

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

BEFORE:

The Hon'ble Justice Ravi Krishan Kapur

W.P.O No 2635 of 1998

IA NO: GA/2/2003(Old No:GA/263/2003), GA/5/2016(Old
No:GA/1244/2016), GA/7/2022, GA/8/2022, GA/9/2022

MRS. VAISHALI MANEK

VS

CALCUTTA MUNICIPAL CORPORATION

For the writ petitioners : Mr. Saptangsu Basu, Senior Advocate
Mrs. Vijaya Bhatia, Advocate
Mr. Ganesh Prasad Shaw, Advocate
Mr. Anupan Dasadhikari, Advocate

For the respondent nos.5 & 7 : Ms. Kumkum Mukherjee, Advocate

For the KMC : Mr. Alok Kumar Ghosh, Advocate
Mrs. Sima Chakraborty, Advocate
Mr. Fazlul Haque, Advocate

Judgment on : 30.01.2024

Ravi Krishan Kapur, J:

1. The petitioners are flat owners of a multi-storeyed building 'Vivek Vihar' situated at 13/3, Ballygunge Circular Road, Kolkata-700019. The grievance of the petitioners is directed against an illegal and unauthorised construction whereby an open space on the ground floor of the building has been converted to a commercial space.
2. Briefly, the respondent no.5 was the owner and developer of the premises and had constructed a building comprising of residential flats. The building was constructed in terms of a plan dated 18 May, 1987 sanctioned by the Kolkata Municipal Corporation. The plan was for

construction of a ground + partly 5 and partly 8 storied building meant exclusively for residential purposes. The ground floor of the building was always meant to be kept open. It is contended that in contravention of the sanction plan, a portion of the mandatory open space has been converted to a commercial space by putting steel structures and steel shutters to cover the same.

3. Upon the filing of this petition, an interim order dated 3 December, 1998 was passed as follows:

“having regard to the fact that the petitioners made a complaint against the alleged unauthorised construction by the respondent no.5 in the premises in question with the Calcutta Municipal Corporation, no steps have yet been taken by it, there will be an ad interim order of injunction restraining the respondent no.5 from making any change in the nature and character of the premises in question.”

4. By an order dated 17 March, 1999 the respondent authorities were directed to carry out an inspection of the building upon notice to the petitioners and the respondent no.5 and submit a report within a period of six weeks. No notice of any inspection was served on the petitioners in terms of the order. In the report, it was stated the respondent no.6 alleging to be the owner of unit No.”G-1”, on the ground floor alongwith 3 car parking spaces, applied to the Corporation for change of use. The respondent Corporation approved such change of use on the ground that there were allegedly excess car parking spaces more than required under the existing Rules.
5. It is also alleged that in order to circumvent the order of injunction dated 3 December 1998, the respondent no.5 set up a third party, Maitry Resources Private Limited, who on the basis of an alleged

agreement of sale was shown to have purchased unit G-1 in the building alongwith the car parking spaces. Thereafter, Maitry Resources Private Limited submitted an application alongwith a plan for change of use of the disputed portion of the premises wherein an order dated 5 March 2001 was passed for conversion. The area proposed for conversion was meant to be used as an air conditioned car show room measuring 177.288 sq.m. By an order dated 22 January, 2001 Maitry Resources Private Limited was impleaded as respondent no.6 and the injunction order made applicable to them.

6. Thereafter, by an order dated 11 July, 2001 the Court had also directed the respondent no.6 to produce the agreement of purchase and the sale deed in its favour. Notwithstanding such order, the respondent no.6 failed to produce any deed or agreement in its favour.
7. Ultimately, by an order dated 3 December 2002, the writ petition was dismissed on the ground of alternative remedy. An appeal against the order dated 3 December 2002 was also dismissed on 28 January, 2003. Thereafter, a Special Leave Petition filed against the order dated 28 January 2003, was disposed of by setting aside the order dated 28 January 2003 and remanding the matter for hearing afresh.
8. By the order dated 25 February, 2005, the Supreme Court inter alia observed as follows:

“There are several issues arising for consideration. Some of them are: whether what was shown as an open space in a multi-storeyed building complex could at all be permitted to be changed to another use? Whether an application under section 416 of the Act could at all be maintained by a person in whose favour there was only an agreement for sale and who had not acquired the title? Whether such an application could be heard and disposed of in the manner in which it has

been done by the Municipal Corporation and without affording an opportunity of hearing to the flat buyers whose interests were apparently adversely affected? Whether a building essentially residential in character, could be permitted under the local law to be used for commercial purposes?

