of such heritage building for the purpose of preservation and conservation thereof, suspending the right of the owner to transfer such heritage building for a maximum period of five years, subject to acquisition either by agreement or under the provisions of the Land Acquisition Act, 1894 (1 of 1894).

(2) The Municipal Commissioner shall thereafter notify the heritage building for letting it out by agreement to any person as tenant for the purpose as aforesaid, and the owner shall be entitled to an amount equal to the reasonable letting value of the heritage building as rent less the cost on account of preservation and conservation of the heritage building.

**425-O. When heritage building ceases to be heritage building.-**

If the Corporation decides that any heritage building has ceased to be of public interest or has lost its importance for any reason whatsoever, it may, with the approval of the State Government, declare that such heritage building has ceased to be heritage building for the purposes of this Act.

**425P. Penalty.—** (1) Any person who destroys, removes, alters defaces or misuses any heritage building or does any act, or abets in the commission thereof, in contravention of any provision of this chapter or the rules or the regulations made thereunder, shall be punishable with rigorous imprisonment for a term which may

extend to three years and also with fine which may extend to fifty thousand rupees and, in default, with further rigorous imprisonment for six months.

(2) Any court convicting any person under this section shall by order direct such person to restore the heritage building to its former shape and beauty at his cost, and any failure to comply with such order shall be deemed to be a continuing offence and such person shall be punishable with an additional fine of rupees two hundred and fifty for every day during which such contravention or failure continues after conviction for the first such contravention.

(3) Where an offence under this section has been committed by a company, the provisions of Section 619 shall apply to such company.

**Explanation.--- For the purposes of this section, \_**

(a) “person” shall include an owner, occupier, lessee, mortgagee, consultant, promoter or financier who supervises or causes erection, destruction, removal, defacement or misuse of any heritage building, and

(b) “company” shall have the same meaning as in the Explanation to Section 619.”

61. It may be noted that Chapter XXIIIA was inserted in the KMC Act, 1980 by Section 34 of the Calcutta Municipal Corporation (Amendment) Act, 1997, with effect from December 22, 1997.

62. We must also note the relevant provisions of the West Bengal Heritage Commission Act, 2001, which came into effect on March 21, 2001. The preamble to the 2001 Act says that it is an Act to provide for the establishment of a Heritage Commission in the State of West Bengal for the purpose of identifying heritage buildings, monuments, precincts and sites and for measures for their restoration and preservation. Section 2(a) defines a “building” as including any structure or erection or part of a structure or erection which is intended to be used for residential, industrial, commercial, cultural or other purposes whether in actual use or not. The term “building operations” has been defined in Section 2(b) as including rebuilding operations, structural alterations of, or additions to buildings or other operations normally undertaken in connection with the construction of buildings. Section 2(d) says that “development” with its grammatical variations means the carrying out of building, engineering, mining or other operations in, on, over or under, land or the making of any material change in any building or land and includes redevelopment. Section 2(f) defines “heritage building” as any building of one or more premises or any part thereof which requires preservation and conservation for historical, architectural, environmental or cultural importance and includes such portion of the land adjoining such building or any part thereof as may be required for fencing or covering or otherwise preserving such building, and also includes the areas and buildings requiring preservation and conservation for the purpose as aforesaid under sub-clause (ii) of clause (a) of subsection (4) of Section 31 of the West Bengal Town and Country (Planning and Development) Act, 1979, monuments of heritage importance,

as defined in clause (i) of this Section, precincts or such other sites commonly considered for heritage importance. Section 2 (g) defines “local authority” as any Municipal Corporation established under any West Bengal Act or Municipality under the West Bengal Municipal Act, 1993 or any Panchayat constituted under the West Bengal Panchayat Act, 1973. Section 2(i) defines “monuments of heritage importance” as any building, structure, erection, monolith, monument, mound, tumulus, tomb, place of interment, cave, sculpture, inscription on an immovable object or any part or remains thereof, or any site, which the Commission by reason of its heritage association, considers it necessary to protect against destruction, injury, alteration, mutilation, defacement, removal, dispersion or falling into decay. Sections 3, 4, 7, 11, 12, 16, 23 and 29 of the 2001 Act which are the other provisions relevant for the present purpose read as follows:

**“3. Establishment of Commission.—**(1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint, there shall be established a Commission by the name of the West Bengal Heritage Commission.

(2) The Commission shall be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and shall, by the said name, sue or be sued.

**4. Composition of Commission.—**The Commission shall be chaired by an eminent person with concern and commitment for Heritage Conservation and shall consist of not more than twenty-

one members, interested in all matters relating to the national and regional heritage. The Commission shall consist of a Chairperson and the following members:-

- (a) Director of Archaeology and Museum, Department of Information and Cultural Affairs, Government of West Bengal;
- (b) a representative of the Department of Environment, Government of West Bengal (preferably an Environmentalist);
- (c) a representative of the Department of Urban Development, Government of West Bengal (preferably a Structural Engineer or an Architect);
- (d) a representative of the Municipal Affairs Department or the Department of Panchayat and Rural Development, Government of West Bengal;
- (e) six members of the Municipal Corporations and the Municipalities in West Bengal, of whom not less than two shall be the Mayor, Calcutta Municipal Corporation, and the Mayor, Howrah Municipal Corporation, or their nominees, one shall be the representative of the Municipalities of Darjeeling, Kalimpong and Kurseong in the District of Darjeeling and the other three from amongst other Municipal Corporations, Municipalities and Zilla Parishads in West Bengal, to be nominated by the State Government;



(f) eleven members from the areas of specialisation, namely, History, Art-History, Fine Arts, Architecture, Conservation, Law (with special reference to property matters), Structural Engineering, Town and Country Planning, Industry and Commerce, of whom two shall be from Industry and Commerce.

