

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO 2587 of 2022

Anjaneya Real Estate Developer LLP & Ors.
Vs.
Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Rachit Lakhani, Adv. Ms. Saswati Chatterjee, Adv. Mr. Dipan Kumar Sarkar, Adv.
For respondents	:-	Mr. Alak Kumar Ghosh, Adv. Mr. Swapan Kr. Debnath, Adv.
Hearing concluded on	:-	08.03.2024
Judgment on	:-	19.03.2024

Amrita Sinha, J.:-

The petitioners in the instant writ petition have assailed the demand notice dated 24th August, 2022 raised by the building department on account of the charges for retention of unauthorized construction and fees for change of use of the structure standing at 692, Diamond Harbour Road, Ward no. 124, Borough XVI under the Kolkata Municipal Corporation.

Portions of the structure at the aforesaid premises were found to be constructed unauthorizedly. To deal with the unauthorized construction a proceeding was initiated by the Kolkata Municipal Corporation under Section 400/400(1) of the KMC Act, 1980. The issue of unauthorized construction was dealt with by the Special Officer (Building), Kolkata Municipal Corporation and hearing was conducted on 26th December, 2020. Order was passed by the Special Officer on 4th January, 2021.

The order records the details of the unauthorized construction. It was recorded that construction of G+4 storied residential building in deviation of the sanctioned plan was detected. The use of car parking space and residential

space was changed with providing extra stair. Several infringements of the KMC Building Rules, 2009 were detected. It was noticed that the total area where there has been change of use is 525.08 sq.mts. and the area of unauthorized construction was found as 74.437 sq.mts. (residential to mercantile wholesale), the land area is 417.12 sq.mts.

The reason for deviation at the time of making construction was considered by the Special Officer and after perusal of all facts and figures the Special Officer was inclined not to pass order of demolition in respect of the impugned structure. The Special Officer permitted the person responsible to retain the unauthorised construction subject, however, to the observation to be obtained from the West Bengal Fire and Emergency Services for the office accommodation.

The Special Officer recorded in the order that the person responsible have to deposit the fees demanded after due concurrence of the authority within thirty days from the date of issue of the order, failing which action for demolition will be taken on approval of the authority and the cost of demolition may be recovered from the person responsible.

It was clearly mentioned that the fees for regularisation should be accepted only after submission of the observation from the West Bengal Fire and Emergency Services. The Special Officer further records that in case of complaint/ dispute arising including discrepancy on the rate on erection, the order may be reviewed and may be revoked, if situation demands.

The Special Officer clearly mentioned in the order that the same will be given effect to subject to the approval of the Board of Administrators, Kolkata Municipal Corporation.

The petitioners claim that in furtherance to the aforesaid order of the Special officer, the impugned demand notice under Sections 400(1), 416 of the KMC Act, 1980 was issued on 24th August, 2022 and the same was valid up to

8th September, 2022. The petitioners allege that the Corporation ought to have raised the demand immediately after the order was passed by the Special Officer (Building) permitting retention of the unauthorised construction and change of use of the subject property. The Corporation ought not to have waited from January, 2021 till August, 2022 for generating the demand. As more than one year elapsed between the date of the order and the date of the demand raised, the Corporation relied upon the scheduled rate for the financial year 2022-23 for raising the demand. Had the demand been raised immediately after the order of the Special Officer in January, 2021, then the quantum of demand would not have been so high.

According to the petitioners the amount demanded is highly exorbitant. Prayer has been made to set aside the impugned demand generated on 24th August, 2022 and apply the schedule or rate which was prevailing on the date of the order passed by the Special Officer.

In support of the submission that the rate prevailing on the day the order was passed by the Special Officer is liable to be applied, the petitioners rely on the judgment delivered by a coordinate Bench of this Court in the matter of ***Bikash Kumar Roy –vs- Kolkata Municipal Corporation & Ors.*** reported in ***2022 SCC Online (Cal) 1589***.