We feel that the writ petition filed in the High Court was not confined to raising disputes between private parties. There was essentially an element of public interest involved as serious questions alleging violations of building laws and the town planning were raised. Whether the power under section 416 was available to be exercised and if so, whether it was rightly exercised by the local authority, was another question. They called for a serious consideration on the part of the High Court. If at all a case of illegal change of use and violation of building laws or town planning was made out, then it was a clear case of calling for an order of demolition of unauthorised construction. We may also place on record that the learned counsel for the petitioners was at pains in submitting that the change of use and the constructions were done during the pendency of the writ petition and also in defiance of the interim orders passed by the High Court which contention has not received the consideration of the High Court.”

9. It is contended that the petitioners being some of the owners and occupants of the flats of the building have an undivided interest in the common areas including the open spaces in the premises which include the disputed portion and any construction or change of use of the same is impermissible. It is also contended that the respondent no.5 had attempted to transfer the disputed portion of the premises to the respondent no.6 only to circumvent the ad-interim order dated 3 December 1998 and thereafter applied for change of use by filing an application under section 416 of the Kolkata Municipal Corporation Act, 1980 (the Act). The application was allowed and sanction was granted without affording any opportunity of hearing to the

petitioners or any of the other occupants of the premises and when the order of injunction was subsisting. It is also alleged that the respondent no.5 failed to produce any deed of conveyance in favour of respondent no.6 before the Corporation. It is contended that respondent no.6 had no locus to apply for change of use and the entire exercise was fraudulently orchestrated in connivance with the respondent authorities to defeat the rights of the petitioners. In any event, any conversion of the disputed portion of the premises meant to be kept as an open space is unlawful and contrary to the Act and the Rules framed thereunder.

10. On behalf of the private respondent, it is contended that there is no prohibition under section 416 of the Act in sanctioning the change of use of the disputed portion of the premises. The conversion which was sanctioned was in view of the extra car parking space lying vacant after all the car parking spaces had been allotted to the flat owners of the building. It is further contended that the deed of conveyance executed by and between the petitioners and the respondent no.5 stipulated that the common areas including the common passage, driveway, common areas excepting the specified car parking spaces had been allotted to each of the apartment owners. Thus, the contention that the entirety of the open space fell within the common area was unsubstantiated. In any event, there is no challenge to the order sanctioning conversion dated 5 March, 2001 in the writ petition.
11. On behalf of the respondent Corporation it is submitted that, the order dated 5 March 2001 was passed after due inspection of the

premises and after complying with all formalities. The respondent no.6 was recorded as an assessee in the assessment books and had paid consolidated taxes to the Corporation alongwith maintenance charges of the building. It is also contended that a sale agreement had been entered into between the respondent nos.5 and 6 on 15 February 1994 in respect of the disputed portion wherein the respondent no.6 was shown to be in possession of the disputed portion on the date when the application for sanction had been filed. Thereafter, disputes arose between the parties which were referred to an arbitration. Ultimately, the disputed portion was sold to the respondent no.7 and all disputes were settled by and between the respondent no.5 and respondent no.6. Hence, the respondent no.6 was the title holder of the disputed portion and lawfully entitled to apply for conversion of the same. It is also contended that under section 416 of the Act a change of use of the car parking space is permissible and can always be granted. Upon inspection it was found that the disputed portion at the contemporaneous point to time was being used as a jewellery shop under the name and style of M. Walters & Co.

12. At the outset, it is true that as a principle of law, the rights of the parties should be determined on the date of institution of the proceeding. However, this does not mean that subsequent events which have transpired during the pendency of the proceeding cannot be taken into consideration. In fact, it is the duty of a Court to consider the changed circumstances in order to do complete justice between them. Moreso, when such facts have a direct bearing on the

reliefs claimed by the petitioners and consequently on the entire purpose of the writ. (*Pasupuleti Venkateswarlu vs. Motor & General Traders*, AIR 1975 SC 1409 and *Om Prakash Gupta vs. Ranbir B. Goyal*, AIR 2002 SC 665).