**7. Vacancies amongst members, or defect in the constitution, of Commission not to invalidate acts or proceedings of Commission.**-No act or proceedings of the Commission shall be deemed to be invalid by reason merely of any vacancy in, or any defect in the constitution of, the Commission.

**11. Powers and functions of Commission.**—(1) Notwithstanding anything contained in any other law for the time being in force, all local authorities shall refer anything related to identification, restoration and preservation of any heritage building or any other development or any engineering operation which is likely to affect preservation of any heritage building, for advice.

(2) Subject to the provisions of sub-section (1), the functions of the Commission shall be

(i) '[to draw out programme] on preparing a classification of buildings in certain grades of heritage buildings after scrutinising applications and proposals received, including supplementing the existing list of buildings as well as all other matters relating to heritage conservation;

(ia) to declare any heritage building as monuments of heritage importance;]

(ii) to draw out a programme on any alteration, modification or relaxation of any law for the time being in force for development, control and conservation of any heritage building;

(iii) to advise the local authorities, where necessary, on the policy of the grant of any certificate of right of development of any heritage building;

(iv)to advise all concerned and the State Government] whether to allow commercial or other use of heritage buildings and, if so, when to prohibit such use;

(v) to frame special regulation for such heritage building as may be listed by the Commission;]

(vi) to advise the local authorities to regulate the installation of advertisement and display structure in respect of heritage buildings;

(vii) to advise the State Government on guidelines to be adopted by private parties who sponsor beautification schemes in West Bengal;

(viii) to advise the local authorities on the cost of repair of heritage buildings and the policy to the adopted for raising funds from private sources;

(ix) to advise the local authorities to prepare special designs and guidelines for heritage buildings controlling the height and essential characteristics and to suggest other aspects of conservation and restoration;

(x) to advise the local authorities on the provision of incentive by exemption from payment of rates or taxes or fees for supply of water or any other charge in respect of heritage buildings;

(xi) to advise the State Government on the penal measures for defacing or destroying a heritage building;

(xii) to advise the State Government and the local authorities on the making of provision for restoration of heritage buildings;

'[(xiii) to perform the work of documentation, inform the State Government and advise the local authorities on documentation of records of heritage buildings or monuments of heritage importance.

Explanation.-For the purpose of this clause, "documentation" means keeping of all documents relating to any heritage building or monuments of heritage importance, which the Commission considers necessary for its identification, preservation, or maintenance;]

(xiv) [to draw out programme] on the steps to involve public opinion in mobilisation of efforts for creating awareness, preserving or maintaining heritage, and the consciousness of its

visible architectural and natural evidences, so as to foster the creation of a popular mandate for heritage preservation;

(xv) to draw out programme on any other matter relating to restoration or preservation of buildings of heritage importance as may be entrusted by the State Government to the Commission.

(3) Notwithstanding anything contained in any other law for the time being in force, no local authority shall take any step for identification, preservation, conservation or restoration of any heritage building, not consistent with the determination or advice of the Commission.

**12. Appeal to State Government in certain cases.**—If any local authority is aggrieved by any advice of the Commission in respect of any building operation, engineering operation or development proposal referred to the Commission under sub-section (1) of section 11, such local authority may, within sixty days from the date of advice by the Commission, prefer an appeal to the State Government, and the State Government may pass such order thereon as it deems fit.

**16. State Government and local authority to accept, and to take action in accordance with, the advice of the Commission.**—(1) Subject to the other provisions of this Act, the State Government and every local authority shall accept every advice of the Commission to that Government or the local

authority, as the case may be, and shall take action for prompt and effective implementation of such advice.

(2) The State Government may, for the purposes of sub-section (1), give such directions to a local authority as it may deem fit and, thereupon, such local authority shall act according to the directions as aforesaid.

**23. Delegation of powers.**-The Commission may, by general or special order in writing, delegate to the Chairperson, or any other member, or any officer, of the Commission, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act as it may deem necessary for the efficient running of the day-to-day administration of the Commission.

**29. Act to have overriding effect.**- The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force, providing for heritage buildings.”

63. It would appear from the provisions of Chapter XXIIIA of the KMC Act, 1980 and those of the 2001 Act that although there may be no conflict between the provisions of the said two Acts, it is clear that the Heritage Commission has primacy over the Heritage Conservation Committee. Heritage Conservation Committee Was constituted as a part of KMC to identify, preserve and conserve heritage properties. However, under the 2001 Act, any local authority has to refer any issue pertaining to

identification, restoration and preservation of any heritage building or any other development or any engineering operation which is likely to affect preservation of any heritage building for advice, to the Heritage Commission. The Heritage Commission is empowered and obliged to advise the State Government on any alteration, modification or relaxation of any law for the time being in force for development, control and conservation of any heritage building. The commission also has the power to declare any heritage building as monument of heritage importance. The Commission is also to advise the local authorities which would include KMC, on the policy of grant of any certificate of right of development of any heritage building. The Heritage Commission is also empowered to advise all concerned, which would include the KMC, whether to allow commercial or other use of heritage buildings and if so, when to prohibit such use. A local authority is prohibited from taking any step for identification or preservation, conservation or restoration of any heritage building, which is not consistent with the determination or advice of the Heritage Commission. Section 16 of the 2001 Act mandates that the State Government and every local authority shall accept every advice of the Commission and shall take action for prompt and effective implementation of such advice. Of course, if a local authority is aggrieved by any advice of the Heritage Commission, it may prefer appeal before the State Government as provided by Section 12 of the 2001 Act.

64. What therefore indubitably follows is that after the 2001 Act came into force and the Heritage Commission was constituted, the role of HCC in identifying, conserving and preserving heritage buildings, became

secondary. It can only play second fiddle to the Heritage Commission. In the facts of the present case, the Heritage Commission granted approval to the concerned building plan from the heritage point of view. Once such approval was conveyed to KMC, there was no further reason for KMC to seek the opinion of HCC since the Heritage Commission's advice was binding on KMC. Of course, KMC could have appealed to the State Government. However, in its wisdom it did not prefer an appeal and decided to accept the decision of the Heritage Commission. Having found the draft building plan to be in order otherwise, KMC sanctioned the plan. Therefore, Shiromoni is not right in contending that the Heritage Commission sanctioned the plan. KMC always was and still is the competent authority to sanction a building plan within the territorial limits of the Corporation and to that extent Shiromoni is right.