The Corporation has opposed the prayer of the petitioners by filing an affidavit. It has been submitted that the impugned demand has not been raised in furtherance to the order of the said Special Officer dated 4th January, 2021. The said order of the Special Officer was put to review. The matter was heard afresh and finally disposed of by the Special Officer on 27th September, 2021. The earlier order passed by the Special Officer on 4th January, 2021 was sent for review by the Board of Administrators in its meeting held on 23rd July, 2021. On review, the Special Officer noticed that initially the building was proposed a sanction for residential use but later the same was constructed for mixed use. The ground, first and second floors were meant for commercial use

and the remaining upper two floors i.e. third and fourth floors for residential use.

The mandatory side open spaces required for commercial purpose is higher than the residential use. There is no difference in the subject of car parking space. While constructing the building for residential purpose, the person responsible, in gross violation of the sanctioned plan and the Building Rules, did not provide for the mandatory open spaces and the car parking space as required for commercial buildings. As construction of the building was almost complete, the prayer of the petitioners to allow conversion of some parts of the building for commercial use without demolishing the unauthorised portion was accepted. The fire safety certificate issued by the Fire and Emergency Services was also taken note of. It was also noted that there is no complaint from the flat owners or from any other person with regard to the conversion of the car parking spaces to commercial units.

Having considered the report of the Fire and Emergency Services, the infringement statement submitted by the Borough office and the statement of the person responsible and taking note of the previous order dated 4th January, 2021 passed by the Special Officer, fresh order was passed on 27th September, 2021 to minimise the extent of infringement. Direction was issued for service of the copy of the order on all concerned for information and necessary action. The conversion as proposed by the person responsible was allowed subject to fulfilling the necessary terms and conditions and on payment of the requisite fees.

The demand notice dated 24th August, 2022 was generated only after final order was passed on 27th September, 2021. The demand was valid only upto 8th September, 2022 and the said demand stood lapsed prior to affirmation of the instant writ petition on 12th September, 2022.

It has been submitted that the impugned demand notice does not have any existence at present and the petitioners would be liable to pay the charges on account of unauthorized construction and the charge for change of use in accordance with the rate of fees and charges applicable for the financial year 2021-2022. As per the calculation in accordance with the aforesaid rate the petitioners are required to pay a sum of Rs. 1,69,51,121/-.

The Corporation has annexed the breakup of the demand relying upon the schedule of rates prevailing in respect of the financial years 2020-2021 (initial order was passed), 2021-2022 (final order was passed) and 2022-2023 (hearing of the writ petition).

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

It appears that the issue of unauthorized construction was initially dealt with by the Special Officer in the year 2020 and an order was passed on 4th January, 2021. There was no direction in the said order for communication of the same to the persons responsible for making construction. On the contrary, it was categorically mentioned that the said order will be given effect to only upon approval of the Board of Administrators of the Corporation. There was a requirement of submission of a report from the West Bengal Fire and Emergency Services prior to accepting any fees from the persons responsible. The order clearly mentioned that in case of a dispute the same may be reviewed and may be revoked if situation demands.

The order of the Special Officer was never communicated to the petitioners. The said order was placed before the Board of Administrators for approval. The Board of Administrators did not approve the order passed by the Special Officer on 4th January, 2021 and the same was directed to be reviewed. The order was accordingly reviewed by the Special Officer and a subsequent order dated 27th September, 2021 was passed.

In the said order there was a direction for communication of the same for information and necessary action. There was no direction in the order prescribing a time limit within which the requisite fees was required to be paid. In furtherance to the order passed by the Special Officer on 27th September, 2021, demand was raised by the building department on 24th August, 2022. The said demand was valid upto 8th September, 2022. The petitioners accepted the order passed by the Special Officer but allege that the demand is highly exorbitant.

It appears that the petitioners intended to portray before the Court that there was enough delay on the part of the Corporation in raising the demand. The petitioners have placed reliance on the order of the Special Officer dated 4th January, 2021, but for deliberate reasons did not disclose the subsequent order of the Special Officer dated 27th September, 2021. The order passed on 27th September, 2021 was upon review of the earlier order passed on 4th January, 2021. The review was necessitated by the order of the Board of Administrators in its meeting held in July, 2021.