13. For convenience, the relevant provisions of the Act are set out hereinbelow:

416. Prohibition on change of use of building:-

(1) No person shall, without any written permission of the Municipal Commissioner or otherwise than in conformity with the conditions, if any, of such permission--

(a) use or permit to be used for the purpose of human habitation any part of a building not originally erected or authorized to be used for such purpose;

(b) change or allow the change of the use of any building for any purpose other

than that specified in the sanction under section 396;

(c) change or allow the change of the use of any building erected before the commencement of this Act contrary to the use for which such erection was originally sanctioned;

(d) convert or allow the conversion of a tenement under a particular occupancy

or use group to a tenement under another occupancy or use group :

Provided that no such permission shall be given if the new occupancy or use group is otherwise than in conformity with the provisions of this Act or the rules and the regulations, made thereunder or of any other law in force for the time being.

(2) If, in any case, such permission is given, no change of occupancy or use group shall be allowed before any necessary alterations or provisions have been made to the satisfaction of the Municipal Commissioner and in accordance with the provisions of this Act or the rules and the regulations made thereunder or of any other law in force for the time being.

(3) Any change of use made before the commencement of this Act, except in so far as such use is permitted under 1[section 385] of the Calcutta Municipal Act, 1951 (West Ben. Act XXXIII of 1951), shall be deemed to be an authorized change and shall be dealt with under the provisions of this Act.

(4) Notwithstanding any other action that may be taken against any person whether owner or occupier or both, contravening any provision of this section, the Municipal Commissioner may levy on such person in accordance with such

scale as may be 2 [determined by regulations] a fine not exceeding in each case rupees one hundred per square metre per month for the area under unauthorized use throughout the period during which such contravention continues.

(5) The Municipal Commissioner may, if he deems fit, order that the unauthorized use be stopped forthwith:

Provided that before making any such order, the Municipal Commissioner shall give a reasonable opportunity to the person affected to show cause why such order should not be made.

(6) Any person aggrieved by an order of the Municipal Commissioner under subsection (5) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under section 415.

(7) Where an appeal is preferred under sub-section (6), the Municipal Building Tribunal may stay the enforcement of the order on such terms, if any, and for such period as it may think fit: *Provided that the fine levied under sub-section (4) shall not be waived.*

(8) Save as otherwise provided in this section, no Court shall entertain any suit, application or other proceeding for injunction or other relief against Municipal Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this section.

(9) Every order made by the Municipal Building Tribunal on appeal and subject to such order, the order of the Municipal Commissioner under subsection (5) shall be final and conclusive.

(10) Where no appeal has been preferred against an order made under subsection(5) or where an order under that sub-section has been confirmed on appeal, whether with or without modification, the person against whom such orders has been made shall comply with the same within the period specified therein, or, as the case may be, within the period, if any, fixed by the Municipal Building Tribunal on appeal, and on the failure of such person to comply with such order within such period, the Municipal Commissioner may require any police officer or any employee of the Corporation to seal up such area after evicting all persons therefrom to prevent its further unauthorized use.

424(2). *Permission in case of other non-residential uses of premises:-*

(2) The Municipal Commissioner may refuse to give such permission in any case on the ground that such use--

(a) would be objectionable by reason of the density of population in the neighbourhood, or

- (b) would add to the traffic constraints in the vicinity including parking spaces, for vehicles, or*
- (c) would not conform to other predominant uses in the neighbourhood, or*
- (d) would constitute a fire hazard, or*
- (e) would be a nuisance to the inhabitants of the neighbour-hood, or*
- (f) in the case of hospital or clinic would be harmful to the patients due to noise or an environment which poses a health hazard, or*
- (g) in the case of an educational building would deprive the students of playground facilities; or on any other similar ground.*

14. Section 416 of the Act mandates that no person shall be at liberty to make any changes to any portion of a residential building not originally erected or authorized to be used for such purpose without prior written permission from the Kolkata Municipal Corporation. Any change of use without written permission shall be deemed to be unauthorized. The section provides that “no person shall” meaning thereby that the person must be having a right, title and interest in the premises in order to apply for change of use. The contention of the private respondents that an agreement of sale had been executed between the respondent nos.5 & 6 and the respondent no.6 was recorded as an assessee in the assessment books of the KMC which gave the respondent no.6 locus or title to apply for change of use is untenable. It is well settled that mutation *per se* does not confer any right or title in favour of a person. Thus, even assuming that the respondent no.6 was in possession of the disputed portion and had paid its share of municipal rates and taxes and maintenance charges, the same did not confer any right, title or interest upon the respondent no.6 to apply for change of use of the disputed portion under section 416 of the Act. Significantly, notwithstanding the order dated 11 July 2001, the respondent no.6 failed to produce any document or deed in its favour to suggest that it

had any right, title or interest in the disputed portion of the premises. There is also no merit in the contention that the respondent no.6 has a derivative title in respect of the flat post the conversion and thus had locus to apply for sanction of the disputed portion. Accordingly, as on the date of filing the application under section 416 of the Act, the respondent no.6 had no right, title and interest to apply for conversion. This aspect of the matter has not even been considered by the respondent authorities in the order dated 5 March 2001. [*Municipal Corporation, Aurangabad Vs. The State of Maharashtra and Ors., (2015)6 SCC 689*].