64A. It must also be noted that Section 11 of the 2001 Act starts with a non-obstante clause giving it overriding effect vis-a-vis any other law for the time being in force. Also, Section 29 of the 2001 Act clarifies that the provisions of that Act shall have overriding effect vis-a-vis any other law for the time being in force, providing for heritage buildings. Therefore, the primacy of the Heritage Commission over the HCC is fairly clear.

65. Another grievance raised by Shiromoni is that the requirements of Rule 62 of the Kolkata Municipal Corporation Building Rules, 2009, were wrongly relaxed in exercise of power under Rule 65A of the said Rules. Rule 62 specifies the minimum open spaces that have to be maintained with respect to buildings for residential use. The specifications are for the front of the building, rear of the building as also the two sides. It is not necessary to

set out the specifications. However, Rule 65A makes an inroad into Rule 62 of the 2009 Rules. Rule 65A reads as follows:

**“65A. Minimum open spaces with respect to heritage building and / or land having water body.-** In case of heritage building and/or land having water body, Mayor-in-Council may allow, on the recommendation of Municipal Building Committee, necessary relaxation in respect of front, sides and rear spaces keeping sufficient open space available for movement of Fire and Emergency vehicles up to the satisfaction of West Bengal Fire & Emergency Services provided that the existing Heritage Building or Water Body or both taken together occupy at least 25% of the land area.”

66. Shiromoni contended that the existing heritage building does not occupy at least 25% of the land area and hence no relaxation as regards open spaces could have been granted by the MIC or the Municipal Building Committee of KMC. This is essentially a factual issue. The Municipal Building Committee after due inspection of the property in question, in its 538<sup>th</sup> meeting, recommended relaxation of the requirements with respect to open spaces for the proposed building. The MIC accepted such recommendation and relaxed the requirements under Rule 62. Following the same, the municipal commissioner finally sanctioned the building plan. We see no reason to doubt the correctness of the decision of MIC to exercise power under Rule 65A of the 2009 Rules. While Shiromoni strenuously contended that the existing heritage building does not occupy at least 25% of the total land area, the owner, developer and KMC contended to the



contrary relying upon the sanctioned building plan. Their submission has been recorded above. We are inclined to give credence to the official acts of KMC including its MIC. In this connection one may refer to Section 114, illustration (e) of the Evidence Act which says that the Court may presume that judicial and official acts have been regularly performed. Keeping in mind that KMC discharges governmental functions, one may refer to the dicta of the Hon'ble Supreme Court in a three-Judge decision in the case of ***Villainur Iyarkkai Padukappu Maiyam v. Union of India & Ors., reported at (2009) 7 SCC 561***. In paragraph 170 of the reported judgement, the Hon'ble court observed as follows:

“170. Normally, there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or against public interest because there are large number of considerations, which necessarily weigh with the Government in taking an action.”

67. One may also refer to the observation of the Hon'ble Supreme Court in the case of ***Municipal Corporation of Delhi v. Qimat Rai Gupta & Ors. Reported at (2007) 7 SCC 309***. The Hon'ble Court observed at Paragraph 17 of the judgment that when an order is passed by a high-ranking authority appointed by the central government the law presumes that it

would act bona fide. Misuse of power should not be readily inferred. This principle, in our view, would apply to the concerned decision of KMC in granting relaxation of the required open spaces and sanctioning the building plan. Shiromoni has not been able to demonstrate that such official acts of KMC were in abuse or misuse of the statutory power vested in it by the West Bengal State Legislature.

68. We also refer to the observation of the Hon'ble Supreme Court in paragraph 208 of the reported judgment in the case of ***Mohd. Shahabuddin v. State of Bihar & Ors., reported at (2010)4 SCC 653***. Paragraph 208 reads as follows:

“208. It is a well-established law that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other provision or rule, and the validity of such impugned order must be judged on a consideration of its substance and not its form. The principle is that we must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void. In such cases, this Court will always rely upon Section 114 Illustration (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action. (Reference in this regard may be made to the decisions of this Court in *P. Balakotaiah v. Union of India* [AIR 1958 SC 232] ; *Lekhraj*

Sathramdas Lalvani v. Custodian-cum-Managing Officer [AIR 1966 SC 334 : (1966) 1 SCR 120] ; Peerless General Finance and Investment Co. Ltd. v. RBI [(1992) 2 SCC 343] and BSE Brokers' Forum v. SEBI [(2001) 3 SCC 482] .)”

69. Another issue that has been raised by Shiromoni is that even assuming that the Heritage Commission could grant approval to the concerned building plan the Chairman of the Commission could not have done so alone. The letters dated April 20, 2017 and May 2, 2017, were written by the Chairman of the Commission without reference to any meeting of the members of the Commission. By the said two letters final approval was granted to the plan of a B + G + 13 storeyed building. It was the Commission which could accord such approval and not the Chairperson. A statutory body must operate within the four corners of the statute. The approval accorded by the Chairman is void.

70. We see from the records that for the period September 14, 2014, to August 26, 2015, the Heritage Commission had three members. After the Commission's meeting on January 16, 2015, which was attended by two out of the three members and wherein approval to the concerned building plan was granted by the members present, a letter was written on February 4, 2015, by the Commission through its chairman to KMC communicating the approval. The letters dated April 20, 2017, and May 2, 2017, were issued for the purpose of reduction of the height of the proposed building from 17 to 13 storeys. Since the Commission had approved the proposed construction from the heritage point of view at the meeting dated January 16, 2015, it may not have been necessary for the Commission to hold yet another

meeting for the purpose of merely reducing the height of the building. Hence, we do not find any merit in this contention of Shiromoni.