On 10th September, 2021 a hearing was conducted and the persons responsible appeared in the hearing. Even thereafter the petitioners did not disclose either the date of the next hearing or the order passed by the Special Officer on review of the earlier order. On account of the order passed by the Special Officer on review, the earlier order passed by the Special Officer on 4th January, 2021 lost its force and it merged with the subsequent order passed by the Special Officer in September, 2021. As on the date of the demand there was no independent existence of the earlier order passed by the Special Officer on January, 2021, accordingly, the petitioners under no circumstances can place reliance on the same. It is only the last and final order passed by the Special Officer on 27th September, 2021 which may be and is required to be acted upon by both the parties. The demand which has been impugned has been calculated on the schedule of rates prevailing in the current financial year

when the demand was raised that is 2021-2022. The observation and report of the Fire and Emergency Services was made available in April, 2021.

The contention of the petitioners that the rate prevailing on the day the initial order was passed by the Special Officer has to be applied for calculating the requisite fees cannot be accepted. The order of the Special Officer passed on 4th January, 2021 lost its force and stood reviewed by the subsequent order passed in September 2021, as such, the rate prevailing at an earlier point of time cannot be accepted at all.

Learned advocate for the Corporation relies upon an unreported judgment dated 28th April, 2023 passed by this Bench in **WPO 2321 of 2022** in the matter of **Goutam Das and Ors. –vs- Kolkata Municipal Corporation & Ors.** wherein the Court permitted the Special Officer to review the order passed.

According to Regulation 6 of the KMC (Regulation of Building) Regulations, 2015 there is a provision for review of the earlier order that is passed. In the present case, the Board of Administrators took a decision to review the order that was passed by the Special Officer. The order passed by the Special Officer on review of the earlier order is *per se* not challenged in the present proceeding. The demand which has been raised in furtherance to the order passed by the Special Officer in September, 2021 is impugned herein.

Submission of the petitioners that the ratio laid down in the matter of Bikash Kumar Roy (supra) has to be followed cannot be accepted by the Court. In Bikash Kumar Roy (supra) the order passed by the Special Officer was directed to be served upon all the parties for information and necessary action. Once the order is served upon the parties, the same comes to the knowledge of the parties and the parties are made aware that they are supposed to act in accordance with the same. The said order was liable to be executed. In the instant case, the order passed in January, 2021 was never communicated to

the parties. The parties were not supposed to have knowledge of the said order and the same was not executable. Assuming that by some undisclosed means the petitioners obtained a copy of the order dated January, 2021 but the same cannot be acted upon as the same was subject to the approval of the Board of Administrators. As the said order was not approved by the Board of Administrators and, on the contrary, the same was directed to be reviewed by the Special Officer, accordingly, the said order is certainly not liable to be executed. It is only the subsequent order passed by the Special Officer in September, 2021, which attained finality, that is required to be executed. It is settled law that till any order is formally communicated to the parties, the same cannot be directed to be acted upon. It is also settled law that as per the principle of merger, it is only the last order which is liable to be executed.

The demand was raised by the Corporation in August, 2022 valid up to 8th September, 2022 in the financial year 2021-22 and, accordingly, the rate prevailing therein is liable to be applied.

However, the Corporation has annexed in its report the rate of charges for the three consecutive financial years 2020-21, 2021-22 and 2022-23. It appears that the schedule of rates in the year 2021 is more than the schedule of rates for the year 2022-23. The petitioners have already deposited a sum of rupees thirty lakh in terms of the order passed by the Hon'ble Division Bench in APO No. 101 of 2022.

In view of the fact that the petitioners have submitted that the demand is exorbitant and the Corporation has reduced the rate in the subsequent year, accordingly, the Corporation is directed to apply the rate prevailing for the financial year 2022-23. The Corporation is directed to raise fresh demand relying on the aforesaid rate after adjusting the sum of rupees thirty lakh already paid by the petitioners and communicate the same to the petitioners within a fortnight from date. The petitioners shall be obliged to pay the charges within the time limit as specified in the demand notice. As the impugned

demand already stood lapsed, accordingly, no order is passed in connection with the same.

The writ petition stands disposed of.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)