15. On the other hand, the petitioners as flat owners had an indefeasible right in the common areas of the building including the disputed portion earmarked as an open space and should have been heard by the respondent authorities before passing any order for change of use. [*Basant Dutta & Ors. vs. State of West Bengal & Ors. (2005) 3 Cal LJ 67*]. The writ petition was pending. The ad interim order of injunction dated 3 December, 1998 was in force on the date of the application for change of use was filed before the respondent authorities. The respondent authorities were parties to this proceeding and had full notice and knowledge of the order. The complaint of illegal and unlawful construction was made in August, 1998 and there is nothing to suggest that the same had been disposed of. The application for change of use was filed in December 1998. It is true that the ad interim order date 3 December 1998 may not have been an express prohibition on the statutory respondents. Regardless of the form of the order, it was obligatory on the respondent authorities to grant an opportunity of

hearing to the petitioners who were admittedly the owners of the flats and occupants of the building and had a direct interest in the subject matter of the proceedings for conversion. [*Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise*, (2015) 8 SCC 519 and *State of Uttar Pradesh vs. Sudhir Kumar Singh* (2020) SCC OnLine 847]. The purpose which the Court sought to achieve by the order dated 3 December, 1998 has been thwarted and circumvented by the deliberate and intentional acts of the private respondents alongwith the statutory authorities in permitting the change of use in the nature and character of the disputed portion of the premises. There is also an element of unfairness and unreasonableness in the actions of the respondent Corporation. In such circumstances, the order for conversion dated 5 March, 2001 has not only been passed in the teeth of the order of injunction but could not have been passed without affording a right of hearing to the petitioners. In view of the violation of the principles of natural justice and the violation of the interim order there is also no question of availing of the alternative remedy under the Act. [*Punjab National Bank vs. Delite Properties Pvt. Ltd. & Ors.* 2003 SCC OnLine 492 and *Krishna Kumar Khemkha vs. Grindlays Bank Pvt. Ltd. & Ors.* (1990) 3 SCC 669]. The decision of *Smt. Rinkoo Mitra vs. State of West Bengal* (2003) 2 Cal LJ 588 is distinguishable and inapplicable.

16. Any order for change of use of any premises must be in accordance with law and within the four corners of the Act and the Rules framed thereunder. The section grants an enabling power to the respondent Corporation and any discretion exercised in terms thereof must be lawful and informed. The section mandates that the building should be

used for the purpose for which sanction had been obtained in terms of section 396 of the Act. The intent of having mandatory open spaces may be for a variety of reasons namely to leave space for essential emergency services; to ensure that in the event of an act of God, the surroundings are not materially affected; to ensure that all buildings have access to natural light; to separate the boundaries, bounds, extent and measurements of particular properties; to ensure that every building has sufficient way of leave for of ingress and egress; to ensure that buildings are constructed keeping in mind the structural mandates which essentially allow the building stability to stand independently and without any precarious support; to ensure easy passage and access for laying essential services like drainage, sewerage, electricity etc; to an extent to protect the privacy of neighbours.

17. The original plan sanctioned on 18 May 1987 was meant for residential purposes and mandatorily provided for open space in the disputed portion of the premises. The basement and ground floor which was open had been earmarked for 54 car parking spaces in the plan. The remaining area was marked as open space. The mandatory requirement to keep open spaces was in conformity with the requirements under the Calcutta Municipal Corporation Building Rules, 1951 (as amended). Rules 4, 5 & 8 of the Schedule XVI of Act stipulate that mandatory open space should be maintained in the front and at the rear and on the sides of any constructed building. Rule 22(2) inter-alia provides that open space shall not be converted to any other use. The provisions of the Act and the prevailing Rules framed thereunder do not confer any power nor jurisdiction to convert any mandatory open space for any