71. In this context, learned Senior Advocate for Shiromoni relied on the decisions of two learned Judges of our court in the cases of ***Partha Pratim Ishor @ Partha Pratim Isore. V. Cooch Behar Municipality & Ors., supra and Smt. Kanak Lata Saxena v. Uttarpara Kotrung Municipality & Ors., supra*** in support of the contention that the approval of the Chairman is void since it was not the approval of the Heritage Commission. Those two cases pertain to the provisions of the West Bengal Municipal Act 1993. In the first of them, it was held that it is the Board of Councillors of a municipality which can issue a demolition order under Section 218 of the 1993 Act. The chairman of the municipality having issued the demolition order, the same was void. In the second case also, the issue was whether the chairman of the municipality could cancel a sanctioned building plan on the ground of the same having been obtained by making misrepresentation. It was held that it was the Board of Councillors alone which could cancel such plan under Section 217 of the 1993 Act. Those decisions, in our opinion, do not have relevance to the facts of the present case where the decision to approve the proposed building appears to have been taken by a majority of the members of the Heritage Commission at a meeting held on January 16, 2015.

72. Even assuming that the final decision to approve the concerned building plan was taken in April/May, 2017 and accordingly the letters dated April 20, 2017 and May 2, 2017, were written by the Chairman of the Heritage Commission to KMC and the owner, and even assuming that such

decision was not preceded by a meeting of the members of the Heritage Commission who were 19 in number at the relevant time, the Heritage Commission has repeatedly ratified the act of approval of the building plan. Before the learned Single Judge, the Heritage Commission filed an affidavit affirmed on March 8, 2021, ratifying the acts of the Chairman of the Heritage Commission. The Heritage Commission has also preferred a separate appeal against the order of the learned Single Judge. The Commission has also disclosed minutes of the meeting dated May 5, 2022, wherein the Heritage Commission affirmed the acts of the Chairman of the Commission approving the proposed building plan from the heritage point of view. Even assuming that the Chairman alone took the decision to approve the proposed building, he did so on behalf of the Heritage Commission. Hence a duly constituted Commission was competent ratify such act of the Chairman. In this connection one may refer to the observation of the Hon'ble Supreme Court in the case of ***Sri Parmeshwari Prasad Gupta v. Union of India., reported at (1973) 2 SCC 543.*** Reference may be made to Paragraph 14 of the reported judgment which reads as follows:-

“14. The agenda of the meeting of the Board of Directors held on December 23, 1953 shows that one item of business was the confirmation of the minutes of the meeting of the Directors held on December 16, 1953. The confirmation of the minutes of the meeting of the Directors held on December 16, 1953 would not in any way show that the Board of Directors adopted the resolution to terminate the services of the appellant passed on December 16, 1953. It only shows that the Board passed the minutes of the

proceedings of the meeting held on December 16, 1953. But the resolution of the Board of Directors to confirm the action of the Chairman to terminate the services of the appellant by his telegram and letter dated December 17, 1953 would show that the Board ratified the action of the Chairman. Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance to the invalid resolution of the Board of Directors passed on December 16, 1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorized, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on December 17, 1953. The appellant was not entitled to the declaration prayed for by him and the trial court as well as the High Court was right in dismissing the claim.”

73. The expression “ratification” Means the approval by act, word or conduct, of that which was attempted but which was improperly or unauthorizedly performed in the first instance. In the case of **National**

***Institute of Technology and Anr. v. Pannalal Choudhury and Anr., reported at (2015) 11 SCC 669***, the Hon'ble Supreme Court discussed the principle of ratification at paragraphs 29, 32, 33, and 34 of the reported judgement which read as follows:-

“29. The expression “ratification” means “the making valid of an act already done”. This principle is derived from the Latin maxim “*ratihabitio mandato aequiparatur*” meaning thereby “a subsequent ratification of an act is equivalent to a prior authority to perform such act”. It is for this reason, the ratification assumes an invalid act which is retrospectively validated.

32. The aforesaid principle of law of ratification was again applied by this Court in *Maharashtra State Mining Corpn. v. Sunil* [*Maharashtra State Mining Corpn. v. Sunil*, (2006) 5 SCC 96 : 2006 SCC (L&S) 926] . In this case, the respondent was an employee of the appellant Corporation. Consequent to a departmental enquiry, he was dismissed by the Managing Director of the appellant. The respondent then filed a writ petition before the High Court. During the pendency of the writ petition, the Board of Directors of the appellant Corporation passed a resolution ratifying the impugned action of the Managing Director and also empowering him to take decision in respect of the officers and staff in the grade of pay the maximum of which did not exceed Rs 4700 p.m. Earlier, the Managing Director had powers only in respect of those posts where the maximum pay did not exceed Rs 1900 p.m. The respondent at the relevant time was drawing more

than Rs 1900 p.m. Therefore, at the relevant time, the Managing Director was incompetent to dismiss the respondent. Accordingly, the High Court held [Sunil v. Maharashtra State Mining Corpn., 2005 SCC OnLine Bom 758: (2006) 1 Mah LJ 495] the order of dismissal to be invalid. The High Court further held that the said defect could not be rectified subsequently by the resolution of the Board of Directors. The High Court set aside the dismissal order and granted consequential relief. The appellant then filed the appeal in this Court by special leave. Ruma Pal, J. speaking for the three-Judge Bench, while allowing the appeal and setting aside the order of the High Court held as under: (Sunil case [Maharashtra State Mining Corpn. v. Sunil, (2006) 5 SCC 96 : 2006 SCC (L&S) 926] , SCC pp. 96g-h & 97a-b)

“The High Court rightly held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act could not be subsequently ‘rectified’ by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim *ratihabitio mandato aequiparatur*, namely, ‘a subsequent ratification of an act is equivalent to a prior authority to perform such act’. Therefore, ratification assumes an invalid act which is retrospectively validated.

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In the present case, the Managing Director's order dismissing the respondent from the service was admittedly ratified by the Board



of Directors which unquestionably had the power to terminate the services of the respondent. Since the order of the Managing Director had been ratified by the Board of Directors such ratification related back to the date of the order and validated it.”

33. Applying the aforementioned law of ratification to the facts at hand, even if we assume for the sake of argument that the order of dismissal dated 16-8-1996 was passed by the Principal and Secretary who had neither any authority to pass such order under the Rules nor was there any authorisation given by the BoG in his favour to pass such order yet in our considered view when the BoG in their meeting held on 22-8-1996 approved the previous actions of the Principal and Secretary in passing the respondent's dismissal order dated 16-8-1996, all the irregularities complained of by the respondent in the proceedings including the authority exercised by the Principal and Secretary to dismiss him stood ratified by the competent authority (Board of Governors) themselves with retrospective effect from 16-8-1996 thereby making an invalid act a lawful one in conformity with the procedure prescribed in the Rules.

34. In such circumstances, the respondent's grievance that the dismissal order had not been passed by the competent authority i.e. the BoG no longer survived.”

74. In the case of ***High Court of Judicature for Rajasthan v. P. P. Singh & Anr., reported at (2003) 4 SCC 239***, at paragraph 42 of the reported judgment, the Hon'ble Supreme Court while referring to its earlier

decision in the case of **Sri Parmeshwari Prasad Gupta, supra**, observed that even in a case where the initial action is illegal the same can be ratified by a body competent therefor.

75. Learned Sr. Advocate for the writ petitioners relied on the decision of the Hon'ble Supreme Court in the case of **Marathwada University v. Seshrao Balwant Rao Chavan, (supra)**. The said decision, in our opinion, does not advance the case of the writ petitioners for the following reasons. In that case what was in issue was whether or not the Vice-Chancellor of the University was competent to initiate disciplinary proceedings against the Deputy Registrar, which culminated in the punishment of dismissal of the Deputy Registrar. The relevant statute empowered the Executive Council of the University to initiate such proceedings. The Hon'ble Apex court found that the purported delegation of power by the Executive Council to the Vice-chancellor of the University to initiate disciplinary proceedings against the Deputy Registrar, was invalid. The Vice-Chancellor was otherwise not empowered under the statute, to initiate such proceedings. Accordingly, the Hon'ble Supreme Court set aside the disciplinary proceedings and the order of dismissal. The Hon'ble Supreme Court held that the act on the part of the Vice-Chancellor in initiating the disciplinary proceedings was void in law and could not be ratified by the Executive Council subsequently since there was nothing in the eye of law to ratify. The facts of the present case are different. In this case the Chairman of the Heritage Commission, acting on behalf of the Commission which undisputedly had the power to approve the design of the proposed building from the heritage perspective, approved the building plan. The Commission subsequently ratified such decision in view

of the controversy raised by the writ petitioners. In our opinion, any procedural irregularity that may have been there in the matter of approval of the building plan, stood cured by the subsequent ratification of the same by the members of the Commission. In the Supreme Court case relied upon by the writ petitioners, the Vice-Chancellor purported to do something which was beyond his competence. Hence, the Hon'ble Court held his acts to be non-est in the eye of law and hence in-capable of ratification. In the present case, in our view the approval of the building plan from the heritage point of view, by the Chairman acting on behalf of the Heritage Commission cannot be said to be void or non-est in the eye of law. Hence, the same was capable of ratification and was in fact ratified by the Commission.

75A. However, this discussion is really academic since we have already found that the decision to approve the design of the proposed building was taken by a majority (two out of three, the other member was not present) of the members of the Heritage Commission at its meeting dated January 16, 2015.

76. If one considers the definition of "heritage building" in Section 2(42A) of the KMC Act, 1980, one would see that it does not include the entire land adjoining such building. It is only such portion of the land adjoining a heritage building or any part thereof as may be required for fencing or covering or otherwise preserving such building which is included within the definition of 'heritage building'.

77. No legal bar has been placed before us by Shiromoni showing that the new proposed construction could not have been raised on the vacant portion of a part of the land comprised in the property known as Tripura House,

without in any manner affecting the existing heritage building. Shiromoni has not been able to demonstrate before us that the conservation or preservation of the existing heritage building has been adversely affected in any manner by the construction of the new building.

78. One must keep in mind that the right to property, although no more a fundamental right, is still a valuable constitutional right and has come to be recognized as a human right. One should be free to deal with his property in any manner as he may desire subject to not violating any law laid down in that regard. When a property or a building is declared to be a heritage building, it puts a fetter on the right of the owner of that building or property to deal with the same in the manner as he pleases. Hence, definition of “heritage building” in Section 2(42A) of the KMC Act, should be interpreted in a balanced manner so as to protect a heritage building in greater public interest and also to enable the owner of the property to enjoy the same in the manner that he likes without affecting the heritage building. In the present case, we do not find that the heritage building has been jeopardized in any manner by construction of the new building.

78A. It may also be noted that Section 425E of the KMC Act as well as Section 11 of the 2001 Act, contemplate erection in or development of a heritage building. There does not appear to be any absolute bar to development of the vacant portion of a property without adversely affecting a heritage building that may be standing on another portion of the property.

79. Further, the learned Judge has, in our opinion, fallen in a fundamental error. The learned Judge has proceeded on the basis that the Heritage Commission must consist of at least 21 members. On January 16, 2015,

when the Commission approved the proposed building plan it had only three members. Therefore, according to the learned Judge, the Commission could not have approved the building plan. It purported to do so in hot haste without waiting for appointment of 21 members. This also indicates unholy entente between the owner/developer of the property and the Heritage Commission. It was a one man show, i.e., that of the Chairman. The KMC also conveniently played second fiddle to the Heritage Commission by contending that under the provisions of the 2001 Act, the advice of the Heritage Commission is binding on KMC. The entire scenario creates grave suspicion of undue favour having been shown by the Heritage Commission and KMC to the owner/developer of the property in collusion with each other.