purpose. By the impugned sanction, the respondent authorities have converted a space to be left mandatorily open to commercial space. Due to the conversion in case of an accident, the free and uninterrupted movement of emergency services, would also be hindered and interfered with. This is also contrary to the provisions of the West Bengal Fire Service Act, 1950 which provides that the approach on all the side passages surrounding the building shall always be kept open, free, and uninterrupted. Even assuming that there were excess sanctioned car parking spaces, the same could not be converted or permitted to be changed for another use. The respondents also failed to controvert the allegation that though an approval for conversion of only 177.288 sq.m. had been granted, the entire open space measuring 305.76 sq.ft. had been illegally converted. The order dated 5 March 2001 sanctioning the change of use of the disputed portion has also been passed in contravention of section 424 of the Act and without taking into consideration any of the factors enumerated therein. In terms of section 424 of the Act, a residential space being converted to a commercial space particularly causing obstruction for ingress and egress of the residents of the apartment building complex which may also obstruct the escape way in case of or contribute to any fire hazard is impermissible. In such circumstances, the mandatory open space in the building could not have been permitted to be changed for any other use.

18. Any illegal or unauthorized construction affects the right to enjoyment of property by persons residing in a particular area. The Municipal Authorities owe a statutory duty and obligation to regulate all building

activities for the purpose of inter alia maintaining uniform standards. To this extent, private interests stand subordinate to public good. The intent of every developer to commercially exploit each and every inch of land at any cost is unacceptable. There are diverse regulations which control building construction activities. Such regulations have been framed inter alia to control community development, prevent overcrowding of land, elimination of fire hazards, the avoidance of traffic dangers etc. All such regulations ultimately aim to achieve the larger purpose of public safety and general public welfare. Any unlawful construction is against public interest and may also be hazardous to the safety of occupiers and residents of the building. Such construction not only violates Municipal laws and the concept of planned development of a particular area but also affects the rights of residents. There can be no tolerance for any illegal or unauthorized construction and the same is liable to be demolished. [*Shri Ramdas Shenoy vs. The Chief Officer, Town Municipal Council, Udaipur & Ors.* (1974) 2 SCC 506, *Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation and Ors.* (2013) 5 SCC 353 and *M. I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and Ors.* (1999) 6 SCC 464].

19. In such circumstances, any construction in the disputed portion of the premises whereby the mandatory open space has been converted to a commercial space is illegal and unlawful. All steps culminating in the order dated 5 March, 2001 and subsequent thereto are also in violation of the principles of natural justice and *non est* in law. The entire decision making process and the haste in which the impugned sanction

was granted in derogation of the order of injunction dated 3 December, 1998 is also arbitrary and illegal.

20. During the course of hearing, by an order dated 6 December, 2022 this Court had directed the respondent Corporation to produce the records pertaining to this proceeding including the original and revised sanctioned plan relating to permission granted under section 416 of the Calcutta Municipal Corporation Act, 1980. By two separate reports dated 10 December, 2022 both the Municipal Commissioner and Director General Building of the Corporation respectively had submitted that there were no records pertaining to this proceeding lying with them and the same had been misplaced. In the absence of the original records, the presumption of regularity attached to the acts of the respondent authorities and all steps culminating in the order dated 5 March 2001 and consequential thereto also stand negated and questionable.

21. The contention raised by the respondent nos. 5 and 7 and also the respondent authorities that this is a case of a limited remand and not an open remand is also rejected. It is evident from a plain reading of the order dated 25 February, 2005 passed by the Supreme Court that though there were issues framed in the order dated 3 December 1998, the same cannot be described as exhaustive but merely illustrative or suggestive. In such circumstances, any attempt to restrict the scope of the writ petition limited to the questions raised in the order dated 25 February, 2005 is unconvincing.

22. In view of the aforesaid, the entirety of the construction made in the open space on the ground floor of the premises being used as a

commercial space is directed to be demolished forthwith. There shall be an order in terms of prayers (a) to (c) of the writ petition. All steps taken by the respondent authorities culminating in the order of conversion for change of use dated 5 March 2001 and consequential thereto are declared null and void. The Kolkata Municipal Corporation is directed to carry out the above demolition within a period of two weeks from the date of passing of this order.

23. With the aforesaid directions, W.P.O No.2635 of 1998 stands allowed.

GA 7 of 2022, a formal application to record the death of the petitioner no.18 and for bringing his heirs and legal representatives on record is allowed. In view of the aforesaid, nothing survives in the remaining applications and the same stand dismissed as infructuous.

(Ravi Krishan Kapur J.)