80. The fact is that the statute provides that the Heritage Commission shall constitute of not more than 21 members. The learned Judge's conclusion that at least 21 members must be there for the Commission to function validly is erroneous. 21 members is the maximum that the Commission is statutorily empowered to have. In this connection of course the question will arise whether the Commission could function with three members. In our opinion, it could not have been the intention of the Legislature that without a full House of 21 members the Heritage Commission cannot function. Section 7 therefore clarified that any vacancy in the Commission or any defect in constitution of the Commission would not invalidate any act of the Commission.

81. The effect of a provision like Section 7 of the 2001 Act, was discussed by the Hon'ble Supreme Court in the case of **B.K. Srinivasan &Ors. v. State**

***of Karnataka and Ors., reported at (1987) 1 SCC 658.*** In that case, a provision like Section 7 was termed as the “GANGA” Clause, since such a provision is a curative and validating provision. At paragraph 18 of the reported judgment, the Supreme Court observed as follows:-

“18. The High Court was of the view that such defect as there was in regard to publication of the Plan was cured by Section 76-J, the Omnibus Curative clause to which we earlier made a reference as the ‘Ganga’ clause. Provisions similar to Section 76-J are found in several modern Acts and their object is to put beyond challenge defects of constitution of statutory bodies and defects of procedure which have not led to any substantial prejudice. We are inclined to agree with the High Court that a defective publication which has otherwise served its purpose is not sufficient to render illegal what is published and that such defect is cured by Section 76J. The High Court relied on the two decisions of this Court Bangalore Woollen, Cotton & Silk Mills Co. Ltd. Bangalore v. Corporation of the City of Bangalore 1961 (3) S.C.R. 707 and Municipal Board, Sitapur v. Prayag Narain Saigal & Firm Moosaram Bhagwandas, 1969 (3) S.C.R. 387. In the first case objection was raised to the imposition of octroi duty on the ground that there was failure to notify the final resolution of the imposition of the tax in the Government Gazette as required by Section 98(2) of the City of Bangalore Municipal Corporation Act. A Constitution Bench of the Court held that the failure to publish the final resolution in the Official Gazette was cured by Section 38(1)(b) of the Act which

provided that no act done or proceeding taken under the Act shall be questioned merely on the ground of any defect or irregularity in such act or proceeding, not affecting the merits of the case. The Court said that the resolution had been published in the newspapers and was communicated to those affected and failure to publish the resolution did not affect the merits of its imposition and failure to notify the resolution in the Gazette was not fatal to the legality of the imposition. In the second case it was held that the non-publication of a special resolution imposing a tax was a mere irregularity since the inhabitants had no right to object to special resolutions and had otherwise clear notice of the imposition of the tax. It is true that both these cases relate to non-publication of a resolution regarding imposition of a tax where the imposition of a tax was otherwise well known to the public. In the present case the situation may not be the same but there certainly was an effort to bring the Plan and Regulations to the notice of the public by giving notice of the Plan in the Official Gazette. Non-publication of the Plan in the Official Gazette was therefore a curable defect capable of being cured by Section 76J. It is here that the failure of the appellants to plead want of publication or want of knowledge in the first instance assumes importance. In the answer to the Writ Petitions, the appellants took up the substantial plea that they had complied with the requirements of the Outline Development Plan and the Regulations but not that they had no knowledge of any such requirement. It can safely be

said that the defect or irregularity did not affect the merits of the case.”

82. At internal Page 29 of the impugned judgment, the learned Judge held that if the initial decision to approve the plan proposal for construction is arbitrary and bad in law, then the subsequent follow up steps taken in the matter fall flat. The learned Judge observed that the court is more than convinced that the initial decision of the Heritage Commission to approve the plan for construction was bad *ab initio* and accordingly all steps taken further thereto do not have legal legs to stand upon. With respect, the basic premises of the learned Judge is erroneous. The decision of the Commission taken at the meeting dated January 16, 2015, was held to be bad because the Commission did not have 21 members. Therefore, all subsequent actions were held to be bad. As already indicated hereinbefore the statutory requirement is not of at least 21 members but that number denotes the maximum number of members that the Commission can have.

83. We also feel compelled to make some observation regarding the comment of the learned Judge that the owner of the property was primarily interested in ‘earning’ and the developer was also interested in ‘earning’ by developing the property. We see no wrong in the owner of a property exploiting the same commercially provided the same is done in accordance with the applicable laws. It is not a crime to make money out of one’s own property following due process of law. In the present case the construction has been made following the plan sanctioned by KMC after the same was approved by the Heritage Commission from the heritage perspective. It may well be necessary for the owner of a heritage building to commercially exploit a part



of the land comprised in the entire property for better maintenance of the heritage building. So long as the heritage building is not harmed or damaged in any manner, such an act of the owner cannot be faulted. The learned Judge, while imposing penalty on the owner and the developer, really proceeded on the basis of conjectures and surmises.

84. It is also not clear on the basis of what material the learned Judge came to the conclusion that the newly constructed building has resulted in felling of a good number of trees and greenery of the area. Neither that case has been made out by Shiromoni in the pleadings before the learned Single Judge, nor was the same argued before us on behalf of Shiromoni. Permit from the Forest Department for felling 12 number of trees has been shown to us. The entire basis of directing the owner and the developer to deposit Rupees 22 crore each with the named authorities is to replenish the greenery which has allegedly been destroyed in course of constructing the new building. However, we find no material on record to justify such a conclusion.

85. Coming to the question of CBI inquiry, the law is now fairly well established that the writ Court cannot direct CBI investigation into a matter at the drop of a hat. Before directing such investigation the Court must come to a definite conclusion on the basis of pleadings and material on record that the case *prima facie* discloses commission of a criminal offence by the person against whom the Court proposes to direct CBI investigation. Further, before passing such an order, the person concerned must be granted an opportunity of hearing. After all, a CBI inquiry, would entail questioning such person and this would definitely tend to lower that

person's dignity and honour in the eyes of the members of the society at large. Hence, CBI investigation cannot be directed lightly.

86. Another reason as to why the Constitutional Courts should sparingly exercise its undisputed power to direct CBI to conduct investigation into a matter is that, that investigating agency is busy with conducting investigation into matters of great public importance having national and international ramifications. If in any and every matter, the writ Court directs the CBI to hold an investigation, it may practically not be possible for CBI to do so with any degree of efficiency in view of its limited resources.

87. Let us note a few decisions of the Hon'ble Supreme Court in this regard. In the case of ***Common Cause, a Registered Society v. Union of India and Ors., reported at (1999) 6 SCC 667***, at paragraphs 174 to 176 of the reported judgment, the Hon'ble Apex Court observed as follows:-

"174. The other direction, namely, the direction to the C.B.I. to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to the C.B.I. to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE" and "LIBERTY" guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE" has been explained in a manner which has infused "LIFE" into the letters of Article 21.

175. "Right to Life", set out in Article 21, means something more than mere survival or animal existence. (See: *State of Maharashtra vs. Chandrabhan Tale*, AIR 1983 SC 803 = (1983) 3 SCC 387 = 1983 (3) SCR 327). This Right also includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in different forms, freely moving about and mixing and commingling with fellow human beings. [See: *Francis Coralie Mullin vs. Administrator Union Territory of Delhi*, AIR 1981 SC 746 = (1981) 1 SCC 608 = 1981 (2) SCR 516; *Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors.*, AIR 1986 SC 180 (paras 33 and 34) = (1985) 3 SCC 545 = 1985 Supp. (2) SCR 51; *Delhi Transport Corporation vs. D.T.C. Mazdoor Congress & Ors.*, AIR 1991 SC 101 (paras 223, 234 and 259) = (1991) Supp. 1 SCC 600 = 1990 Supp. (1) SCR 142]. In *Kharak Singh vs. State of U.P.*, AIR 1963 SC 1295 = 1964 (1) SCR 332, domiciliary visit by the Police was held to be violative of Article 21.

176. A man has, therefore, to be left alone to enjoy "LIFE" without fetters. He cannot be hounded out by the Police or C.B.I. merely to find out whether he has committed any offence or is living as a law-abiding citizen. Even under Article 142 of the Constitution, such a direction cannot be issued. While passing an order under Article 142 of the Constitution, this Court cannot ignore the substantive provision of law much less the constitutional rights

available to a person. (See : Supreme Court Bar Association vs. Union of India & Ors. (1998) 4 SCC 409 = AIR 1998 SC 1895).”

88. In **Secretary, Mining Irrigation and Rural Engineering Services, U.P. and Ors., v. Sahngoo Ram Arya & Anr., reported at (2002) 5 SCC 521**, the Hon’ble Supreme Court observed that the undisputed power of the High Court under Article 226 of the Constitution to direct an inquiry by CBI, can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such inquiry. It is not sufficient to have such material in the pleadings. On the contrary, there is a need for the High Court, on consideration of such pleadings, to come to the conclusion that the material before it is sufficient to direct an inquiry by CBI. After noting the observations of the Supreme Court at paragraph 174 of the judgment in the case of **Common Cause**, the Supreme Court in paragraph 6, observed as follows:-

“6. It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or the CBI to find out whether he has committed any offence or is living as a law- abiding citizen. Therefore, it is clear that a decision to direct an inquiry by the CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the

High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of 'ifs' and 'buts' and thought it appropriate that the inquiry should be made by the CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause (supra).”

89. In the case of ***State of Punjab v. Davinder Pal Singh Bhullar and Ors., reported at (2011) 14 SCC 770***, at paragraphs 71 to 75 of the judgment, the Hon’ble Apex Court observed as follows:-

“71. In Secretary, Minor Irrigation and Rural Engineering Services, U.P. & Ors. v. Sahngoo Ram Arya & Anr., AIR 2002 SC 2225, this Court placed reliance on its earlier judgment in Common Cause, A Registered Society v. Union of India & Ors, (1999) 6 SCC 667 and held that before directing CBI to investigate, the court must reach a conclusion on the basis of pleadings and material on record that a prima facie case is made out against the accused. The court cannot direct CBI to investigate as to whether a person committed an offence as alleged or not. The court cannot merely proceed on the basis of ‘ifs’ and ‘buts’ and think it appropriate that inquiry should be made by the CBI.

72. In Divine Retreat Centre (Supra), this Court held that the High Court could have passed a judicial order directing investigation against a person and his activities only after giving him an opportunity of being heard. It is not permissible for the court to set the criminal law in motion on the basis of allegations made against

a person in violation of principles of natural justice. A person against whom an inquiry is directed must have a reasonable opportunity of being heard as he is likely to be adversely affected by such order and, particularly, when such an order results in drastic consequence of affecting his reputation.

73. In *D. Venkatasubramaniam & Ors. v. M.K.Mohan Krishnamachari & Anr.*, (2009) 10 SCC 488, this Court held that an order passed behind the back of a party is a nullity and liable to be set aside only on this score. Therefore, a person against whom an order is passed on the basis of a criminal petition filed against him, he should be impleaded as a respondent being a necessary party.

74. This Court in *Disha v. State of Gujarat & Ors.*, AIR 2011 SC 3168, after considering the various judgments of this Court, particularly, in *Vineet Narain & Ors. v. Union of India & Anr.*, AIR 1996 SC 3386; *Union of India v. Sushil Kumar Modi*, (1998) 8 SCC 661; *Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India*, (2006) 6 SCC 613; *Rubabbuddin Sheikh v. State of Gujarat & Ors.*, AIR 2010 SC 3175; and *Ashok Kumar Todi v. Kishwar Jahan & Ors.*, (2011) 3 SCC 758; held that the court can transfer the matter to the CBI or any other special agency only when it is satisfied that the accused is a very powerful and influential person or the State Authorities like high police officials are involved in the offence and the investigation has not been proceeded with in proper direction or the investigation had been conducted in a biased manner. In

such a case, in order to do complete justice and having belief that it would lend credibility to the final outcome of the investigation, such directions may be issued.

75. Thus, in view of the above, it is evident that a constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie, a case against the accused. However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible.”

90. In ***Sujatha Ravi Kiran v. State of Kerala & Ors., reported at (2016) 7 SCC 597***, a three Judge Bench of the Hon’ble Supreme Court, at paragraph 9 of the judgment, observed as follows:-

“9. It is well settled that the extraordinary power of the constitutional courts in directing C.B.I. to conduct investigation in a case must be exercised rarely in exceptional circumstances, especially, when there is lack of confidence in the investigating agency or in the national interest and for doing complete justice in

the matter. A Constitution Bench of this Court in *State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors.* (2010) 3 SCC 571 held as under: (SCC P. 602, paras 69-71)

“69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts, must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised



but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

71. In *Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya* (2002) 5 SCC 521, this Court had said that an order directing an enquiry by CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a *prima facie* case calling for an investigation by CBI or any other similar agency. We respectfully concur with these observations.”

91. In the present case, in the writ petition as originally filed, there was no allegation of collusion between KMC, the Heritage Commission and the owner and developer of the property in question. There was no allegation that KMC and Heritage Commission illegally permitted the owner and developer to construct the building in question with any dishonest motive.

Such a case was sought to be made out by way of amendment of the writ petition. However, even in the amended writ petition, there were no pleadings or prayer for CBI enquiry. It is admitted by learned advocates for the parties before us that no argument was advanced on behalf of any of the parties on the point of CBI investigation. Therefore, ordinarily the court ought not to have directed CBI enquiry when none of the parties in an adversarial litigation urged that point.

The observation of the learned Judge that KMC sanctioned the building plan in hot haste, may not also be justified. The application for sanction was made in the year 2014. The plan was sanctioned in 2018.

Even then, the Learned Judge might have been justified in directing CBI enquiry had the facts of the case blatantly revealed that there was gross irregularity and palpable illegality in the matter of sanction of the concerned building plan. However, in our opinion, the facts of this case are not such. The Learned Judge was driven by suspicion which may not be justified in the facts of this case. We appreciate that the intention of the Learned Judge was that any irregularity/illegality in the matter of sanction of the building plan and any passing of money under the table, should be brought to light. However, the Learned Single Judge did not even record a finding that the facts of the case and the documents on record at least prima facie show the commission of a crime which needs to be investigated by CBI. Further, no opportunity of hearing was granted to the two persons against whom CBI inquiry has been ordered. Rules of natural justice have not been observed.

91A. The owner and the developer have contended that the writ petitioners have been set up by Mayavati Trading which was not successful in claiming

the right to develop or construct the building that has come up. We need not go into that issue. However we cannot help noticing that when Mayavati constructed a building on the eastern side of the Tripura House premises, the writ petitioners did not raise any objection on any count whatsoever including that the provisions of the KMC Act 1980 or the 2001 Act were being violated or that the heritage building was being jeopardized in any manner.

92. In view of the aforesaid, the appeals preferred by the owner, the developer, KMC and the Heritage Commission stand allowed both on the point of locus standi of the writ petitioners and on merits. The judgment and order under appeal is set aside. Interim order if any, stands vacated. Consequently, the cross objection of Shiromoni filed in the owner's appeal is dismissed as we find no reason to direct demolition of the new building that has been constructed at the Tripura House premises. There will be no order as to costs.

93. We have noted above that Section 425P of the KMC Act, 1980 provides that any person who destroys, removes, alters, defaces or misuses any heritage building or does any act or abets in the commission thereof, in contravention of any provision in Chapter XXIIIA or the rules or regulations made there under shall be punishable with imprisonment or fine or both. If the writ petitioners are of the view that anybody including the owner or the developer or any officer of KMC or the Heritage Commission, has committed an offence under Section 425P of the KMC Act, 1980, then the writ petitioners would be at liberty to initiate appropriate criminal proceedings against such persons before the appropriate forum. If any such action is

taken, the criminal complaint will be dealt with by the concerned forum in accordance with law without being influenced by any observation in the present judgment and order.

94. Before parting we would like to say that we are not unaware are that there have been cases where sanction of a building plan has been obtained illegally by the owner/developer of a property. One recent example is the “Twin Towers” case where the Hon’ble Supreme Court came down heavily on the builder and the concerned authorities. Two towers were directed to be demolished. In that case, unholy entente between the builder and the relevant authorities was writ large on the face of it. The facts were glaring. In a case of that nature, no doubt the writ court should interfere. However, as we have seen, the present case is not such a case. CBI inquiry was directed and penalty was imposed on the basis of suspicion, surmises and conjectures. Therefore, for the ends of justice we have felt impelled to interfere.

95. Urgent Photostat certified copies of this order, if applied for, be supplied to the parties on compliance of all necessary formalities.

**(ARIJIT BANERJEE, J.)**

**I agree.**

**(RAI CHATTOPADHYAY, J.)**

**Later:**

After the judgement is delivered in open Court, learned senior counsel for the writ petitioners, prays for stay of operation of the judgement and order.

Such prayer is considered and is refused.

If any original file of Kolkata Municipal Corporation is lying in the custody of the Registrar, Original Side of this Court in terms of our order, let the same be immediately sent back to Kolkata Municipal Corporation.

**(ARIJIT BANERJEE, J.)**

**I agree.**

**(RAI CHATTOPADHYAY, J.)**